SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIRST REPORT

OF

1991

13 FEBRUARY 1991

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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

FIRST REPORT OF 1991

The Committee has the honour to present its First Report of 1991 to the Senate.

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

Builders Labourers' Federation Legislation Amendment Act 1990

Customs and Excise Legislation Amendment Act 1990

Primary Industries Levies and Charges Collection Bill 1990

BUILDERS LABOURERS' FEDERATION LEGISLATION AMENDMENT ACT 1990

This Bill for this Act was introduced into the House of Representatives on 8 November 1990 by the Minister Representing the Minister for Industrial Relations.

The Act excludes the Builders Labourers' Federation (BLF), State registered branches of the BLF and any equivalent association of its members, from applying for registration under the Industrial Relations Act 1988 until 14 April 1996. Further, it allows, in limited circumstances, the Australian Industrial Relations Commission to hear matters in which the State registered branches may have an interest.

The Committee dealt with the Bill in Alert Digest No. 10 of 1990, in which it made certain comments on the Bill. The Minister for Industrial Relations responded to those comments by letter dated 20 December 1990. Unfortunately, since the Bill was passed by the Senate on 18 December 1990, the Committee and, indeed, the Senate did not have access to the response prior to the passage of the Bill. However, as the response may be of general interest to Senators in any event, a copy is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Section 6

In Alert Digest No. 10, the Committee noted that clause 6 of the (then) Bill provided that the provisions of the Bill, with the exception of subclause 4(b) (which would, in certain circumstances, allow a State registered association to intervene in proceedings before the Australian Industrial Relations Commission), have effect in relation to any

application or proceedings under the Industrial Relations Act 1988 made or commenced before the commencement of the provisions of the Bill. The Committee observed that these provisions could, therefore, operate retrospectively in relation to proceedings already commenced. Indeed, the Committee indicated that it understood that there were proceedings on foot at that time to which the proposed amendment would apply if enacted.

The Committee indicated that it was concerned that the amendment could operate in this way, as it could have the effect of determining issues in and, consequently, the outcome of proceedings already before the Australian Industrial Relations Commission. In the light of that concern, the Committee sought assistance from the Minister as to the effect of the amendments on any current proceedings and, if relevant, the rationale behind such an application of the law.

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 Minister for Industrial Relations has provided the Committee with a detailed and informative response, which sets out the background to the amendments as well as providing further information on the amendments themselves. In relation to clause 6 of the Bill, the Minister states:

> Clause 6 is an application clause, providing that a substantive amendment in the bill operates in relation to any application or proceeding under the Industrial Relations Act 1988, made or instituted before the commencement of the amendment. This is not a clause for the retrospective application of amendments. Rather, it requires that they operate prospectively.

The Minister goes on to state:

> It will, however, affect any proceedings which are before the Commission at the commencement of the relevant provisions:
>
> (a) any such proceedings involving a non-registered association will be affected in that the revised criteria will strictly apply to the State registered branches of the BLF, thereby placing their lack of standing beyond dispute [see section 3 of the Consequential provisions Act as amended by paragraph 3(d) of the bill (definition of 'State association') and subsection 4(3) of the Consequential Provisions Act];
>
> (b) on the other hand, an officer, employee, agent or member of a non-registered association who is involved in such proceedings before the Commission will now not, by reason of being such a person, lack standing ...

In relation to the Committee' query concerning the effect of the amendments on current proceedings, the Minister goes on to state:

> The State registered branches of the BLF in Western Australia, Queensland, South Australia and Tasmania are objectors in the following proceedings before the Australian Industrial Relations Commission:
>
> - R105 and R106 of 1986 - applications by the Building Workers Industrial Union of Australia for consent to changes in eligibility and industry rules;
>
> - R147 and R148 of 1986 - applications by the Federated Engine Drivers and Firemen's Association for consent to changes in eligibility and industry rules.
>
> Officers of those State registered branches and groups of members of the Western Australian and South Australian branches have also lodged objections.

> The Australian Builders Labourers' Federated Union of Workers (Western Australian Branch) has applied (R253 of 1986) in its own right for registration under the Industrial Relations Act 1988.
>
> These proceedings involving the BWIU, the FEDFA and the BLF (WA Branch) have been adjourned until January 1991 to give the parties an opportunity to resolve the underlying issues by agreement. The commencement of clauses 3, 4 and 6 before those discussions are concluded could undermine the resolution process and thereby contribute indirectly to possible industrial friction. it is hoped that the discussions will be successful and that, in consequence, the commencement of subclause 4(2) will not need to be proclaimed.

The Minister concludes by saying:

> The bill is a balanced measure which will, in fact, place the State registered branches in Western Australia, Queensland, South Australia and Tasmania in a better and more legally certain position than they were in on the commencement of the 1986 legislation. Similarly, officers, employees, agents and members of non-registered associations will be in a better position. The bill introduces no new concepts but strengthens the existing legislative scheme.

The Committee thanks the Minister for his response, which has been both useful and informative. It could have proved more useful, however, if the Committee and the Senate had had access to the information prior to the legislation being debated and, ultimately, passed.

CUSTOMS AND EXCISE LEGISLATION AMENDMENT ACT 1990

The Bill for this Act was introduced into the House of Representatives on 13 November 1990 by the Minister for Small Business and Customs.

The Act amends the Customs Act 1901 and Excise Act 1901 to:

- introduce an electronic entry and cargo reporting system for exports (and to consequentially repeal the existing export return scheme);
- provide for advance reporting of ships and aircraft and their cargo and crew, including the electronic reporting of this information;
- validate past seizures of dangerous goods, following a Federal Court decision which found a provision of the Customs legislation to be invalid; and
- correct technical deficiencies in Customs provisions concerned with offences and the control of narcotic goods.

The Committee dealt with the Bill in Alert Digest No. 11 of 1990, in which it made certain comments on various clauses of the Bill. The Minister for Small Business and Customs responded to those comments in a letter which was received by the Committee on 1 February 1991. Unfortunately, since the Bill was passed by the Senate on 13 December 1991, the Committee and, indeed, the Senate did not have access to the response prior to the passage of the Bill. However, as the Minister's response may be of general interest to Senators in any event, a copy of the letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subsection 2(4), section 49

In Alert Digest No. 11, the Committee noted that clause 49 of the (then) Bill deals with 'purported exercise[s]' of the Minister's power under item 18 of the Second Schedule to the Customs (Prohibited Imports) Regulations in relation to dangerous goods. The Committee observed that the clause, if enacted, would retrospectively validate certain decisions made between 13 December 1956 and 11 October in relation to such goods.

As the Committee noted in Alert Digest No. 11, the Explanatory Memorandum to the Bill acknowledges that the provision is intended to validate past seizures under this particular item of the Customs (Prohibited Imports) Regulations which, as a result of a decision of the Federal Court of Australia, could be ruled to be invalid.

The decision in question, in the case of Owen v Turner and Jones, was made by a single judge on 21 December 1989 and upheld by the Full Court on 14 September 1990. In the light of the decision, an amendment was made to the Regulations on 11 October 1990. What is now section 49 of this Act seeks to validate any decisions made prior to that amendment.

In Alert Digest No. 11, the Committee noted that, by way of explanation for the retrospectivity, the Explanatory Memorandum to the Bill states:

> Whilst recognizing that retrospective provisions are open to criticism in that they operate to prejudice persons' legal rights, it is felt in the present situation that the dangers posed to the community should any Item 18 goods (which include machine guns, bombs, flick knives, land mines, etc.) be required to be released into home consumption is a circumstance where a retrospective provision validating otherwise invalid, although bona fide, seizures is both legitimate and justified.

Further, in his Second Reading speech, the Minister said:

> This House has long been careful when faced with provisions which are retrospective in effect and operate to remove citizens rights, and properly so. In this circumstance, however, the Government is of the view that the amendment is both justified and necessary. The alternative would be the possibility that customs could be required to release into the general community the bombs, guns, unsafe toys, flick knives etc., that had been seized, in good faith in the belief that item 18 was valid.

The Committee indicated that, as a matter of principle, it was concerned that the decision of a court can be, in effect, over-ruled by the subsequent passage of a piece of legislation. Such a course of action would tend to detract from the role of courts in the legal system (of which the Parliament is, of course, also a part) and the certainty of their decisions. However, in making this statement, the Committee noted the circumstances of this case and the particular dangers to the community which the Minister said the amendment is intended to contain. The Committee concluded that, ultimately, the principles had to be balanced against the realities.

The Committee noted that the case to which this amendment is a response involved machine guns. However, the Explanatory Memorandum and the Second Reading speech also refer to bombs, flick knives and land mines as goods which, as a result of the case, could be released. However, reference is also made to 'unsafe toys'. In Alert Digest No. 11, the Committee indicated that it would be interested to examine a more exhaustive list of the kinds of goods to which this amendment relates. Attached to the Minister's response are exhaustive lists of the kinds of goods the importation of which is prohibited both before and after the Owen case. The Committee thanks the Minister for this response.

The Committee indicated that it was also interested in the effect of the amendment on the importer of the goods in the Owen case. In particular, the Committee wanted to know whether the goods in question were returned to the person as a result of the Federal Court decision and, if so, whether the effect of the proposed amendment was to require the person to return them. The Minister responded as follows:

> The seized guns were not returned to Mr Owen. Although the Full Federal Court upheld the trial judge's view that Item 18 was an invalid delegation to the Minister of the Governor-General's power under section 50 of the Customs Act, it nevertheless accepted that the seizing officer had validly considered whether the guns were 'of military type' and thereby prohibited under Item 30 of the Second Schedule.
>
> As the seizure had been effected in reliance of both Items 18 and Item 30, the validity of the seizure was therefore maintained under the latter item.

The Committee was also concerned about the question of who had to pay the costs of the various cases before the Federal Court. In response, the Minister advised that

> [t]he order of the Full Court on the question of costs was to the effect that each party bear their own costs both of the application and of the appeal. This order supersedes ... that of the trial judge and therefore Mr Owen must bear his own legal costs for the initial application. While no reason was given for this, it is safe to assume it was because the validity of the seizure was upheld under one of the two items which was claimed.

The Committee thanks the Minister for this detailed response. Of course, it could have been of even greater assistance if it had been available to the Committee and the Senate before the Bill was debated and, ultimately, passed.

PRIMARY INDUSTRIES LEVIES AND CHARGES COLLECTION BILL 1990

This Bill was introduced into the House of Representatives on 15 November 1990 by the Minister for Resources.

The Bill proposes to rationalise primary industries levy and charge collection. It will enable a uniformity of collection methods and allow a consistent approach to procedural matters previously embodied in more than 30 Acts.

The Committee dealt with the Bill in Alert Digest No. 11 of 1990, in which commented on various clauses of the Bill. The Minister for Resources responded to those comments in a letter dated 4 February 1991. A copy of the letter is attached to this report. Relevant parts of the response are also discussed below.

Issue of search warrants by non-judicial officers
Clause 20

In Alert Digest No. 11, the Committee noted that clause 20 of the Bill provides for the issue of search warrants to enter premises in certain circumstances. The Committee observed that the provision would allow a magistrate to issue such a warrant. However, pursuant to subclause 4(1) of the Bill, magistrate is defined to '[include] a justice of the peace'. The Committee has consistently drawn attention to provisions which would allow non-judicial officers to issue search warrants. Indeed, the Committee referred to a statement to that effect in its 1987-88 Annual Report (at pp 14-15).

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 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 Investigations 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 stating:

> I emphasise that officers administering the Primary Industries Levies and Charges Collection arrangements will only approach a Justice of the Peace for the issue of a search warrant where it is not possible to obtain a warrant from a magistrate.

The Committee thanks the Minister for his response and for this assurance. However, while accepting the practical difficulties to which the Minister refers, the Committee remains of the view that search warrants should not be issued by non-judicial officers.

Entering premises with consent
Clause 19

The Committee noted that clause 19 of the Bill would allow

an authorised person (as defined in subclause 4(1)) to enter premises either in accordance with a warrant, as discussed above, or with the consent of the occupier of the premises. However, as it previously had noted in Alert Digest No. 8 of 1990, in relation to a similar provision contained in the Cattle and Beef Levy Collection Bill 1990, the Committee observed that the provision provides no protection to the occupant to ensure that the consent obtained is really true consent.

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 Minister has responded as follows:

> Departmental Investigations Officers on field visits basically conduct an auditing function, help and assist levy payers, undertake a public relations role and verify accuracy of information already provided on return forms.
>
> It is considered that any further acknowledgment in relation to consent to enter premises would constitute a significant administrative burden which would outweigh the implied benefits in terms of possible trespass on personal rights and liberties.

The Minister goes on to say:

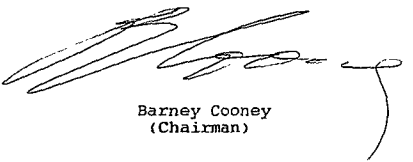
> They would, moreover, be counter-productive in creating an atmosphere of duress that is neither desired nor necessary.

The Committee thanks the Minister for this response.

General comment

The Committee noted that subclause 4(1) of the Bill contains a definition of 'order' for the purposes of the Bill. The subclause also defines 'prescribed' to include 'prescribed by Order'. 'Regulations' are defined as including 'orders'. The Committee indicated that it assumed that 'Order', in the definition of 'prescribed', should be 'order'. In his response, the Minister confirmed that this was the case.

The Committee thanks the Minister for his assistance with this Bill.



Barney Cooney
(Chairman)

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14 JAN 1991
Senate Standing Cttee for the Scrutiny of Bills

MINISTER FOR INDUSTRIAL RELATIONS

PARLIAMENT HOUSE
CANBERRA, A C T 2600

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

20 DEC 1990

Dear Senator Cooney Barney,

I refer to the comments of your committee concerning the Builders Labourers' Federation Legislation Amendment Bill 1990. Those comments appear in the Scrutiny of Bills Alert Digest No.10 of 1990, dated 10 November 1990. The Committee has expressed concern that proposed clause 6 of the bill might have retrospective operation. The Committee sought some assurance as to the effect of the proposed amendments on any current proceedings and, if relevant, the rationale behind such an application of the proposed law.

The Government has decided that the purposes for which the Builders Labourers' Federation (Cancellation of Registration) Act 1986 was enacted have not yet been achieved, and that it is therefore appropriate for that legislation to be given extended operation.

Background

The circumstances which led to the federal deregistration of the Australian Building Construction Employees and Builders Labourers' Federation (the BLF) in 1986 should be recalled. There had been an inquiry by the Australian Conciliation and Arbitration Commission into the BLF's conduct, particularly since its re-registration in 1976. A pattern of serious industrial misconduct and broken undertakings was demonstrated. The Commission described the case against the BLF as overwhelming.

In the circumstances, legislation was introduced for the BLF's deregistration, and its consequences. That legislation, the Builders Labourers' Federation (Cancellation of Registration) Act 1986 and the Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Act 1986 (the Consequential Provisions Act), which was found by the International Labour Organisation to be justified (see 244th Report of the ILO Governing Body's Committee on Freedom of Association, case no.1345 paras.185 and 193), had the following main features:

(a) the BLF was deregistered;

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(b) a non-registered association (broadly, the BLF or an unregistered union in the building and construction industry, whose membership comprised a majority of BLF or former BLF members) could not apply for registration for 5 years;

(c) a non-registered association could not appear in or be a party to proceedings before the Commission.

The legislation affected neither the existence of the BLF nor any other body, nor their rights to participate in State industrial reglations systems.

The legislation was intended to provide a period in which the BLF, in all its forms, was excluded from the federal system. This applied as much to State registered branches as to the deregistered federal body, and all clearly came within the definition of a "non-registered association".

This was deliberate. Although, owing to their incorporation upon registration, the State registered BLFs are, as a matter of law, separate entities, in other respects they are simply parts of a single, well-organised BLF structure. It would defeat the primary object of the legislation if the BLF were to be able to re-emerge in the federal system by having some or all of its State branches federally registered before the expiry of the exclusion period. The whole point of that period was to provide a time during which, it was hoped, the BLF would reform and become fit to participate again in that system. The Government regrets that this has not occurred.

Since 1986, there have been various attempts by officers and branches to be involved in proceedings before the Australian Conciliation and Arbitration Commission, and its successor, the Australian Industrial Relations Commission. There have also been attempts by some State registered branches to obtain registration, ostensibly in their own right. Up to the present time, none of those attempts has been successful. The Commonwealth has been involved in the various proceedings and has demonstrated that the applicants come within the scope of the 1986 legislation.

A question has arisen, however, of whether the composition of the membership of non-registered associations (eg, State registered BLFs) other than the deregistered BLF itself has changed or could change so that the definition of "non-registered association" no longer applies. Were this to be established and with no other substantial change in the structure, methods or objectives of the BLF and its related elements, the purpose of the existing legislation could be defeated. With the passage of time, the possibility of such an outcome increases.

The Amendments

Against this background, the Government decided that the Consequential Provisions Act should be amended, by the

Builders Labourers' Federation Legislation Amendment Bill, to the following effect:

(a) the period of exclusion from the federal system should be extended from 5 years to 10 years (clause 5);

(b) the original intention of the legislation should be reinforced by specifying that the State registered branches are, for the purposes of the legislation, "non-registered associations" [paragraphs 3(a) and (d)];

(c) the definition of "non-registered association" should be further changed by providing that an association comes within the definition if a substantial number rather than a majority of its members are members or former members of the deregistered BLF [paragraph 3(c)];

(d) given the longer exclusion period and the legitimate interests of State registered branches in protecting their position in their respective State systems (where they have such a place), provision should be made permitting those branches to be able to appear before the Commission to argue that certain awards, orders or decisions not be made which affect the branches adversely [subclause 4(1)].

The relationships established in the bill between the relevant operative provisions and their commencement arrangements are complex, but necessary to meet the exigencies of the matter. Clause 6 of the bill is properly regarded not in isolation, but in that context.

Clauses 3, 4 and 6 of the bill are to commence on proclamation and are repealed if they do not commence within 6 months of Royal Assent. It is these provisions which may affect current proceedings.

Clause 6

Clause 6 is an application clause, providing that a substantive amendment in the bill operates in relation to any application or proceeding under the Industrial Relations Act 1988, made or instituted before the commencement of the amendment. This is not a clause for the retrospective application of amendments. Rather, it requires that they operate prospectively. It will, however, affect any proceedings which are before the Commission at the commencement of the relevant provisions:

(a) any such proceedings involving a non-registered association will be affected in that the revised criteria will strictly apply to the State registered branches of the BLF, thereby placing their lack of standing beyond dispute [see section 3 of the Consequential Provisions Act as amended by paragraph 3(d) of the bill (definition of "State association") and subsection 4(3) of the Consequential Provisions Act];

(b) on the other hand, an officer, employee, agent or member of a non-registered association who is involved in such proceedings before the Commission will now not, by reason of being such a person, lack standing [see comments below on paragraph 4(1)(c)].

Subclause 4(2)

Subclause 4(1) qualifies the exclusionary effect of subsection 4(3) of the Consequential Provisions Act by giving certain State associations the rights of intervention described above. Subclause 4(2), if proclaimed, will provide that these rights will apply only in respect of future proceedings. If it is not proclaimed, but clause 6 is proclaimed, those State associations will have standing in relation to any proceedings within the scope of paragraph 4(1)(b) of the bill which are current at the commencement of subclause 4(1).

Subclause 4(2) would, therefore, have the effect of maintaining the intention of the Consequential Provisions Act as introduced by preventing a State registered branch of the BLF from maintaining any proceeding which it may have instituted before the commencement of paragraph 4(1)(b).

It should be noted that, if subclause 4(2) is not proclaimed to commence at the same time as the new rights of intervention in paragraph 4(1)(b), then it is repealed.

Applications or proceedings involving individuals in their own right will not be affected. In fact, the position of officers and certain other persons associated with a non-registered association will be improved. Under existing subsection 4(6) of the Consequential Provisions Act, a person or an organisation or an association of employees is not entitled to be represented by an officer, employee, agent or member of a non-registered association in proceedings before the Commission (other than an application by the non-registered association for registration). As mentioned, this subsection is to be repealed - paragraph 4(1)(c) of the bill.

Proceedings which may be affected by the bill

The State registered branches of the BLF in Western Australia, Queensland, South Australia and Tasmania are objectors in the following proceedings before the Australian Industrial Relations Commission:

- R105 and R106 of 1986 - applications by the Building Workers Industrial Union of Australia for consent to changes in eligibility and industry rules;

- R147 and R148 of 1986 - applications by the Federated Engine Drivers and Firemen's Association for consent to changes in eligibility and industry rules.

Officers of those State registered branches and groups of members of the Western Australian and South Australian branches have also lodged objections.

The Australian Builders Labourers' Federated Union of Workers (Western Australian Branch) has applied (R253 of 1986) in its own right for registration under the Industrial Relations Act 1988.

These proceedings involving the BWIU, the FEDFA and the BLF (WA Branch) have been adjourned until January 1991 to give the parties an opportunity to resolve the underlying issues by agreement. The commencement of clauses 3, 4 and 6 before those discussions are concluded could undermine the resolution process and thereby contribute indirectly to possible industrial friction. It is hoped that the discussions will be successful and that, in consequence, the commencement of subclause 4(2) will not need to be proclaimed.

Final comment

The bill is a balanced measure which will, in fact, place the State registered branches in Western Australia, Queensland, South Australia and Tasmania in a better and more legally certain position than they were in on the commencement of the 1986 legislation. Similarly, officers, employees, agents and members of non-registered associations will be in a better position. The bill introduces no new concepts but strengthens the existing legislative scheme.

Yours sincerely

Peter Cook

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01 FEB 1991
Senate Standing Cttee for the Scrutiny of Bills

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

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. 11 of 1990, dated 29 November 1990, which contained several queries by the Senate Standing Committee for the Scrutiny of Bills on the Customs and Excise Legislation Amendment Bill 1990, and in particular, Clause 49, which was prompted by the Open Guns case in September of this year.

The Committee acknowledged the very point the Government has admitted in all the documentation presented with this Bill in the Parliament; that is, in exceptional circumstances, retrospective legislation which has a prejudicial effect on some persons' rights is sometimes in the community's interests.

The Senate without opposition accepted on 13 December the necessity for retrospectivity in the particular circumstances of this case, and the real dangers to the community by not retrospectively validating the seizures of the dangerous goods to which item 18 related. I note your Committee has also accepted in this circumstance the reality that occasionally a Parliament must entertain the passage of legislation which is not only retrospective, but which also has the effect of overturning the decision of a court. It is to every law-makers credit that this occurs only rarely.

With regard to the specific queries raised by your Committee on some of the background to the item 18 instrument, I am advised that the amendment in Clause 49 of the Bill preserves the prohibited imports status of item 18 goods prior to 11 October 1990, when the "invalid" item was corrected by Statutory Rules No. 324. The Clause effectively validates past seizures of item 18 goods, ensuring thereby that they are not required to be released into the community.

For the information of the Committee, I have attached the last item 18 instrument detailing the list of goods whose importation was prohibited until struck down by the Court in the Owen Guns case (Attachment A refers).

For the information of the Committee, I have also attached the list of those item 18 goods which continue to be controlled (as items in their own right) under the amended Statutory Rules 1990

No 324 (A copy of the Statutory Rules, together with its Explanatory Statement is attached at Attachment B, noting the continued controls, also refers). The Committee will note the opportunity was taken in the review of the Item 18 controls to modernise the description of some of the dangerous goods, and indeed desist with some of the controls. The goods no longer controlled are detailed at Attachment C. The reason for ceasing control in respect of all of those goods was basically because the control was seen as unnecessary. Due to State and Territory consumer affairs legislation and sales of goods legislation there have been no attempted importations or seizures of any of those goods listed at Attachment C.

As to the Committees enquiries concerning the Owen Guns case itself, relating to whether or not the guns were returned to Mr. Owen, and the issue of costs, I am advised as follows:

- The seized guns were not returned to Mr. Owen. Although the Full Federal Court upheld the trial judge's view that Item 18 was an invalid delegation to the Minister of the Governor-General's power under Section 50 of the Customs Act, it nevertheless accepted that the seizing officer had validly considered whether the guns were "of military type" and thereby prohibited under Item 30 of the Second Schedule.

  As the seizure had been effected in reliance of both Items 18 and Item 30, the validity of the seizure was therefore maintained under the latter item.

- Costs were not awarded to Mr. Owen. The order of the Full Court on the question of costs was to the effect that each party bear their own costs both of the application and of the appeal. This order supersedes... that of the trial judge and therefore Mr Owen must bear his own legal costs for the initial application. While no reason was given for this, it is safe to assume it was because the validity of the seizure was upheld under one of the two items which was claimed.

I trust the above is of assistance to the Committee.

Yours sincerely,

(DAVID BEDDALL)

ATTACHMENT A

CUSTOMS (PROHIBITED IMPORTS) REGULATIONS

I, BARRY OWEN JONES, Minister for Science, Customs and Small Business pursuant to Regulation 4 and Item 18 in the Second Schedule to the Customs (Prohibited Imports) Regulations, hereby declare that the importation into Australia of the goods specified in the Schedule hereto is prohibited as the goods are, in my opinion, of a dangerous character and a menace to the community.

THE SCHEDULE

1. Animal training collars of a kind which incorporate protrusions which are capable of puncturing or bruising an animal's neck when tightened or pulled.

2. Apparel made up from man made fibre textile fabrics which contains tris (2, 3 dibromopropyl) phosphate and yarns and textile fabrics of man made fibres containing tris (2, 3 dibromopropyl) phosphate of a kind used in the manufacture of apparel.

3. Baby soothers, being "dummies" or "pacifiers", without a safety shield, consisting of a bulbous test, of 30mm in maximum diameter, attached to a whistle which sounds as the baby sucks on the teat.

4. Balloon-blowing kits, capable of being used to make balloon-like shapes, which contain polyvinyl acetate, ethyl acetate, acetone or benzene.

5. Blow pipe darts tipped with poison.

6. Bludgeons.

7. Candlesticks and other candle holders which will not withstand the application of a candle flame or the heat from a candle without igniting or melting and articles incorporating such holders.

8. Children's toys and playthings which are coated with a material or materials such as paints, lacquers, varnishes, inks and/or similar materials and where the coating material exceeds the level of contamination specified in Table 1.

TABLE 1

Element	Maximum percentage of the element and its compounds in the non volatile content of the coating material, calculated as the element.
Lead	0.25
Arsenic	0.1
Antimony	0.1
Cadmium	0.1
Selenium	0.1
Mercury	0.01
Chromium	0.1
Barium	Soluble compounds of barium shall not exceed 0.05 percent calculated as barium on the non-volatile content of the coating material.

In determining the level of the elements in the coating material the analytical method used shall be approved by the Australian Government Analyst.

9. Confectionery bottles consisting of a plastic bottle containing sherbet powder or other confectionery and a separate fitted top or stopper which can be used as a whistle.

10. Cosmetic products containing more than 250 mg/kg of lead and its compounds (except lead acetate for use in hair treatment).

"Cosmetic product" means any substance or preparation intended to be applied to any part of the external surfaces of the human body, including the epidermis, hair system, nails, lips, mucous membranes, external genital organs or the teeth wholly or mainly for the purpose of cleaning, perfuming or protecting them or keeping them in good condition or changing their appearance or combating body odour or perspiration.

11. Devices designed to convert a semi-automatic rifle to rapid fire capability.

12. Erasers in the shape of dummies where the eraser or any component parts fit into a truncated cylinder having the dimensions specified in Appendix D of Australian Standard 1647, Part 2 - 1981 'Children's Toys (Safety Requirements) Part 2 - Constructional Requirements'.

13. Erasers resembling food in scent and appearance which, when tested in accordance with the method for determining leachable substances in coating, plastics and graphic materials, set out in Appendix A of Australian Standard 1647, Part 3 - 1982, Children's Toys (Safety Requirements) published by the Standards Association of Australian on 9 August 1982, leach substances in which elements exceed the concentrations specified in Table 1:

TABLE 1

Element	Maximum concentration milligrams of element per kilogram of test specimen
Antimony	250
Arsenic	100
Barium	500
Cadmium	100
Chromium	100
Lead	250
Mercury	100
Selenium	100

14. Firearms which fail to satisfy the safety tests specified in the pamphlet entitled "Safety Tests for Imported Firearms" issued by the Australian Customs Service, Canberra.

15. Fish, crustaceans and molluscs with a mean level of mercury (calculated as the metal) greater than 0.5 mg/kg.

Products containing fish, crustaceans and molluscs where the mean level of mercury (calculated as the metal) in the fish, crustacean and mollusc content is greater than 0.5 mg/kg.

In determining the mercury content of the goods:

(a) the methods of sampling and preparation of samples for analysis shall be those specified in paragraph 5 of the National Health and Medical Research Council Model Food Standards Regulation "A12. Metals and Contaminants in Food" adopted by Council at the Ninety-ninth session in June 1985; and

(b) the analytical method shall be approved by the Australian Government Analyst.

16. Gloves or similar coverings for the hand incorporating protrusions (capable of puncturing or bruising the skin on contact or of a kind to make more effective the use of "karate" type blows.)

17. Goods that include a concealed knife or sword blade.

18. Hand-held battery-operated devices capable of administering an electric shock on contact, including but not limited to, goods known as:

- "BLS 1 Blaster Wand"
- "Counter Attack"
- "Hand-Held Personal Defence Shocker"
- "Power Zapper"
- "Protecto Stick".

19. Hand-held battery-operated devices capable of emitting adjustable high frequency acoustic shock waves including, but not limited to, goods known as the "Phaser Shock Wave Pistol".

20. Hand-held battery-operated flashlights capable of discharging a gas or liquid including, but not limited to, goods known as the "Guardian Security Flashlight".

21. Hunting Sling, catapult or slingshot which is designed for use with, or a component part of which is, a brace which -

(a) fits or rests upon the forearm or upon another part of the body of the user; and

(b) supports the wrist against the tension of elastic material used to propel a projectile.

22. Metal drink dispensers or containers which cause the dispensed or contained beverage to exceed National Health and Medical Research Council recommended levels for metal contamination. The relevant maximum levels are as follows:

Zinc	5 mg/kg
Mercury	.03 mg/kg
Copper	5 mg/kg
Antimony	0.15 mg/kg
Arsenic	0.15 mg/kg
Lead	0.2 mg/kg
Any other metal	0.15 mg/kg

23. Motor vehicle windscreens, windows or interior partitions not complying with Australian Design Rule No. 8 - Safety Glass.

24. Novelty money boxes designed or marketed for use by children where the accessible coating material contains any lead or any lead-containing substance so that the concentration of lead calculated as the element exceeds 2500 mg/kg of the coating material.

25. Pencils and children's paint brushes coated with paint any other substance containing -

Lead exceeding 0.25 per cent;
Arsenic exceeding 0.1 per cent;
Antimony exceeding 0.1 per cent;
Cadmium exceeding 0.1 per cent;
Selenium exceeding 0.1 per cent;
Mercury exceeding 0.01 per cent;
Chromium exceeding 0.1 per cent; or
Soluble compounds of barium exceeding 0.05 per cent,

by mass (weight) of the non-volatile content of the paint or other substance.

26. Protective helmets of a kind worn by vehicle users which do not comply with Australian Standard - 1698-1980, 'Protective Helmets for Vehicle Users' approved by the Standards Association of Australia on 27 August 1980, as amended by Amendment No. 1 of November 1984, and as varied by deleting paragraph (g) of Clause 14, and substituting in its place the following paragraph:-

(g) The registered Certification Mark of the Standards Association of Australia, encircled by the words "Manufactured to Australian Standard 1698".

27. Self re-lighting novelty candles designed in such a manner that, when lighted and subsequently extinguished by any means, they re-light spontaneously.

28. Shuriken throwing irons and similar devices.

29. Snake bite kits and first aid kits that include instructions which recommend any of the following methods of first aid treatment for snake bite:

    . the cutting or excising of the bitten area;

    . the use of arterial tourniquets.

30. Specimens or part specimens of venomous reptiles not listed in Schedules 1 or 2 of the Wildlife Protection (Regulation of Exports and Imports) Act 1982, whether stuffed or not, from which the venom glands, ducts or fangs have not been removed.

31. Stink bombs designed to release on impact nauseous irritating or dangerous substances.

32. Swordsticks being articles in the form of a walking stick in which a rapier-like blade is concealed.

33. Toy firearms from which missiles can be discharged by means of an explosive charge.

34. Toy firearms which emit a noise of such proportions as to be a hazard to hearing.

35. Toys or novelties, which have two dimensions less than 45 millimetres and which expand in volume when immersed in liquid, including but not limited to toys sold under name of "Magic Egg", "Wonder Water Creatures" and "Wonder Growing Pets".

36. Toys and novelties which, when used, spray a foam containing a flammable gas.

37. Trick foodstuffs and similar articles that may be ingested.

38. Walking stick guns.

39. Walking stick, hollow, with revolver and bayonet combined.

40. Warfare appliances and equipment viz.:

(a) Dazzle and decoy devices;

(b) Equipment designed or adapted for the making of smoke screens;

(c) Explosives and incendiary materials;

(d) Flame throwers;

(e) Gases or liquids designed for the purpose of killing or incapacitating persons and decontamination appliances and equipment;

(f) Grenades (smoke or explosive, whether charged or not);

(g) Launchers, throwers and projectors, for grenades, bombs, rockets or any other missile or substance, used in warfare, and parts and accessories therefor;

(h) Mines (whether charged or not);

(i) Projectiles and missiles;

(j) Rockets (whether charged or not);

(k) Trip flares, and

(l) Spare and component parts of or for any of the goods specified above.

41. Weapons of a machine gun construction and parts therefor including replicas, unless for official purposes.

The previous Instrument of Prohibition dated 9th March 1987 relating to the above goods is hereby revoked.

Dated this 24th day of June 1988.

MINISTER FOR SCIENCE,
CUSTOMS & SMALL BUSINESS

AMENDMENTS TO THE SECOND SCHEDULE

- Proposed Amendments to Existing Items in the Second Schedule

  Item 10: amend to include animal collars incorporating protusions designed to puncture or bruise an animal's skin, or designed to cause an electric shock.

- Proposed new Items for the Second Schedule

  It is proposed to amend the Second schedule to include the following new items which were previously prohibited under Item 18:

	Description of Goods	Item 18 Paragraph No.
i)	Apparel made from man made fibre textile fabrics which contain tris (2,3, dibromopropyl) phosphate and yarns and textile fabrics of man made fibres containing tris (2,3 dibromopropyl) phosphate of a kind used in the manufacture of apparel.	2
ii)	Blow pipe darts dipped with poison	5
iii)	Toys or playthings coated with paint, lacquer, varnish, ink or similar material which exceeds the level of contamination specified below:	8

Element	Maximum percentage of the element and its compounds in the non volatile content of the coating material, calculated as the element
Lead	0.25
Arsenic	0.1
Antimony	0.1
Cadmium	0.1
Selenium	0.1
Mercury	0.01
Chromium	0.1
Barium	Soluble compounds of barium shall not exceed 0.05 percent calculated as barium on the non-volatile content of the coating material.

iv)	Cosmetic products containing more than 250 mg/kg of lead or lead compounds, except products containing more than 250 mg/kg of lead acetate designed for use in hair treatments.	10

v) Devices designed to modify any firearm to enable it to fire continuously while the trigger is depressed until the supply of ammunition is exhausted. 11

vi) Firearms which fail to satisfy safety requirements specified by the Commissioner, Australian Federal Police, listed in Table A to this Schedule, not being goods listed in Table B to this Schedule. 14

vii) Fish, crustaceans and molluscs with a mean level of mercury (calculated as the metal) greater than 0.5mg/kg. 15

viii) Products containing fish, crustaceans and molluscs where the mean level of mercury (calculated as the metal) in the fish, crustacean and mollusc content is greater than 0.5mg/kg. 15

ix) Gloves or similar coverings for the hand incorporating protusions designed to puncture or bruise the skin. 16

x) Goods which incorporate a concealed gun, knife or blade. 17 38,39

xi) Hand held battery operated devices designed to administer an electric shock on contact. 18

xii) Hand held battery operated devices designed to emit a high frequency acoustic shock. 19

xiii) Hand held battery operated devices designed to discharge a gas or liquid. 20

xiv) Hunting slings, catapults or sling shots designed for use with, or a component part of which is, a brace which: 21

a) fits or rests upon for forearm or upon another part of the body of the user; and

b) supports the wrist or forearm against the tension of any material used to propel a projectile.

xv) Money boxes where the coating material contains lead or any lead containing substance exceeding 2500 mg/kg of the coating material. 24

xvi) Pencils or paint brushes coated with paint or any other substance containing - 25

Lead exceeding 0.25 per cent;
Arsenic exceeding 0.1 per cent;
Antimony exceeding 0.1 per cent;
Cadmium exceeding 0.1 per cent;
Selenium exceeding 0.1 per cent;
Mercury exceeding 0.01 per cent;
Chromium exceeding 0.1 per cent; or
Soluble compounds of barium exceeding 0.05 per cent, by mass (weight) of the non-volatile content of the paint or other substance.

xvii) Shuriken throwing irons or star knives and similar devices. 28

xviii) Snake bite kits or first aid kits which include instructions which recommend treatment for snake bite by cutting or excising the bitten area, or the use of arterial tourniquets. 29

xix) Specimens or part specimens of venomous reptiles not listed in Schedules 1 or 2 of the Wildlife Protection (Regulation of Exports and Imports) Act 1982 from which the venom glands, ducts or fangs have not been removed. 30

xx) Toys which spray a foam containing a flammable gas. 36

xxi) Appliances or equipment designed or adapted for warfare or like purposes being any of, or any combination of, the following: 40

a) dazzle or decoy devices;

b) equipment designed or adapted for the making of smoke screens;

c) explosives or incendiary materials;

d) flame throwers;

e) gases or liquids designed for the purpose of killing or incapacitating persons and devices or apparatus designed or adapted for use with those goods;

f) grenades of any type, whether charged or not;

g) launchers, throwers and projectors, designed for grenades, bombs, rockets or any other missiles or substances;

h) mines (whether charged or not);

i) projectiles, missiles or rockets (whether charged or not);

j) trip flares; and

k) parts designed or adapted for use with any of the goods specified above.

xxii) Weapons of a machine gun construction being any firearm which: 41

a) was originally manufactured to fire continuously while the trigger is depressed until the supply of ammunition is exhausted, whether or not that capacity has been made inoperative; or

b) has been modified, or is capable of being modified or manipulated, to fire continuously while the trigger is depressed until the supply of ammunition is exhausted.

33 Erasers in the shape of babies dummies the dimensions of which are smaller than the dimensions specified in Appendix D of Australian Standard 1647, Part 2 - 1981: 'Childrens Toys (Safety Requirements), Part 2 - Constructional Requirements', published on 1 March 1981.

34 Erasers resembling food in scent or appearance that do not satisfy Australian Standard 1647, Part 3 - 1982: 'Childrens Toys (Safety Requirements), Part 3 - Toxicological Requirements', published by the Standards Association of Australia on 9 August 1982.

35 Metal drink dispensers or containers that cause contamination of the dispensed or contained beverage in excess of the levels of contamination specified in the National Medical and Research Food Standard A12 ('Metals and Contaminants in Food'), published in Gazette No.P12 of 27 August 1987 and amended in Gazette No.)19 of 15 July 1988 and Gazette No.P28 of 11 October 1989.

36 Motor-vehicle windscreens, windows or interior partitions not complying with Australian Design Rule (Third Edition) 8/00 ('Safety Glazing Material'), issued on 1 July 1988.

37 Protective helmets for motor-vehicle users not complying with Australian Standard 1698-1988 ('Protective Helmets for Vehicle Users'), published on 9 May 1990".

Proposed Deletions from the Second Schedule
It is proposed to delete the following items from the Second Schedule:

Item 2: "Ammunition for rifles of a military type, being ammunition the calibre of which is greater than .22 calibre".

- this prohibition was a postwar attempt to control .303 calibre ammunition. Recent discussions with the AFP have indicated that there is no need for such a control

Item 8: "Confectionery, the consumption of which would, in the opinion of the Minister, be injurious

- this item is based on the Minister's opinion, and is therefore vulnerable to the same criticism as Item 18

Item 20: "Pipes for use in opium smoking and all parts and accessories to such pipes".

- this item is considered to be an out of date reference, and one which is ineffective given the ready availability of pipes, bongs and hookahs etc.

Statutory Rules 1990 No. 324[1]

Customs (Prohibited Imports) Regulations[2] (Amendment)

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulations under the *Customs Act 1901*.

Dated 11 October 1990.

BILL HAYDEN
Governor-General

By His Excellency's Command,

D. BEDDALL
Minister of State for Small Business and Customs

1. Amendment

1.1 The Customs (Prohibited Imports) Regulations are amended as set out in these Regulations.

2. Regulation 4 (Goods the importation of which is prohibited unless conditions or restrictions complied with)

2.1 Subregulation 4 (1):

Omit "the Second Schedule to these Regulations", insert "Part 1 of Schedule 2".

2.2 Subregulation 4 (1):

After "the Minister", insert "or an authorised person".

2.3 After subregulation 4 (1), insert:

"(1AA) Where, in relation to an application for a permission under subregulation (1), an authorised person has formed an opinion that the permission should not be granted, the authorised person is to refer the application to the Minister.

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"(1AB) Where an application has been referred to the Minister in accordance with subregulation (1AA), the Minister may grant, or refuse to grant, the permission.

"(1AC) In subregulations (1) and (1AA), **'authorised person'** means a person authorised in writing by the Minister for the purposes of this subregulation.".

2.4 Subregulation 4 (1A)

Omit "sub-regulation (1)", substitute "subregulation (1) or (1AB)".

3. Regulation 4N (Prohibition of importation of aircraft, airframes or aircraft engines)

3.1 Omit the regulation.

4. Second Schedule (Goods the importation of which is prohibited unless the permission in writing of the Minister has been granted)

4.1 Heading:

Omit:

"SECOND SCHEDULE *Subregulation 4 (1)*

GOODS THE IMPORTATION OF WHICH IS PROHIBITED UNLESS THE PERMISSION IN WRITING OF THE MINISTER HAS BEEN GRANTED".

substitute:

"SCHEDULE 2 *Subregulation 4 (1)*

GOODS THE IMPORTATION OF WHICH IS PROHIBITED UNLESS THE PERMISSION IN WRITING OF THE MINISTER OR AN AUTHORISED PERSON HAS BEEN GRANTED

PART 1—SPECIFICATION OF GOODS".

4.2 Items 2, 7 and 8:

Omit the items, substitute:

"1 Apparel made from man-made fibre textile fabrics which contain tris (2,3-dibromopropyl) phosphate and yarns and textile fabrics of man-made fibres containing tris (2,3-dibromopropyl) phosphate of a kind used in the manufacture of apparel

2 Toys or playthings coated with a material the non-volatile content of which contains more than:
- (a) 250 mg/kg of lead or lead compounds, calculated as lead; or
- (b) 100 mg/kg of arsenic or arsenic compounds, calculated as arsenic; or
- (c) 100 mg/kg of antimony or antimony compounds, calculated as antimony; or
- (d) 100 mg/kg of cadmium or cadmium compounds, calculated as cadmium; or
- (e) 100 mg/kg of selenium or selenium compounds, calculated as selenium; or
- (f) 10 mg/kg of mercury or mercury compounds, calculated as mercury; or
- (g) 100 mg/kg of chromium or chromium compounds, calculated as chromium; or
- (h) 50 mg/kg of soluble compounds of barium, calculated as barium

3 Cosmetic products containing more than 250 mg/kg of lead or lead compounds (calculated as lead), except products containing more than 250 mg/kg of lead acetate designed for use in hair treatments

4 Fish, crustaceans and molluscs with a mean level of *mercury* (calculated as the metal) greater than 0.5 mg/kg

5 Products containing fish, crustaceans and molluscs where the mean level of *mercury* (calculated as the metal) in the fish, crustacean and *mollusc* content is greater than 0.5 mg/kg

6 Money boxes coated with a material that contains more than 250 mg/kg of lead or lead compounds, calculated as lead

7 Pencils or paint brushes coated with a material the non-volatile content of which contains more than:
- (a) 250 mg/kg of lead or lead compounds, calculated as lead; or
- (b) 100 mg/kg of *arsenic or arsenic compounds*, calculated as arsenic; or
- (c) 100 mg/kg of *antimony or antimony compounds*, calculated as antimony; or
- (d) 100 mg/kg of *cadmium* or cadmium compounds, calculated as cadmium; or
- (e) 100 mg/kg of selenium or selenium compounds, calculated as selenium; or
- (f) 10 mg/kg of *mercury* or mercury compounds, calculated as mercury; or
- (g) 100 mg/kg of chromium or chromium compounds, calculated as chromium, or
- (h) 50 mg/kg of soluble compounds of barium, calculated as barium

8 Appliances or equipment designed or adapted for warfare or like purposes, being any of, or any combination of, the following:
- (a) dazzle or decoy devices,
- (b) equipment designed or adapted for the making of smoke screens;
- (c) explosives or incendiary materials,
- (d) flame throwers;
- (e) gases or liquids designed for the purpose of killing or incapacitating persons, and devices or apparatus designed or adapted for use with those goods,
- (f) grenades of any type, whether charged or not,
- (g) launchers, throwers and projectors, designed for grenades, bombs, rockets or any other missiles or substances,
- (h) mines (whether charged or not);
- (i) projectiles, missiles or rockets (whether charged or not),
- (j) trip flares; and
- (k) parts designed or adapted for use with any of the goods in the preceding paragraphs of this item".

4.3 Item 10:

Omit the item, substitute:

"10 Dog collars incorporating:
- (a) apparatus designed to cause an electric shock; or
- (b) protrusions designed to puncture or bruise an animal's skin".

4.4 After item 11, insert:

"12 Hand-held battery-operated devices designed to administer an electric shock on contact

13 Hand-held battery-operated devices designed to emit a high-frequency acoustic shock

14 Hand-held battery-operated devices designed to discharge a gas or liquid".

4.5 Item 18:

Omit the item, substitute:

"18 Blowpipe darts tipped with poison".

4.6 Item 20:

Omit the item, substitute:

"20 Gloves, or similar coverings for the hand, incorporating protrusions designed to puncture or bruise the skin

21 Goods incorporating a concealed gun, knife or blade

22 Hunting slings, catapults or sling shots designed for use with, or a component part of which is, a brace that:

(a) fits or rests upon the forearm or upon another part of the body of the user; and

(b) supports the wrist or forearm against the tension of any material used to propel a projectile

23 Shuriken throwing irons or star knives and similar devices

24 Firearms that fail to satisfy the safety requirements specified in Part 2 of this Schedule

25 Weapons of a machine-gun construction, being any firearm:

(a) originally manufactured to fire continuously while the trigger is depressed until the supply of ammunition is exhausted, whether or not that capacity has been made inoperative; or

(b) modified to fire continuously while the trigger is depressed until the supply of ammunition is exhausted

26 Devices designed to modify any firearm to enable it to fire continuously while the trigger is depressed until the supply of ammunition is exhausted"

4.7 After item 30AA, add:

"31 Snake-bite kits or first-aid kits that include instructions which recommend treatment for snake-bite by cutting or excising the bitten area, or the use of arterial tourniquets

32 Specimens or part specimens of venomous reptiles, not listed in Schedule 1 or 2 of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*, from which the venom glands, ducts or fangs have not been removed

33 Erasers, in the shape of babies dummies, the dimensions of which are smaller than the dimensions specified in Appendix D of Part 2 ('Constructional Standards') of Australian Standard 1647-1981, ('Childrens Toys (Safety Requirements)'), published on 1 March 1981

34 Erasers, resembling food in scent or appearance, that do not satisfy Part 3 ('Toxological Requirements') of Australian Standard 1647-1982 ('Childrens Toys (Safety Requirements)'), published on 9 August 1982

35 Metal drink dispensers or containers that cause contamination of the dispensed or contained beverage in excess of the levels of contamination specified in the National Medical and Research Council Food Standard A12 ('Metals and Contaminants in Food'), published in *Gazette* No. P 12 of 27 August 1987 and amended in *Gazette* No. P 19 of 15 July 1988 and *Gazette* No. P 28 of 11 October 1989

36 Motor-vehicle windscreens, windows or interior partitions not complying with Australian Design Rule (Third Edition) 8/00 ('Safety Glazing Material'), issued on 1 July 1988

37 Protective helmets for motor-vehicle users not complying with Australian Standard 1698-1988 ('Protective Helmets for Vehicle Users'), published on 9 May 1990".

4.8 Add at the end:

"PART 2—SAFETY REQUIREMENTS FOR FIREARMS

1. The firearm, loaded with a test blank cartridge, fully cocked and with the safety catch or safety notch (if any) disengaged, must not operate so as to discharge the test blank if:

(a) it is held with the barrel vertical and dropped thrice, being re-cocked after each drop, from a height of not more than 45 centimetres butt-first onto a rubber mat that:

(i) is 25 millimetres thick; and

(ii) has a hardness reading (in this clause called 'the appropriate hardness reading') of 75/85 when tested in accordance with Part 15 of Australian Standard 1683–1976 ('Indentation Hardness of Rubber and Plastics by means of a Durometer'), published on 1 September 1976; or

(b) it is struck not more than 6 times at various points along its length by a rubber hammer that,

(i) has a head that weighs 450 grams and has the appropriate hardness reading; and

(ii) is held at the end of the handle with the head 30 centimetres above the point to be struck; and

(iii) is allowed to fall under its own weight once at each of those points;

with no pressure being exerted on the trigger and with the firearm being recocked after each blow; or

(c) in the case of a firearm having an exposed hammer or exposed hammers or having a bolt action, each hammer or bolt fall is struck once by a rubber hammer that:

(i) has a head that weighs 450 grams and has the appropriate hardness reading, and

(ii) is held at the end of the handle with the head 30 centimetres above the place to be struck; and

(iii) is allowed to fall under its own weight, or

(d) in the case of a firearm having an exposed hammer or cocking device or exposed hammers or cocking devices, each hammer or cocking device is moved back towards the cocked position 3 times and, immediately before the sear engages the bent or bents in the fully cocked position and with no pressure being applied to the trigger, the hammer or cocking device is released 3 times and allowed to travel forward under the pressure of the spring.

2. Unless the firearm is fitted with an adjustable trigger or triggers, the trigger mechanism must not operate when a force of 11 newtons is exerted on the central point of the trigger in the direction in which the trigger operates.

3. The firearm must be fitted with an effective trigger guard.

4. The firearm, unless it is a hammer firearm fitted with a half-cock mechanism or safety bent, must be fitted with a safety device that:

(a) when engaged in the 'Safe' position, prevents operation of the trigger mechanism; and

(b) can be disengaged only by a distinct pressure of a finger or thumb; and

(c) clearly indicates that the firearm is in either a 'Safe' or 'Fire' condition.".

NOTES

1. Notified in the *Commonwealth of Australia Gazette* on 12 October 1990.

2. Statutory Rules 1956 No. 90 as amended to date. For previous amendments *see* Note 2 to Statutory Rules 1990 No. 39 and *see also* Statutory Rules 1990 Nos. 39, 191 and 265.

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EXPLANATORY STATEMENT

CUSTOMS ACT 1901

CUSTOMS (PROHIBITED IMPORTS) REGULATIONS (AMENDMENT)

STATUTORY RULES 1990 NO.

ISSUED BY THE AUTHORITY OF THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS

Section 50 of the Customs Act 1901 (the Act) provides in part that:

"1) The Governor-General may, by regulation, prohibit the importation of goods from Australia.

2) The power conferred by the last preceding sub-section may be exercised - ... (b) by prohibiting the importation of goods to a specified place; or (c) by prohibiting the importation of goods unless specified conditions or restrictions are complied with.

2A) Without limiting the generality of paragraph (2)(c), the Regulations - ...(a) may provide that the importation of the goods is prohibited unless a licence, permission, consent or approval to import the goods or a class of goods in which the goods are included has been granted as prescribed by the regulations; and ..."

The Customs (Prohibited Imports) Regulations (the Regulations) control the importation of goods specified in the various Regulations or the Schedules to the Regulations, by prohibiting importation absolutely, or making importation subject to the permission of a Minister of State or a specified person.

The proposed Statutory Rules contain several amendments to the Regulations which:

i) amend the Second Schedule to prohibit the importation of various goods previously prohibited under a Ministerial Instrument prepared under Item 18 of the Second Schedule;

ii) enable an authorised person to give permission to import goods under Regulation 4, and provide a review by the Minister where an authorised person has refused to grant a permission to import goods covered by that regulation; and

iii) repeal regulation 4N.

Background

i) Amendment to the Regulations to Prohibit the Importation of Goods previously prohibited under Item 18 of the Second Schedule

The amendments propose the addition of new items to the Second Schedule of the Regulations to prohibit the importation of certain goods unless the permission of the Minister, or an authorised 2. person has been obtained. The specific goods were previously controlled by a Ministerial Instrument prepared under Item 18 of the Second Schedule which prohibited:

"Goods which, in the opinion of the Minister, are of a dangerous character and a menace to the community".

On 14 September 1990 the Full Court of the Federal Court of Australia unanimously held (in its decision in Robert Alfred Turnery and Barry Owen Jones v Ronald Owen, No. G12 of 1993) that Item 18 was invalid, as it was an unauthorised delegation to the Minister of the Governor-General's power to prohibit the importation of goods. The Court held such a delegation was not permitted by the empowering sections in the Customs Act 1901.

As a result of the Court's decision dangerous goods which were previously prohibited under Item 18 have lost their status as prohibited imports, and therefore can no longer be controlled or seized at the Customs barrier.

The details of the proposed new Items, and the reasons for control of such goods are specified in the Attachment hereto.

ii) Amendment to allow an authorised person to permit the importation of goods, and review by the Minister where the authorised person has refused to grant a permission

This amendment has been inserted to enable a person authorised by the Minister to grant a permission to import certain goods, consistent with other recent amendments to other Schedules in the Customs (Prohibited Imports) Regulations.

The denial of an import permission is not independently reviewable by the Administrative Appeals Tribunal, as it is considered because of the dangerous nature of the goods, any independent review of such a decision can be justifiably denied on "high - government" policy grounds (public health and safety). Such a denial of a permission however must be made by the Minister responsible, consistent with all recent Customs (Prohibited Imports) and (Prohibited Exports) Regulations and undertakings to the Senate Standing Committee for Regulations and Ordinances. Thus, where an authorised person forms an opinion that a permission should not be granted, the authorised person must refer that application to the Minister, who is responsible for the final decision.

10/10

iii) Repeal of Regulation 4N

Regulation 4N which was inserted as a result of the Airlines Agreement Act 1981, prohibits the importation of an aircraft, airframe or aircraft engine unless a permission in writing has been granted by the Secretary to the Department of Transport and Communications.

The Airlines Agreement Act 1981 was recently repealed by the Airlines Agreement (Termination) Act 1990 (Act No. 73 of 1990), which received Royal Assent on 24 September 1990. The latter Act effects a deregulation of the domestic aviation industry on and from 31 October 1990. As a consequence of that deregulation the Secretary to the Department of Transport and Communications requested the repeal of regulation 4N of the Regulations.

All of the above proposed changes are explained in detail in the attachment hereto.

S.R. /90

Regulation 1: is a machinery provision which states that the Customs (Prohibited Imports) Regulations (the Principal Regulations) are amended as set out in these Statutory Rules.

Regulation 2: amends Regulation 4 of the Principal Regulations as follows :

Regulation 2.1: is a minor technical amendment to rename the "Second Schedule" to "Schedule 2";

Regulation 2.2: amends Regulation 4 to enable an authorized person to grant permission to import prohibited goods similar to other recent control regimes in the Customs (Prohibited Imports) and (Prohibited Exports) Regulations;

Regulation 2.3: inserts new subregulations 4(1AA) and 4(1AB) which provide a review by the Minister where the authorized person, defined in new subregulation 4(1AC), has refused to grant a permission.

Regulation 3: omits Regulation 4N, relating to controls on aircraft,airframe or aircraft engine, from the Regulations in anticipation of deregulation of the aviation industry.

Regulation 4: amends the Second Schedule to become Schedule 2 and inserts new items into Part 1 of Schedule 2.

Regulation 4.1: is a technical drafting amendment effecting the change of name of the Schedule.

Regulation 4.2: removes existing Items 2,7 and 8 for which control is no longer needed, and in respect of which no importations or seizures have ever occurred. The new Items which are inserted into Part 1 of Schedule 2, and the rationale for control of those goods are as follows:

Item 1: apparel and textiles containing tris (2,3 - dibromopropyl)

- tris is a potent carcinogen which may be absorbed through the skin or ingested if a textile is sucked or chewed;

Item 2: toys coated with toxic materials

- toys which contain excessive levels of toxic metals present a health hazard, particularly to children who are apt to place such objects in the mouth;

Item 3: cosmetics containing excessive levels of lead

- cosmetics containing excessive levels of lead are unsafe and a health hazard;

Item 4: and 5 fish and fish products containing excessive levels of mercury

- such products are unsafe and present a health hazard;

Item 6: money boxes containing excessive levels of lead

- such goods are unsafe and present a health hazard;

Item 7: pencils or paint brushes coated with toxic materials

- such goods which contain excessive levels of toxic metals are unsafe and present a health hazard; and

Item 8: appliances or equipment designed or adopted for warfare

- these goods have no legitimate civilian use, and the prohibition is imposed to limit their availability to the defence forces.

Regulation 4.3: amends Item 10 (dog collars) to include collars designed to puncture or bruise an animal's skin.

Regulation 4.4: inserts new Items 12,13 and 14 which prohibit hand held devices designed to administer electric or acoustic shocks, or to discharge a gas or liquid. Such devices can cause great injury to victims and have no legitimate civilian use.

Regulation 4.5: omits existing and inserts a control on blowpipe darts tipped with poison, which have no legitimate use and could cause fatal injury.

Regulation 4.6: removes existing Item 20 (opium pipes) as that prohibition is considered to be ineffective given the ready availability of bongs etc, and inserts in its place the following new items:

Item 20: gloves incorporating protrusions designed to puncture or bruise the skin

- such goods are dangerous and have no legitimate use;

Item 21: concealed guns, knives or blades

- such goods are offensive weapons and have no legitimate use;

Item 22: hunting slings, catapults or sling shots

- such goods are dangerous and are capable of propelling missiles at high speed causing serious injury;

Item 23: shuriken throwing irons or star knives

- the prohibition was introduced to limit the availability of such dangerous weapons to martial arts clubs which could demonstrate a legitimate use as the basis for a permission for importation;

Item 24: unsafe firearms

- the importation of firearms which do not meet safety tests prescribed in new Part 2 of Schedule 2 (inserted by Regulation 4.8) is prohibited as such unsafe firearms require strict control;

Item 25: weapons of machine gun construction

- such goods are manifestly dangerous and access to them should be as restricted as possible;

Item 26: devices designed to modify firearms to enable them to fire continuously

- these goods have no legitimate civilian use or application and cause risks to public safety;

Regulation 4.7: inserts the following new Items :

Item 31: snake bite / first aid kits which recommend treatment for bites by excision or tourniquet

- the treatment of bites by these methods is considered to be highly dangerous, and the prohibition is sought at the request of Commonwealth and State Health Authorities;

Item 32: wildlife specimens with venom glands, fangs, ducts etc. intact

- such specimens retain the potency of the venom and are dangerous;

Item 33: erasers which do not meet Australian standards and 34

- such goods present health risks to users, especially as they are apt to be placed in the mouth;

Item 35: drink dispensers which contaminate the beverage

- such dispensers contaminate the liquid with excessive and dangerous levels of toxic contaminants;

Item 36: vehicle windscreens, windows or internal partitions which fail to meet safety standards

- such goods which do not comply with safety standards are unsafe; and

Item 37: motor vehicle helmets, including motor cycle helmets, which fail to meet safety standards

- such goods are unsafe as they do not provide the protection required by the user, and in some cases could increase the risk of injury.

Regulation 4.8: inserts new Part 2 which details the safety requirements for firearms, such minimum safety standards, which have been developed in consultation with the Australian Federal Police, are necessary for the safety of users of such firearms, as well as the wider community.

3. Baby soothers, being "dummies" or "pacifiers" without a safety shield, consisting of a bulbous teat, 30 mm in maximum diameter, attached to a whistle which sounds as the baby sucks on the teat.

4. Balloon-blowing kits, capable of being used to make balloon-like shapes, which contain polyvinyl acetate, ethyl acetate, acetone or benzene.

6. Bludgeons.

7. Candlesticks and other candle holders which will not withstand the application of a candle flame or the heat from a candle without igniting or melting and articles incorporating such holders.

9. Confectionery bottles consisting of a plastic bottle containing sherbet powder or other confectionery and a separate fitted top or stopper which can be used as a whistle.

27. Self re-lighting novelty candles designed in such a manner that, when lighted and subsequently extinguished by any means, they re-light spontaneously.

31. Stink bombs designed to release on impact nauseous, irritating or dangerous substances.

33. Toy firearms from which missiles can be discharged by means of an explosive charge.

34. Toys firearms which emit a noise of such proportions as to be a hazard to hearing.

35. Toys or novelties, which have two dimensions less than 45 millimetres and which expand in volume when immersed in liquid, including but not limited to toys sold under the name of "Magic Egg", "Wonder Water Creatures" and "Wonder Growing Pets".

36. Toys and novelties which, when used, spray a foam containing a flammable gas.

37. Trick foodstuffs and similar articles that may be ingested.

MINISTER FOR RESOURCES

The Hon. Alan Griffiths, MP

- 5 FEB 1991

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 of Bills Alert Digest No 11 of 1990 concerning the Primary Industries Levies and Charges Collection Bill 1990.

Issue of search warrants by non-judicial officers - Clause 20

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 Investigations 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 Primary Industries Levies and Charges Collection arrangements will only approach a Justice of the Peace for the issue of a search warrant where it is not possible to obtain a warrant from a magistrate.

Entering premises with consent - Clause 19

Departmental Investigations Officers on field visits basically conduct an auditing function, help and assist levy payers, undertake a public relations role and verify accuracy of information already provided on return forms.

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

It is considered that any further acknowlegement in relation to consent to enter premises 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 nor necessary.

General Comment

The Committee's assumption that 'Order', in the definition of 'prescribed', should be 'order' is correct.

Yours sincerely

Alan Griffiths

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT

OF

1991

20 FEBRUARY 1991

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

SECOND REPORT OF 1991

The Committee has the honour to present its Second Report of 1991 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:

Crimes (Investigation of Commonwealth Offences) Amendment Bill 1990

CRIMES (INVESTIGATION OF COMMONWEALTH OFFENCES) AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 15 November 1990 by the Attorney-General.

The Bill proposes to provide for a maximum period during which an arrested person may be held for questioning or investigation before being taken before a magistrate. It also proposes to introduce the mandatory tape-recording of confessional material. This Bill is in response to the High Court's decision in Williams v The Queen.

The Committee dealt with the Bill in Alert Digest No. 11 of 1990, in which it requested further assistance from the Attorney-General in relation to certain provisions contained in the Bill. The Attorney-General responded to the request in a letter dated 19 December 1990. A copy of that letter is attached to this report. Relevant parts of the Attorney-General's response are also discussed below.

General comment
Clause 3

By way of a general comment, the Committee noted that clause 3 of the Bill proposes to insert a new Part 1B into the Crimes Act 1914 to provide for a pre-charge custodial period in relation to Commonwealth offences. The Explanatory Memorandum to the Bill states that the purpose of the proposed amendment is

> to provide a necessary and reasonable pre-charge investigation period before a suspect must be released, either unconditionally or on bail, or brought before a magistrate.

According to the Second Reading speech, the new part aims to remedy a 'serious dilemma' which was created by the High Court's decision in Williams v The Queen, ((1986) 161 CLR 278).

In the proposed new part, proposed new subsections 23B(3), 23C(3)(b) and (7)(a), 23D(2) and 23E(7) refer to the role of magistrates in relation to certain Commonwealth offences, including giving magistrates certain powers in relation to persons brought before them as required by the provisions of the Bill.

'Magistrate' is defined in proposed subsection 23B(1) as including a justice of the peace. However, proposed subsection 23D(2) provides for an application to extend an investigation period to be made to:

> (a) a magistrate; or
> (b) if it cannot be made at a time when a magistrate is available - a justice of the peace.

In the light of the earlier definition of magistrate to include a justice of the peace, the Committee indicated that it was curious to know the intent and effect of this provision. In particular, the Committee said that it would like to know whether the framing of paragraph (b) is simply intended to make the situation abundantly clear or whether some other meaning is intended. Accordingly, the Committee sought some assistance from the Attorney-General on this point.

The Attorney-General has responded as follows:

> Each of [the] references to the role of the magistrate with the exception of subsections 23D(2) and 23E(8) involves the remand or bail functions, which in most jurisdictions may be

> performed by a justice of the peace at times when no magistrate is available. The Bill does not seek to alter whatever may be the current arrangements of State/Territory jurisdictions regarding these functions.

The Attorney-General goes on to say:

> [T]he intention in section 23D is to make it clear that for the purposes of authorising the extension of an investigation period (a function to be conferred by the proposed legislation) a magistrate and a justice of the peace are not interchangeable and recourse may only be had to a justice of the peace if no magistrate is available.

The Attorney-General notes that the relevant rule of statutory interpretation is

> that all definitions of the meaning of words or phrases in legislation are to be read either expressly or impliedly as subject to the qualification 'unless the contrary intention appears': Hall v Jones (1942) SR(NSW) 203; if the definition is to be departed from it is only to be for the purposes of the particular provision where the contrary intention is apparent, (cf DC Pearce Statutory Interpretation in Australia 2ed Butterworths 1981 at para 156).

The Attorney-General also goes on to explain the preference for a magistrate in certain circumstances. He says:

> [I]n the case of extensions of the investigation period, including telephone extensions, ... it is essential that the decision be made in a judicial manner since it has serious implications both for the liberty of the subject and the admissibility of evidence subsequently obtained.

The Attorney-General goes on to say:

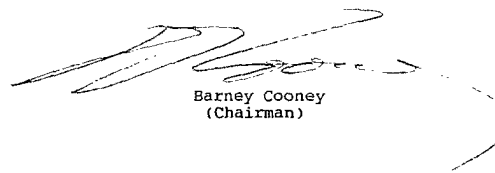
> In general the magistrate will be the more experienced and more sensitive to the issues involved.

The Committee endorses these comments by the Attorney-General, which underline the concern that the Committee has consistently expressed in relation to the role of non-judicial officers in the issuing of warrants. While the Attorney-General has made these comments, however, it should be noted that he goes on to add a significant proviso:

> However it is intended that in appropriate circumstances a justice of the peace may authorise an extension as a matter of practicality in those jurisdictions where magistrates are not accessible, even by telephone, out of hours.

The Committee notes the Attorney-General's statement and notes that, in the present case, the 'appropriate circumstances' which call for the involvement of a justice of the peace are fairly limited and have been so limited with regard to what the Committee would regard as the appropriate and relevant criteria.

The Committee thanks the Attorney-General for his response and for his assistance with this Bill.



Barney Cooney
(Chairman)

Attorney-General

RECEIVED

20 DEC 1990

Senate Standing Cttee for the Scrutiny of Bills

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

19 DEC 1990

CLE90/16160

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

Dear Barney,

Dear Senator Cooney

In Scrutiny of Bills Alert Digest No 11 of 1990 the Committee indicated that it would appreciate some assistance from me in relation to the intent and effect of subsection 23D(2) of the Crimes (Investigation of Commonwealth Offences) Amendment Bill 1990 (the Bill).

As the Committee notes, "magistrate" is defined in proposed subsection 23B(1) of the Bill as including a justice of the peace, and proposed new subsections 23B(3), 23C(3)(b) and (7)(a), 23D(2) and 23E(7) refer to the role of the magistrate in relation to certain Commonwealth offences.

Each of these references to the role of the magistrate with the exception of subsections 23D(2) and 23E(7) involves the remand or bail functions, which in most jurisdictions may be performed by a justice of the peace at times when no magistrate is available. The Bill does not seek to alter whatever may be the current arrangements of State/Territory jurisdictions regarding these functions.

However, the intention in section 23D is to make it clear that for the purposes of authorising the extension of an investigation period (a function to be conferred by the proposed legislation) a magistrate and a justice of the peace are not interchangeable and recourse may only be had to a justice of the peace if no magistrate is available.

The relevant rule of statutory interpretation is that all definitions of the meaning of words or phrases in legislation are to be read either expressly or impliedly as subject to the qualification "unless the contrary intention appears": Hall v Jones (1942) SR(NSW) 203; if

the definition is to be departed from it is only to be for the purposes of the particular provision where the contrary intention is apparent, (cf D C Pearce "Statutory Interpretation in Australia" 2ed Butterworths 1981 at para 156).

The reason for the preference of a magistrate over a justice of the peace in the case of extensions of the investigation period, including telephone extensions, is that it is essential that the decision be made in a judicial manner since it has serious implications both for the liberty of the subject and the admissibility of evidence subsequently obtained. In general the magistrate will be the more experienced and more sensitive to the issues involved. However it is intended that in appropriate circumstances a justice of the peace may authorise an extension as a matter of practicality in those jurisdictions where magistrates are not accessible, even by telephone, out of hours.

I hope that this explanation is of assistance to the Committee.

Yours sincerely

Regards
Michael Duffy

MICHAEL DUFFY

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRD REPORT

OF

1991

6 MARCH 1991

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

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(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

THIRD REPORT OF 1991

The Committee has the honour to present its Third Report of 1991 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:

Family Law Amendment Bill 1990

Industry, Technology and Commerce Legislation Bill 1991

FAMILY LAW AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 16 May 1990 by the Attorney-General.

The Bill proposes to implement recommendations of the Family Law Council for improvements in the handling of child abuse allegations in child custody and access proceedings, to clarify the effect which a step-parent adoption of a child has on the custody, guardianship or access rights of the child's natural parents under the Family Law Act 1975 and to limit the conferral of child custody or guardianship rights on a person who is not a parent of the child. Other amendments would allow police to enter premises and search for a person when they are authorised under the Family Law Act to arrest that person and extend the protection given by the Family Law Act from State or Territory stamp duties to child maintenance agreements and certain other instruments. Other technical amendments are also proposed.

The Committee dealt with the Bill in Alert Digest No. 2 of 1990, in which it made various comments. The Attorney-General responded to those comments in a letter dated 5 July 1990. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Power to arrest without warrant
Proposed new section 122A

In Alert Digest No. 2, the Committee noted that clause 19 of the Bill, if enacted, would insert new section 122A into the Family Law Act 1975. The proposed new section would allow the Family Court to authorise persons to enter and search

premises, without warrant, for the purposes of arresting a person whom the arresting person is authorised (under the Act) to arrest. While noting that powers to arrest without warrant already exist in section 114AA of the Act, the Committee observed that this provision would extend those powers. Accordingly, the Committee drew the clause 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 Attorney-General has responded as follows:

> I do not believe that section 122A will result in any undue trespass on personal rights and liberties. As the Digest points out, the Family Law Act already authorises arrest without warrant where a person breaches a Family Court order by causing, or threatening to cause, bodily harm to a child or spouse. Section 122A will empower police to enter and search premises without a warrant in situations where they are attempting to make such an arrest. Under section 122A a police officer will only exercise the power to enter premises where the officer has reasonable grounds to believe that the person to be arrested is in those premises.

The Attorney-General goes on to say:

> The insertion of section 122A was recommended to the Government by judges of the Family Court in response to a recent case in which a person breached a Family Court order by assaulting his wife in the matrimonial home. The person sought sanctuary from arrest by the police in a relative's home. The inability of the police to enter those premises made a mockery of the powers of arrest provided under the Act.

The Attorney-General concludes by saying:

> I believe the extension of powers of arrest to include a power of entry and search to make the

arrest, is essential to ensure the effectiveness of the *scheme* of provisions in the Act aimed at enabling the Family Court to deal with domestic violence.

The Committee thanks the Attorney-General for his assistance with this Bill.

INDUSTRY, TECHNOLOGY AND COMMERCE LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the Senate on 13 February 1991 by the Minister for Industry, Technology and Commerce.

This omnibus Bill proposes to amend the following Acts:

- Industry Research and Development Act 1986;
- National Measurement Act 1960;
- Science and Industry Research Act 1949;
- Export Market Development Grants Act 1974;
- Industry, Technology and Commerce Legislation Amendment Act 1989; and
- Patents Act 1990.

The Committee dealt with the Bill in Alert Digest No. 2 of 1991, in which it made various comments. The Minister for Industry, Technology and Commerce responded to those comments in a letter dated 5 March 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clause
Clause 4

In Alert Digest No. 2, the Committee noted that clause 4 of the Bill proposes various amendments to the Industry Research and Development Act 1986. Included in those proposed amendments is a definition of 'designated activity'

for the purposes of the legislation. Pursuant to paragraph (f) of the definition, one of the meanings of 'designated activity' is

> an activity in respect of which a declaration under section 34B is in force ...

The Committee noted that proposed new section 34B is to be inserted pursuant to clause 9 of the Bill. That proposed new section provides:

> The Minister may, by notice published in the Gazette, declare an activity to be a designated activity for the purposes of the definition of 'designated activity' in subsection 4(1).

The Committee observed that the effect of paragraph (f) of the proposed definition is, therefore, to allow the Minister to vary the definition of 'designated activity' as set out in (what would be) a piece of primary legislation by declaring that another 'activity' is a 'designated activity' for the purposes of the legislation. In that sense, it is what the Committee would regard as a 'Henry VIII' clause.

The Committee noted that there is no requirement for such a declaration to be tabled in the Parliament. Further, there is no suggestion of the declaration being a 'disallowable instrument' for the purposes of section 46A of the Acts Interpretation Act 1901. Given the effect of such declarations, the Committee suggested that these mechanisms for Parliamentary scrutiny of the declarations may be appropriate.

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 Minister has responded as follows:

> One of the objects of the Bill is to insert into the Act the National Procurement Development Program. The provisions relating to this program have been largely modelled on those currently in the Act relating to the Discretionary Grants Scheme. Section 26 of the Act, which relates to the definition of 'eligible activities', is in the same terms as the proposed new section 34B in that both allow the Minister to declare that a particular activity is eligible for a grant.

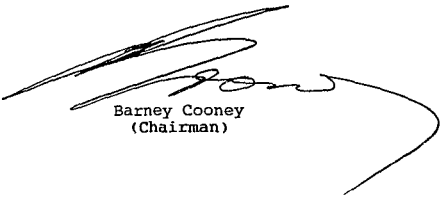
The Minister goes on to say:

> The purpose of both sections is the same, namely to ensure that legitimate research and development which meets the object of the Act is not unfairly or arbitrarily excluded from Government support merely because it may not readily fit the statutory definition of a particular scheme. Thus [Research and Development] support can be readily applied to emerging fields which were not envisaged when the Act was drawn up. For example, section 26 has been used in this way with respect to tissue culture.

The Minister concludes by saying:

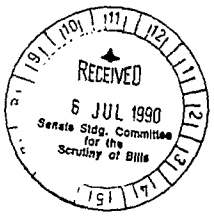
> The need for the amendment of the definition to accommodate such emerging new technology will often not be apparent until a grant application has been lodged. Both schemes are designed to function such that an application for a grant will only be successful if the project will not proceed without prompt Government support. This means that applications for grants must be dealt with as soon as practicable. To date section 26 has only been used rarely but section 26 and proposed section 34B are intended to advantage applicants for grants by creating a mechanism for promptly accommodating such situations when they arise.

The Committee thanks the Minister for the response and for his assistance with the Bill.



Barney Cooney
(Chairman)

Attorney-General



The Hon Michael Duffy M P
Parliament House
Canberra ACT 2600

89-6183

5 JUL 1990

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 comments made in the Scrutiny of Bills Alert Digest No.2 of 1990 in relation to clause 19 of the Family Law Amendment Bill 1990, which inserts a new section 122A in the Family Law Act dealing with entry and search of premises by police seeking to arrest a person.

I do not believe that section 122A will result in any undue trespass on personal rights and liberties. As the Digest points out, the Family Law Act already authorises arrest without warrant where a person breaches a Family Court order by causing, or threatening to cause, bodily harm to a child or spouse. Section 122A will empower police to enter and search premises without a warrant in situations where they are attempting to make such an arrest. Under section 122A a police officer will only exercise the power to enter premises where the officer has reasonable grounds to believe that the person to be arrested is in those premises.

The insertion of section 122A was recommended to the Government by judges of the Family Court in response to a recent case in which a person breached a Family Court order by assaulting his wife in the matrimonial home. The person sought sanctuary from arrest by the police in a relative's home. The inability of the police to enter those premises made a mockery of the powers of arrest provided under the Act.

I believe the extension of powers of arrest to include a power of entry and search to make the arrest, is essential to ensure the effectiveness of the scheme of provisions in the Act aimed at enabling the Family Court to deal with domestic violence.

I hope that this information is of assistance to you.

Yours sincerely

Regards
michael Duffy

MICHAEL DUFFY

RECEIVED

5 MAR 1991

Senate Standing Cttee
for the Scrutiny of Bills

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

5 MAR 1991

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

Dear Senator Cooney

In Scrutiny of Bills Alert Digest No 2 of 1991 the Committee has drawn the attention of Senators to the definition of 'designated activity' which is proposed to be inserted in the Industry Research and Development Act 1986 by clause 4 of the Industry Technology and Commerce Legislation Bill 1991. By virtue of clause 9 of the Bill, which inserts a new section 34B in the Act, the Minister may amend the definition of 'designated activity' by notice published in the Gazette.

One of the objects of the Bill is to insert into the Act the National Procurement Development Program. The provisions relating to this program have been largely modelled on those currently in the Act relating to the Discretionary Grants Scheme. Section 26 of the Act, which relates to the definition of 'eligible activities', is in the same terms as the proposed new section 34B in that both allow the Minister to declare that a particular activity is eligible for a grant.

The purpose of both sections is the same, namely to ensure that legitimate research and development which meets the object of the Act is not unfairly or arbitrarily excluded from Government support merely because it may not readily fit the statutory definition of a particular scheme. Thus R&D support can be readily applied to emerging fields which were not envisaged when the Act was drawn up. For example, section 26 has been used in this way with respect to tissue culture. The need for the amendment of the definition to accommodate such emerging new technology will often not be apparent until a grant application has been lodged. Both schemes are designed to function such that an application for a grant will only be successful if the project will not proceed without prompt Government support. This means that applications for grants must be dealt with as soon as practicable. To date section 26 has only been used rarely but section 26 and proposed section 34B are intended to advantage applicants for grants by creating a mechanism for promptly accommodating such situations when they arise.

I hope that this explanation is of assistance to the Committee.

Yours sincerely

John N Button

(John N Button)

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT

OF

1991

10 APRIL 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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 1991

The Committee has the honour to present its Fourth Report of 1991 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 Capital Territory (Electoral) Amendment Bill 1991

***Trusts (Hague Convention)* Bill 1991**

AUSTRALIAN CAPITAL TERRITORY (ELECTORAL) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 March 1991 by the Minister for the Arts, Tourism and Territories.

The Bill proposes to amend the Australian Capital Territory (Electoral) Act 1988 to provide for a revised system to elect the Australian Capital Territory Legislative Assembly, to be known as the 'ACT Electoral System'.

The Committee dealt with the Bill in Alert Digest No. 4 of 1991, in which it made various comments. The Minister for the Arts, Tourism and Territories responded to those comments in a letter dated 8 April 1991. 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. 4, the Committee noted that the Act which this Bill proposes to amend, the Australian Capital Territory (Electoral) Act 1988, contains, in a Schedule, a series of modifications to the Commonwealth Electoral Act 1918 in order to apply a large part of the Commonwealth Electoral Act to elections in the Australian Capital Territory, subject to the changes effected by the Schedule. The Committee noted that this Bill contains three such Schedules (in fact, the Bill contains four schedules in all).

Schedule 1 proposes to amend the modifications which were made to the Commonwealth Electoral Act by the Schedule to the Australian Capital Territory (Electoral) Act. Schedule 2 proposes to substitute some of the modifications which

were made by the Schedule with other modifications. Schedule 3 proposes to repeal some of the earlier modifications.

In Alert Digest No. 4, the Committee indicated that it was of the view that this situation presents a person wishing to look up the electoral law that applies to the ACT with a very confusing task. A person would have to refer to three separate pieces of legislation, including cross-referencing four different Schedules, in order to establish what the electoral law is.

The Committee noted that, among other things, it is charged with the responsibility of scrutinising legislation to ensure that it does not trespass unduly on personal rights and liberties. It stated that the right to vote is a fundamental right, which also involves a right to be able to ascertain readily whether or not an individual has an entitlement to vote and, if so, how that vote fits in to the overall electoral system. The Committee suggested that this legislation and the way it would operate in conjunction with other relevant legislation makes that task difficult.

Given the importance of this legislation for the ACT, the Committee suggested that it would have been helpful if the electoral framework could be reflected by a single, free-standing piece of legislation. It also indicated that it would appreciate the Minister's views on this suggestion.

The Minister has responded to that request as follows:

> The decision not to introduce a free standing Australian Capital Territory electoral bill at this time is consequent upon the fact that the Principal Act, the Australian Capital Territory (Electoral) Act 1988, contains a schedule modifying and applying the Commonwealth Electoral Act 1918 to Australian Capital Territory elections.

The Minister goes on to say:

> I note for your information that early drafts of the Bill contained only one schedule amending Schedule 1 to the Principal Act. However officers within my department in consultation with officers from the Australian Electoral Commission were concerned that such an expression of the modifications to the Commonwealth Electoral Act 1918 was awkward. Accordingly, Parliamentary Counsel provided a revised draft of the Bill with four schedules each listing amendments of a consistent nature in order to enhance the intelligibility of the Bill.

While the Committee appreciates that the use of three schedules instead of one might be less 'awkward' it is nevertheless concerned that the end result is to make the legislation difficult to understand. The Committee remains of the view that a free-standing piece of legislation would be easier to comprehend.

The Committee notes that the Minister concludes his letter by saying:

> You should be aware that following the Opposition's retraction of its support for the Bill as introduced into the House, the Government is reconsidering its position in respect of the legislation.

The Committee suggests that part of this reconsideration should involve some further consideration of the form which such legislation should take.

The Committee thanks the Minister for his response.

TRUSTS (HAGUE CONVENTION) BILL 1991

This Bill was introduced into the House of Representatives on 20 February 1991 by the Attorney-General.

The Bill proposes to implement and give effect in Australian law to the provisions of the Hague Convention on the Law Applicable to Trusts and on their Recognition. The Convention will come into force with Australia's ratification.

The Committee dealt with the Bill in Alert Digest No. 3 of 1991, in which it made various comments. The Attorney-General responded to those comments in a letter dated 14 March 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

General comment
Clause 2

In Alert Digest No. 3, the Committee observed that clause 2 of the Bill provides for the commencement of the Bill. Subclause 2(1) provides that (subject to subclause (2)) the legislation is to commence on a date to be fixed by Proclamation, though this cannot be before the date on which the Hague Convention on the Law Applicable to Trusts and on their Recognition comes into force in Australia.

The Committee noted that subclause (2) provides that if such a Proclamation has not been made within six months of the Convention coming into force, then the legislation is to commence on the first day after the end of that period. The Committee concluded that this subclause satisfied the requirements relating to commencement by Proclamation which are set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

The Committee noted that pursuant to Article 30 of the Convention, its entering into force in Australia is dependent on three countries ratifying, accepting or approving the Convention. The Committee also noted that, according to the Attorney-General's Second Reading speech, two countries (the United Kingdom and Italy) have already ratified the Convention. The Committee stated that, as the ratification of the Convention by Australia would appear to be within the discretion of the Attorney-General and that since there does not appear to be any reason why the Attorney-General should not ratify the Convention, it was curious to know why the Convention has not been ratified to date.

Accordingly, the Committee sought the Attorney-General's advice as to when the Convention might be ratified by Australia. The Attorney-General has provided a detailed response to that request for advice, covering several points of interest. First, he has advised that it is not within his discretion to ratify the Convention. The Attorney-General advises that

> under the Administrative Arrangements responsibility for treaty action falls to the Minister for Foreign Affairs and Trade. Importantly, such an exercise of the Commonwealth's executive power does not fall within the discretion of any one Minister, but rather requires the approval of the Executive Council.

The Committee thanks the Attorney-General for pointing this out. As to the issue of why the Convention has not been ratified to date, the Attorney-General has said:

> The short answer is that to ratify the Convention before the necessary implementing legislation is in place would raise a question as to whether Australia was meeting its international obligations under the Convention.
>
> As you will appreciate, once Australia ratifies the Convention, and it has entered into force, Australia will be bound to perform its obligations under the Convention in good faith. If Australia is to meet its treaty obligations,

> our domestic law must be in conformity with those obligations. However, the executive act of ratifying a treaty does not itself bring about the necessary changes to domestic law - under our constitutional arrangement, legislation is required.

The Attorney-General goes on to say:

> While the differences between existing Australian law and the provisions of the Convention are in most cases slight, ratification of the Convention prior to commencement of the necessary implementing legislation could raise a real question as to whether Australia was meeting its obligations under the Convention.

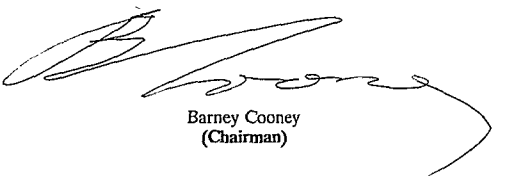
The Attorney-General's response also contains some useful information on the principles involved in deciding whether or not to ratify a treaty. His response states:

> The principles involved are long established and are neatly summarised in the following extract from the relevant Guidelines published under the authority of the then Minister for Foreign Affairs and Trade in 1987:
>
> > The Minister for Foreign Affairs cannot recommend to the Executive Council that Australia become a party to a treaty where the Australian federal or state legal position would be at variance with obligations to be assumed under the proposed treaty when it enters into force for Australia. The Department most concerned with the substance of the treaty must be satisfied ... that any legislation required for Australia to meet its treaty obligations is or will be in place by the time Australia consents to be bound by the treaty.

The Attorney-General concludes by saying:

> It is for this reason, which I am sure you and your Committee will agree is a substantial one, that the Government does not propose to ratify the Convention until the implementing legislation is in place.
>
> Once the implementing legislation is in place you and your Committee can be assured that the Government will be moving to sign and ratify the Convention as soon as possible.

The Committee thanks the Attorney-General for this informative response and for his assistance with the Bill.



Barney Cooney
(Chairman)

Minister for the Arts, Tourism and Territories

The Hon. David Simmons, MP
Federal Member for Calare

18 APR 1991

RECEIVED
9 APR 1991
Senate Standing Cttee for the Scrutiny of Bills

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

Dear Senator Cooney

I refer to the letter from your Committee Secretary to my Senior Adviser dated 13 March 1991 concerning the Committee's scrutiny of the Australian Capital Territory (Electoral) Amendment Bill 1991.

The decision not to introduce a free standing Australian Capital Territory electoral bill at this time is consequent upon the fact that the Principal Act, the Australian Capital Territory (Electoral) Act 1988, contains a schedule modifying and applying the Commonwealth Electoral Act 1918 to Australian Capital Territory elections.

I note for your information that early drafts of the Bill contained only one schedule amending Schedule 1 to the Principal Act. However officers within my department in consultation with officers from the Australian Electoral Commission were concerned that such an expression of the modifications to the Commonwealth Electoral Act 1918 was awkward. Accordingly, Parliamentary Counsel provided a revised draft of the Bill with four schedules each listing amendments of a consistent nature in order to enhance the intelligibility of the Bill.

You should be aware that following the Opposition's retraction of its support for the Bill as introduced into the House, the Government is reconsidering its position in respect of the legislation.

Yours sincerely

David Simmons

DAVID SIMMONS

Parliament House, Canberra ACT 2600. Telephone: (06) 277 7360. Fax: (06) 273 4125

Attorney-General

RECEIVED
15 MAR 1991
Senate Standing Committee for the Scrutiny of Bills

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

Min No.90173

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

Dear Senator Barney,

I am responding to Scrutiny of Bills Alert Digest No 3 of 1991 concerning the Trusts (Hague Convention) Bill 1991 (the Bill). That Alert asked why I had not yet ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition (the Convention) and sought advice on when the Convention might be ratified by Australia.

As noted in the Alert, the Convention will enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval (art. 30 of the Convention). As the United Kingdom and Italy have already ratified the Convention, ratification by Australia or any other country would have the effect of triggering this entry-into-force provision. Entry into force of the Convention would in turn trigger the commencement of the implementing legislation (subclause 2(2) of the Bill) unless a Proclamation under subclause 2(1) had already been made.

The Alert suggests that ratification of the Convention is within my discretion as Attorney-General. In fact, under the Administrative Arrangements responsibility for treaty action falls to the Minister for Foreign Affairs and Trade. Importantly, such an exercise of the Commonwealth's executive power does not fall within the discretion of any one Minister, but rather requires the approval of the Executive Council.

The Alert also suggests that there "does not appear any reason" why Australia has not already ratified the Convention. The short answer is that to ratify the Convention before the necessary implementing legislation is in place would raise a question as to whether Australia was meeting its international obligations under the Convention.

As you will appreciate, once Australia ratifies the Convention, and it has entered into force, Australia will be bound to perform its obligations under the Convention in good faith. If Australia is to meet its treaty obligations, our domestic law must be in conformity with those obligations. However, the executive act of ratifying a treaty does not itself bring about the necessary changes to domestic law - under our constitutional arrangements, legislation is required.

While the differences between existing Australian law and the provisions of the Convention are in most cases slight, ratification of the Convention prior to commencement of the necessary implementing legislation could raise a real question as to whether Australia was meeting its obligations under the Convention.

The principles involved are long established and are neatly summarised in the following extract from the relevant Guidelines published under the authority of the then Minister for Foreign Affairs and Trade in 1987:

> "The Minister for Foreign Affairs cannot recommend to the Executive Council that Australia become a party to a treaty where the Australian federal or state legal position would be at variance with obligations to be assumed under the proposed treaty when it enters into force for Australia. The Department most concerned with the substance of the treaty must be satisfied...that any legislation required for Australia to meet its treaty obligations is or will be in place by the time Australia consents to be bound by the treaty."

It is for this reason, which I am sure you and your Committee will agree is a substantial one, that the Government does not propose to ratify the Convention until the implementing legislation is in place.

Once the implementing legislation is in place you and your Committee can be assured that the Government will be moving to sign and ratify the Convention as soon as possible.

I have sent a copy of this letter to the Secretary of your Committee, Mr Argument.

Yours sincerely

Regards
Michael Duffy

MICHAEL DUFFY

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT

OF

1991

17 APRIL 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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 1991

The Committee has the honour to present its Fifth Report of 1991 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:

Albury-Wodonga Development Amendment Bill 1991

ALBURY-WODONGA DEVELOPMENT AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Local Government.

The Bill proposes to amend the Albury-Wodonga Development Act 1973 to:

- alter the membership of the Albury-Wodonga Development Corporation;

- enable the Commonwealth, New South Wales and Victorian Corporations to produce one annual report on the Albury-Wodonga project, instead of three;

- provide Corporation staff with reciprocal mobility rights within the Australian Public Service and with other statutory authorities; and

- approve the Albury-Wodonga Area Development Agreement Amendment Agreement (No. 2).

The Committee dealt with the Bill in Alert Digest No. 5 of 1991, in which it made certain comments. The Minister for Local Government responded to those comments in a letter dated 16 April 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Prospective commencement
Subclauses 2 (2), (3) and (4)

In Alert Digest No. 5, the Committee noted that subclause 2(1) provides that clauses 1, 2 and 5 of the Bill are to commence on Royal Assent. The Committee noted that subclause 2(2) of the Bill provides that clause 18 (which relates to mobility of employment between the Albury-Wodonga Development Corporation and the Australian Public Service) is to commence on a day to be fixed by Proclamation. However, subclause (3) provides that if the commencement of clause 18 is not proclaimed within six months of Royal Assent, then it is to be repealed. The Committee observed that this is in accordance with the requirements of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

The Committee also noted that, pursuant to subclause 2(4), the remaining provisions of the Bill are to commence on a day to be fixed by Proclamation. There is no limit on the time within which such a Proclamation must be made, though it cannot be made prior to the execution by all three governments of the Agreement which is to be approved by clause 5 of the Bill.

The Committee noted that Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 provides that, as a general rule, the time within which Proclamation of an Act or parts of an Act should be made should be limited to six months from the Act receiving the Royal Assent. If this is not the case, the Drafting Instruction suggests that the Explanatory Memorandum should give reasons why a longer period is necessary.

The Committee observed that, in the present case, the Explanatory Memorandum gives no reason for the open-ended Proclamation provision in subclause 2(4). Though it is presumably a matter which is connected to the uncertainty as to when the Agreement referred to in clause 5 will be executed by the three governments

involved, the Committee noted that the Explanatory Memorandum does not say this. The Committee suggested that some clarification on this point would be helpful.

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

The Minister's response gives two reasons for the open-ended Proclamation provision:

> First, because of uncertainty as to when the Agreement referred to in clause 5 will be executed by New South Wales and Victoria and second, because of the desirability of the Commonwealth and State complementary legislation commencing on the same day.

The Minister goes on to say:

> For example, in respect of the second reason, there are three Albury-Wodonga statutory authorities with common membership and conditions, except that members are only entitled to remuneration in their capacity as members of the Commonwealth's Albury-Wodonga Development Corporation. Members' responsibilities and remuneration are to change on proclamation of the Commonwealth's Act and failure to coordinate commencement dates could disrupt management arrangements.

The Committee thanks the Minister for this response and for her assistance with the Bill.

Barney Cooney
(Chairman)

The Hon Wendy Fatin MP
Minister for Local Government
Minister Assisting the Prime Minister for the Status of Women

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

Barney

Dear Senator Cooney

I refer to the comments in the Scrutiny of Bills Digest No. 5 of 1991 (10 April 1991) concerning the *Albury-Wodonga Development Amendment Bill 1991*.

The Bill provides an open-ended Proclamation provision for most of the Bill for two reasons. First, because of uncertainty as to when the Agreement referred to in clause 5 will be executed by New South Wales and Victoria and second, because of the desirability of the Commonwealth and State complementary legislation commencing on the same day. For example, in respect of the second reason, there are three Albury-Wodonga statutory authorities with common membership and conditions, except that members are only entitled to remuneration in their capacity as members of the Commonwealth's Albury-Wodonga Development Corporation. Members' responsibilities and remuneration are to change on proclamation of the Commonwealth's Act and failure to coordinate commencement dates could disrupt management arrangements.

Yours sincerely

WENDY FATIN

16.4.91

PARLIAMENT HOUSE, CANBERRA 2600, AUSTRALIA TEL (06) 277 7240 FAX (06) 273 4152

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT

OF

1991

8 MAY 1991

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 from Standing Order 24

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

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 1991

The Committee has the honour to present its Sixth Report of 1991 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:

Customs Tariff (Uranium Concentrate Export Duty) Amendment Bill 1991

Defence Force Superannuation Legislation Amendment Bill 1991

Occupational Superannuation Laws Amendment Bill 1991

Social Security Legislation Amendment Bill 1991

Superannuation Supervisory Levy Bill 1991

CUSTOMS TARIFF (URANIUM CONCENTRATE EXPORT DUTY) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Small Business and Customs.

The Bill proposes to amend the Customs Tariff (Uranium Concentrate Export Duty) Act 1980 to increase the duty on exported uranium concentrate mined in the Alligator Rivers Region from $1.15 to $1.30 per kilogram, effective from 21 February 1990.

The Committee dealt with the Bill in Alert Digest No. 5 of 10 April 1991, in which it made various comments. The Minister for Small Business and Customs responded to those comments in a letter dated 19 April 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Clause 2

In Alert Digest No. 5, the Committee noted that clause 2 of the Bill provides that the Bill is to be taken to have commenced on 21 February 1990. The Explanatory Memorandum refers to this date as being the date of effect of the Customs Tariff (Uranium Concentrate Export Duty) Proposal, which was tabled in the Parliament on 10 May 1990 in accordance with section 273EA of the Customs Act 1901. The Committee noted that that section provides:

> (1) The Minister may, at any time when the Parliament is prorogued or the House of Representatives has expired by effluxion of time, has been dissolved or is adjourned

otherwise than for a period not exceeding 7 days, publish in the *Gazette* a notice that it is intended, within 7 sitting days of the House of Representatives after the date of the publication of the notice, to propose in the Parliament a Customs Tariff or Customs Tariff alteration in accordance with particulars specified in the notice and operating as from such time as is specified in the notice, not being:

(a) in the case of a Customs Tariff or Customs Tariff alteration that could have the effect of making the duty payable by any person importing goods greater than the duty that would, but for that Customs Tariff or Customs Tariff alteration, by payable - a time earlier than the time of publication of the notice; or

(b) in any other case - a time earlier than 6 months before the time of publication of the notice.

(2) Where notice of intention to propose a Customs Tariff or a Customs Tariff alteration has been published in accordance with this section, the Customs Tariff or Customs Tariff alteration shall, for the purposes of this Act (other than section 226) and any other Act, be deemed to be a Customs Tariff or Customs Tariff alteration, as the case may be, proposed in the Parliament.

While the Committee acknowledged that the retrospectivity which is intended in the present case is explicitly authorised by section 273EA, the Committee indicated that it was nevertheless concerned that it had taken over 12 months to commence the legislative action required to effect the change in tariff. Accordingly, the Committee sought the Minister's advice on the reason for this delay.

The Minister has offered the following information by way of background on this matter:

Changes in rates of customs or excise duty are commonly

scheduled to occur at times when the Parliament is not sitting, such as the beginning of a financial year. Since Parliament is not sitting, notification of the proposed rate change is effected by publication in the Gazette, pursuant to sections 273EA of the Customs Act 1901 or 160B of the Excise Act 1901. (Your Committee has extracted the former provision in the Alert Digest under reply).

When Parliament resumes sitting, a tariff proposal is required to be tabled in the House of Representatives within 7 sitting days, outlining the proposed change. This legislative mechanism facilitates the demand and collection of the proposed rate of duty as long as that rate alteration is incorporated in an Act of Parliament within 12 months of the tabling of the proposal in the House of Representatives or before the close of that session of Parliament, whichever first happens (paragraphs 226(2)(b) and 114(2)(b) of the Customs Act 1901 and Excise Act 1901 respectively, refer).

It is these latter provisions which allow for the possibility of a rate alteration to be in existence without validation for a period of time in excess of 12 months. This is so because the relevant time for validation runs from the tabling of the proposal in Parliament, not from the time the rate alteration was notified in the Gazette. The legislation specifically countenances this situation, and in fact, caters for it. However, there is nothing untoward with such a time lag; a fact which I note your Committee acknowledges by stating that this Proposal followed the legislative head of power in the Customs Act.

In relation to the time lag in the present case, the Minister goes on to say:

Parliament was prorogued on 19 February 1990, which necessitated a fresh tariff proposal in the Commonwealth Gazette on 21 February 1990 (Gazette No. S46) so that the tariff rate increase from $1.15 to $1.30 could be collected. When the 36th Parliament commenced sitting, the relevant Proposal was tabled in the House of Representatives (ie. on 10 May 1990). That tabling was within the 7 sitting days required by section 273EA of the Customs Act 1901. Legislation validating that Proposal has therefore to be passed before 10 May 1991 (ie. within 12 months of the tabling of the proposal) or action may be commenced in terms of section 226 of the Customs Act 1901 for recovery of the extra duty collected during that period.

The Minister concludes by saying:

> A Customs Tariff (Uranium Concentrate Export Duty) Amendment Bill validating the Proposal was not introduced into the Parliament during the Budget Sittings 1990 because it was not regarded as "essential for passage" Budget legislation. it was appropriate therefore to introduce such a Bill in the current Autumn Sittings, which has occurred.

The Committee thanks the Minister for this detailed response.

DEFENCE FORCE SUPERANNUATION LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Defence Science and Personnel.

The Bill proposes to amend the Defence Force Retirement and Death Benefits Act 1973 to remove uncertainties about the operation of certain provisions and make minor improvements to the closed scheme operating under that Act. The proposed amendments are consequent upon the Military Superannuation and Benefits Bill 1991.

The Committee dealt with the Bill in Alert Digest No. 5 of 1991, in which it made various comments. The Minister for Defence Science and Personnel responded to those comments in a letter dated 6 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 5, the Committee noted that subclause 2(2) of the Bill provides that the amendments proposed by subclause 4(1) (which amends certain definitions) and clauses 15 (dealing with invalidity benefits payable to certain superannuation contributors), 18 (proposing amendments to the Superannuation Act [1976] and the Superannuation Act 1990) and 22 (dealing with payment of refunds under the Superannuation Act 1990) are to be taken to have commenced on 1 July 1990. The Committee noted that while the amendments all appear to operate beneficially on individuals, neither the Explanatory Memorandum nor the Minister's Second

Reading speech to the Bill offer any explanation of either the need for the retrospectivity or any indication that the proposed amendments are, in fact, beneficial to individuals. The Committee suggested that such an approach would be helpful.

The Minister has provided a detailed explanation of the need for retrospectivity in the Bill, which confirms the Committee's views on the effect of the retrospectivity on individuals. A copy of the explanation is attached to this report for the information of Senators. The Committee thanks the Minister for his response and for his assistance with the Bill.

OCCUPATIONAL SUPERANNUATION LAWS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 March 1991 by the Minister Assisting the Treasurer.

The Bill proposes to:

- provide for the collection of the superannuation supervisory levy proposed to be imposed by the Superannuation Supervisory Levy Bill 1991;
- make changes concerning the provision of information under sections 15F and 15G of the Occupational Superannuation Standards Act 1987;
- apply a fee to requests made to the Insurance and Superannuation Commissioner under section 15Q;
- allow the Commissioner some discretion in the collection of fees for late lodgement of returns;
- correct a technical oversight in the Insurance and Superannuation Commissioner Act 1987 relating to pooled superannuation trusts; and
- insert a provision in the Income Tax Assessment Act 1936 that the late lodgement amount of the levy is not tax deductible.

The Committee dealt with the Bill in Alert Digest No. 4 of 1991, in which it made various comments. The Parliamentary Secretary to the Treasurer responded to those comments in a letter received by the Committee on 8 May 1991. Unfortunately, the Committee has not had time to consider the response in detail.

Nevertheless, a copy of the letter is attached to this report for the information of Senators. Relevant parts of the response are also extracted below.

Inappropriate delegation of legislative power
Clause 25

In Alert Digest No. 4, the Committee noted that clause 25 of the Bill proposes to amend section 22 of the Occupational Superannuation Standards Act 1987, which sets out the regulation-making power of that Act. The clause proposes to add three further 'matters' in relation to which regulations can be made pursuant to the Occupational Superannuation Standards Act.

The Committee noted that proposed new paragraph 22(e) would allow the Governor-General to make regulations providing for exemptions and remissions of the levy which is to be paid pursuant to other amendments proposed by this Bill. The Committee observed that there is no suggestion of the grounds on which such exemptions or remissions might be made. This would be left up to the regulations. The Committee noted that, while the regulations would, of course, be disallowable, the Parliament would not be able to make any positive input into the content of such regulations.

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

The Parliamentary Secretary to the Treasurer has responded as follows:

> I support the general principle that the detail of a tax measure should be dealt with by primary legislation to the extent that that is an efficient and equitable proposition. However I believe that there are good reasons to regard such an approach as being neither efficient nor equitable in this instance, and as a

consequence the detail of the basic levy amount will be prescribed by regulation. In recognition of the circumstances, however, the Government has established a number of safeguards in the process that leads up to a recommendation for regulations under the Bill.

While the levy is a tax, in reality the Government has only approved a levy which will recover the full costs of the supervision of superannuation by the Insurance and Superannuation Commission. It has not approved the use of the levy for revenue raising.

Consequently the Government's decision binds the Insurance and Superannuation Commission to raising no more [than] the full cost of supervision, and requires the Commission to consult with the Department of Finance in order to establish that cost from year to year.

The Commission is also bound by the Government to consult with the superannuation industry on the structure and impact of the levy before regulations are recommended.

The Parliamentary Secretary to the Treasurer goes on to say:

It is likely that changes will need to be made to the scale of the levy to recover the ongoing cost, both due to increasing monies in superannuation and due to decreasing numbers of funds. Consultations with the industry will assist this process, but initially it will be difficult to accurately establish a scale of levy which will both recover no more and no less than the cost of supervision, and impose upon funds appropriately to the extent of their contribution towards the overall cost. It is envisaged that different levies may apply to different categories of fund. For instance I understand that a different scale of levy is proposed for pooled superannuation trusts than will apply to superannuation funds.

Reasons for setting a statutory limit on the maximum levy at a much higher level than will be charged to the large majority of funds first, at least the first few years, include that it could well be appropriate to charge a particular category of fund a higher levy than the others to recover the cost of services provided to that category of funds.

The Parliamentary Secretary to the Treasurer concludes by saying:

> I am satisfied that it would be efficient and equitable to set out the scale of levies in the regulations and allow the Treasurer to recommend their amendment when necessary to reflect developments and following full consultation as already mentioned, rather than incorporating them in the Bill and seeking Parliament's approval each time an adjustment is required.
>
> The House of Representatives has agreed to an amendment to the Superannuation Supervisory Levy Bill to require consultation with the Association of Superannuation Funds of Australia (ASFA), the Life Insurance Federation of Australia (LIFA) and other industry bodies as appropriate. Both ASFA and LIFA endorse the inclusion of the levy scale in regulations, rather than in the Bill. I have also received a letter for ASFA indicating that it endorses the [Government's] amendments to the Bill and that extensive consultations on the initial scale of the levy have already been undertaken.

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

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Aged, Family and Health Services.

This omnibus Bill primarily intends to address the following social security concerns:

- scholarship payments awarded from outside Australia;
- exemption of certain funeral bonds from the income and assets test;
- recovery by the Commonwealth of social security payments from compensation lump sums in spite of contrary State or Territory legislation; and
- a protocol between Australia and Canada concerning pensions payable to widows covered by the Agreement on Social Security.

The Bill also proposes to effect other minor technical amendments.

The Committee dealt with the Bill in Alert Digest No. 5 of 1991, in which it made various comments. The Acting Minister for Social Security responded to those comments in a letter dated 7 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Subclause 4(b) and (d), clause 8

In Alert Digest No. 5, the Committee noted that clause 8 of the Bill proposes to insert a new section 12AAB into the Social Security Act 1947. If enacted, the clause would remove certain overseas scholarships from the definition of 'income' for the purposes of the Social Security Act. The Committee noted that subclauses 4(b) and (d) propose to make consequential amendments to the interpretation section of the Social Security Act.

The Committee observed that the proposed amendments are to take effect from 1 September 1990 and that, according to the Explanatory Memorandum to the Bill, this was to reflect 'the Government's policy announcement of this initiative'. The Committee stated that this was, therefore, an example of what it regards as 'legislation by press release', whereby the Government announces a legislative initiative on a particular date, on the assumption that the legislation will be enacted, and then expresses the legislation to operate retrospectively, from the date of the announcement. However, the Committee went on to indicate that it would not draw attention to the provision on this basis since, among other reasons, the provision appeared to be beneficial to individuals.

However, another aspect of proposed new section 12AAB did cause the Committee some concern. The Committee noted that the new provision, in conjunction with clauses 4(b) and (d), would give the Minister the power to decide what were and what were not to be 'approved scholarships' for the purposes of the exemption from the income test proposed by new section 12AAB. The Committee noted that this decision did not appear to be open to scrutiny by the Parliament. Accordingly, the Committee suggested that any document which approved such scholarships should, at least, be tabled in the Parliament.

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

The Acting Minister has responded as follows:

> I agree with the Committee's suggestion that any approval given under new section 12AAB should be subject to tabling in Parliament. I hope to introduce an amendment in the next session of Parliament to put this arrangement in place.

The Committee thanks the Acting Minister for his response and for indicating that the legislation will be amended in accordance with the Committee's concerns.

Non-reviewable decision
Clause 19

In Alert Digest No. 5, the Committee noted that section 178 of the Social Security Act lists various decisions pursuant to the Act which are explicitly not open to review by the Social Security Appeals Tribunal. The Committee observed that clause 19 proposes to add to that list decisions pursuant to subsection 251(1B) of the Act, which allows the Minister to give, vary or revoke directions to the Secretary of the Department of Social Security concerning the exercise of the Secretary's discretion to write-off or waive debts owed to the Commonwealth by welfare beneficiaries.

The Committee noted that, in 1988, it drew attention to the provision which inserted the existing power of the Minister to give those directions to the Secretary (see Seventeenth Report of 1988 and Second Report of 1989). At that time, the Committee noted that while the directions are required to be tabled in the Parliament, they are not subject to disallowance. The Committee indicated that it

was concerned that these directions are expressed to be binding, not only on the Secretary but also on the Social Security Appeals Tribunal or the Administrative Appeals Tribunal in reviewing relevant decisions of the Secretary. In view of this binding effect, the Committee suggested that the directions should be subject to disallowance. This suggestion was not taken up by the Minister or by the Senate.

In Alert Digest No. 5, the Committee indicated that it remained of the view that the directions should be tabled. The Committee noted that this amendment, if enacted, would further restrict the possibility of any review of the directions, as it would make the Minister's decision to issue, vary or revoke directions immune from review. Accordingly, the Committee drew attention to the clause, as it may be considered to make personal rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

The Acting Minister has responded as follows:

> The position on the general question of review of the subsection 251(1B) power remains unchanged and the amendment made by clause 19 is really just a logical progression of the 1988 decision to make subsection 251(1B) not subject to disallowance in Parliament. It is necessary that the directions issued by the Minister under this provision are of a binding nature to avoid difficulties in reconciling decisions made by review bodies with Departmental policy on effective debt management and control. The directions only go to the criteria to be applied when waiving a debt rather than, for example, outlining cases where waiver is barred.

The Acting Minister goes on to say:

> The system which was in place before subsection 251(1B) was enacted was based on administrative criteria flowing from those issued by the Minister for Finance to delegates making decisions on waiver under the Audit Act 1901. Those criteria, which were in

line with those applying in most other Commonwealth departments and instrumentalities, were undermined over time by varying administrative review decisions. I believe that review bodies should not be free to operate in this area according to principles of their own devising and therefore the Minister's directions under subsection 251(1B) should not be subject to review.

The Committee thanks the Acting Minister for this response. The Committee remains of the view that the directions should be subject to disallowance.

SUPERANNUATION SUPERVISORY LEVY BILL 1991

This Bill was introduced into the House of Representatives on 7 March 1991 by the Minister Assisting the Treasurer.

The Bill proposes to effect full cost recovery in relation to the superannuation aspects of the Insurance and Superannuation Commission operations by imposing a levy on superannuation funds, approved deposit funds and pooled superannuation trusts that lodge an annual return with the Insurance and Superannuation Commissioner.

The Committee dealt with the Bill in Alert Digest No. 4 of 1991, in which it made various comments. The Parliamentary Secretary to the Treasurer responded to those comments in a letter received by the Committee on 8 May 1991. Unfortunately, the Committee has not had time to consider the response in detail. Nevertheless, a copy of the letter is attached to this report for the information of Senators. Relevant parts of the response are also extracted below.

Inappropriate delegation of legislative power
Paragraph 6(1)(a)

In Alert Digest No. 4, the Committee noted that clause 6 of the Bill provides for the amount of levy to be paid by superannuation funds, approved deposit funds and pooled superannuation trusts in conjunction with the annual return which they lodge with the Insurance and Superannuation Commissioner. The Committee noted that paragraph 6(1)(a) provides that the 'basic levy amount' is to be ascertained 'in accordance with the regulations'.

The Committee suggested that the provision raised two possible concerns. First, the Committee questioned whether this was an appropriate matter to be left for the regulations. The Committee noted that the only guidance on what the regulations might contain comes from subclause 6(5), which provides:

> The regulations may provide for different basic levy amounts for different classes of funds or unit trusts.

Second, the Committee suggested that there was a question as to whether this 'levy' is more appropriately categorised as a tax. The Committee noted that if this was more properly categorised as a tax then, clearly, it was a matter which should be dealt with by primary legislation and not by regulation.

In making this comment, the Committee accepted that subclause 6(4) set the maximum amount for the basic levy amount at $30,000. The Committee indicated that the specification in the legislation of a maximum levy or a formula for determining the maximum levy was a factor which generally tended to allay its concerns in this regard. However, the Committee noted that in the present case, in his Second Reading speech, the Minister stated:

> I expect that the maximum levy imposed by regulation for the first year or so of operation would be of the order of $5,000.

The Committee observed that, if this was so, the maximum levy allowed under subclause 6(4) was significantly higher than the amount which (at least initially) was expected to be set, leaving a considerable scope for discretion in regulations subsequently made to alter the levy. The Committee indicated that, in all the circumstances, it would appreciate some guidance from the Minister on the reason that the clause has been drafted in this way.

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

The Parliamentary Secretary to the Treasurer has responded in identical terms to his response in relation to the Occupational Superannuation Laws Amendment Bill 1991 (which is discussed elsewhere in this report). In relation to the levy/tax matter, the Parliamentary Secretary says:

> I should begin by explaining that the Superannuation Supervisory Levy Bill 1991 is a tax bill and was recognised as such in the second reading speech on its introduction to the Senate.
>
> I support the general principle that the detail of a tax measure should be dealt with by primary legislation to the extent that that is an efficient and equitable proposition. However I believe that there are good reasons to regard such an approach as being neither efficient nor equitable in this instance, and as a consequence the detail of the basic levy amount will be prescribed by regulation. In recognition of the circumstances, however, the Government has established a number of safeguards in the process that leads up to a recommendation for regulations under the Bill.

The Parliamentary Secretary to the Treasurer goes on to say:

> While the levy is a tax, in reality the Government has only approved a levy which will recover the full costs of the supervision of superannuation by the Insurance and Superannuation Commission. It has not approved the use of the levy for revenue raising.
>
> Consequently the Government's decision binds the Insurance and Superannuation Commission to raising no more [than] the full cost of supervision, and requires the Commission to consult with the Department of Finance in order to establish that cost from year to year.
>
> The Commission is also bound by the Government to consult with the superannuation industry on the structure and impact of the

levy before regulations are recommended.

The Parliamentary Secretary to the Treasurer says:

> It is likely that changes will need to be made to the scale of the levy to recover the ongoing cost, both due to increasing monies in superannuation and due to decreasing numbers of funds. Consultations with the industry will assist this process, but initially it will be difficult to accurately establish a scale of levy which will both recover no more and no less than the cost of supervision, and impose upon funds appropriately to the extent of their contribution towards the overall cost. It is envisaged that different levies may apply to different categories of fund. For instance I understand that a different scale of levy is proposed for pooled superannuation trusts than will apply to superannuation funds.
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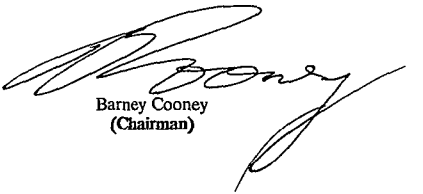
> Reasons for setting a statutory limit on the maximum levy at a much higher level than will be charged to the large majority of funds first, at least the first few years, include that it could well be appropriate to charge a particular category of fund a higher levy than the others to recover the cost of services provided to that category of funds.

The Parliamentary Secretary to the Treasurer concludes by saying:

> I am satisfied that it would be efficient and equitable to set out the scale of levies in the regulations and allow the Treasurer to recommend their amendment when necessary to reflect developments and following full consultation as already mentioned, rather than incorporating them in the Bill and seeking Parliament's approval each time an adjustment is required.
>
> The House of Representatives has agreed to an amendment to the Superannuation Supervisory Levy Bill to require consultation with the Association of Superannuation Funds of Australia (ASFA), the Life Insurance Federation of Australia (LIFA) and other industry bodies as appropriate. Both ASFA and LIFA endorse the inclusion of the levy scale in regulations, rather than in the Bill. I have also received a letter for ASFA indicating that it endorses the [Government's] amendments to the Bill and that extensive consultations on the initial scale of the levy have already been undertaken.

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



Barney Cooney
(Chairman)

7 MAY 1991

Minister for Small Business and Customs

The Hon. David Beddall, MP

19 APR 1991

Senator Barney 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 Digest No. 5 of 1991, dated 10 April 1991, which contained comments by the Senate Standing Committee for the Scrutiny of Bills on the Customs Tariff (Uranium Concentrate Export Duty) Amendment Bill 1991. In particular, your Committee expressed concern that it has taken over 12 months to commence the legislative action required to effect the relevant change in the tariff rate.

Changes in rates of customs or excise duty are commonly scheduled to occur at times when the Parliament is not sitting, such as the beginning of a financial year. Since Parliament is not sitting, notification of the proposed rate change is effected by publication in the Gazette, pursuant to sections 273EA of the Customs Act 1901 or 160B of the Excise Act 1901. (Your Committee has extracted the former provision in the Alert Digest under reply).

When Parliament resumes sitting, a tariff proposal is required to be tabled in the House of Representatives within 7 sitting days, outlining the proposed change. This legislative mechanism facilitates the demand and collection of the proposed rate of duty as long as that rate alteration is incorporated in an Act of Parliament within 12 months of the tabling of the proposal in the House of Representatives or before the close of that session of Parliament, whichever first happens (paragraphs 226(2)(b) and 114(2)(b) of the Customs Act 1901 and Excise Act 1901 respectively, refer).

It is these latter provisions which allow for the possibility of a rate alteration to be in existence without validation for a period of time in excess of 12 months. This is so because the relevant time for validation runs from the tabling of the proposal in Parliament, not from the time the rate alteration was notified in

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the Gazette. The legislation specifically countenances this situation, and in fact, caters for it. However, there is nothing untoward with such a time lag; a fact which I note your Committee acknowledges by stating that this Proposal followed the legislative head of power in the Customs Act.

With respect to the facts behind the time lag in validating the Proposal the subject of this present Customs Tariff (Uranium Concentrate Export Duty) Bill, I note the following for the Committee's information.

Parliament was prorogued on 19 February 1990, which necessitated a fresh tariff proposal in the Commonwealth Gazette on 21 February 1990 (Gazette No. S46) so that the tariff rate increase from $1.15 to $1.30 could be collected. When the 36th Parliament commenced sitting, the relevant Proposal was tabled in the House of Representatives (ie. on 10 May 1990). That tabling was within the 7 sitting days required by section 273EA of the Customs Act 1901. Legislation validating that Proposal has therefore to be passed before 10 May 1991 (ie. within 12 months of the tabling of the proposal) or action may be commenced in terms of section 226 of the Customs Act 1901 for recovery of the extra duty collected during that period.

A Customs Tariff (Uranium Concentrate Export Duty) Amendment Bill validating the Proposal was not introduced into the Parliament during the Budget Sittings 1990 because it was not regarded as "essential for passage" Budget legislation. It was appropriate therefore to introduce such a Bill in the current Autumn Sittings, which has occurred.

I trust the above is of assistance to the Committee.

Yours sincerely

(DAVID BRODALL)

MINISTER FOR
DEFENCE SCIENCE AND PERSONNEL
PARLIAMENT HOUSE, CANBERRA, A.C.T. 2600

- 6 MAY 1991

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

Dear Senator Cooney

I refer to your Committee's Scrutiny of Bills Alert Digest No 5 of 1991 regarding the retrospectivity provided by subclause 2(2) of the Defence Force Superannuation Legislation Amendment Bill 1991, in accordance with which subclauses 4(1), 15, 18 and 22 of the Bill would have retrospective operation to 1 July 1991.

I regret that an explanation of the need for retrospectivity was not provided in the explanatory memorandum. I enclose an explanation.

Yours sincerely

GORDON BILNEY

DEFENCE FORCE SUPERANNUATION LEGISLATION AMENDMENT BILL 1991

Explanation of need for retrospectivity for clauses 4(1), 15, 18 and 22

Members of the Australian Public Service may be granted leave without pay in order to undertake defence service. Where the defence service to be rendered is not less than 12 months continuous full time service, the person is required to contribute to the Defence Force Retirement and Death Benefits Scheme (Defence Force Retirement and Death Benefits Act 1973 (DFRDB Act) s.17)). When this occurs, the person's liability to make contributions to the Superannuation Fund is (with certain exceptions) deferred until the person ceases to be a DFRDB contributor or ceases to be an eligible member of the Superannuation Scheme (Superannuation Act 1976 (Super Act) s.54(1)).

2. Where the person ceases to be a DFRDB contributor or ceases to be an eligible member of the Superannuation Scheme, the deferred contributions become payable to the Commissioner for Superannuation (Super Act s.54(1)).

3. If the person is invalided from the Defence Force, the person is not entitled to an invalidity pension under the DFRDB Act (DFRDB Act s.36(2)). In the event that the person is invalided from the APS as well, invalidity benefits become payable under the Super Act. If the person died while a DFRDB contributor, a DFRDB pension is not payable to the dependants of the person (DFRDB Act s.46). Instead , pensions are paid under the Super Act. If either the invalidity pension or pension payable to the dependants is less than that which would have been payable under the DFRDB Act, there is a discretion to increase the pension to that higher level (Super Act s.117(2)).

4. In all these cases, contributions not exceeding the amount of the deferred contributions under the Super Act are paid out of the person's refund of contributions under the DFRDB Act (DFRDB Act s.61).

5. Where, before the person ceases to be a DFRDB contributor, the person is invalided from the Australian Public Service (APS) with an invalidity pension, the invalidity pension is suspended until the person ceases to be a DFRDB contributor (Super Act s.117(1)). Appropriate provision is also made in respect of a person who dies before ceasing to be a DFRDB contributor.

6. With the introduction of the 1990 public sector superannuation scheme, the rules for that scheme make provision corresponding to Super Act s.54 (rule 3.1.17),

and Super Act s.117 (rule 9.1.8). The Bill makes the necessary consequential amendments to the DFRDB Act.

7. The intention of these provisions is to prevent "double-dipping", in this case the acquisition of benefits under both schemes in respect of the one period of service. In addition, it is intended that the death and invalidity cover available be the greater of that provided by each scheme.

8. The provisions of the Super Act (or rules) and the DFRDB Act on this matter interlock and require, for their effective operation, that related amendments to each operate from a common date. It is for this reason that the Bill provides for the amendments to the DFRDB Act to operate from 1 July 1990, the starting date for the Public Service scheme.

9. It would appear that the effect of the present legislation in relation to a person who:

a. joined the new public sector scheme (ie on or after 1 July 1990); and

b. was subsequently granted leave to undertake defence service for a period of or exceeding 12 months; and

c. before the amendments in the Bill come into operation, was invalided out of the Defence Force or died;

is that the person (or the person's dependants in the case of death) would accrue a right under both the DFRDB and public sector schemes. When the amendments came into force, the right under the DFRDB scheme would be extinguished from the beginning.

10. It would also appear that, in those cases, and in cases where the person ceased to render defence service for other reasons before the amendments in the Bill come into operation, the persons's deferred contributions under the Super Act could not be paid out of his or her contributions under the DFRDB Act, but the person (or the person's estate in the case of death) would continue to be liable to pay the deferred contributions.

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
Chairman
Standing Committee for the Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney,

The Treasurer has asked me to respond on his behalf to Mr Argument's letter of 13 March 1991 to the Treasurer's Senior Adviser concerning the Committee's comments in the Scrutiny of Bills Alert Digest No. 4 of 1991 in respect of the Occupational Superannuation Laws Amendment Bill 1991 and the Superannuation Supervisory Levy Bill 1991. I apologise for the delay in replying.

I should begin by explaining that the Superannuation Supervisory Levy Bill 1991 is a tax bill and was recognised as such in the second reading speech on its introduction to the Senate.

I support the general principle that the detail of a tax measure should be dealt with by primary legislation to the extent that that is an efficient and equitable proposition. However I believe that there are good reasons to regard such an approach as being neither efficient nor equitable in this instance, and as a consequence the detail of the basic levy amount will be prescribed by regulation. In recognition of the circumstances, however, the Government has established a number of safeguards in the process that leads up to a recommendation for regulations under the Bill.

While the levy is a tax, in reality the Government has only approved a levy which will recover the full costs of the supervision of superannuation by the Insurance and Superannuation Commission. It has not approved the use of the levy for revenue raising.

Consequently the Government's decision binds the Insurance and Superannuation Commission to raising no more then the full cost of supervision, and requires the Commission to consult with the Department of Finance in order to establish that cost from year to year.

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The Commission is also bound by the Government to consult with the superannuation industry on the structure and impact of the levy before regulations are recommended.

It is likely that changes will need to be made to the scale of the levy to recover the ongoing cost, both due to increasing monies in superannuation and due to decreasing numbers of funds. Consultations with the industry will assist this process, but initially it will be difficult to accurately establish a scale of levy which will both recover no more and no less than the cost of supervision, and impose upon funds appropriately to the extent of their contribution towards the overall cost. It is envisaged that different levies may apply to different categories of fund. For instance I understand that a different scale of levy is proposed for pooled superannuation trusts than will apply to superannuation funds.

Reasons for setting a statutory limit on the maximum levy at a much higher level than will be charged to the large majority of funds first, at least the first few years, include that it could well be appropriate to charge a particular category of fund a higher levy than the others to recover the cost of services provided to that category of funds.

I am satisfied that it would be efficient and equitable to set out the scale of levies in the regulations and allow the Treasurer to recommend their amendment when necessary to reflect developments and following full consultation as already mentioned, rather than incorporating them in the Bill and seeking Parliament's approval each time an adjustment is required.

The House of Representatives has agreed to an amendment to the Superannuation Supervisory Levy Bill to require consultation with the Association of Superannuation Funds of Australia (ASFA), the Life Insurance Federation of Australia (LIFA) and other industry bodies as appropriate. Both ASFA and LIFA endorse the inclusion of the levy scale in regulations, rather than in the Bill. I have also received a letter from ASFA indicating that it endorses the Governments amendments to the Bill and that extensive consultations on the initial scale of the levy have already been undertaken.

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I hope that these comments will assist the Committee's understanding of the intentions behind the structure of this legislation.

Yours sincerely

SENATOR BOB MCMULLAN
Parliamentary Secretary to the Treasurer

copy to:
Mr S Argument
Secretary
Standing Committee for the Scrutiny of Bills

RECEIVED
7 MAY 1991
Senate Standing Ctte for the Scrutiny of Bills

COMMONWEALTH OF AUSTRALIA

Acting
MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

-7 MAY 1991

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

Dear Senator Cooney

On 11 April 1991, your Committee's Secretary drew attention to the comments on the Social Security Legislation Amendment Bill 1991 made by the Committee in its Alert Digest No 5 of 1991.

Clauses 4(b), (c) and (d), 5(1) and (2), 9, 10, 11, 12, 13, 21, 23 and 25

The Committee expressed concern over the retrospective effect of these clauses. However, as noted, none of the clauses is controversial in nature. There is some explanation in the Explanatory Memorandum of why it is necessary for each clause to operate retrospectively and the Committee has chosen to make no further comment on this issue.

Clauses 4(b) and (d) and 8

The Committee notes that the retrospective commencement date of these clauses is to reflect the Government's policy announcement of the initiative effected by them. There is concern that this constitutes a case of "legislation by press release". The Committee notes that the initiative has only beneficial effects on clients and also that the period between the retrospective date of commencement and the introduction of the legislation is less than two weeks over the generally accepted six month time lag for such cases. I acknowledge the Committee's decision to record no objection on this occasion.

As the Committee points out, new section 12AAB of the Social Security Act 1947 (the Act) which is inserted by clause 8 gives the Minister the power to approve a scholarship or class of scholarships of a certain type for the purpose of an exemption from the income test. As drafted, the provision does not involve scrutiny by Parliament of the Minister's approval and the Committee feels that it may therefore constitute an inappropriate delegation of legislative power. I agree with the Committee's suggestion that any approval given under new section 12AAB should be subject to tabling in Parliament. I hope to introduce an amendment in the next session of Parliament to put this arrangement in place.

Clause 19

This clause has the effect of adding subsection 251(1B) of the Act to the list of provisions which are not reviewable by the Social Security Appeals Tribunal (SSAT). Subsection 251(1B) allows the Minister to give, vary or revoke directions to the Secretary relating to the waiver of recovery of debts. (Contrary to the Committee's interpretation, such directions may not extend to the Secretary's related power to write off debts.) Making the Minister's power non-reviewable by the SSAT leads the Committee to express concern over whether personal rights, liberties or obligations are made unduly dependent on a non-reviewable decision.

The Committee recalls its previous suggestion when subsection 251(1B) was inserted in 1988 that the provision should be subject to disallowance, a suggestion which was not taken up by Parliament.

The position on the general question of review of the subsection 251(1B) power remains unchanged and the amendment made by clause 19 is really just a logical progression of the 1988 decision to make subsection 251(1B) not subject to disallowance in Parliament. It is necessary that the directions issued by the Minister under this provision are of a binding nature to avoid difficulties in reconciling decisions made by review bodies with Departmental policy on effective debt management and control. The directions only go to the criteria to be applied when waiving a debt rather than, for example, outlining cases where waiver is barred.

The system which was in place before subsection 251(1B) was enacted was based on administrative criteria flowing from those issued by the Minister for Finance to delegates making decisions on waiver under the Audit Act 1901. Those criteria, which were in line with those applying in most other Commonwealth departments and instrumentalities, were undermined over time by varying administrative review decisions. I believe that review bodies should not be free to operate in this area according to principles of their own devising and therefore the Minister's directions under subsection 251(1B) should not be subject to review.

Yours sincerely

Brian Howe

BRIAN HOWE

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

1991

15 MAY 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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 1991

The Committee has the honour to present its Seventh Report of 1991 to the Senate.

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

Bounty (Citric Acid) Act 1991

Health Insurance (Pathology Services) Amendment Act 1991

Training Guarantee (Administration) Amendment Bill 1991

BOUNTY (CITRIC ACID) ACT 1991

The Bill for this Act was introduced into the House of Representatives on 14 March 1991 by the Minister for Science and Technology.

The Act provides bounty assistance in relation to the production of citric acid by fermentation. The bounty (to operate from 12 March 1991 to 31 December 1995) is to be paid at $700 per tonne in the first year, reducing to $150 per tonne in the final year.

The Committee dealt with the Bill in Alert Digest No. 5 of 1991, in which it made various comments. The Minister for Science and Technology responded to those comments in a letter dated 9 May 1991. Unfortunately, since the Bill was passed by the Senate on 17 April 1991, neither the Committee nor the Senate had the opportunity to consider the response prior to the Bill being passed. Nevertheless, a copy of the Minister's letter is attached to this report for the information of Senators. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Subclauses 15(5) and (7)

In Alert Digest No. 5, the Committee noted that clause 15 of the (then) Bill provided for persons to be registered as producers of bountiable citric acid for the purposes of the legislation. The Committee noted that subclause 15(5) provided that regulations made under clause 31 may prescribe conditions to be met by applicants for registration and that, similarly, subclause 15(7) provided for regulations to be made prescribing conditions on the production of bountiable citric acid.

The Committee noted that the Explanatory Memorandum states that it is 'proposed' that the regulations setting out registration criteria will 'give effect to the following policy conditions':

- that a registered person continue research, development and commercialisation of citric acid by the high technology production process the subject of the present bounty;
- that a registered person contribute to research in new product development arising from or associated with the fermentation process the subject of this bounty;
- that a registered person explore international market opportunities for the fermentation technology and the product (ie. citric acid); and
- that a registered person take all reasonable steps to ensure maximum advantage is taken from the expertise and know-how associated with the development and production of citric acid and other new products in Australia by suitable licensing, franchising or other arrangements.

While the Committee accepted that this statement gives some guidance on what the regulations might contain, the Committee pointed out that though the Parliament would have the opportunity to disallow such regulations, there would be no scope for the Parliament to make any positive input as to their content.

In making that comment, the Committee noted that, pursuant to clause 28 of the Bill, various decisions made under the Bill would be open to review on the merits by the Administrative Appeals Tribunal. In particular, the Committee noted that decisions to approve (paragraph 28(1(e)) or cancel (paragraph 28(1)(f)) a registration are open to such review. Nevertheless, the Committee indicated that it was concerned that the Parliament would not appear to have any opportunity to

influence either the content of the regulations setting out the criteria upon which registration would be decided or the 'policy conditions' on which those criteria would be based.

Accordingly, the Committee drew Senators' attention to the provisions, as they may have been considered 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:

> Conditions of registration are a standard provision in modern Bounty Legislation. The conditions are sometimes contained in the principal legislation (eg. Bounty (Ships) Act 1989) and sometimes prescribed by regulation (eg. Bounty (Photographic Film) Act 1989). In situations such as the present, your Committee is concerned that by prescribing conditions of registration by regulation, Parliament is being denied the opportunity to make any positive input as to their content, because its scrutiny over regulations is restricted to disallowance, rather than amendment.

The Minister goes on to say:

> I accept the Committee's concern. Given the unique nature of the technology being assisted, however, a more flexible registration arrangement was desired than one where all the details are contained in principal legislation.
>
> Given that the bounty is aimed at assisting this new high technology process of producing citric acid by the fermentation of carbohydrates in air lift fermenters, it was considered essential that certain conditions attach to registration. The first condition that the Committee mentioned, for example, will ensure that the bounty recipient will continue research and development into what is still a developing industry. It is clear, however, that the necessity for continuing research may cease before the end of the bounty period if, for example, commercialisation of citric acid reaches a satisfactory optimum. Similarly, the third condition, that the bounty recipient explore international market opportunities for the technology and the product, may cease to be relevant if sufficient international market

opportunities are realised and any more exploration in such markets would have a detrimental affect upon the Australian citric acid industry. Because of this need for flexibility in administering these conditions, it was decided to prescribe the conditions by regulation.

By referring to the proposed conditions in my Second Reading Speech and having the conditions also outlined in the Explanatory Memorandum, it was my intention to point the Parliament not only to the facility to prescribe conditions by regulation, but also to the anticipated conditions.

The Minister concludes by saying:

A further matter which your Committee did not raise, but which may be of some interest, especially given your Committee's comments on the Bill's proposed retrospe ctivity, is the commencement of the regulations prescribing registration conditions.

If an application for registration is received by the Comptroller not later than 30 days after the Royal Assent to the Act, which occurred on 24 April 1991, then the registration shall have effect from 12 March 1991 - the date of the Act's commencement (Subclause 14(4) of the Bill refers). In order to be registered applicants will have to comply with certain conditions that are, as outlined above, to be prescribed by regulation. The time they have to comply with the conditions is at the time of application however, and not from the effective starting date of the bounty scheme. Even though the benefit of bounty assistance to the producer of bountiable citric acid can be made retrospective, the obligations imposed by the regulations cannot. Those obligations only commence from the date of commencement of the Regulations which occurred on 30 April 1991 when the relevant Statutory Rules (SR 87 of 1991) were Gazetted. I have enclosed for your Committee's information the Federal Executive Council documents which accompanied those Regulations.

Copies of those documents are also attached to this report. The Committee thanks the Minister for his detailed response and for his assistance in this matter.

The Bill for this Act was introduced into the House of Representatives on 11 April 1991 by the Minister for Community Services and Health.

The Act validates certain recommendations made by the Medicare Benefits Advisory Committee relating to the payment of Medicare benefits. These recommendations were previously denied legal effect as a result of a failure to make the necessary Ministerial determinations.

The Committee dealt with the Bill in Alert Digest No. 6 of 1991, in which it made various comments. The Minister for Community Services and Health responded to those comments in a letter dated 10 May 1991. Unfortunately, as the Bill was passed by the Senate on 17 April 1991, neither the Committee nor the Senate had the opportunity to consider the Minister's response prior to the passage of the Bill. Nevertheless, a copy of the Minister's letter is attached to this report for the information of Senators. Relevant parts of the response are also discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 6, the Committee noted that subclause 2(2) of the (then) Bill, would, if enacted, make the amendments proposed by subclauses 4(1) and 5(1) retrospective to the dates set out in the various paragraphs of those subclauses. The Committee noted that paragraphs 4(1)(a) and (b), for example, were to operate retrospectively from 1 January 1980.

The Committee noted that the Explanatory Memorandum to the Bill offered the following explanation for the retrospectivity:

> From time to time over a period of some years the Department issued Medical Benefits Assessment Advices based on determinations of the Medical Benefits Advisory Committee which purported to make amendments to Schedule 1 or Schedule 1A to the Health Insurance Act 1978. In fact they were ineffective for that purpose but were generally acted upon for some time by the Department, most relevant medical practitioners and the public in general. In particular payments were generally made in accordance with the Advices. They related to certain pathology tests not dealt with expressly in the Schedules.
>
> The purpose of this Bill is to validate the Advices so that claims and payments made in accordance with them will become valid and proper, to bring the legislation into line with the general practice in fact adopted at that time.

The Committee noted that the Explanatory Memorandum goes on to state:

> There will be transitional provisions to ensure that no-one will be required to make any refund of any payment already made as a result of this Bill, to preserve a right to additional payment in respect of anyone who, on the basis that the amendments contained in the Advices are valid, has been underpaid, and to exclude any liability for any additional windfall payments to pathologists for the procedures covered by the Advices in excess of the amounts specified in the Advices. The amount specified in the Advices for payment were fixed on the recommendation of the Medical Benefits Advisory Committee as proper remuneration for such procedures.

The Committee also noted that, according to the Minister's Second Reading speech, this was a matter which had been and was still the subject of litigation. The Committee noted that it had previously expressed concern that legislation could be used to determine the outcome of proceedings that were already before the courts.

For this reason, the Committee indicated that it would appreciate the Minister's advice on the nature and number of the '[f]urther litigation' referred to in his Second Reading speech and the likely effect of the Bill (if enacted) on that litigation.

The Minister has responded as follows:

> Only one pathologist challenged in the courts the validity of the Medicare Assessment Advices the subject of this Act. The decision handed down in that matter will not be affected by this Act. The same litigant has, however, brought further proceedings to widen greatly the effect of the previous decision and it is these further proceedings that have been affected by this Act.
>
> As I indicated in my speech, this Act preserves the right to additional payments for persons who, because of the validation of the advices, would be underpaid. More importantly, the Act excludes liability for any additional windfall benefits (to pathologists) in excess of the amounts specified in the advices.

The Committee thanks the Minister for this response.

TRAINING GUARANTEE (ADMINISTRATION) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 11 April 1991 by the Minister for Resources.

The Bill proposes to amend the Training Guarantee (Administration) Act 1990 to streamline the operation of that Act. In particular, the Bill proposes to introduce the concept of 'outstanding trainers' and to clarify the status and operation of Registered Industry Training Agents (RITAs).

The Committee dealt with the Bill in Alert Digest No. 6 of 1991 in which it made various comments. The Minister for Employment, Education and Training responded to those comments in a letter dated 13 May 1991. 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 5 and 6

In Alert Digest No. 6, the Committee noted that clause 5 of the Bill proposes to insert new sections 11A and 11B into the Training Guarantee (Administration) Act 1990, to govern the treatment of partnerships and unincorporated associations, respectively, for the purposes of that Act. The Committee noted that proposed new subclause 11A(4), if enacted, would make an offence against the Act which is committed by a partnership an offence committed by each of the partners. The Committee noted that, similarly, proposed new subclause 11B(5) would make an offence committed by an unincorporated association an offence committed by the controlling officer or officers of the association.

The Committee noted that proposed new subclauses 11A(5) and 11B(6), respectively, provide that a partner or a controlling officer (as the case may be) can raise by way of defence to such an alleged offence that they did not aid, abet, counsel or procure the act or omission involved in the offence or that they were not in any way knowingly concerned in or party to that act or omission. However, the Committee noted that this was a matter to be proved by the partner or controlling officer raising the defence. The Committee suggested that, as such, it may be considered a reversal of the onus of proof, as it is ordinarily incumbent on the prosecution to prove all the elements of an offence.

The Committee noted that, similarly, clause 6 proposes to amend section 12 of the Act, which relates to business groups. The Committee noted that, in particular, it proposes to replace paragraph 3(b) with a series of new paragraphs, which will have the effect of making an offence committed by a business group an offence by each of the individual members. The Committee noted that, as with the provisions to be inserted by clause 5, proposed new paragraph 12(3)(e) provides individual members with a defence to such an offence. However, as with those clauses, it is for the person raising the defence to prove it.

While accepting that there may be valid reasons for reversing the onus of proof, the Committee stated that it had consistently drawn attention to such provisions. Accordingly, the Committee drew attention to the provisions referred to above, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> The provisions of subclauses 11A(5) and 11B(6) are a statement of the liability of partners or controlling officers of bodies corporate in accordance with the accepted law in the area of partnership and company law respectively. It is necessary, therefore, to provide a statutory defence for the 'innocent' partner or officer in order to

rebut the presumption. The matters to be proved in the defence, on the balance of probabilities, will be peculiarly within the knowledge of the defendant and extremely difficult for the prosecution to negative. The reversed onus is therefore justified and comes within the principles the Committee applies to these matters.

The Minister notes that the Committee made comments to this effect in its Tenth Report of 1987.

The Minister goes on to say:

> Further, since the Act is taxation legislation, the proposed onus of proof provisions are similar to other taxation laws. In fact similar provisions on onus of proof are also found in taxation legislation as follows:
>
> - Sections 165 and 166 of the Fringe Benefits Tax Assessment Act 1986
> - Sections 102AAZG, 221YHZN, and 468 of the Income Tax Assessment Act 1936
> - Sections 12 and 13 of the Petroleum Resource Rent Tax Assessment Act 1987.

The Committee thanks the Minister for this response.

General comment

The Committee raised two further matters by way of general comment. First, the Committee noted that the Bill explicitly makes individual members of partnerships or business groups or the controlling officers of unincorporated associations liable for breaches of the Training Guarantee (Administration) Act 1990. The Committee observed that the Act imposes a range of penalties for the various offences set out in the Act.

The Committee noted that the penalties imposed by the Act range from imprisonment (for up to 2 years), to fines (of up to $3000), to the imposition of penalty charges. The Committee sought advice from the Minister as to whether the imposition of, say, a fine on the members of a partnership individually would lead to the imposition, in effect, of a fine equivalent to the total of the fine which would be levied on a sole proprietor or a company but multiplied by the number of partners held liable, thereby subjecting the partnership to a greater penalty than that which would be levied on a sole proprietor or a company. In making this request, the Committee noted the effect of proposed new subsections 11A(3) and 11B(4), which would make partners or controlling officers 'jointly and severally' liable for any amount payable by the partnership or unincorporated association, as the case may be.

The Minister has responded as follows:

> Where criminal proceedings apply, clearly a penalty by way of imprisonment can only be imposed on an individual according to the nature and seriousness of the criminal act.
>
> In case of an offence the liability of each of the partners or controlling officers is up to the maximum penalty because each partner or controlling officer may individually commit an offence. For instance, several partners could each be fined a maximum of $3,000 for committing the same offence. Since an offence may be committed individually, it is appropriate that the individual partner or controlling officer be subject to the maximum penalty. The drafting accords with this intention and the jointly and severally liable provisions under subclauses 11A(3) and 11B(45) are not applicable in regard to fines for offences committed by individual partners or controlling officers.

The Minister goes on to say:

> The provision for each partner or controlling officer to be liable to the maximum penalty for an offence ensures that there is an adequate and appropriate deterrent against offences under the Act. If, for instance, there are many partners involved in an offence, and

> the courts were only able to fine the partnership a maximum of $3,000 in aggregate, there might be little deterrent. The proposed provisions give the courts the discretion to deal appropriately with each individual according to the seriousness of the offence, with scope to impose the maximum penalty where appropriate. The existence of a number of offenders and the penalties imposed on them would be matters a sentencing court would take into account in determining the appropriate penalty in an individual case.

The Minister concludes by saying:

> The provisions of subclauses 11A(3) and 11B(4), concerning the joint and several liability of partners or members, respectively, apply to penalty charges imposed under the Act. In other words, where a partnership or unincorporated association incurs a penalty in respect of a liability arising under the Act, the partners or members, as the case may be, are jointly and severally liable for the penalty charges involved.

The Committee thanks the Minister for this response. However, the Committee reiterates its understanding that the provision would appear to impose on a multi-member partnership a higher degree of liability, in monetary terms than that which would be imposed on, say, a sole proprietor or a body corporate.

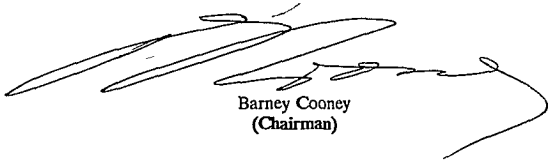
Finally, the Committee noted that this Bill proposes to make what appear to be substantial amendments to a piece of legislation, most of which only came into force on 1 July 1990. The Committee indicated that it was concerned that persons upon whom this legislation imposes significant obligations will, already, have to refer to at least two separate pieces of legislation (if the Bill is enacted) in order to understand those obligations.

The Minister has responded as follows:

> I note the Committee's concerns that the enactment of the Bill could give rise to two separate pieces of legislation (the Act and Amendment Act) and this might pose some difficulties for employers

understanding their obligations. Arrangements are being made with Attorney-General's Department to have a reprint available of the Act when the Bill is enacted.

The Committee thanks the Minister for this response and for his assistance with the Bill.



Barney Cooney
(Chairman)

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

-9 MAY 1991

Senator Barney 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. 5 of 1991, dated 10 April 1991, which contained comments by the Senate Standing Committee for the Scrutiny of Bills on the Bounty (Citric Acid) Act 1991. In particular, your Committee expressed concern that the facility to prescribe conditions of registration by regulation, rather than principal legislation, could constitute an inappropriate delegation of legislative power.

I regret that I had no opportunity to reply to your Committee's concerns to enable inclusion in the Committee's Fifth Report of 1991 of 17 April 1991, especially considering that the Act was debated and passed by the Senate on that day. I trust, however, that the following will meet the concerns of your Committee as outlined in the Scrutiny of Bills Alert Digest mentioned above.

Conditions of registration are a standard provision in modern Bounty Legislation. The conditions are sometimes contained in the principal legislation (eg. Bounty (Ships) Act 1989) and sometimes prescribed by regulation (eg. Bounty (Photographic Film) Act 1989). In situations such as the present, your Committee is concerned that by prescribing conditions of registration by regulation, Parliament is being denied the opportunity to make any positive input as to their content, because its scrutiny over regulations is restricted to disallowance, rather than amendment.

I accept the Committee's concern. Given the unique nature of the technology being assisted, however, a more flexible registration arrangement was desired than one where all the details are contained in principal legislation.

.../2

Given that the bounty is aimed at assisting this new high technology process of producing citric acid by the fermentation of carbohydrates in air lift fermenters, it was considered essential that certain conditions attach to registration. The first condition that the Committee mentioned, for example, will ensure that the bounty recipient will continue research and development into what is still a developing industry. It is clear, however, that the necessity for continuing research may cease before the end of the bounty period if, for example, commercialisation of citric acid reaches a satisfactory optimum. Similarly, the third condition, that the bounty recipient explore international market opportunities for the technology and the product, may cease to be relevant if sufficient international market opportunities are realised and any more exploration in such markets would have a detrimental affect upon the Australian citric acid industry. Because of this need for flexibility in administering these conditions, it was decided to prescribe the conditions by regulation.

By referring to the proposed conditions in my Second Reading Speech and having the conditions also outlined in the Explanatory Memorandum, it was my intention to point the Parliament not only to the facility to prescribe conditions by regulation, but also to the anticipated conditions.

A further matter which your Committee did not raise, but which may be of some interest, especially given your Committee's comments on the Bill's proposed retrospectivity, is the commencement of the regulations prescribing registration conditions.

If an application for registration is received by the Comptroller not later than 30 days after the Royal Assent to the Act, which occurred on 24 April 1991, then the registration shall have effect from 12 March 1991 - the date of the Act's commencement (Subclause 15(4) of the Bill refers). In order to be registered applicants will have to comply with certain conditions that are, as outlined above, to be prescribed by regulation. The time they have to comply with the conditions is at the time of application however, and not from the effective starting date of the bounty scheme. Even though the benefit of bounty assistance to the producer of bountiable citric acid can be made retrospective, the obligations imposed by the regulations cannot. Those obligations only commence from the date of commencement of the Regulations which occurred on 30 April 1991 when the relevant Statutory Rules (SR 87 of 1991) were Gazetted. I have enclosed for your Committee's information the Federal Executive Council documents which accompanied those Regulations.

I trust the above is of assistance to the Committee.

Yours sincerely

Simon Crean

MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS

Departmental No. 17

Executive Council Meeting
No. 11

24th April 19 91

MINUTE PAPER FOR THE EXECUTIVE COUNCIL

SUBJECT

Bounty (Citric Acid) Act 1991

Bounty (Citric Acid) Regulations

Recommended for the approval of His Excellency the Governor-General in Council that, under Section 31 of the Bounty (Citric Acid) Act 1991, he make Regulations in the attached form.

Minister of State for
Small Business and Customs

Approved in Council

BILL HAYDEN

Governor-General

29 APR 1991

Filed in the Records of the Council

K F DUGGAN

Secretary to the Executive Council

Statutory Rules 1991 No. [1]

Bounty (Citric Acid) Regulations

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Bounty (Citric Acid) Act 1991*.

Dated 29 April 1991.

BILL HA[illegible]

Governor-General

By His Excellency's Command,

Minister of State for
Small Business and Customs

Citation

1. These Regulations may be cited as the Bounty (Citric Acid) Regulations.

Interpretation

2. In these Regulations:

"the Act" means the *Bounty (Citric Acid) Act 1991*.

Prescribed conditions (subsections 15 (5) and (7))

3. (1) For the purposes of subsection 15 (5) of the Act, the following conditions are prescribed:

(a) the applicant will undertake, or continue to undertake, research into, and development and commercialisation of, the production in Australia of bountiable citric acid;

(b) the applicant will contribute to research into the development of new products arising from, or associated with, the fermentation technology employed in the production of bountiable citric acid, with a view to the commercialisation of these products in Australia;

(c) the applicant will explore international market opportunities for bountiable citric acid and for the fermentation technology employed in the production of bountiable citric acid;

(d) the applicant will take all reasonable steps to ensure that maximum advantage is derived in Australia, by suitable licensing, franchising and other arrangements, from the expertise and know-how associated with the development of the fermentation technology employed in the production of bountiable citric acid and with the production of bountiable citric acid and related new products.

(2) For the purposes of subsection 15 (7) of the Act, the following conditions are prescribed:

(a) the registered person has undertaken, and will continue to undertake, research into, and development and commercialisation of, the production in Australia of bountiable citric acid;

(b) the registered person has contributed, and will continue to contribute, to research into the development of new products arising from, or associated with, the fermentation technology employed in the production of bountiable citric acid, with a view to the commercialisation of those products in Australia;

(c) the registered person has explored, and will continue to explore, international market opportunities for bountiable citric acid and for the fermentation technology employed in the production of bountiable citric acid;

(d) the registered person has taken, and will continue to take all reasonable steps to ensure that maximum advantage is derived in Australia, by suitable licensing, franchising and other arrangements, from the expertise and know-how associated with the development of the fermentation technology employed in the production of bountiable citric

acid and with the production of bountiable citric acid and related new products.

NOTE

1. Notified in the *Commonwealth of Australia Gazette* on 1991.

EXPLANATORY MEMORANDUM

Minute No. 17 of 1991 - Minister of State for Small Business and Customs

Subject - Bounty (Citric Acid) Act 1991

Bounty (Citric Acid) Regulations

Section 31 of the Bounty (Citric Acid) Act (the Act) provides that:

"The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters:

a) permitted by this Act to be prescribed; or

b) necessary or convenient to be prescribed for carrying out or giving effect to this Act".

Background

Cabinet, by Decision No. 14784 dated 20 December 1990, decided to provide bounty assistance on the production of citric acid via a special high technology production process which involves the fermentation of carbohydrates in air lift fermenters. Under the new Act, bounty is payable to the producer of bountiable citric acid (defined as citric acid produced via the fermentation process above) on the production of such acid provided that the production is carried out in Australia during the bounty period and that the producer is, at the time of production, a registered person.

- The Act passed both Houses of Parliament on 17 April 1991 and received the Royal Assent last week.

Registration of persons is dealt with under Section 15 of the Act.

Subsections 15(5) and 15(7) of the Act provide that the regulations may prescribe conditions to be met by an applicant for registration (subsection 15(5)) and that the regulations may further prescribe conditions to be complied with by a person registered under section 15 (subsection 15(7)).

Proposed Regulation 1: provides that the proposed Regulations may be cited as the Bounty (Citric Acid) Regulations.

Proposed Regulation 2: provides that in the proposed regulations, "the Act" means the Bounty (Citric Acid) Act 1991.

Proposed subregulation 3(1): provides that an applicant for registration must meet the following conditions:

a) that the applicant will continue to research, develop and apply the fermentation technology the subject of the bounty to the commercialisation of citric acid in Australia;

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b) that the applicant will contribute to research in new product development arising from or associated with the fermentation technology the subject of the bounty, with a view to the commercialisation of those new products in Australia;

c) that the applicant will explore international market opportunities for the fermentation technology and the product (ie. bountiable citric acid); and

d) that the applicant will take all reasonable steps to ensure maximum advantage is taken from the expertise and know-how associated with the development of the fermentation technology and the production of bountiable citric acid and other new products in Australia by suitable licensing, franchise or other arrangements.

Proposed subregulation 3(2): provides that a registered person must comply with the following conditions:

a) that the registered person will continue to research, develop and apply the fermentation technology the subject of the bounty to the commercialisation of citric acid in Australia;

b) that the registered person will contribute to research in new product development arising from or associated with the fermentation technology the subject of the bounty, with a view to the commercialisation of those new products in Australia;

c) that the registered person will explore international market opportunities for the fermentation technology and the product (ie. bountiable citric acid) and

d) that the registered person will take all reasonable steps to ensure maximum advantage is taken from the expertise and know-how associated with the development of the fermentation technology and the production of bountiable citric acid and other new products in Australia by suitable licensing, franchise or other arrangements.

The Minute recommends that Regulations be made in the form proposed.

Authority: Section 31 of the Bounty (Citric Acid) Act 1991

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EXPLANATORY STATEMENT

BOUNTY (CITRIC ACID) ACT 1991

BOUNTY (CITRIC ACID) REGULATIONS

STATUTORY RULES 1991 NO.

ISSUED BY THE AUTHORITY OF THE MINISTER OF STATE FOR SMALL BUSINESS AND CUSTOMS

Section 31 of the Bounty (Citric Acid) Act (the Act) provides that:

> "The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters:
>
> a) permitted by this Act to be prescribed; or
>
> b) necessary or convenient to be prescribed for carrying out or giving effect to this Act".

Background

The Government announced in the March Industry Statement its decision to introduce legislation into the Parliament to provide bounty assistance on the production of citric acid via a special high technology production process which involves the fermentation of carbohydrates in air lift fermenters. That legislation (the Bounty (Citric Acid) Act 1991) was passed on 17 April 1991, and the Act received the Royal Assent in the week ending 26 April 1991.

Under the new Act, bounty is payable to the producer of bountiable citric acid (defined as citric acid produced via the fermentation process above) on the production of such acid provided that the production is carried out in Australia during the bounty period and that the producer is, at the time of production, a registered person.

Registration of persons is dealt with under Section 15 of the Act.

Subsections 15(5) and 15(7) of the Act provide that the regulations may prescribe conditions to be met by an applicant for registration (subsection 15(5)) and that the regulations may further prescribe conditions to be complied with by a person registered under section 15 (subsection 15(7)).

Regulation 1: provides that the Regulations may be cited as the Bounty (Citric Acid) Regulations.

Regulation 2: provides that in the regulations, "the Act" means the Bounty (Citric Acid) Act 1991.

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a) that the applicant will continue to research, develop and apply the fermentation technology the subject of the bounty to the commercialisation of citric acid in Australia;

b) that the applicant will contribute to research in new product development arising from or associated with the fermentation technology the subject of the bounty, with a view to the commercialisation of those new products in Australia;

c) that the applicant will explore international market opportunities for the fermentation technology and the product (ie. bountiable citric acid); and

d) that the applicant will take all reasonable steps to ensure maximum advantage is taken from the expertise and know-how associated with the development of the fermentation technology and the production of bountiable citric acid and other new products in Australia by suitable licensing, franchise or other arrangements.

Subregulation 3(2): provides that a registered person must comply with the following conditions:

a) that the registered person will continue to research, develop and apply the fermentation technology the subject of the bounty to the commercialisation of citric acid in Australia;

b) that the registered person will contribute to research in new product development arising from or associated with the fermentation technology the subject of the bounty, with a view to the commercialisation of those new products in Australia;

c) that the registered person will explore international market opportunities for the fermentation technology and the product (ie. bountiable citric acid) and

d) that the registered person will take all reasonable steps to ensure maximum advantage is taken from the expertise and know-how associated with the development of the fermentation technology and the production of bountiable citric acid and other new products in Australia by suitable licensing, franchise or other arrangements.

(91 R188)

24/4

MINISTER FOR COMMUNITY SERVICES AND HEALTH

Parliament House
CANBERRA ACT 2600

Telephone: (06) 277 7680
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Senator B Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

10 MAY 1991

Dear Senator Cooney

HEALTH INSURANCE (PATHOLOGY SERVICES) AMENDMENT ACT NO. 57 OF 1991

You have noted the retrospective nature of the Health Insurance (Pathology Services) Amendment Act No. 57 of 1991 ('the Act') passed by both Houses of Parliament and assented to by His Excellency the Governor General on 24 April 1991. Particularly, you are seeking advice on the nature and number of the further litigation referred to in my second reading speech and the effect of the Act on that litigation.

Only one pathologist challenged in the courts the validity of the Medicare Assessment Advices the subject of this Act. The decision handed down in that matter will not be affected by this Act. The same litigant has, however, brought further proceedings to widen greatly the effect of the previous decision and it is these further proceedings that have been affected by this Act.

As I indicated in my speech, this Act preserves the right to additional payments for persons who, because of the validation of the advices, would be underpaid. More importantly, the Act excludes liability for any additional windfall benefits (to pathologists) in excess of the amounts specified in the advices.

Yours sincerely

Brian Howe

BRIAN HOWE

RECEIVED
13 MAY 1991
Senate Standing C'tte for the Scrutiny of Bills

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

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

10 MAY 1991

Dear Senator

I refer to the Scrutiny of Bills Alert Digest No 6 of 1991 (17 April) concerning some aspects of the Training Guarantee (Administration) Amendment Bill 1991, which was referred to my office by Mr Argument on 18 April.

Reversal of onus of proof

The Committee raises questions concerning reversal of the onus of proof under clauses 5 and 6 of the Bill.

Clause 5 proposes the insertion of new Sections 11A and 11B into the Training Guarantee (Administration) Act 1990 governing the treatment of partnerships and unincorporated associations, respectively. The proposed new Sections include provision for the treatment of offences against the Act.

The Committee draws attention to subclauses 11A(5) and 11B(6) which, respectively, provide that a partner or controlling officer (as the case may be) can raise a defence against an alleged offence if the partner or controlling officer proves certain specified matters. The Committee notes that this may be considered a reversal of the onus of proof, as it is ordinarily incumbent on the prosecution to prove all the elements of an offence.

Similarly, clause 6 includes provision for an offence committed by a business group to be an offence by each of the individual members. However, as with the partner or controlling officer under clause 5, the onus of proof is placed on the person raising the defence.

The provisions of subclauses 11A(5) and 11B(6) are a statement of the liability of partners or controlling officers of bodies corporate in accordance with the accepted law in the area of partnership and company law respectively. It is necessary, therefore, to provide a statutory defence for the 'innocent' partner or officer in order to rebut the presumption. The matters to be proved in the defence, on the balance of probabilities, will be peculiarly within the knowledge of the defendant and extremely difficult for the prosecution to negative. The reversed onus is therefore justified and comes within the principles the Committee applies to these matters. (See the Committee's 10th Report of 1987.)

Further, since the Act is taxation legislation, the proposed onus of proof provisions are similar to other taxation laws. In fact similar provisions on onus of proof are also found in taxation legislation as follows:

- Sections 165 and 166 of the Fringe Benefits Tax Assessment Act 1986
- Sections 102AAZG, 221YHZN, and 468 of the Income Tax Assessment Act 1936
- Sections 12 and 13 of the Petroleum Resource Rent Tax Assessment Act 1987

Penalties relating to partnerships and unincorporated associations

Also your Committee seeks my advice on the effect of proposed new subclauses 11A(3) and 11B(4) in relation to penalties under the Act ranging from imprisonment (for up to 2 years), to fines (of up to $3,000), to the imposition of penalty charges. Subclauses 11A(3) and 11B(4), respectively, provide that partners or members are jointly and severally liable for any amount payable by the partnership or unincorporated association, as the case may be.

The Committee asks whether each partner or controlling officer would be held liable up to a maximum penalty, thus subjecting the partnership or unincorporated association to a greater penalty than would be levied on a sole proprietor or company.

Where criminal proceedings apply, clearly a penalty by way of imprisonment can only be imposed on an individual according to the nature and seriousness of the criminal act.

In case of an offence the liability of each of the partners or controlling officers is up to the maximum penalty because each partner or controlling officer may individually commit an offence. For instance, several partners could each be fined a maximum of $3,000 for committing the same offence. Since an offence may be committed individually, it is appropriate that the individual partner or controlling officer be subject to the maximum penalty. The drafting accords with this intention and the jointly and severally liable provisions under subclauses 11A(3) and 11B(4) are not applicable in regard to fines for offences committed by individual partners or controlling officers.

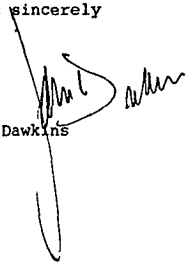
The provision for each partner or controlling officer to be liable to the maximum penalty for an offence ensures that there is an adequate and appropriate deterrent against offences under the Act. If, for instance, there are many partners involved in an offence, and the courts were only able to fine the partnership a maximum of $3,000 in aggregate, there might be little deterrent. The proposed provisions give the courts the discretion to deal appropriately with each individual according to the seriousness of the offence, with scope to impose the maximum penalty where appropriate. The existence of a number of offenders and the penalties imposed on them would be matters a sentencing court would take into account in determining the appropriate penalty in an individual case.

The provisions of subclauses 11A(3) and 11B(4), concerning the joint and several liability of partners or members, respectively, apply to penalty charges imposed under the Act. In other words, where a partnership or unincorporated assoication incurs a penalty in respect of a liability arising under the Act, the partners or members, as the case may be, are jointly and severally liable for the penalty charges involved.

Proposed reprint of the Act

I note the Committee's concerns that the enactment of the Bill could give rise to two separate pieces of legislation (the Act and Amendment Act) and this might pose some difficulties for employers understanding their obligations. Arrangements are being made with Attorney-General's Department to have a reprint available of the Act when the Bill is enacted.

Yours sincerely



John Dawkins

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTH REPORT

OF

1991

29 MAY 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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 1991

The Committee has the honour to present its Eighth Report of 1991 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:

Student Assistance Amendment Bill 1991

STUDENT ASSISTANCE AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 14 March 1991 by the Minister for Higher Education and Employment Services.

This omnibus Bill proposes to amend the Student Assistance Act 1973 to:

- delete references to competitive postgraduate awards;
- provide that students must give their tax file numbers to the Department before being paid assistance;
- change arrangements for late payment charges by debtors;
- protect student assistance files from subpoenas by courts and tribunals;
- change the annual reporting requirement on the operation of the Act;
- provide that decisions of the Student Assistance Review Tribunal be available within 10 working days of the Tribunal making its decision; and
- provide that Ministerial determinations made under the Act are to be tabled in the Parliament and subject to disallowance.

The Committee dealt with the Bill in Alert Digest No. 5 of 1991 in which it made various comments. The Minister for Higher Education and Employment Services responded to those comments in a letter dated 15 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Non-reviewable decision
Paragraph 14(a)

In Alert Digest No. 5, the Committee observed that paragraph 14(a) of the Bill proposes to replace the current subsection 14(1) of the Student Assistance Act 1973 with a new subsection 14(1). The Committee noted that new subsection 14(1) would, if enacted, allow '[t]he Minister or a prescribed officer' to determine whether or not to waive the payment of a late payment charge or interest on overpaid amounts. The Committee also noted that any such decision by the Minister or a prescribed officer would appear to be immune from review.

The Committee observed that while the Student Assistance Review Tribunal has a general power, pursuant to Part 5 of the Act, to review decisions that are adverse to an applicant, the power to review is confined to decisions by an 'authorised officer'. Decisions by the Minister or a 'prescribed officer' under proposed new subsection 14(1) would, therefore, appear to be immune from review.

Accordingly, the Committee drew attention to the provision as it may make personal rights, liberties or obligations unduly dependent on non-reviewable decision, in breach of principle 1(a)(iii) of the Committee's terms of reference.

The Minister has responded as follows:

> Paragraph 14(a) of the present Bill substantially repeats existing provisions in the Act, and the issue of non-reviewability was discussed in relation to the previous provisions (see the Committee's Twentieth Report of 1989, 6 December 1989). I would adopt the comments by the then Minister:
>
> > The Government considers that, once an overpayment is identified, recovery should proceed as expeditiously as possible in a similar manner to normal commercial practice.

> The Bill therefore does not include provision for external reviews of decisions relating to the recovery of overpayments.
>
> However, I would add that the Department has a strong policy of re-examining a person's situation where a debtor wishes to discuss his or her case with the Department.
>
> Further, decisions about the existence or amount of an overpayment under the Student Assistance Act are reviewable by the Student Assistance Review Tribunal (SART) and then by the Administrative Appeals Tribunal (AAT). Further, it is proposed to introduce external appeals for the non-legislated student assistance schemes for Aboriginal students. It is also proposed to introduce legislation next year to bring the Assistance for Isolated Children Scheme within the Student Assistance Act, and so within the jurisdiction of the SART and the AAT.
>
> A debtor will also be able to seek a review under the Ombudsman Act and the Administrative Decisions (Judicial Review) Act.
>
> As decisions relating to the recovery of overpayments will not be subject to external review, the Bill provides (in proposed section 30H) for Ministerial guidelines on decisions concerning the recovery of overpayments. As the Second Reading Speech indicated, guidelines will be introduced as soon as possible relating to the writing off, waiver and recovery by instalments of overpayment, and to the approval of interest free periods.

The Minister goes on to say:

> I should perhaps add that the Government remains committed to introducing external appeals for the

> ABSTUDY scheme, although the details are still to be finalised. The Government has not introduced legislation relating to the Assistance for Isolated Children Scheme as the Scheme is currently under review. Unfortunately, the Ministerial guidelines have not yet been prepared as my Department's debt processing procedures are still being established; I have directed that guidelines be finalised as a matter of priority.

The Committee thanks the Minister for this response and trusts that the initiatives referred to will proceed as a matter of urgency.

Provision of tax file numbers
Clause 17

In Alert Digest No. 5, the Committee noted that clause 17 of the Bill would, if enacted, require an applicant for AUSTUDY or for a special educational assistance scheme to supply their tax file number in relation to that application. The Committee observed that the provision is similar in effect to provisions which it has previously drawn attention to, most recently in Alert Digest No. 9 of 1990 in relation to provisions in the Social Security Legislation Amendment Bill 1990.

The Committee suggested that, as it had observed at that time, while such provisions may be seen as necessary to prevent persons defrauding the student assistance system, they may also be considered as unduly intrusive upon a person's privacy. Accordingly, the Committee drew the provision to Senators' attention 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 Minister has responded as follows:

> The proposed requirement is part of a legislative package involving data comparison under the Data Matching Program (Assistance and Tax) Act 1990. The Government appreciates the privacy issues involved, and these have been a primary concern in drafting the legislation. We have been careful to ensure that the legislation does not go beyond the periodic checks to prevent abuses of the assistance and taxation systems.
>
> I also note in this regard that the majority of the Senate Standing Committee on Legal and Constitutional Affairs, in its report The Proposed Tax File Number Provisions and Data matching Program, concluded that use of the tax file numbers in the data matching is appropriate (para 21, page 9, of the report).

The Committee thanks the Minister for this response. The Committee notes that the Minister has referred the Committee to the report of the Senate Standing Committee on Legal and Constitutional Affairs entitled The Proposed Tax File Number Provisions and Data matching Program. It is useful to reproduce in full the paragraph referred to by the Minister. That paragraph states:

> The [Legal and Constitutional Affairs] Committee is aware of much debate concerning the proposed extension of use of the tax file number and feels that any extensions should only proceed for the most compelling of reasons. The Committee is not insensitive to privacy concerns but the majority is of the view that the present circumstances are such as to warrant the tax file number's use.

The Committee notes that in the extract reproduced above, the Standing Committee on Legal and Constitutional Affairs indicated that extensions to the use of the tax file number should only proceed 'for the most compelling of reasons'. Further, the Committee notes that the Legal and Constitutional Affairs Committee stated that the majority view was that use of the tax file number was warranted in 'the present circumstances', that is, the circumstances that applied in respect of the Bill that that Committee was then considering.

General comment

In Alert Digest No. 5, the Committee noted by way of a general comment that the legislation of which this amendment is to form a part is almost impossible to follow. The Committee observed that the Student Assistance Act 1973 was re-numbered and re-lettered (with effect from 2 January 1990) as a result of section 17 of the Student Assistance Amendment Act (No. 2) 1989. The Committee noted that the Act has not been reprinted to take account of the re-numbering. The Committee observed that since the latest reprint of the Act was published in 1986, in order to find the relevant section referred to by this amending Bill, it is necessary to take the 1986 reprint and manually re-number it, taking into account the several other amendments that have been enacted to date.

The Committee re-iterated the concerns which it expressed in Alert Digest No. 4 of 1991 (in relation to the Australian Capital Territory (Electoral) Amendment Bill 1991), individuals have a right to be able to work out what the law is. The Committee also noted that in 1947, Lord Justice Scott of the English Court of Appeal said:

> [T]here is one quite general question affecting all such sub-delegated legislation, and of supreme importance to the continuance of the rule of law under the British constitution, namely, the right of the public affected to know what that law is. (Blackpool Corporation v Locker [1948] 1 KB 349, at p361)

The Committee suggested that though the comment was made in relation to sub-delegated legislation, the general proposition was, surely, of even greater importance in relation to primary legislation. The Committee observed that, in making the comment, Lord Justice Scott noted that, as a matter of law, ignorance of the law is no excuse. The Committee stated that if the law is hard to understand (as it is here), it does nothing to assist the general public in knowing what the law

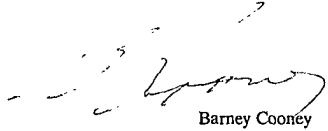
is. Accordingly, the Committee suggested that the reprinting of the Student Assistance Act 1973 be undertaken as a matter of urgency.

The Minister has responded as follows:

> I accept the Committee's concern on this matter. I have written to my colleague, the Attorney-General, to ask that a reprint be arranged as soon as possible after the present Bill is finalised.

The Committee thanks the Minister for this response and trusts that the reprinting of the Act will proceed as a matter of urgency.

The Committee notes with approval that this Bill also proposes to give effect to an undertaking given by the then Minister in 1989 (see Twentieth Report of 1989, pp 438-9) to make Ministerial determinations relating to the manner in which student assistance is to be paid subject to review by the Parliament. The relevant amendments, which are effected by clauses 6 and 22 of the Bill, provide that, in future, such conditions are to be set out in regulations rather than in Ministerial determinations. The Committee thanks the Minister for proposing this amendment.



Barney Cooney
(Chairman)

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

RECEIVED
28 MAY 1991
Senate Standing Cttee for the Scrutiny of Bills

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

Dear Senator Cooney

I am writing in response to comments made by the Standing Committee for the Scrutiny of Bills on the Student Assistance Amendment Bill 1991 ("the Bill"). The Bill proposes a number of amendments to the Student Assistance Act 1973 ("the Act").

Non-reviewable decisions
Paragraph 14(a)

The Committee has noted that the Student Assistance Review Tribunal will not be able to review decisions whether or not to waive the late payment charge or interest on overpaid amounts.

Paragraph 14(a) of the present Bill substantially repeats existing provisions in the Act, and the issue of non-reviewability was discussed in relation to the previous provisions (see the Committee's Twentieth Report of 1989, 6 December 1989). I would adopt the comments by the then Minister:

> "The Government considers that, once an overpayment is identified, recovery should proceed as expeditiously as possible in a similar manner to normal commercial practice. The Bill therefore does not include provision for external reviews of decisions relating to the recovery of overpayments.
>
> "However, I would add that the Department has a strong policy of re-examining a person's situation where a debtor wishes to discuss his or her case with the Department.

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"Further, decisions about the existence or amount of an overpayment under the Student Assistance Act are reviewable by the Student Assistance Review Tribunal (SART) and then by the Administrative Appeals Tribunal (AAT). Further, it is proposed to introduce external appeals for the non-legislated student assistance schemes for Aboriginal students. It is also proposed to introduce legislation next year to bring the Assistance for Isolated Children Scheme within the Student Assistance Act, and so within the jurisdiction of the SART and the AAT.

"A debtor will also be able to seek a review under the Ombudsman Act and the Administrative Decisions (Judicial Review) Act.

"As decisions relating to the recovery of overpayments will not be subject to external review, the Bill provides (in proposed section 30H) for Ministerial guidelines on decisions concerning the recovery of overpayments. As the Second Reading Speech indicated, guidelines will be introduced as soon as possible relating to the writing off, waiver and recovery by instalments of overpayment, and to the approval of interest free periods."

I should perhaps add that the Government remains committed to introducing external appeals for the ABSTUDY scheme, although the details are still to be finalised. The Government has not introduced legislation relating to the Assistance for Isolated Children Scheme as the Scheme is currently under review. Unfortunately, the Ministerial guidelines have not yet been prepared as my Department's debt processing procedures are still being established; I have directed that guidelines be finalised as a matter of priority.

Provision of tax file numbers
Clause 17

The Committee has referred to the privacy issues relating to the requirement that applicants for student assistance will need to supply their tax file numbers.

The proposed requirement is part of a legislative package involving data comparison under the Data Matching Program (Assistance and Tax) Act 1990. The Government appreciates the privacy issues involved, and these have been a primary concern in drafting the legislation. We have been careful to ensure that the legislation does not go beyond the periodic checks to prevent abuses of the assistance and taxation systems.

I also note in this regard that the majority of the Senate Standing Committee on Legal and Constitutional Affairs, in its report The Proposed Tax File Number Provisions and Data matching Program, concluded that use of the tax file numbers in the data matching is appropriate (para 21, page 9, of the report).

General comment

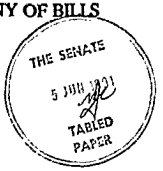
The Committee added a general note that the Act is difficult to follow, because its provisions have been re-numbered and re-lettered. The Committee accordingly suggested the Act be reprinted as a matter of urgency.

I accept the Committee's concern on this matter. I have written to my colleague, the Attorney-General, to ask that a reprint be arranged as soon as possible after the present Bill is finalised.

Yours sincerely

Peter Baldwin

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS



NINTH REPORT

OF

1991

5 JUNE 1991

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 from Standing Order 24

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

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

(iii) make 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 1991

The Committee has the honour to present its Ninth Report of 1991 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 and Overseas Telecommunications Corporation Bill 1991

Export Control Amendment Bill 1991

Petroleum (Submerged Lands) Amendment Bill 1991

Social Security (Job Search and Newstart) Amendment Bill 1991

Telecommunications Bill 1991

Telecommunications (Numbering Fees) Bill 1991

Telecommunications (Universal Service Levy) Bill 1991

The Committee advises Senators that, due to the volume of material before the Committee at the time that this Report was considered, it has not been able to offer any concluded views on the various Ministerial responses contained herein. Those responses are, however, reproduced in full for the information of Senators.

AUSTRALIAN AND OVERSEAS TELECOMMUNICATIONS CORPORATION BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to amalgamate Telecom and OTC and to create a new fully public-owned corporation, the Australian and Overseas Telecommunications Corporation.

The Committee dealt with the Bill in Alert Digest No. 8 of 1991, in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 27 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Definition of 'authorised person'
Clause 3

In Alert Digest No. 8, the Committee noted that clause 3 of the Bill provides that an 'authorised person' is either the Minister or 'a person authorised by the Minister'. The Committee noted that there is no limit as to the persons or classes of persons whom the Minister may so authorise. Given that an authorised person would be able, for example, to certify that a matter is an exempt matter for the purposes of Commonwealth, State or Territory taxation (clause 25), the Committee suggested that this might be considered to be a power which should involve limits as to the persons to whom it can be delegated.

Accordingly, the Committee drew Senators' attention to the provision as it may be considered 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 Committee's concern needs to be viewed against the probability of a certification needing to be provided. The need to have a matter formally certified as an exempt matter would only arise if there were to be a dispute between the AOTC and a taxing authority over whether a matter is related to the operation of, or the giving effect to, Part 4 of the Bill (AOTC to be successor of Telecom and OTC). I expect that as the Parliament's intention in providing an exemption from certain Commonwealth, State, and Territory taxes in relation to the merging of Telecom and OTC is clearly expressed, the probability of a dispute arising is extremely low.

The Minister goes on to say:

> In this regard, you may wish to note that clause 25 is cast in similar terms to sections 33 and 34 of the OTC Act 1946, inserted by section 16 of the OTC (Conversion into Public Company) Act 1988. My Department advises that no instrument declaring a person to be authorised was made under those provisions and, in fact, it has never been necessary to specify anything as an exempt matter under those provisions as no disputes have arisen.
>
> Nevertheless, if a dispute did arise between the AOTC and a taxing authority, I would not envisage exercise of the certifying power other than by myself or the Secretary of my Department.

The Minister concludes by saying:

> I would also point out that the way Clause 25 is structured means that the tax exemptions are not open-

> ended. Clearly the further in time from the succession date the less sustainable the argument that a matter is associated with the succession process. Consequently, the Committee need not be concerned that any delegation of power will be open-ended.

The Committee thanks the Minister for this response.

'Henry VIII' provisions
Clauses 24 and 27

In Alert Digest No. 8, the Committee noted that clause 24 of the Bill provides that the Australian Overseas Telecommunication Corporation is not to be taken to be a public authority. The Committee noted that this means, among other things, that the Corporation is not to be entitled to any immunity or privilege of the Commonwealth. However, the clause concludes by providing that this exclusion applies

> except so far as express provision is made by this Act or any other law of the Commonwealth, or by a law of a State or of a Territory, as the case may be, or the regulations otherwise provide.

The Committee suggested that the reference to regulations 'otherwise [providing]' resulted in the clause being what it would generally regard as a 'Henry VIII' clause, as the effect of such a provision would be to allow for the primary legislation to be amended by secondary legislation.

Similarly, the Committee noted that clause 27 of the Bill provides that, subject to clause 24, the laws of the Commonwealth are to apply to the Corporation,

> except to the extent that [the Corporation] is exempted from the application of a particular law or class or laws

by express provision of this Act or the regulations or of any other law of the Commonwealth.

The Committee suggested that this also had the effect of allowing amendment of the provisions of the primary Act can, in effect, be amended by regulation. The Committee noted that the Explanatory Memorandum to the Bill offers no justification for the clauses being drafted in this way.

Accordingly, the Committee drew attention to the clauses, as they 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 policy issue raised by the Committee's query relates to which Commonwealth, State, and Territory laws should, or should not, apply to the AOTC. The Government gave careful consideration to this question being conscious of the need to create, as far as possible, a fair basis for the efficient emergence of competition between the AOTC and the new second carrier. It agreed that Commonwealth administrative, defence, security, criminal, and human rights and equal opportunity laws should apply to the AOTC.

The Minister goes on to say:

> However, it was not possible, within the time available, to identify the implications for the AOTC of all Commonwealth legislation which might apply to the company. Accordingly, the Government agreed that I determine in consultation with other Ministers which legislation should apply, and the nature of its application. The outcome of my consultations with my Ministerial colleagues can therefore be implemented readily via the regulation making power.

The Minister concludes by saying:

> I also wish to reiterate that the circumstances under which exemptions from Commonwealth laws will be granted to AOTC are limited. Details were provided in the Explanatory Memorandum and in my Second Reading Speech. Exemptions will only be provided where that exemption raises no significant problems but where the cost to the AOTC of complying with the particular legislation would be particularly onerous and would result in a substantial flow-on to customers; where the introduction of competition would be hampered; or where an exemption is essential in order to satisfy other Government policy objectives.
>
> As any regulations made to give exemptions to the AOTC will be disallowable instruments, the Parliament will be able to satisfy itself that the above criteria have been met or that there is other good reason for the specific exemptions to be granted.

The Committee thanks the Minister for this response and for his assistance with the Bill.

EXPORT CONTROL AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 11 April 1991 by the Minister for Resources.

The Bill proposes to amend the Export Control Act 1982 to make several administrative changes. It also proposes to create two new offences:

(1) an offence of entering goods for export where export conditions have not been complied with; and

(2) an offence of authorised officers receiving goods or services from owners of registered export establishments without the written permission of the Secretary.

The Committee dealt with the Bill in Alert Digest No. 6 of 1991, in which it made various comments. The Minister for Resources responded to those comments in a letter dated 22 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Strict liability offences
Clause 6

In Alert Digest No. 6, the Committee noted that clause 6 of the Bill proposes to insert a new section 7A into the Export Control Act 1982. That proposed new section would make it an offence (punishable by imprisonment for up to five years) for a person to enter goods for export and falsely represent that any conditions or restrictions applicable to the goods have been complied with.

Proposed new subsection 7A(1) deals with cases where the export of 'prescribed goods' is simply prohibited by the regulations, while proposed new subsection 7A(2) deals with prohibitions on the export of 'prescribed goods' to a 'specified' place. The Committee observed that, in each case, the offence created appears to be one of strict liability, as no proof is required that the person knowingly performed the acts constituting the offence. The Committee noted that, indeed, the Explanatory Memorandum to the Bill states:

> It is not a necessary element of the offence that the person intends to export the goods.

The Committee noted that criminal offence provisions normally require proof that the person intended to commit the act or acts constituting the offence. By expressly deleting this mental element (commonly referred to as mens rea), the Committee suggested that the offences are what it would generally regard as strict liability offences.

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

The Minister has responded as follows:

> Proposed section 7A was drafted in this matter to maintain consistency with the existing offence provision of false trade descriptions in section 15 of the *Export Control Act 1982*, which does not specifically require that the offender knows the trade description to be false.
>
> The Attorney-General's Department has advised that 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.

> 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. (eg 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 Minister goes on to say:

> Accordingly, to obtain a conviction under the proposed offence it will be necessary to prove that the offender had an intention to "enter the goods for export". Also it will be necessary to prove that the false representation was made knowingly.

The Minister notes the Committee's reference to the Explanatory Memorandum to the Bill and to the statement that it is not a necessary element of the offence to prove that a person intends to export the relevant goods. The Minister says:

> This statement was included to highlight the distinction between the existing offence of 'intent to export' in section 8 of the *Export Control Act 1982* and the proposed new offence of 'entering for export'. The statement referred to indicates that a person can intend to 'enter goods for export' even if the person has not decided whether the goods are to be exported. This will require persons who use the export inspection system to comply with the requirements of that system.

The Committee thanks the Minister for this response and for his assistance with the Bill.

PETROLEUM (SUBMERGED LANDS) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 8 May 1991 by the Minister for Resources.

The Bill proposes to amend the Petroleum (Submerged Lands) Act 1967, to streamline the operation of the Act in relation to offshore petroleum.

The Committee dealt with the Bill in Alert Digest No. 8 of 1991, in which it made various comments. The Minister for Resources responded to those comments in a letter dated 31 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Delegation of power to 'two persons'
Clause 3

In Alert Digest No. 8, the Committee noted that clause 3 of the Bill proposes to insert new section 8H into the Petroleum (Submerged Lands) Act 1967. Proposed new section 8H would allow a Joint Authority (which, in respect of each relevant State and Territory, consists of the Commonwealth Minister responsible for administering the legislation and the Minister's counterpart in the relevant State or Territory) to delegate its powers under the Act to 'two persons'.

The Committee observed that, under the Act, a Joint Authority has wide-ranging powers, principally concerned with the granting of permits in relation to exploration of the continental shelf. In the light of this, the Committee suggested that it may be considered appropriate that the persons or classes of persons to whom the power can be delegated should be limited.

Accordingly, the Committee drew Senators' attention to the clause, as it may be considered 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:

> There are no provisions at present in the Petroleum (Submerged Lands) Act 1967 (the Act) to allow the Commonwealth Minister or his State/NT counterpart to delegate Joint Authority (JA) powers. However, section 15 of the Act enables the Designated Authority to delegate "generally or as otherwise provided by the instrument of delegation, by writing signed by him" any of his powers under the Act, or its subsidiary Acts or regulations, other than the power to delegate.
>
> The bulk of Ministerial decisions relating to the administration of offshore petroleum operations involve routine procedural matters in which the decision is based on well established administrative guidelines. For example, in 1989/90, in excess of 300 matters arose that required a JA decision under the Act. Of these, 241 related to the approval and registration of legal transactions (eg. transfers and farm-ins) affecting titles. The remaining 73 decisions mainly related to inviting applications for, or granting, titles.

The Minister goes on to say:

> All matters requiring a decision which would deviate from approved policy, irrespective of whether the category of decision had been delegated to officials, are to be retained for Ministerial approval as are all decisions involving the award, renewal or cancellation of titles. The proposed amendment will also ensure that, in the case that there is any disagreement between the two Commonwealth and State officials empowered, the decision will need to be made by the two Ministers comprising the Joint Authority. A senior official responsible for administration of the Act is intended to be the Commonwealth Minister's delegate while a similar

official is expected to act as the State/NT Minister's delegate.

The Minister concludes by saying:

> The amendment will reduce the need for Ministers to be involved in purely administrative matters while ensuring that they retain decision-making powers over all policy matters. The amendment should result in quicker decision-making and therefore savings to industry.
>
> All State and Northern Territory Ministers involved in Joint Authorities support the proposal. Also, the 'joint' nature of the proposed delegation, requiring the concurrence of both State/NT Ministers and the Commonwealth Minister, provides an additional safeguard not available in most other legislation.

The Committee thanks the Minister for this response and for his assistance with the Bill.

SOCIAL SECURITY (JOB SEARCH AND NEWSTART) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 18 April 1991 by the Minister Representing the Minister for Social Security.

The Bill proposes to abolish the unemployment benefit and job search allowance and replace them with two new components:

(1) a short-term job search allowance, available to unemployed persons under 18 years of age and persons over 18 who have been registered as unemployed for less than 12 months; and

(2) a newstart allowance for persons 18 years of age and over who have been registered as unemployed for more than 12 months.

The Committee dealt with the Bill in Alert Digest No. 7 of 1991 in which it made various comments. The Minister for Social Security responded to those comments in a letter dated 30 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Provision of tax file numbers
Clause 7 - proposed new sections 527, 528, 609 and 610

In Alert Digest No. 7, the Committee noted that clause 7 of the Bill proposes to repeal and replace Parts 2.11 and 2.12 of the Social Security Act 1991. The

Committee noted that those new Parts include requirements to provide tax file numbers in relation to job search allowances and newstart allowances. The Committee noted that, in addition, proposed new sections 528 and 610 would require an applicant for such an allowance to provide their partner's tax file number also.

The Committee observed that the provisions are similar in effect to provisions which the Committee has previously drawn attention to, most recently in Alert Digest No. 5 of 1991 in relation to provisions in the Student Assistance Amendment Bill 1991. As the Committee observed at that time, while such provisions may be seen as necessary to prevent persons defrauding the social security system, they may also be considered as unduly intrusive upon a person's privacy. Accordingly, the Committee draws the provisions to Senators' attention as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> The data-matching program is authorised by the Data-matching Program (Assistance and Tax) Act 1990. The collection of TFN's from recipients and partners of recipients of the current job search allowance and unemployment benefit is sanctioned by the Social Security Act 1947 (the 1947 Act). This policy has been carried across into new Parts 2.11 and 2.12 of the Bill for the same reasons as were applicable when the data-matching program was first introduced from 1 January 1991.
>
> Job search allowance and newstart allowance are to be income tested; that is, the rate of payment for which a person is qualified is dependent on what income he or she receives. For members of a couple, the partner's income is also taken into account.

The Minister goes on to say:

> The Government decided some time ago to introduce a data-matching program in which the income information people disclose to paying agencies such as the Department of Social Security is to be checked automatically against the income information they disclose to the Australian Taxation Office (ATO) and other paying agencies. For this to be done efficiently and to prevent persons defrauding the social security system, the TFNs of both the recipient and his or her partner can be required.

The Minister concludes by saying:

> It should also be noted that these provisions would provide an opportunity for my Department to assist many of its clients who currently have problems with TFN provisions. Some individuals, for example, have difficulty in obtaining a TFN because of proof of identity requirements. These provisions would allow my Department to act as agent for the ATO to assist clients who have difficulty in obtaining a TFN by accepting applications on behalf of the ATO and conducting the necessary proof of identity checks. As my Department currently conducts its own proof of identity checks, this would not constitute any increased intrusiveness from the client's point of view. Indeed, disabled people, persons with language difficulties and new entrants to the workforce, eg school leavers, should all find benefit in my Department's involvement in the TFN application process.

The Committee thanks the Minister for this response.

Non-reviewable decisions
Clause 13

In Alert Digest No. 7, the Committee noted that clause 13 of the Bill proposes to amend section 1250 of the Social Security Act 1991. Section 1250 provides that certain decisions under the legislation are not subject to review by the Social Security Appeals Tribunal. The Committee noted that clause 13 proposes to add three further decisions to the list. They are:

a) a decision (pursuant to proposed new subsection 23(4A)) by the Employment Secretary to approve an 'allowance category';

b) a decision (pursuant to proposed new subsection 606(2)) by the Secretary to approve the terms of a Newstart Activity Agreement; and

c) a decision by the Employment Secretary under a provision dealing with the approval of a course or labour market program.

The Committee stated that principle 1(a)(iii) of its terms of reference require it to draw attention to provisions which make personal rights, liberties and/or obligations unduly dependent on non-reviewable decisions. With that in mind, the Committee indicated that it would appreciate some assistance from the Minister on the need for these decisions to be immune from review and the likely impact of such immunity on would-be applicants for review.

The Minister has provided an explanation as to the need for non-reviewability in each case. In relation to clause 13(a), which deals with approvals of allowance categories, the Minister says:

> Clients are normally registered in an "allowance category" called "unemployed awaiting place (UAP)" unless they are not unemployed and merely seeking to change jobs, or seeking part-time or casual work in which case they are registered in the categories of "improved position (IP)" or "other employment (OE)". The UAP category is currently, and will after 1 July 1991 be, an approved category for the purposes of qualification for job search allowance and newstart allowance. The other categories are not approved allowance categories for obvious reasons.
>
> Persons who apply for job search allowance are always registered as "unemployed awaiting placement".

The Minister goes on to say:

> It should also be stressed that the decision to approve an allowance category is one that determines an appropriate type of CES registration relevant for qualification purposes rather than a determination in respect of which category an individual is registered.

The Committee thanks the Minister for this response.

In relation to paragraph 13(b), the Committee indicated that, in particular, it would appreciate the Minister's advice as to the effect which the immunity from review would have in relation to Newstart Activity Agreements under proposed new section 606. The Committee noted that though the proposed new section refers to the arrangement between the Department and the applicant as an 'agreement', it appears that an applicant for a newstart allowance would have no opportunity to negotiate the terms of such an agreement. They could, of course, decline to sign the agreement. However, the Committee noted that this would, presumably, result in the allowance being denied. The Committee sought the Minister's advice as to whether, in fact, an opportunity would exist for an applicant to question the terms of a Newstart Activity Agreement.

The Minister has responded as follows:

> An amendment was moved by the Government in the House of Representatives to omit proposed paragraph 1250(1)(ca) from the Bill. The effect of the Government moved amendment is that the terms of a Newstart Activity Agreement will be subject to review by the SSAT.

The Committee thanks the Minister for this response and notes that the amendment moved in the House addresses the Committee's concerns about the clause.

In relation to the Committee's comments in relation to the proposed non-reviewability of approvals by the Employment Secretary of courses on labour market programs, the Minister says:

> The Employment Secretary is, and has been, responsible for applying labour market program eligibility criteria, approved by the "Employment Minister", which are not currently subject to the Social Security Act 1947 and should not be subject to the 1991 Act.
>
> Courses not approved by the Department of Employment, Education and Training (DEET), although not subject to these eligibility criteria, need to be assessed by the Employment Secretary as likely to improve the person's prospects of obtaining suitable paid work or to assist the person in seeking paid work. Given the expertise of relevant officers of DEET in assessing labour market prospect enhancement capacity, this determination is best made by the Employment Secretary.

The Committee thanks the Minister for this response.

General comment

In Alert Digest No. 7, by way of a general comment, the Committee noted that this Bill seeks to amend a piece of legislation which only passed both Houses of the Parliament on 10 April 1991. The Committee noted that the amendments proposed are both complicated and substantial. Given that a primary object of the Principal Act was to make the social security legislation easier to comprehend, the Committee suggested that it was unfortunate that this piece of amending legislation has been necessary so soon after the passage of the Principal Act.

The Minister has responded as follows:

> The Social Security Act 1991 was introduced into the House of Representatives late in the Budget Sittings 1990 and incorporated a plain English version of the 1947 Act as it stood after the Autumn Sittings 1990.
>
> The Bill gives legislative effect to the Newstart strategy announced in the Treasurer's Economic Statement in February 1990.
>
> I suggest that the timing of the Bill is in fact fortunate in that complicated and substantial provisions contained in the Bill can be presented using the more understandable and better structured format of the 1991 Act.

The Committee thanks the Minister for this response. The Committee welcomes the presentation of the amendments in a more understandable and better structured format and, indeed, commends the efforts of the Minister and his Department in this regard. Nevertheless, it is unfortunate that the effect of the amendments will be to require that two separate pieces of legislation be consulted in order to ascertain the applicable law in certain cases.

TELECOMMUNICATIONS BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to repeal and replace the Telecommunications Act 1989, to provide the general regulatory framework for the provision of telecommunications facilities and services in Australia.

The Committee dealt with the Bill in Alert Digest No. 8 of 1991 in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 27 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' provision
Clause 11

In Alert Digest No. 8, the Committee observed that Division 2 of Part 2 of the Bill deals with the boundaries of telecommunications networks. Clause 11 provides:

> (1) The regulations may make provision for or in relation to:
>
> (a) defining the boundaries of a telecommunications network; or
>
> (b) determining the equipment, lines and other facilities that are to be taken to be beyond, or not beyond, the boundaries of a telecommunications network.
>
> (2) Regulations in force because of subsection (1) have effect despite anything in this Division.

The Committee suggested that the effect of subclause 11(2) is to allow the regulations to amend the operation of provisions in Division 2. The Committee indicated that, as such, it is what it would generally regard as a 'Henry VIII' clause, because it would permit the primary legislation to be amended by subordinate legislation.

The Committee noted that the Explanatory Memorandum offers two reasons for allowing this 'latitude' to the regulations:

> First, network interfaces can be technical complex [sic], involving rapidly changing technology. In such circumstances, it may become necessary to modify the application of the provisions, or to create new classes of end facilities.
>
> The second reason for the latitude in regulation making power is to enable effect to be given to the Government's decision announced by the Minister for Transport and Communications on 17 April 1991 that from 1 July 1993 the [network termination point] would be the property boundary.

The Committee indicated that it was puzzled by the second limb of the justification. The Committee suggested that, if it had interpreted the statement correctly, the clause was necessary in order to provide a mechanism in the Bill to enable the amendment of the Bill in two years time, in order to give effect to an initiative which is to operate from that time. That being so, the Committee stated that it found it difficult to understand why such an amendment could not be effected by primary legislation rather than by regulation. Accordingly, the Committee sought some clarification from the Minister on the matter.

The Minister has responded as follows:

> The Government has announced (see my attached press release of 17 April 1991) that from 1 July 1993 it intends the network boundary for new telephone services to be the property boundary, unless the customer contracts with a licensed carrier to supply an alternative NTP within the property.
>
> However, it is not possible to include the alternative formulation in the legislation at this stage since placing the network boundary at the property boundary is likely to be a complex technical matter.

The Minister goes on to say:

> In the event that implementation of the 1993 decision leads to a total conceptual reworking of the approach in the bill towards network boundaries, I agree that it would be appropriate to seek amendment of the primary legislation. However, at this stage, I consider that a regulation-based approach provides the right balance between flexibility and Parliamentary oversight. It may be, for instance, that giving effect to the decision only involves some technical additions to the framework of the existing provisions, particularly given that the decision only relates to new services with little practical effect on the great majority of existing subscribers.

The Minister concludes by saying:

> In any case, the first element of the explanation given in the Explanatory memorandum still applies and, in my view, provides sufficient justification by itself for a significant regulation-making power in this area.

The Committee thanks the Minister for this response.

Non-reviewable decisions
Clauses 57 and 60

In Alert Digest No. 8, the Committee noted that clause 56 of the Bill provides that an eligible corporation (as defined) may apply to the Minister for a general telecommunications licence or a public mobile licence. Clause 57 would allow the Minister to either grant a licence or to refuse or defer an application. Subclause 57(1)(b) would give the Minister an 'absolute discretion' to either grant a licence or refuse an application. Further, subclause 57(3) provides:

> Despite any other law, the Minister need not give reasons for a decision under this section.

The Committee noted that the Explanatory Memorandum acknowledges that this clause excludes the operation of section 13 of the Administrative Decisions (Judicial Review) Act 1977, which, in certain circumstances, gives individuals a right to obtain reasons for decisions made that affect them.

The Committee noted that, similarly, clause 60, which deals with applications to transfer a licence, would give the Minister an 'absolute discretion' to either grant or refuse such an application. Subclause 60(4) also provides that the Minister need not give reasons for such a decision.

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

The Minister has responded as follows:

> As the Committee notes, clauses 57 and 60 do grant the Minister a wide discretion in the grant and transfer of

carrier licences. There are several reasons for this.

First, the grant of carrier licences is likely to be a long and complex process. The grant of one of the licences is linked closely to the sale of AUSSAT which involves a lengthy tender process. It would introduce a great deal of additional uncertainty and complexity into (and therefore jeopardise the successful completion of) that process if Ministerial decisions on the grant of licences were likely to be open to anything other than judicial review.

Second, the licensing of new carriers is related closely to the Government's objective of establishing network competition as quickly as possible. If the Minister's licensing decisions were open to full review on their merits, this might slow down significantly network rollout by a newly selected carrier, until the selected carrier was satisfied that the review processes had run their course.

Third, when network competition has been more firmly established, licensing decisions should become more "normal". The bill contemplates the possibility of licensing decisions ultimately being delegated to AUSTEL (clause 61). Where AUSTEL exercises a delegated licensing power, AUSTEL does not have the same protection from scrutiny of its decisions.

The Committee thanks the Minister for this response and for his assistance with the Bill.

TELECOMMUNICATIONS (NUMBERING FEES) BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to provide for the payment of fees in relation to the allocation of numbers for public telecommunications services.

The Committee dealt with the Bill in Alert Digest No. 8 of 1991 in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 27 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Fees for allocation of 'special numbers'
- inappropriate delegation of legislative power
Clauses 5 and 7

In Alert Digest No. 8, the Committee noted that clause 5 of the Bill provides:

> There is payable to the Commonwealth, by a person to whom a number is to be allocated under section 242 of the Telecommunications Act 1991, in respect of the allocation of that number, the additional fee (if any) worked out as set out in the regulations.

The Committee noted that while the heading to the clause is 'Fees for allocation of "special" numbers', there did not appear to be anything in the body of the Bill to prevent the application of an additional fee to all subscribers. In this context, the Committee noted that, pursuant to subsection 13(3) of the Acts Interpretation Act 1901, a heading is not a part of an Act.

In relation to this clause, the Explanatory Memorandum states:

> This clause allows for the determination under the regulations of an additional fee for the allocation by AUSTEL of a number under section 242 of the Telecommunications Act 1991. Where an additional fee for a number is to be determined or worked out in accordance with the procedure set out in the regulations that additional fee is payable to the Commonwealth by a person to whom the number is allocated by AUSTEL under section 242 of the Telecommunications Act 1991.

The Minister's Second Reading speech on the Bill states:

> The bill provides for different levels of fees to be charged for ordinary and 'special' numbers.

The Committee suggested that, while they are not part of the Bill, the heading, the Explanatory Memorandum and the Minister's Second Reading speech could, of course, be used as extrinsic aids to the interpretation of the provision pursuant to section 15AB of the Acts Interpretation Act. That section provides that if

> (i) [a] provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of [a] provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable,

certain 'extrinsic material' can be used to help determine the meaning of the provision. The heading, the Explanatory Memorandum and the Second Reading speech are all explicitly contemplated as extrinsic aids to the interpretation of a provision (see subsection 15AB(2), especially paragraphs (a), (e) and (f)). The Committee suggested, however, while this provision might assist a subscriber who attempted to challenge the imposition of an additional fee in respect of an

'ordinary' number, it seems preferable that the intent of the provision be manifested in the legislation itself.

In this regard, the Committee noted that clause 7 of the Bill would, if enacted, allow the Governor-General to make regulations for the purposes of clause 5. The Committee noted that, among other things, these regulations can fix fees for the purposes of that clause. The Committee also noted that, unlike clause 6, which sets a limit of $2000 on fees to be fixed by regulation for allocation of 'ordinary' numbers pursuant to clause 4, there is no limit on the fee that can be set for a 'special' number. The Committee indicated that, as such, this was what it would generally regard as an inappropriate delegation of legislative power, as it would give an unfettered discretion to the Governor-General (acting with the advice of the Executive Council) as to the level of the fees to be set.

Given the uncertainty which the Committee had identified concerning the operation of clause 5, it drew Senators' attention to the provisions, as they may involve 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 reason behind the flexible approach taken, rather than spelling out precise details in the Bill, is that at this stage it is not known precisely how any special numbers will be allocated. There are no clear precedents in other countries which can provide guidance. It is intended that the regulations will be used to specify the types of numbers to be regarded as special. The Senate will therefore for have the opportunity to comment on the regulations when they come before it.

In relation to the application of the additional fee, the Minister has responded as follows:

> Such an additional fee can only be imposed by regulations, which will be subject to Parliamentary disallowance.
>
> Under clause 7(2), regulations may fix a fee by way of a premium for particular numbers or classes of numbers, but this provision does not allow a premium to be fixed for all numbers. The regulations may also provide for a tender process or public auction to work out an additional fee. Clearly, any such process would be quite unsuitable for the allocation of numbers for all subscribers, and would only work in the context of allocating special numbers.
>
> AUSTEL has established a Numbering Advisory Committee which is currently developing a national numbering plan. This Committee will also advise on methods for allocating numbers. Regulations for levying numbering fees will not commence until the national numbering plan is put into place. The Bill provides for the mechanisms for setting fees to be set out in regulations so that the rules which are developed will be able to take account of advice that will be obtained from AUSTEL.

The Minister goes on to say:

> It is likely that special numbers will be numbers which are not allocated on a routine basis. They would include numbers which have some intrinsic value, such as being easy to remember, as well as numbers which may be specially requested by a customer because of some particular characteristics specific to the subscriber's requirements.
>
> Clause 7(2)(b) specifically provides for an open market to operate in determining the fees for special numbers by a tender process or public auction. It is anticipated that the process will allow customers to apply for special numbers

> but at this stage the amount they maybe willing to pay is not known. A commercial company, for example, may be willing to invest highly in having a customised telephone number which gives it advantage over its competitor in telephone access, e.g. TAXI100.

The Minister concludes by saying:

> [N]o ceiling has been set for fees because the market is presently untested. Regulations will provide for a premium to be applied to particular numbers of classes of numbers and how those fees will be worked out using the results of a tender process or public auction. The Senate would be able to disallow the regulations if it found these regulations inadequate.

The Committee thanks the Minister for his response and for his assistance with the Bill.

TELECOMMUNICATIONS (UNIVERSAL SERVICE LEVY) BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to impose a levy on certain telecommunications carriers as a contribution to the costs of fulfilling the universal service obligation (as provided in clause 288 of the Telecommunications Bill 1991).

The Committee dealt with the Bill in Alert Digest No. 8 of 1991, in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 27 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Subclause 4(1)

In Alert Digest No. 8, the Committee noted that subclause 4(1) of the Bill provides:

> The Minister may, by notice published in the *Gazette*, declare a specified carrier to be a participating carrier.

The Committee noted that designation as a 'participating carrier' involves the payment of the Universal Service Levy, which may be regarded as a form of taxation. The Committee suggested that, if this was the case, then designation as a 'participating carrier' might be a matter which is more appropriately the subject of scrutiny by the Parliament rather than something which should simply be notified in the *Gazette*. The Committee suggested that notices designating a person as a

'participating carrier' might, therefore, properly be instruments that should be subject to tabling in and disallowance by the Parliament.

Accordingly, the Committee drew Senators' attention to the provision as it may be considered 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 intention of the Universal Service Levy arrangements is that neither of the general carriers should be unnecessarily advantaged or disadvantaged in the new competitive environment. The Levy is an administrative means of ensuring that the second carrier contributes proportionately to the costs of providing reasonable and equitable access to basic telecommunications services, for the benefit of all Australians.

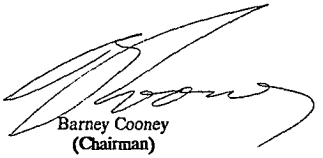
The Minister goes on to say:

> By becoming a licensed general carrier in the duopoly environment, the second carrier will have a right to compete with Telecom and provide a range of services. The limited number of suppliers will mean that it will have an advantaged position in the market. With a right of entry to the market, therefore, should also come the obligation to contribute to the net costs of any loss-making services provided as a result of the Government's universal service policy.
>
> The Universal Service Levy is therefore more in the nature of an obligation that arises because of the opportunity that is being conferred on the second carrier.
>
> It is clear that both Telecom/OTC and the second carrier will be declared as participating carriers once the duopoly arrangements commence. In the circumstances, it would be unnecessary to make this declaration disallowable by Parliament, when the intention is straightforward.

The Minister concludes by saying:

> I give a clear undertaking to the Committee that both Telecom/OTC and the second carrier will be declared to be participating carriers under this provision, in line with the Government's policy intention.

The Committee thanks the Minister for this response and for his assistance with the Bill.



Barney Cooney
(Chairman)

Minister for Transport and Communications

The Hon. Kim C Beazley
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Leader of the House of Representatives
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27 MAY 1991

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

Dear Senator Cooney,

I refer to the letter of 16 May 1991 from the Secretary to your Committee concerning the package of Telecommunications legislation that I introduced into the House of Representatives on 7 May 1991.

The following addresses the main issues on which the Committee has requested clarification or which the Committee has drawn particularly to Senators' attention.

TELECOMMUNICATIONS BILL 1991

Clause 11

The Committee requested clarification of the second reason given in the Explanatory Memorandum for the latitude given to the regulation making power for the network termination point (NTP).

The Government has announced (see my attached press release of 17 April 1991) that from 1 July 1993 it intends the network boundary for new telephone services to be the property boundary, unless the customer contracts with a licensed carrier to supply an alternative NTP within the property.

However, it is not possible to include the alternative formulation in the legislation at this stage since placing the network boundary at the property boundary is likely to be a complex technical matter.

In the event that implementation of the 1993 decision leads to a total conceptual reworking of the approach in the bill towards network boundaries, I agree that it would be appropriate to seek amendment of the primary legislation. However, at this stage, I consider that a regulation-based approach provides the right balance between flexibility and Parliamentary oversight. It may be, for instance, that giving effect to the decision only involves some technical additions to the framework of the existing provisions,

particularly given that the decision only relates to new services with little practical effect on the great majority of existing subscribers.

In any case, the first element of the explanation given in the Explanatory Memorandum still applies and, in my view, provides sufficient justification by itself for a significant regulation-making power in this area.

Clauses 57 and 60

As the Committee notes, clauses 57 and 60 do grant the Minister a wide discretion in the grant and transfer of carrier licences. There are several reasons for this.

First, the grant of carrier licences is likely to be a long and complex process. The grant of one of the licences is linked closely to the sale of AUSSAT which involves a lengthy tender process. It would introduce a great deal of additional uncertainty and complexity into (and therefore jeopardise the successful completion of) that process if Ministerial decisions on the grant of licences were likely to be open to anything other than judicial review.

Second, the licensing of new carriers is related closely to the Government's objective of establishing network competition as quickly as possible. If the Minister's licensing decisions were open to full review on their merits, this might slow down significantly network rollout by a newly selected carrier, until the selected carrier was satisfied that the review processes had run their course.

Third, when network competition has been more firmly established, licensing decisions should become more "normal". The bill contemplates the possibility of licensing decisions ultimately being delegated to AUSTEL (clause 61). Where AUSTEL exercises a delegated licensing power, AUSTEL does not have the same protection from scrutiny of its decisions.

TELECOMMUNICATIONS (UNIVERSAL SERVICE LEVY) BILL 1991

Clause 4 - declaration of participating carrier

Under subclause 4 (1), "the Minister may, by notice published in the Gazette, declare a specified carrier to be a participating carrier".

The intention of the Universal Service Levy arrangements is that neither of the general carriers should be unnecessarily advantaged or disadvantaged in the new competitive environment. The Levy is an administrative means of ensuring that the second carrier contributes proportionately to the costs of providing reasonable and equitable access to basic telecommunications services, for the benefit of all Australians.

By becoming a licensed general carrier in the duopoly environment, the second carrier will have a right to compete with Telecom and provide a range of services. The limited number of suppliers will mean that it will have an advantaged position in the market. With a right of entry to the market, therefore, should also come the obligation to contribute to the net costs of any loss-making services provided as a result of the Government's universal service policy.

The Universal Service Levy is therefore more in the nature of an obligation that arises because of the opportunity that is being conferred on the second carrier.

It is clear that both Telecom/OTC and the second carrier will be declared as participating carriers once the duopoly arrangements commence. In the circumstances, it would be unnecessary to make this declaration disallowable by Parliament, when the intention is straightforward.

I give a clear undertaking to the Committee that both Telecom/OTC and the second carrier will be declared to be participating carriers under this provision, in line with the Government's policy intention.

AUSTRALIAN AND OVERSEAS TELECOMMUNICATIONS CORPORATION BILL 1991

Definition of "authorised person", clause 3

The Committee considers that the definition in the Bill may give rise, in the operation of Clause 25 (Exemption from taxes and charges) to an inappropriate delegation of legislative power. The Committee's concern needs to be viewed against the probability of a certification needing to be provided. The need to have a matter formally certified as an exempt matter would only arise if there were to be a dispute between the AOTC and a taxing authority over whether a matter is related to the operation of, or the giving effect to, Part 4 of the Bill (AOTC to be successor of Telecom and OTC).. I expect that as the Parliament's intention in providing an exemption from certain Commonwealth, State, and Territory taxes in relation to the merging of Telecom and OTC is clearly expressed, the probability of a dispute arising is extremely low.

In this regard, you may wish to note that clause 25 is cast in similar terms to sections 33 and 34 of the OTC Act 1946, inserted by section 16 of the OTC (Conversion into Public Company) Act 1988. My Department advises that no instrument declaring a person to be authorised was made under those provisions and, in fact, it has never been necessary to specify anything as an exempt matter under those provisions as no disputes have arisen.

Nevertheless, if a dispute did arise between the AOTC and a taxing authority, I would not envisage exercise of the certifying power other than by myself or the Secretary of my Department.

I would also point out that the way Clause 25 is structured means that the tax exemptions are not open-ended. Clearly the further in time from the succession date the less sustainable the argument that a matter is associated with the succession process. Consequently, the Committee need not be concerned that any delegation of power will be open-ended.

Clauses 24 and 27

The Committee considers that the regulation making power under these two clauses could result in the primary Act being amended and that this constitutes an inappropriate delegation of legislative power. The policy issue raised by the Committee's query relates to which Commonwealth, State, and Territory laws should, or should not, apply to the AOTC. The Government gave careful consideration to this question being conscious of the need to create, as far as possible, a fair basis for the efficient emergence of competition between the AOTC and the new second carrier. It agreed that Commonwealth administrative, defence, security, criminal, and human rights and equal opportunity laws should apply to the AOTC.

However, it was not possible, within the time available, to identify the implications for the AOTC of all Commonwealth legislation which might apply to the company. Accordingly, the Government agreed that I determine in consultation with other Ministers which legislation should apply, and the nature of its application. The outcome of my consultations with my Ministerial colleagues can therefore be implemented readily via the regulation making power.

I also wish to reiterate that the circumstances under which exemptions from Commonwealth laws will be granted to AOTC are limited. Details were provided in the Explanatory Memorandum and in my Second Reading Speech. Exemptions will only be provided where that exemption raises no significant problems but where the cost to the AOTC of complying with the particular legislation would be particularly onerous and would result in a substantial flow-on to customers; where the introduction of competition would be hampered; or where an exemption is essential in order to satisfy other Government policy objectives.

As any regulations made to give exemptions to the AOTC will be disallowable instruments, the Parliament will be able to satisfy itself that the above criteria have been met or that there is other good reason for the specific exemptions to be granted.

TELECOMMUNICATIONS (NUMBERING FEES) BILL 1991

Clauses 5 and 7 of the Telecommunications (Numbering Fees) Bill have been criticised in the Committee's Digest for giving rise to inappropriate delegation of legislative power.

The reason behind the flexible approach taken, rather than spelling out precise details in the Bill, is that at this stage it is not known precisely how any special numbers will be allocated. There are no clear precedents in other countries which can provide guidance. It is intended that the regulations will be used to specify the types of numbers to be regarded as special. The Senate will therefore have the opportunity to comment on the regulations when they come before it.

The Committee has also raised a concern that there is nothing in the Bill to prevent the application of an additional fee to all subscribers. Such an additional fee can only be imposed by regulations, which will be subject to Parliamentary disallowance.

Under clause 7(2), regulations may fix a fee by way of a premium for particular numbers or classes of numbers, but this provision does not allow a premium to be fixed for all numbers. The regulations may also provide for a tender process or public auction to work out an additional fee. Clearly, any such process would be quite unsuitable for the allocation of numbers for all subscribers, and would only work in the context of allocating special numbers.

AUSTEL has established a Numbering Advisory Committee which is currently developing a national numbering plan. This Committee will also advise on methods for allocating numbers. Regulations for levying numbering fees will not commence until the national numbering plan is put into place. The Bill provides for the mechanisms for setting fees to be set out in regulations so that the rules which are developed will be able to take account of advice that will be obtained from AUSTEL.

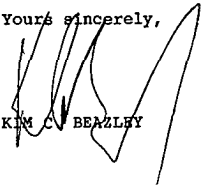
It is likely that special numbers will be numbers which are not allocated on a routine basis. They would include numbers which have some intrinsic value, such as being easy to remember, as well as numbers which may be specially requested by a customer because of some particular characteristics specific to the subscriber's requirements.

Clause 7(2)(b) specifically provides for an open market to operate in determining the fees for special numbers by a tender process or public auction. It is anticipated that the process will allow customers to apply for special numbers but at this stage the amount they may be willing to pay is not known. A commercial company, for example, may be willing to invest highly in having a customized telephone number which gives it advantage over its competitor in telephone access, e.g. TAXI100.

In conclusion, no ceiling has been set for fees because the market is presently untested. Regulations will provide for a premium to be applied to particular numbers or classes of numbers and how those fees will be worked out using the results of a tender process or public auction. The Senate would be able to disallow the regulations if it found these regulations inadequate.

I am sending a copy of this letter to the Secretary of your Committee

Yours sincerely,



KIM C BEAZLEY

MINISTER FOR TRANSPORT AND COMMUNICATIONS

Kim C Beazley, MP

NEWS RELEASE

18A/91
17 April 1991

KEY DECISIONS MADE ON COMPETITION IN TELECOMMUNICATIONS

Several key decisions by the Government clarifying the competitive environment in which Telecom/OTC and the second telecommunications carrier based on AUSSAT will operate, were announced today by the Minister for Transport and Communications, Mr Kim Beazley.

"Potential second carriers will be able to assess their proposed investments in a proper manner as a result of these decisions which clearly demonstrate the legislative and policy framework for the competitive arrangements," Mr Beazley said.

Mr Beazley said the Government had agreed to new price cap arrangements to ensure that the average real price of Telecom/OTC's basic telephone services continued to fall.

"The new arrangements will apply for 3 years from 1 July 1992 and will result in the average price for most services falling in real terms by at least 5.5% per annum, compared with the present 4%," Mr Beazley said.

Furthermore individual price caps of CPI minus 2% for connections, rentals and local calls (rental and local calls are currently subject to an upward price movement of CPI) combined and CPI minus 5.5% for trunk calls and international calls will also apply.

"The new price cap will give effect to the Government's promise that costs for basic telecommunications services will be reduced for both residential and business customers", Mr Beazley said.

"Furthermore, the Government will, through licensing conditions, oblige both carriers to offer residential customers continued access to non-timed local calls."

/2.

"While inflation continues to fall, the new price cap means that telephone users could see their telephone bills actually decline next year compared with general price levels."

Mr Beazley said the Government had also confirmed that Telecom's exclusive right to supply first telephones would cease on 30 June 1991. This meant that telephone subscribers would then be free to have a telephone handset of their choice and not be restricted to choosing one supplied by Telecom.

"There will be a $30.00 reduction in annual rental charges and a $43.00 discount for the once only connection fee payable where a subscriber decides not to take a handset from Telecom/OTC," Mr Beazley said.

Telecom/OTC would retain the right, along with the second carrier when established, to install telecommunications facilities up to the first telephone wall socket for single line premises. For multi-line installations, this right would extend up to the main distribution frame. This arrangement will apply for the period up to 30 June 1993.

From 1 July 1993, the network termination point for new telephone services will be the property boundary, unless the customer contracts with a licensed carrier to supply an alternative network termination point within the property.

Mr Beazley said the decision on these rights did not diminish Telecom/OTC's obligation to provide and maintain basic telephone services throughout Australia. Telecom/OTC would still be required to offer a complete standard service to customers unable to use a competitor's services or choosing not to do so.

Mr Beazley said that Telecom/OTC would be required to produce a comprehensive White Pages directory incorporating the second carrier's subscribers. The merged carriers would also provide an integrated directory assistance service based on listings in the consolidated White Pages.

"Publication of Yellow Pages-type directories will continue to be on a competitive basis," he said.

Arrangements for the management and control of directory services will be reviewed by the Department of Transport and Communications before the general carrier duopoly expires in 1997.

/3.

The Minister said the Government had decided that the merged entity would be an incorporated company under the Corporations Code and would not be regarded as a public authority, instrumentality or agency of the Crown, or as being incorporated for a public purpose or for a purpose of the Commonwealth.

"Other than the arrangements announced today, this will ensure that Telecom/OTC is not entitled to any immunity privilege of the Commonwealth, unavailable to a private sector competitor," he said.

Telecom/OTC will remain subject to the Commonwealth Ombudsman, pending the introduction of a telecommunications industry ombudsman, planned for 1 January 1993 or earlier.

In similar fashion, administrative law/defence, security and criminal law, human rights and equal opportunity law, and privacy law will apply to the new body, subject to a review in 1993, or earlier if requested by the Telecom/OTC Board.

The Minister said the Government had also decided that the carriers would operate with only those powers and immunities considered essential to enable effective competition to be established as quickly as possible.

Carriers will not be given immunity from suit, and issues of excluding or limiting liability are to be determined by normal contractual arrangements.

"In addition, AUSTEL will be empowered to set ceilings on the liability of carriers in such matters as negligence or defamation. For example, because of the lack of control carriers have over the use of their facilities, a limit might be set on the damages a user could claim for consequential economic loss."

Minister's Office -
Contact Officer: Mr Gary O'Neill (06) 277 7200

MINISTER FOR RESOURCES

The Hon. Alan Griffiths, MP

22 MAY 1991

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

Dear Senator Cooney

In the Scrutiny of Bills Alert Digest No. 6 of 1991 the Committee drew the attention of Senators to proposed section 7A included in clause 6 of the Export Control Amendment Bill because it appears to introduce a strict liability offence.

Proposed section 7A was drafted in this manner to maintain consistency with the existing offence provision of false trade descriptions in section 15 of the *Export Control Act 1982*, which does not specifically require that the offender knows the trade description to be false.

The Attorney-General's Department has advised that 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.

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. (eg 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.)

Accordingly, to obtain a conviction under the proposed offence it will be necessary to prove that the offender had an intention to "enter the goods for export". Also it will be necessary to prove that the false representation was made knowingly.

The Committee specifically drew attention to the Explanatory Memorandum to the Bill where it states:

> "It is not a necessary element of the offence that the person intends to export the goods."

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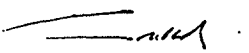
This statement was included to highlight the distinction between the existing offence of 'intent to export' in section 8 of the *Export Control Act 1982* and the proposed new offence of 'entering for export'. The statement referred to indicates that a person can intend to 'enter goods for export' even if the person has not decided whether the goods are to be exported. This will require persons who use the export inspection system to comply with the requirements of that system.

I hope that this information is of assistance to you.

Yours sincerely



Alan Griffiths

MINISTER FOR RESOURCES

The Hon. Alan Griffiths, MP

31 MAY 1991

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 Scrutiny of Bills Alert Digest No 8 of 1991 concerning the Petroleum (Submerged Lands) Amendment Bill 1991.

There are no provisions at present in the Petroleum (Submerged Lands) Act 1967 (the Act) to allow the Commonwealth Minister or his State/NT counterpart to delegate Joint Authority (JA) powers. However, section 15 of the Act enables the Designated Authority to delegate, "generally or as otherwise provided by the instrument of delegation, by writing signed by him" any of his powers under the Act, or its subsidiary Acts or regulations, other than the power to delegate.

The bulk of Ministerial decisions relating to the administration of offshore petroleum operations involve routine procedural matters in which the decision is based on well established administrative guidelines. For example, in 1989/90, in excess of 300 matters arose that required a JA decision under the Act. Of these, 241 related to the approval and registration of legal transactions (eg. transfers and farm-ins) affecting titles. The remaining 73 decisions mainly related to inviting applications for, or granting, titles.

All matters requiring a decision which would deviate from approved policy, irrespective of whether the category of decision had been delegated to officials, are to be retained for Ministerial approval as are all decisions involving the award, renewal or cancellation of titles. The proposed amendment will also ensure that, in the case that there is any disagreement between the two Commonwealth and State officials empowered, the decision will need to be made by the two Ministers comprising the Joint Authority. A senior official responsible for administration of the Act is intended to be the Commonwealth Minister's delegate while a similar official is expected to act as the State/NT Minister's delegate.

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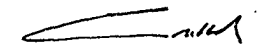
The amendment will reduce the need for Ministers to be involved in purely administrative matters while ensuring that they retain decision-making powers over all policy matters. The amendment should result in quicker decision-making and therefore savings to industry.

All State and Northern Territory Ministers involved in Joint Authorities support the proposal. Also, the 'joint' nature of the proposed delegation, requiring the concurrence of both State/NT Ministers and the Commonwealth Minister, provides an additional safeguard not available in most other legislation.

Yours sincerely



Alan Griffiths

RECEIVED
30 MAY 1991
Senate Standing Cttee for the Scrutiny of Bills

COMMONWEALTH OF AUSTRALIA

MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

30 MAY 1991

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

Dear Senator Cooney

On 8 May 1991, your Committee's Secretary drew attention to the comments on the Social Security (Job Search and Newstart) Amendment Bill 1991 (the Bill) in its Alert Digest No 7 of 1991.

Clause 7 - proposed new sections 527, 528, 609 and 610 : Provision of tax file numbers

The Committee expressed concern that new Parts 2.11 and 2.12 of the Social Security Act 1991 (the Act) include requirements that a person provide to the Secretary his or her tax file number (TFN) and that of the person's partner as a condition of payment of job search allowance or newstart allowance. The Committee commented that, while such provisions may be seen as necessary to prevent persons defrauding the social security system, they may also be considered as unduly intrusive upon a person's privacy.

The data-matching program is authorised by the Data-matching Program (Assistance and Tax) Act 1990. The collection of TFN's from recipients and partners of recipients of the current job search allowance and unemployment benefit is sanctioned by the Social Security Act 1947 (the 1947 Act). This policy has been carried across into new Parts 2.11 and 2.12 of the Bill for the same reasons as were applicable when the data-matching program was first introduced from 1 January 1991.

Job search allowance and newstart allowance are to be income tested; that is, the rate of payment for which a person is qualified is dependent on what income he or she receives. For members of a couple, the partner's income is also taken into account.

The Government decided some time ago to introduce a data-matching program in which the income information people disclose to paying agencies such as the Department of Social Security is to be checked automatically against the income information they disclose to the Australian Taxation Office (ATO) and other paying agencies. For this to be done efficiently and to prevent persons defrauding the social security system, the TFNs of both the recipient and his or her partner can be required.

It should also be noted that these provisions would provide an opportunity for my Department to assist many of its clients who currently have problems with TFN provisions. Some individuals, for example, have difficulty in obtaining a TFN because of proof of identity requirements. These provisions would allow my Department to act as agent for the ATO to assist clients who have difficulty in obtaining a TFN by accepting applications on behalf of the ATO and conducting the necessary proof of identity checks. As my Department currently conducts its own proof of identity checks, this would not constitute any increased intrusiveness from the client's point of view. Indeed, disabled people, persons with language difficulties and new entrants to the workforce, eg school leavers, should all find benefit in my Department's involvement in the TFN application process.

Clause 7 - proposed new sections 576 and 659 ; Abrogation of privilege against self-incrimination

The Committee commented on the notification provisions in sections 574 and 575 and sections 657 and 658 (applicable to job search allowance and newstart allowance respectively) and how subsections 576(1) and 659(1) have the effect of not excusing persons from providing information under the notification sections on the ground that the information provided would tend to incriminate them. The Committee indicated that these provisions would generally be regarded as an abrogation of the privilege against self incrimination.

The Committee acknowledged, however, that such information is not admissible in evidence against a person in criminal proceedings other than proceedings arising under, or as a result, of certain provisions in sections 574, 575, 657 and 658.

As the Committee previously accepted the form of these provisions, I note that the Committee has chosen to make no further comment on this issue.

Clause 13 : Non-reviewable decisions

The Committee drew attention to clause 13 of the Bill which proposes to amend section 1250 of the Act to add further decisions to the list of decisions which are not subject to review by the Social Security Appeals Tribunal (SSAT). These additional decisions are as follows:

- a decision by the Employment Secretary to approve an allowance category under subsection 23(4A);
- a decision by the Secretary to approve the terms of a Newstart Activity Agreement that is in force (section 606); and
- a decision by the Employment Secretary to approve a course or labour market program.

I note that making these decisions non-reviewable led the Committee to question whether personal rights, liberties or obligations are made unduly dependent on non-reviewable decisions.

The Committee sought comments on the need for these decisions to be immune from review and the likely impact of such immunity on applicants. The Committee was particularly concerned with the non-reviewability of decisions under section 606 relating to the terms of a Newstart Activity Agreement that is in force.

Comments on clause 13(a) - approval of allowance category

Clients are normally registered in an "allowance category" called "unemployed awaiting placement (UAP)" unless they are not unemployed and merely seeking to change jobs, or seeking part-time or casual work in which case they are registered in the categories of "improved position (IP)" or "other employment (OE)". The UAP category is currently, and will after 1 July 1991 be, an approved category for the purposes of qualification for job search allowance and newstart allowance. The other categories are not approved allowance categories for obvious reasons.

Persons who apply for job search allowance are always registered as "unemployed awaiting placement".

It should also be stressed that the decision to approve an allowance category is one that determines an appropriate type of CES registration relevant for qualification purposes rather than a determination in respect of which category an individual is registered.

Comments on clause 13(b) - insertion of new paragraph 1250(1)(ca)

The Committee's comments in relation to the non-appellability of the terms of a completed Newstart Activity Agreement have been noted.

An amendment was moved by the Government in the House of Representatives to omit proposed paragraph 1250(1)(ca) from the Bill. The effect of the Government moved amendment is that the terms of a Newstart Activity Agreement will be subject to review by the SSAT.

Comments on clause 13(b) - insertion of new paragraph 1250(1)(cb)

The Employment Secretary is, and has been, responsible for applying labour market program eligibility criteria, approved by the "Employment Minister", which are not currently subject to the Social Security Act 1947 and should not be subject to the 1991 Act.

Courses not approved by the Department of Employment, Education and Training (DEET), although not subject to these eligibility criteria, need to be assessed by the Employment Secretary as likely to improve the person's prospects of obtaining suitable paid work or to assist the person in seeking paid work. Given the expertise of relevant officers of DEET in assessing labour market prospect enhancement capacity, this determination is best made by the Employment Secretary.

General comment

The Committee suggested that it is unfortunate that the complicated and substantial provisions in the Bill are being implemented so soon after the plain English 1991 Act, which was intended to make social security legislation easier to comprehend, was passed through both Houses of Parliament.

The Social Security Act 1991 was introduced into the House of Representatives late in the Budget Sittings 1990 and incorporated a plain English version of the 1947 Act as it stood after the Autumn Sittings 1990.

The Bill gives legislative effect to the Newstart strategy announced in the Treasurer's Economic Statement in February 1990.

I suggest that the timing of the Bill is in fact fortunate in that complicated and substantial provisions contained in the Bill can be presented using the more understandable and better structured format of the 1991 Act.

Yours sincerely

Graham Richardson

GRAHAM RICHARDSON

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TENTH REPORT

OF

1991

19 JUNE 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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 1991

The Committee has the honour to present its Tenth Report of 1991 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:

Courts (Mediation and Arbitration) Bill 1991

Fisheries Management Bill 1991

Great Barrier Reef Marine Park Amendment Bill 1991

Migration Amendment Bill 1991

Proceeds of Crime Legislation Amendment Bill 1991

COURTS (MEDIATION AND ARBITRATION) BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Attorney-General.

The Bill proposes to amend the Family Law Act 1975 and Federal Court Act 1976, in order to facilitate alternative dispute resolution in those courts.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991 of 5 June 1991, in which it made various comments. The Attorney-General responded to those comments in a letter dated 18 June 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clause
Clause 4

In Alert Digest No. 10, the Committee noted that clause 4 of the Bill proposes to add various definitions to the interpretation section of the Family Law Act 1975 (section 4). One of those proposed new definitions is set out as follows:

> **'Part VIII proceedings'** means proceedings under Part VIII for orders with respect to spousal maintenance or the property of parties to a marriage, but does not include any proceedings specified in the regulations for the purposes of this definition.

The Committee suggested that this meant that, in effect, the definition set out in the primary legislation would be able to be amended by regulation. The Committee

indicated that, as a result, this is what it would generally regard as a 'Henry VIII' clause.

The Committee noted that the Explanatory Memorandum to the Bill states:

> Regulations will be made to exclude proceedings such as proceedings for the approval of a maintenance agreement under section 87 of the [Family Law] Act.

The Committee stated that its in principle objection to the use of 'Henry VIII' clauses was not removed by this explanation. The Committee suggested that if the intention was for proceedings under section 87 of the Family Law Act to be excluded from the definition, then those proceedings should be included in the definition contained in the Bill. Indeed, in the light of the explanation referred to, the Committee sought the Attorney-General's advice as to why this was not included in the definition. The Committee indicated that it would also be of assistance if some indication could be given as to what other proceedings might be excluded from the definition by the regulations.

The Committee drew Senators' attention to the clause, as it might be considered 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 legislation is to provide a legislative framework upon which a pilot program of court-annexed and private arbitration of family law matters can operate. For this reason, it is desirable that there be flexibility in determining which matters may be arbitrated and a capacity to respond promptly to any inappropriate use of arbitration.
>
> I have identified some matters which should not be the

subject of arbitration, such as proceedings in relation to the approval of maintenance agreements or for the registration of such agreements. I was faced with specifying those matters which have been identified in the legislation, but leaving a further unidentified class of proceedings either to be specified in regulations or not to be dealt with at all. On balance it is my view that it is preferable to specify all matters in the regulations.

The matters identified as being inappropriate for arbitration are proceedings arising under sections 85, 86 or 87 of the Family Law Act.

The Committee thanks the Attorney-General for this response and for his assistance with the Bill.

FISHERIES MANAGEMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to replace the Fisheries Act 1952 and Continental Shelf (Living Natural Resources) Act 1968. The Bill provides the newly established Australian Fisheries Management Authority with the powers to undertake the restructured management of fisheries. Further, this Bill proposes to establish the Statutory Fishing Rights Allocation Review Panel, which is to consider appeals against the allocation of statutory fishing rights under a plan of management.

The Committee dealt with the Bill in Alert Digest No. 10 of 5 June 1991, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 14 June 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Delegation to 'a person'
Subclause 63(1)

In Alert Digest No. 10, the Committee noted that clause 63 of the Bill would, if enacted, allow a Joint Authority (as provided for by clause 59) to delegate any of its powers (other than certain prescribed powers) to the Australian Fisheries Management Authority 'or any other person'. The Committee noted that the functions and powers of a Joint Authority are set out in clauses 60, 76 and 77. The Committee suggested that those powers and functions appeared to be wide and onerous. The Committee suggested that, accordingly, it might be considered inappropriate that a Joint Authority be authorised to delegate its powers to 'a

person', without any limit on the persons or classes of persons to whom the power might be delegated.

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

The Minister has responded as follows:

> It is agreed that this provision could be made more restrictive, although a Joint Authority might be managing a fishery under either this Bill or the laws of a State represented on the Joint Authority. Commonwealth functions might also be delegated to other than a Commonwealth employee, for example a State Officer or employee.

The Minister goes on to say:

> I would also point out that this provision parallels a similar provision inserted in the Fisheries Act 1952 in 1980.

The Committee notes that the insertion of a similar provision in 1980 does not necessarily mean that the Committee should not object to this clause. Apart from any other reason, the insertion occurred before the Committee was established.

The Minister goes on to say:

> I am also most anxious that this legislation be passed this session and would wish to avoid any delay if possible. The associated Fisheries Administration Bill 1990 establishes the Australian Fisheries Management Authority (AFMA). It is most desirable that AFMA be established as soon as possible. Any delay could have a

serious impact on the morale of the staff involved with the new Authority.

The Committee thanks the Minister for his response and for his assistance with the Bill.

GREAT BARRIER REEF MARINE PARK AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 15 May 1991 by the Minister for the Arts, Sport, the Environment, Tourism and Territories.

The Bill proposes to amend the Great Barrier Reef Marine Park Act 1975, to provide for a system of compulsory pilotage in the areas of the Great Barrier Reef designated as 'Particularly Sensitive Areas' by the International Maritime Organisation.

The Committee dealt with the Bill in Alert Digest No. 9 of 1991, in which it made various comments. The Minister for the Arts, Sport, the Environment, Tourism and Territories responded to those comments in a letter dated 11 June 1991. 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
Clause 10 - proposed new subsections 59H(1) and (3)

In Alert Digest No. 9, the Committee noted that clause 10 of the Bill proposes to insert a new Part VIIA into the Great Barrier Reef Marine Park Act 1975. That proposed new Part deals with 'compulsory pilotage', which means that when vessels navigate certain areas, they are required to have a qualified pilot on board. The Committee noted that the proposed new Part would create various new offences in relation to navigation in those areas without a pilot (see proposed new sections 59B, 59C and 59D).

The Committee noted that proposed new section 59H sets out various defences which would be available in proceedings for an offence against the new sections. Proposed new subsection 59H(1) provides:

> In any proceedings for an offence against section 59B, 59C or 59D, it is a defence if the master or owner (as the case may be) proves that the regulated ship navigated in the compulsory pilotage area because of stress of weather or other unavoidable cause.

The provision would require the person charged to 'prove' that the ship navigated in the compulsory pilotage area because of stress of weather or other unavoidable cause. The Committee indicated that this is what it would ordinarily regard as a reversal of the onus of proof, as it is generally incumbent on the prosecution to prove all the elements of an offence. However, the Committee noted that matters which would need to be proved in such a case are, presumably, matters peculiarly within the knowledge of the person charged.

The Committee also noted that proposed new subsection 59H(2) goes on to provide:

> Any defence established under subsection (1) need only be established on the balance of probabilities.

The Committee suggested that this contrasted with the burden of proof placed on the prosecution, which would be required to prove the commission of the offence **beyond reasonable doubt.**

The Committee noted that proposed new subsection 59H(3) deals with proceedings against the owner of a ship in relation to an offence under the proposed new Part. It provides:

In any proceedings against the owner of a regulated ship for an offence against section 59B, 59C or 59D, it is a defence if the owner proves that the owner:

(a) did not aid, abet, counsel or procure; or

(b) was not in any way, directly or indirectly, knowingly concerned in, or a party to;

the navigation of the ship in the compulsory pilotage area without a pilot.

The Committee suggested that, once again, the onus of proving the defence to the offence is on the owner of the ship. However, unlike the defence provided in relation to the offence under proposed new subsection 59H(1), it would appear that in this case the owner would be required to prove the defence **beyond reasonable doubt**. The Committee suggested that, if this was the case, then it was different to the burden which would apply under the common law. The Committee indicated that, if this was the case, it was unable to discern the need for the statement in proposed new subsection 59H(2) that proof on the balance of probabilities was required in relation to the defence under that provision.

In addition, the Committee suggested that it could not be presumed that whether or not an owner did in fact aid, abet, counsel or procure the commission of an offence would be a matter peculiarly within the knowledge of the owner charged with an offence pursuant to paragraph 59H(3)(a). In this regard, the Committee noted that, unlike proposed paragraph 59H(3)(b), which relates to the owner being directly or indirectly concerned in or party to an offence, there would be no requirement that the owner prove that they were not 'knowingly' involved, which would, clearly, be something peculiarly within the knowledge of the person raising such a defence.

The Committee indicated that it would appreciate some further assistance on these matters. In particular, the Committee sought advice on the burden of proof

applicable in each of the proposed new sections referred to above and the reason for any difference.

The Minister has provided the following response:

> The first issue the Committee raises in relation to the proposed reversal of the onus of proof is the question of the level of proof required. Subsection 59H(2) states that the defence which can be raised by the accused under subsection (1), that is necessity through stress of weather or other unavoidable cause, should be proved by the accused on the balance of probabilities. I understand that the Committee accepts the reversed onus in subsection (1) but points out that the way the section is currently drafted implies that a different level of proof is required for the defence provided in subsection (3) than that provided in (1). If this is the case, it would appear to be an unintended consequence of the way the provision has been drafted.

The Minister goes on to say:

> The same level of proof ought to apply to both defences, and indeed, as the committee has pointed out, in the absence of subsection (2) the common law would apply the balance of probabilities to all the defences provided. It has been included in the provision in order to avoid any argument about the issue. It was not intended that a different level of proof would apply to subsection (3) and the clause will therefore be amended to make it clear that the same level of proof should apply to subsections (1) and (3), that is the balance of probabilities. This could also be achieved by removing subsection (2) altogether but in order to maintain consistency with the cautious approach adopted to date I consider it is more appropriate to make the former amendment.

The Minister concludes by saying:

> The Amendment is being prepared by the Office of Parliamentary Counsel to be moved when the Bill is introduced into the Senate.

The Committee thanks the Minister for this response and for undertaking to move the amendment which is foreshadowed.

On the question of the burden of proof applicable in relation to offences under proposed paragraph 59H(3)(a), the Minister says:

> The second issue raised by the Committee is whether the defence provided in paragraph (3)(a) is an appropriate matter for the accused to be required to prove or whether it is a matter more appropriate for the prosecution to prove beyond reasonable doubt. In this case I would disagree with the Committee's position. Sections 59B, 59C and 59D create statutory offences which apply to both the owner and the master.

The Minister goes on to say:

> However, it is possible that an owner may in fact be 'innocent' of the activity charged, in that the owner had absolutely nothing to do with the contravention of the provision committed by the master of the offending vessel. It is therefore necessary to provide a statutory defence for the owner in circumstances where no knowledge, direct or indirect, or participation by the owner was involved. The defence would also cover a situation where the master acted in contravention of the owner's instructions or established practices.
>
> These and other relevant kinds of matters which would establish the defence, such as business practices or communications from owner to master would be peculiarly within the knowledge of the defendant and very difficult for the prosecution to disprove beyond reasonable doubt. It therefore comes within the Committee's accepted guidelines for reversal of the onus of proof. A similar provision was considered by the

> Committee in its Seventh Report for 1991 in relation to sections 11A and 11B of the Training Guarantee (Administration) Amendment Bill of 1990.

The Minister concludes by saying:

> A distinction needs to be drawn between this defence to a prosecution for an offence against section 59B, 59C and 59D and the prosecution for an offence against section 5 of the Crimes Act 1914. In the latter case, the prosecution would have to establish beyond reasonable doubt that the owner did in fact aid, abet, counsel or procure the commission of an offence against either section referred to.

The Committee thanks the Minister for this detailed response and for her assistance with the Bill.

MIGRATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 17 April 1991 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to amend the Migration Act 1958 to:

- introduce new arrangements for processing undocumented and unexpected arrivals;
- change merits review provisions; and
- make technical amendments to allow improved concessions and measures.

The Committee dealt with the Bill in Alert Digest No. 7 of 1991, in which it made various comments. The Minister for Immigration, Local Government and Ethnic Affairs responded to those comments in a letter dated 30 May 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Delegation of power to 'an officer'
Paragraph 3(d)

In Alert Digest No. 7, the Committee noted that paragraphs 3(c) and (d) of the Bill propose to amend section 4 of the Migration Act 1958 to add to the definition of 'officer' for the purposes of that Act. The Committee noted that the Migration Act currently defines 'officer' as:

(a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph;

(b) a person who is an officer for the purposes of the Customs Act 1901, other than such an officer specified by the Minister in writing for the purposes of this paragraph;

(c) a person who is a protective service officer for the purposes of the Australian Protective Service Act 1987, other than such a person specified by the Minister in writing for the purposes of this paragraph;

(d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or

(e) a member of the police force of an external Territory.

The Committee noted that paragraph 3(c) of the Bill proposes to add 'or' after paragraphs (a), (b) and (c) of the definition and that paragraph 3(d) then proposes to add the following as paragraph (f) of the definition:

> or ... any person authorised by the Minister in writing for the purposes of this paragraph.

The Committee indicated that it generally does not approve of provisions which allow powers to be given to 'a person', as it is preferable that there are limits on the persons to whom such powers can be delegated. In the context of this Bill, the Committee noted that proposed new sections 54C and 54G (to be inserted by clause 12 of the Bill) would, if enacted, allow an 'officer' to, respectively, detain 'an unprocessed person' (as defined by the Bill) or arrest them without warrant. The Committee indicated that this is a significant power and one which should not be open to delegation without any restriction as to the persons or classes of persons to whom it could be delegated.

Accordingly, the Committee drew Senators' attention to the clause 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 Minister has responded as follows:

> I will be moving a Government amendment to subclause 3(d) of the Bill to require that a person may only be authorised to be an 'officer' by notice published in the Gazette. This will permit greater public scrutiny of such authorisations than the requirement for written approval as currently proposed in the Bill.

The Committee thanks the Minister for this response and for agreeing to move an amendment to the Bill to address the concern raised by the Committee.

Discretion to decide a person is an 'unprocessed person'
Clause 12 - proposed new section 54B

In Alert Digest No. 7, the Committee noted that proposed new section 54B, which is to be inserted by clause 12 of the Bill, introduces the concept of an 'unprocessed person'. An unprocessed person is someone who an authorised officer reasonably supposes would, if allowed to enter into Australia, become an illegal immigrant and in relation to whom it is impracticable or inconvenient to decide immediately whether or not an entry permit should be granted.

The Committee observed that classification as an 'unprocessed' person carries with it certain significant consequences including, as discussed above, the liability to be detained or arrested without warrant. However, the Committee noted that there did not appear to be any provision within the legislation to allow a person to challenge their designation as an unprocessed person. The Committee suggested that if this

was the case, it appeared that the only recourse for a person who disputes their designation as such would b a writ of *habeas corpus* or an action in trespass.

The Committee noted that neither course of action would be easy to initiate or of immediate assistance to a person in this situation. Further, the Committee suggested that in the case of an action in trespass, the person detained would have to show that the authorised officer had not properly formed the opinions required in order to designate the person as 'unprocessed'. In addition, the Committee noted that success in such an action would only entitle a person to damages, which would not necessarily make the action the most efficacious recourse to a person who has been incorrectly designated as an 'unprocessed person'.

Accordingly, the Committee drew Senators' attention to the clause as it might be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> [A] decision to designate a person an unprocessed person would be a decision which could be challenged under the Administrative Decisions (Judicial Review) Act 1977 on the basis that an error of law had been made in arriving at that designation. That Act would allow for a declaration to be made as to whether a person is an unprocessed person. Proceedings under that Act are relatively easy to initiate and conduct.

The Minister goes on to say that

> apart from relief of a declaratory kind from the Federal Court, it is not intended that there be a mechanism in the Migration Act which would provide for the release of a person from a processing centre other than in compelling circumstances such as the need for medical treatment. It must be borne in mind that unprocessed persons will be

> persons who have arrived in Australia without permission, seeking to enter Australia in circumstances in which they would become illegal entrants and in which proper immigration, health, customs and quarantine clearance procedures have not been carried out. For the purposes of the Act, these persons have not entered Australia and are potentially prohibited persons. While clearance procedures are being conducted after the persons' arrival, the policy to be expressed in the legislation is that they be restrained from entering the broader Australian community.

The Committee thanks the Minister for this response and for his assistance with the Bill.

PROCEEDS OF CRIME LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Attorney-General.

The Bill proposes to establish the Confiscated Assets Trust Fund, into which will be paid all those funds recovered under the Proceeds of Crime Act 1987, the drug trafficking provisions of the Customs Act 1901, and any money or property recovered under section 9 of the Crimes Act 1914. The Bill also provides that the major proportion of these funds will be distributed to drug education and rehabilitation programs.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Attorney-General responded to those comments in a letter dated 18 June 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Delegation of power to 'a person'
Clauses 9, 15 and 17 - proposed new subsections 208DA(4), 20(3A) and 30(4A)

In Alert Digest No. 10, the Committee noted that clause 9 of the Bill proposes to insert proposed new section 208DA into the Customs Act 1901. That proposed new section deals with the disposal of narcotic-related goods. The Committee noted that proposed new subclause 208DA(4) would impose certain obligations on the Attorney-General 'or a person authorised by the Attorney-General for the purposes of this section'. Those include a power to direct that narcotic goods be disposed of.

The Committee noted that there is no limit on the persons whom the Attorney-General could authorise. Given that this would appear to involve a fairly onerous obligation, the Committee suggested that it may be appropriate to limit the persons or classes of persons whom the Attorney-General could authorise.

The Committee noted that clause 15 of the Bill proposes to insert a new subsection 20(3A) into the Proceeds of Crime Act 1977. That proposed new subsection deals with the effects of a forfeiture order pursuant to that Act. It would allow the Attorney-General 'or a person authorised by the Attorney-General for the purposes of this subsection' direct that property that is subject to a forfeiture order be disposed of.

The Committee noted that, as with clause 9, there is no limit on the persons or classes of persons whom the Attorney-General may so authorise.

The Committee noted that clause 17 of the Bill proposes to insert a new subsection 30(4A) into the Proceeds of Crime Act. That proposed new subsection deals with the forfeiture of restrained property. It would allow the Attorney-General 'or a person authorised by the Attorney-General for the purposes of this subsection' to direct that property forfeited under section 30 of that Act be disposed of.

The Committee noted that there is no limit as to whom the Attorney-General could authorise.

Given the apparent gravity of the powers and obligations involved in each case, the Committee drew Senators' attention to the clauses, as they might be considered 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:

There are three remarks to be made in relation to the Committee's remarks on these amendments. Firstly, the amendments do no more than restate the existing law (save in respect of the Customs Act). The existing provisions of the Proceeds of Crime Act (paragraphs 20(3)(b) and 30(4)(b)) already provide that property forfeited under those provisions shall be disposed of as directed by myself or "of a person authorised by [myself] for the purposes of this paragraph". The amendments will introduce more certainty into the disposal process. At present a discretionary direction is required in every case. In future, in every case property will be sold and the proceeds paid to the Trust Fund *unless* I or my delegate give a direction to the contrary.

In relation to the Customs Act provision, the power of direction to be conferred on my by new subsection 208DA(4) will replace an existing power of direction that is vested in the Commissioner or a Deputy Commissioner of the AFP. However, the new power of direction, as it is a reserve power as mentioned above, will introduce more certainty into the process of disposal. In the future, if I decide to exercise the power of delegation, it is probable that I would delegate the power under subsection 208DA(4) to the Commissioner of the AFP or to the First Assistant Secretary of Criminal Law and Law Enforcement Division, which would restore the existing situation.

Secondly, even if the power of delegation were omitted from the subsections referred to, there would still remain a power of delegation stemming from the general power of delegation which is conferred on me by section 17 of the *Law Officers Act 1964*.

Thirdly, I believe that the matters concerned are not of such gravity as the Committee perceives. The power relates only to the disposal of property which has already been forfeited. Under the Proceeds of Crime Act this can only occur after a person has been convicted of a criminal offence and the appeal process (if any) has been completed. Even after the conviction of the person, a further court order is required to support the confiscation of the property, save in the case of statutory forfeiture under section 30 (which is, however, limited to

> circumstances where the person has been convicted of a serious offence).
>
> Under the Customs Act, property is condemned as forfeit only after a quite extensive process of notice and waiting periods has occurred. Thus the power of direction is entirely administrative and is subsequent to the processes by which ample opportunity is provided for the rights to the property to be determined.

The Committee thanks the Attorney-General for this detailed response.

'Henry VIII' clause
Clause 19 - proposed new subsection 34C(2)

In Alert Digest No. 10, the Committee noted that clause 19 proposes to insert a new Part IIA into the Proceeds of Crime Act. That new Part deals with the proposed Confiscated Assets Trust Fund. The Committee noted that proposed new section 34C deals with payments out of that Trust Fund. Paragraph 34C(1)(b) deals with the payment of funds out of the trust fund in relation to a 'relevant offence'. Subsection 34C(2) provides that a 'relevant offence'

> means an offence under section 29A, 29B, 29C, 29D, 71, 86 or 86A of the *Crimes Act 1914* or a prescribed offence.

The Committee suggested that the effect of the provision was that the Governor-General (acting on the advice of the Executive Council) would be able to make regulations prescribing further offences as 'relevant' offences for the purposes of proposed new section 34C. The Committee indicated that, as a result, the proposed new subsection 34C(2) is what it would generally consider to be a 'Henry VIII' clause, as it would allow the operation of the primary legislation to be amended by subordinate legislation.

Accordingly, the Committee drew Senators' attention to the clause, as it might be considered 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:

> In assessing whether this provision is acceptable it is necessary to bear in mind the purpose of the expression "relevant offence". The expression is used in proposed subparagraph 34C(1)(b)(i) which allows for a GBE [Government Business Enterprise] to be reimbursed in certain circumstances. Briefly, the procedure in subparagraph 34C(1)(b)(i) will apply where an amount is recovered under the Proceeds of Crime Act and the recovery stems from an offence which caused financial loss to a GBE.

The Attorney-General has offered the following example:

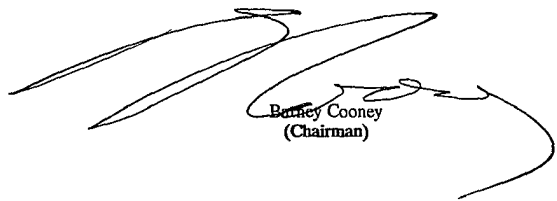
> For example, a person may be convicted under section 29D of the *Crimes Act 1914* (Fraud) in circumstances where money was defrauded from Australia Post. In such a case, if Australia Post had chosen to sue the offender civilly for the return of the money the amount recovered would be payable to Australia Post. If, however, the more effective provisions of the Proceeds of Crime Act were used to deprive the person of the benefit of the offence then the recovered amount would be paid to the Trust Fund. Clearly this may lead to a disinclination on the part of the GBE to use the provisions of the Proceeds of Crime Act. The facility for reimbursement will ensure that the general policy of depriving offenders of their ill-gotten gains will be pursued in all appropriate cases.

The Attorney-General goes on to say:

> In this context, the difficulty is to ensure that the facility for reimbursement is available in any case where the recovery stems from the conviction of a person for an

offence which caused financial loss to the GBE. Whilst all existing offences of this kind are identified within the definition of "relevant offence" it is very desirable to have the flexibility to prescribe other similar offences which may be enacted in the future. It is my view, and I would hope that the Committee will agree, that in these particular circumstances the regulation making power is appropriate.

The Committee thanks the Attorney-General for this detailed response and for his assistance with the Bill.



Barney Cooney
(Chairman)

RECEIVED
18 JUN 1991
Senate Standing Cttee for the Scrutiny of Bills

Attorney-General

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

92529

Senator B 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 comments contained in Scrutiny of Bills Digest No. 10 of 1991 (5 June 1991), concerning Clause 4 of the Courts (Mediation and Arbitration) Bill 1991.

The Committee has expressed its concern that the definition of "Part VIII proceedings" in clause 4 of the Bill allows regulations to be made to exclude certain property and spousal maintenance proceedings as matters which may be the subject of court-annexed or private arbitration, and may therefore be an inappropriate delegation of legislative power in breach of principle 1(a)(iv) of the Committee's terms of reference.

The legislation is to provide a legislative framework upon which a pilot program of court-annexed and private arbitration of family law matters can operate. For this reason, it is desirable that there be flexibility in determining which matters may be arbitrated and a capacity to respond promptly to any inappropriate use of arbitration.

I have identified some matters which should not be the subject of arbitration, such as proceedings in relation to the approval of maintenance agreements or for the registration of such agreements. I was faced with specifying those matters which have been identified in the legislation, but leaving a further unidentified class of proceedings either to be specified in regulations or not to be dealt with at all. On balance it is my view that it is preferable to specify all matters in the regulations.

The matters identified as being inappropriate for arbitration are proceedings arising under sections 85, 86 or 87 of the Family Law Act.

I trust that this information is of assistance to the Committee.

Yours sincerely

MICHAEL DUFFY

MINISTER FOR PRIMARY INDUSTRIES AND ENERGY
PARLIAMENT HOUSE
CANBERRA 2600

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

14 JUN 1991

Dear Senator

I refer to the comments contained in your Committee's Alert Digest No. 10 of 1991 (5 June 1991) concerning the package of fisheries legislation now before the Senate. The only matter with respect to this legislation with respect to which your Committee has sought comment relates to subclause 63(1) of the Fisheries Management Bill 1991 which would allow a Joint Authority established under this Bill to delegate it's powers to AFMA "or any other person".

It is agreed that this provision could be made more restrictive, although a Joint Authority might be managing a fishery under either this Bill or the laws of a State represented on the Joint Authority. Commonwealth functions might also be delegated to other than a Commonwealth employee, for example a State Officer or employee.

I would also point out that this provision parallels a similar provision inserted in the Fisheries Act 1952 in 1980.

I am also most anxious that this legislation be passed this session and would wish to avoid any delay if possible. The associated Fisheries Administration Bill 1990 establishes the Australian Fisheries Management Authority (AFMA). It is most desirable that AFMA be established as soon as possible. Any delay could have a serious impact on the morale of the staff involved with the new Authority.

As this is a relatively minor matter and I trust your Committee will take into account factors outlined above in arriving at it's attitude on this matter.

Yours sincerely

SIMON CREAN

MINISTER FOR THE ARTS, SPORT, THE ENVIRONMENT, TOURISM AND TERRITORIES

Hon. Ros Kelly M.P.

Phone: (06) 277 7640
Facsimile: (06) 273 4130

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

11 JUN 1991

Dear Senator Cooney

Thank you for the comments from the Senate Scrutiny of Bills Committee on the Great Barrier Reef Marine Park Amendment Bill 1991.

The first issue the Committee raises in relation to the proposed reversal of the onus of proof is the question of the level of proof required. Subsection 59H(2) states that the defence which can be raised by the accused under subsection (1), that is necessity through stress of weather or other unavoidable cause, should be proved by the accused on the balance of probabilities. I understand that the Committee accepts the reversed onus in subsection (1) but points out that the way the section is currently drafted implies that a different level of proof is required for the defence provided in subsection (3) than that provided in (1). If this is the case, it would appear to be an unintended consequence of the way the provision has been drafted.

The same level of proof ought to apply to both defences, and indeed, as the committee has pointed out, in the absence of subsection (2) the common law would apply the balance of probabilities to all the defences provided. It has been included in the provision in order to avoid any argument about the issue. It was not intended that a different level of proof would apply to subsection (3) and the clause will therefore be amended to make it clear that the same level of proof should apply to subsections (1) and (3), that is the balance of probabilities. This could also be achieved by removing subsection (2) altogether but in order to maintain consistency with the cautious approach adopted to date I consider it is more appropriate to make the former amendment.

The Amendment is being prepared by the Office of Parliamentary Counsel to be moved when the Bill is introduced into the Senate.

PARLIAMENT HOUSE, CANBERRA, A.C.T. 2600

The second issue raised by the Committee is whether the defence provided in paragraph (3)(a) is an appropriate matter for the accused to be required to prove or whether it is a matter more appropriate for the prosecution to prove beyond reasonable doubt. In this case I would disagree with the Committee's position. Sections 59B, 59C and 59D create statutory offences which apply to both the owner and the master.

However, it is possible that an owner may in fact be 'innocent' of the activity charged, in that the owner had absolutely nothing to do with the contravention of the provision committed by the master of the offending vessel. It is therefore necessary to provide a statutory defence for the owner in circumstances where no knowledge, direct or indirect, or participation by the owner was involved. The defence would also cover a situation where the master acted in contravention of the owner's instructions or established practices.

These and other relevant kinds of matters which would establish the defence, such as business practices or communications from owner to master would be peculiarly within the knowledge of the defendant and very difficult for the prosecution to disprove beyond reasonable doubt. It therefore comes within the Committee's accepted guideline for reversal of the onus of proof. A similar provision was considered by the Committee in its Seventh Report for 1991 in relation to sections 11A and 11B of the Training Guarantee (Administration) Amendment Bill of 1990.

A distinction needs to be drawn between this defence to a prosecution for an offence against section 59B, 59C and 59D and the prosecution for an offence against section 5 of the Crimes Act 1914. In the latter case, the prosecution would have to establish beyond reasonable doubt that the owner did in fact aid, abet, counsel or procure the commission of an offence against either section referred to.

Yours sincerely

ROS KELLY

RECEIVED

30 MAY 1991

Senate Standing Cttee for the Scrutiny of Bills

MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

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

Dear Senator Cooney

Thank you for having drawn to my attention the comments of the Senate Standing Committee for the Scrutiny of Bills in the Scrutiny of Bills Alert Digest No. 7 of 1991 (8 May 1991) on the Migration Amendment Bill 1991. I would like to make the following comments in relation to the Committee's concerns.

The Committee was concerned that limits should be placed on the persons or classes of persons authorised by the Minister to be 'officers' for the purposes of the Act. I will be moving a Government amendment to subclause 3(d) of the Bill to require that a person may only be authorised to be an 'officer' by notice published in the Gazette. This will permit greater public scrutiny of such authorisations than the requirement for written approval as currently proposed in the Bill.

The Committee was also concerned about the absence of a specific mechanism in the Act to allow a person to challenge being designated an unprocessed person. However, a decision to designate a person an unprocessed person would be a decision which could be challenged under the Administrative Decisions (Judical Review) Act 1977 on the basis that an error of law had been made in arriving at that designation. That Act would allow for a declaration to be made as to whether a person is an unprocessed person. Proceedings under that Act are relatively easy to initiate and conduct.

However, apart from relief of a declaratory kind from the Federal Court, it is not intended that there be a mechanism in the Migration Act which would provide for the release of a person from a processing centre other than in compelling circumstances such as the need for medical treatment. It must be borne in mind that unprocessed persons will be persons who have arrived in Australia without permission, seeking to enter Australia in circumstances in which they would become illegal entrants and in which proper immigration, health, customs and quarantine clearance procedures have not been carried out. For the purposes of the Act, these persons have not entered Australia and are potentially prohibited persons. While clearance procedures are being conducted after the persons' arrival, the policy to be expressed in the legislation is that they be restrained from entering the broader Australian community.

I trust that the above comments have removed the Committee's concerns about the Bill.

Yours sincerely

Gerry Hand

RECEIVED
18 JUN 1991
Senate Standing Cttee for the Scrutiny of Bills

Attorney-General

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

CLE91/8071
Min No 92530

18 JUN 1991

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 of 5 June 1991 (number 10 of 1991). That digest contains remarks on the *Proceeds of Crime Legislation Amendment Bill 1991*. The digest comments on the following clauses of the Bill:

- clauses 9, 15 and 17 (inserting proposed subsection 208DA(4) of the *Customs Act 1901* and subsections 20(3A) and 30(4A) of the *Proceeds of Crime Act 1987*). These clauses are commented upon for the perceived breadth of the power of delegation which is conferred by the new provisions; and

- clause 19 (proposed new subsection 34C(2) of the *Proceeds of Crime Act 1987*). This clause is commented upon for containing a "Henry VIII" clause.

I would like to comment upon each of these remarks.

Clauses 9, 15 and 17

The new subsections to be inserted into the Customs Act and the Proceeds of Crime Act by clauses 9, 15 and 17 all confer upon myself a power to direct that forfeited property shall be dealt with in some manner other than by way of sale with the net proceeds being paid to the Confiscated Assets Trust Fund. As the Explanatory Memorandum states this power may be exercised in order to direct that a particular item of property be made available to a law enforcement agency for use in connection with its operations. The new subsections include a power of delegation under which I may delegate this power of direction to any person. The Committee comments that the breadth of this power of delegation may

be considered inappropriate "given the apparent gravity of the powers and obligations involved in each case".

There are three remarks to be made in relation to the Committee's remarks on these amendments. Firstly, the amendments do no more than restate the existing law (save in respect of the Customs Act). The existing provisions of the Proceeds of Crime Act (paragraphs 20(3)(b) and 30(4)(b)) already provide that property forfeited under those provisions shall be disposed of as directed by myself or "of a person authorised by [myself] for the purposes of this paragraph". The amendments will introduce more certainty into the disposal process. At present a discretionary direction is required in every case. In future, in every case property will be sold and the proceeds paid to the Trust Fund *unless* I or my delegate give a direction to the contrary.

In relation to the Customs Act provision, the power of direction to be conferred on me by new subsection 208DA(4) will replace an existing power of direction that is vested in the Commissioner or a Deputy Commissioner of the AFP. However, the new power of direction, as it is a reserve power as mentioned above, will introduce more certainty into the process of disposal. In the future, if I decide to exercise the power of delegation, it is probable that I would delegate the power under subsection 208DA(4) to the Commissioner of the AFP or to the First Assistant Secretary of Criminal Law and Law Enforcement Division, which would restore the existing situation.

Secondly, even if the power of delegation were omitted from the subsections referred to, there would still remain a power of delegation stemming from the general power of delegation which is conferred on me by section 17 of the *Law Officers Act 1964*.

Thirdly, I believe that the matters concerned are not of such gravity as the Committee perceives. The power relates only to the disposal of property which has already been forfeited. Under the Proceeds of Crime Act this can only occur after a person has been convicted of a criminal offence and the appeal process (if any) has been completed. Even after the conviction of the person, a further court order is required to support the confiscation of the property, save in the case of statutory forfeiture under section 30 (which is, however, limited to circumstances where the person has been convicted of a serious offence).

Under the Customs Act, property is condemned as forfeit only after a quite extensive process of notice and waiting periods has occurred. Thus the power of direction is entirely administrative and is subsequent to the processes by which ample opportunity is provided for the rights to the property to be determined.

Clause 19

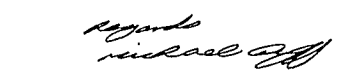
Turning now to the comments on clause 19 of the Bill, in particular proposed subsection 34C(2) of the Proceeds of Crime Act. Proposed subsection 34C(2) will permit the definition of "relevant offence" to be extended by regulation.

In assessing whether this provision is acceptable it is necessary to bear in mind the purpose of the expression "relevant offence". The expression is used in proposed subparagraph 34C(1)(b)(i) which allows for a GBE to be reimbursed in certain circumstances. Briefly, the procedure in subparagraph 34C(1)(b)(i) will apply where an amount is recovered under the Proceeds of Crime Act and the recovery stems from an offence which caused financial loss to a GBE. For example, a person may be convicted under section 29D of the *Crimes Act 1914* (Fraud) in circumstances where money was defrauded from Australia Post. In such a case, if Australia Post had chosen to sue the offender civilly for the return of the money the amount recovered would be payable to Australia Post. If, however, the more effective provisions of the Proceeds of Crime Act were used to deprive the person of the benefit of the offence then the recovered amount would be paid to the Trust Fund. Clearly this may lead to a disinclination on the part of the GBE to use the provisions of the Proceeds of Crime Act. The facility for reimbursement will ensure that the general policy of depriving offenders of their ill-gotten gains will be pursued in all appropriate cases.

In this context, the difficulty is to ensure that the facility for reimbursement is available in any case where the recovery stems from the conviction of a person for an offence which caused financial loss to the GBE. Whilst all existing offences of this kind are identified within the definition of "relevant offence" it is very desirable to have the flexibity to prescribe other similar offences which may be enacted in the future. It is my view, and I would hope that the Committee will agree, that in these particular circumstances the regulation making power is appropriate.

In conclusion, I thank the Committee for its considered views on the *Proceeds of Crime Legislation Amendment Bill 1991.*

Yours sincerely



MICHAEL DUFFY

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF

1991

14 AUGUST 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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 1991

The Committee has the honour to present its Eleventh Report of 1991 to the Senate.

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

Australian National University Bill 1991

Corporations Legislation Amendment Act 1991

Interstate Road Transport Amendment Bill 1991

Interstate Road Transport Charge Amendment Bill 1991

Service and Execution of Process Amendment Bill 1991

Social Security (Disability and Sickness Support) Amendment Bill 1991

Social Security Legislation Amendment Act (No.2) 1991

Transport Legislation Amendment Act 1991

AUSTRALIAN NATIONAL UNIVERSITY BILL 1991

This Bill was introduced into the House of Representatives on 15 May 1991 by the Minister for Higher Education and Employment Services.

The Bill proposes to repeal the Australian National University Act 1946 and the Canberra Institute of the Arts Ordinance 1988, to allow the amalgamation of the Australian National University and the Canberra Institute of the Arts with effect from 1 January 1992.

The Committee dealt with the Bill in Alert Digest No. 9 of 1991, in which it made various comments. The Minister for Higher Education and Employment Services responded to those comments in a letter dated 1 August 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Delegation of power to 'a person'
Subclause 47(11)

In Alert Digest No. 9, the Committee noted that various subclauses of clause 47 of the Bill would permit the Auditor-General 'or an authorised person' to do certain things. Subclause 47(11) defines an 'authorised person' as:

> a person authorised in writing by the Auditor-General to act under this section.

The Committee noted that there is no limit on the persons whom the Auditor-General may so authorise. Given the powers and responsibilities which could be delegated by such authorisation, the Committee suggested that there should be a

limit on the persons or classes of persons whom the Auditor-General can authorise for the purposes of the provision.

The Committee drew Senators' attention to the provision, as it may be considered 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 Office of Parliamentary Counsel (OPC) has advised that this is a standard provision worked out with the Auditor-General many years ago. I understand that there are over 100 instances of its use in the Commonwealth Statutes including, in particular, model sections 63G and 63L of the Audit Act 1901, which are applicable to a large number of statutory authorities.
>
> I believe it would be inappropriate to alter this provision in the Australian National University Bill. If a change is to be made, it should be made in the Audit Act as well as all other Acts containing the provision. As this would be a matter for consideration by the Minister for Finance, I have drawn his attention to the Committee's comments.

The Committee thanks the Minister for this response. In making the comment, the Committee was aware of the situation regarding the Audit Act 1901 but remained of the view that delegation of this power to 'a person' is inappropriate.

The Committee notes that the Minister has indicated that he has drawn the Committee's comments to the attention of the Minister for Finance. The Committee hopes that the Minister for Finance will consider those comments and provide an appropriate response in due course.

'Henry VIII' clause
Subclause 48(3)

In Alert Digest No. 9, the Committee noted that clause 48 of the Bill deals with the University's immunity from taxation. Subclause 48(1) provides that (subject to subclause 48(3)) the University is not to be subject to taxation under the laws of the Commonwealth or of a State or Territory. The Committee noted that, similarly, subclause 48(2) provides that (subject to subclause 48(3)) the University is not to be subject to taxation imposed by the Debits Tax Act 1982 or to sales tax. However, the Committee noted that subclause 48(3) goes on to provide that the Governor-General may make regulations providing that the provision does not apply in relation to taxation under a specified law.

The Committee indicated that this is what it would generally regard as a 'Henry VIII' clause, as it would allow the Governor-General (acting with the advice of the Executive Council) to make regulations which, in effect, amend the substantive provisions of the primary legislation. The Committee draws attention to such clauses as a matter of principle. In addition, however, the Committee noted that in the present case there is no indication of the kinds of eventualities which the provision is intended to cover. Accordingly, the Committee drew Senators' attention to the provision, as it may be considered 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:

> At present one regulation relating to payroll taxation is in force under this provision. I propose to amend the provision to provide explicitly that the University is subject to State and Territory Laws relating to such taxation.

The Committee thanks the Minister for this response and for his agreement to amend the legislation to restrict the operation of the clause in the light of the Committee's concerns.

General comment

In Alert Digest No. 9, the Committee noted that the exemption in subclause 48(2) of the Bill from 'taxation imposed by the Debits Tax Act 1982' would appear to be unnecessary, given that section 4A of that Act provides that such tax is not imposed in relation to debits made on or after 1 January 1991 and bearing in mind that, pursuant to clause 2, the Bill would not commence until 1 January 1992.

The Minister has responded as follows:

> I have been advised by [the Office of Parliamentary Counsel] that the subclause is redundant and have initiated action to have it removed from the Bill.

The Committee thanks the Minister for his response and for his assistance with the Bill.

CORPORATIONS LEGISLATION AMENDMENT ACT 1991

The Bill for this Act was introduced into the House of Representatives on 29 May 1991 by the Attorney-General.

The Act amends the Corporations Act 1989 and the Australian Securities Commission Act 1989 to:

- wind up the National Companies and Securities Commission;
- require the consolidation of accounts of companies and subsidiaries for financial reporting purposes;
- reform insider trading regulation;
- confer on the Family Court of Australia and the Family Court of Western Australia jurisdiction in relation to civil matters arising under the Corporations Law,
- allow the Australian Securities Commission to regulate compliance with trust deeds;
- propose a statutory moratorium on the requirement for companies to include their Australian Company Number on business documents and negotiable instruments; and
- require retiring directors to notify a changeover in ownership of a company.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Attorney-General responded to those comments in a letter received 20 June 1991. As the Bill was due to be debated by the Senate within a very short time of the Committee receiving the Attorney's response, the letter was

tabled in the Senate on the day it was received, to allow Senators to refer to the contents of the letter in the course of the debate.

The Bill was passed by the Senate on 21 June 1991. However, as the Committee's comments and the Attorney's responses to them may still be of interest to Senators, those comments and the relevant responses are discussed below. A copy of the Attorney-General's letter is also attached to this report.

Commencement by Proclamation
***Subsections* 2(3), (4), (10), (11) and (12)**

In Alert Digest No. 10, the Committee noted that subclause 2(3) of the (then) Bill provided that certain specified amendments to the Corporations Act 1989 were to commence by Proclamation. The Committee noted that there was no limit as to the time within which such a Proclamation must be made and that, as a result, the clause contravened the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

However, the Committee noted that, in relation to this subclause, the Explanatory Memorandum stated:

> [T]he specified proposed amendments of the [Corporations Act] set out in Schedule 1 of the Bill to come into operation by virtue of subclause 3(3) [sic], which relate to the conferment of jurisdiction on the Family Courts, will commence on a day to be fixed by Proclamation. These proposed amendments are not subject to the usual requirement for amendments to automatically commence after the expiration of 6 months from Royal Assent, because they rely on the subsequent passage of legislation by the States for their effective operation under the national scheme arrangements ...

The Committee accepted that this explanation fitted within the exception set out in paragraph 6 of Drafting Instruction No. 2, since the commencement was dependent on 'unusual circumstances', as contemplated by that paragraph. As a result, the Committee made no further comment on the clause.

Similarly, the Committee noted that subclause 2(4) of the Bill provided that, subject to subclause (5), clauses 7 and 8 of the Bill would commence on a day or days to be fixed by Proclamation. However, the Committee noted that, in accordance with Drafting Instruction No. 2, subclause (5) provided that if those clauses had not been proclaimed within six months of Royal Assent, they were to commence on the following day. Accordingly, the Committee made no further comment on the clause.

The Committee also noted that subclause 2(10) of the Bill provided that, subject to subclause (11), the provisions of Part 6 of the Bill (which dealt with the winding up of the National Companies and Securities Commission) were to commence on a day or days to be fixed by Proclamation. In addition, the Committee noted that subclause (11) provided:

> A Proclamation under subsection (10) must not fix a day for the commencement of section 14 that is earlier than the first day on which all the provisions of Division 2 and 3 of Part 6 are in operation.

The Committee noted that, contrary to the general rule in Drafting Instruction No. 2 of 1989, there was no limit on the time within which the Proclamation must be made. The Committee suggested that, in fact, as a result of subclause (11), the limits on Proclamation pursuant to subclause (10) were on the time within which a Proclamation must not be made.

The Committee noted that subclause 2(12) provided that the provisions of the new Part 16 of the Australian Securities Commission Act 1989 (which was to be added by clause 23 of the Bill) were to commence on a day or days to be fixed by

Proclamation. The Committee noted that that proposed new Part provided for transitional arrangements which would apply to the winding up of the National Companies and Securities Commission. The Committee also noted that there was no limit on the time within which such a Proclamation must be made.

The Committee observed that, by way of explanation, the Explanatory Memorandum stated:

> It would not be appropriate to make [these] provisions subject to [the requirement of automatic commencement] because it is possible that not all the administrative action necessary to complete the winding up processes will be completed within 6 months of the commencement of the Bill so that all relevant provisions can come into operation at that time.

While the Committee accepted this as a valid justification for the provisions not commencing within six months, the Committee suggested that it may still have been appropriate that the provisions commence automatically after, say, a 12 month period. The Committee indicated that it would appreciate the Attorney-General's views in relation to this suggestion.

The Attorney-General responded as follows:

> I am sympathetic to the Committee's position that it is desirable, wherever possible, to fix a specified period beyond which legislation must come into operation.
>
> However, in this particular case the operation of the provisions depends on the completion of certain administrative and accounting processes some of which involve matters beyond the control of the Government, including consultation and agreement with States on the outcome of those administrative and financial processes. Because it is not possible to guarantee the completion of those processes within any specific period, and the provision would not effectively operate if brought into

> operation before those processes were completed, it has been necessary to provide for flexibility in the commencement of the provisions. However, having provided this explanation, I wish to reassure the Committee that the Commonwealth is seeking to resolve those matters as quickly as possible, and would expect that in the normal event these processes would be completed well inside 12 months.

The Committee thanks the Attorney for this response and for his assurance that the Commonwealth will be seeking to resolve the relevant matters as quickly as possible.

'Henry VIII' clauses
Schedule 3 - new sections 294A and 294B

In Alert Digest No. 10, the Committee noted that Schedule 3 of the Bill contained various proposed amendments to the Corporations Law which were to be effected pursuant to clause 7 of the Bill. The Committee noted that, among other things, the Schedule proposed to insert a new Division 4A into the Corporations Law. That new Division deals with the consolidated accounts of a company and the entities it controls.

The Committee noted that (then) proposed new subsection 294A(1) provided that the regulations may define the meaning of various expressions for the purposes of the legislation. In particular, the Committee noted that proposed new subsection 294A(3) provided that a definition contained in an accounting standard may (subject to any regulations) also be applied in respect of the expressions.

In addition, the Committee noted that (then) proposed new subsection 294B(1) provided that the regulations may provide for the determination of the question as to whether or not an entity controls another entity. The Committee noted that

proposed new subsection 294B(3) provided that a definition contained in an accounting standard may (subject to any regulations) also be applied to determine whether or not an entity controls another entity.

The Committee indicated that these provisions were what it generally considered to be 'Henry VIII' clauses, as they would allow the operation of the primary legislation to be amended, in effect, by subordinate legislation. The Committee noted that the definitions to which they related appeared to be crucial to the operation of the proposed new part. Accordingly, the Committee drew Senators' attention to the clauses, as they may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Attorney-General responded as follows:

> A key aspect of the amendments contained in Schedule 3 will be to require the production by companies of consolidated accounts dealing with all the "entities" which they "control". In order to assist consideration of the structure of sections 294A and 294B, it might be helpful to review briefly the circumstances which have led the Government to propose the amendments set out in Schedule 3.
>
> The amendments tackle some of the key failures of financial reporting requirements which came to light during the 1980s. The present law requires a company to prepare group accounts only in respect of the company and its "subsidiaries". This rule is technical and formal. It is also easily evaded. It has enabled unscrupulous company operators to disguise the true financial position of their companies by arranging their affairs in a manner that lies just beyond the reach of the rules. "Off-balance-sheet vehicles" like trusts and partnerships are not part of a group because the definition of "subsidiary" reaches only corporate entities. Similarly, companies which are 49.9% owned by another are said not to be part of the other's group because a key element of the definition of

subsidiary focusses on the technicality of 50% ownership of shares, even though the rest of the share register might be so structured as to give the 49.9% shareholder complete effective control.

To prevent technical evasion of this nature, and to ensure adequate disclosure of the true financial position of companies, it is necessary to substitute new rules for consolidated accounts. Clearly, the new rules must be of general application, so as to close off any new potential loopholes. At the same time, they must be flexible enough to adapt to evolving business practices. They must also be capable of being refined quickly, should the need arise, given the significant change represented by the adoption of broad rules in a previously technical area.

The Australian Accounting Standards Board, and its predecessor under the co-operative scheme, the Accounting Standards Review Board, have been considering for some time how to ensure that consolidation is made compulsory in those cases where it is appropriate, but not in others. They have in the proposed Standard 1024 developed a series of definitions which are designed to spread the consolidation net as broadly as necessary without imposing needless expense which would occur, for example, if each company in a chain of wholly-owned subsidiaries was required to produce a separate set of consolidated accounts.

The Attorney-General goes on to say:

Given these considerations, the approach taken in sections 294A and 294B is to adopt key definitions in Standard 1024. In my view, this approach has the following significant advantages.

(a) It takes advantage of work already done. Standard 1024 has been developed by the Boards over a period of some years. An exposure draft was issued in September 1987 and a professional standard in June 1990, prior to the release in December 1990 of a Standard proposed to be made legally enforceable under the Corporations Law. The

Standard therefore reflects the advantage of a lengthy deliberation and public comment. It is appropriate to draw on that process of consultation by adopting the definitions in the Standard, rather than trying to develop new definitions at this stage.

(b) It makes the Corporations Law simpler and easier to understand in its statement of the principle of compulsory consolidation for all controlled entities, leaving the detailed application of that principle to be spelt out in the Standard. The definitions in the proposed Standard are detailed and are supported by lengthy passages of commentary designed to spell out their application in a variety of special cases. They necessarily involve economic concepts, not readily able to be translated into a statute. Further, the definitions in the standard are constructed by use of a number of cross-references; if they were to be incorporated into the Corporations Law, the length and detail of the Law would need to be substantially increased to include all the cross-referenced material.

(c) It is flexible. If any further refinements to the definitions need to be effected to meet evolving business practices, these can be made quickly by the Australian Accounting Standards Board through amendments to the definitions in the Standard, and these amendments will apply automatically, without the need to await amendment of the Corporations Law. However, in this regard I also note that both Accounting Standards and the Regulations may be disallowed by Parliament in accordance with the normal procedures applicable to sub-ordinate instruments.

The Attorney concludes by saying:

> The existence of regulation-making powers enables the amended Corporations Law to operate effectively even if, for whatever reason, an accounting standard is delayed. The regulation-making powers also represent a further safeguard against unintended consequences of the new wide-ranging rules. Once a financial year has ended, the Board loses any power to apply a new amending standard in respect of that year (Corporations Law, subsection 285(2)). If a need to refine the definitions emerges only as companies commence to prepare their financial statements after the end of a financial year, this refinement will be able to be effected by regulation.
>
> In the light of these factors I consider that the approach adopted in the Bill to establish the legal framework requiring the consolidation of accounts which applies the detailed technical and conceptual framework of an accounting standard represents an appropriate mechanism in which to effectively and conveniently give effect to such accounting concepts in the law.

The Committee thanks the Attorney-General for this detailed and informative response.

INTERSTATE ROAD TRANSPORT AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Land Transport.

The Bill proposes to provide for the registration and regulation (under the Federal Interstate Registration Scheme) of prime movers which are to be used as part of a B-double combination. The Bill also provides for the making of regulations covering roadworthiness, designation of routes and technical requirements.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Minister for Land Transport responded to those comments in a letter dated 13 August 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Ministerial determinations
Clause 7

In Alert Digest No. 10, the Committee noted that clause 7 of the Bill proposes to insert a new section 43A into the Interstate Road Transport Act 1945. That proposed new section provides:

> (1) The Minister may determine, in writing, that certain roads or categories of roads are to be routes for the carriage of passengers or goods between prescribed places or for any purpose that is incidental to carriage of that kind.
>
> (2) The Minister may determine, in writing, conditions to which the operation of a B-double on a federal route is subject.

(3) The Minister must cause a notice of a determination made under this section to be published in the *Gazette*.

The Committee noted that clause 5 of the Bill proposes to insert a new section 12B into the Interstate Road Transport Act. That proposed new section would allow regulations to be promulgated to govern the operation of B-doubles (which are defined in proposed new section 3A - they are a type of motor vehicle).

The Committee noted that proposed new paragraph 12B(2)(c) provides that the regulation may prohibit the operation of a B-double in breach of conditions determined under proposed new subsection 43A(2). The Committee suggested that, if this was the case, those determinations could have an effect which approaches that of legislation. The Committee suggested that, if this was so, it was appropriate that the determinations be, at least, tabled in the Parliament and, perhaps, should be subject to disallowance.

The Committee drew Senators' attention to the provision, as it may be considered 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:

> ... I can advise you that the Bill was debated in the House of Representatives on 6 June 1991. In the course of this debate, the Opposition moved an amendment to the Bill to require that determinations made under new subsection 43A(2) be tabled in both Houses of Parliament and be subject to disallowance during a period of 15 sitting days from that time. The proposed amendment has been accepted. The concerns raised by the Committee in relation to these determinations would appear to have been satisfied by the amendment.

The Committee thanks the Minister for this response and for accepting the amendment moved in the House of Representatives.

INTERSTATE ROAD TRANSPORT CHARGE AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Land Transport.

The Bill proposes to remove provisions from the Interstate Road Transport Charge Act 1985 which permit only road maintenance costs to be taken into account in determining registration charges for B-double combinations and limit the charges that can be imposed on vehicles registered under the Federal Interstate Registration Scheme.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Minister for Land Transport responded to those comments in a letter dated 13 August 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Removal of limits on charges
Clauses 3 and 4

In Alert Digest No. 10, the Committee noted that clause 3 proposes to delete those provisions of the Interstate Road Transport Charge Act 1985 which presently limit the factors that can be taken into account in determining the charge applicable to motor vehicles and trailers. The Committee noted that, according to the Minister's Second Reading speech on the Bill, this is to reflect a reinterpretation of section 92 of the Constitution by the High Court (in the case of Cole v Whitfield (1988) 165 CLR 360), the effect of which is to allow construction costs to be taken into account in determining the charge. The clause also proposes to delete the limits on the level of the charge which currently apply pursuant to subsections 5(4) and (5).

The Committee noted that clause 4 proposes to repeal section 6 of the Interstate Road Transport Charge Act. That section provides for indexation of the limits which currently apply pursuant to subsections 5(4) and (5). The repeal is proposed on the basis that if the limits are no longer to apply, then the indexation provisions are redundant.

The Committee noted that the Explanatory Memorandum to the Bill offers no justification for the removal of the limits on the charge. However, the Minister's Second Reading speech, in addition to referring to the High Court decision, indicates that the purpose of the Bill is to enable registration charges to be determined on a 'full cost recovery' basis. The Second Reading speech also states:

> Given that industry has the opportunity to reap significant efficiency gains through the operation of B-Doubles on a national basis, it is reasonable to expect that they be prepared to accept the costs involved.

The Minister goes on to say:

> While it is not proposed to review existing charges on the basis of full cost recovery in these amendments, it is not appropriate to amend the Act so that there are two separate sets of charging principles - one for B-Doubles and one for all other categories.

In Alert Digest No. 10, the Committee indicated that it was concerned that these charges could be set in such a way that they might be more appropriately categorised as a tax. The Committee suggested that, if this was the case, they should be set by primary legislation and subject to full parliamentary scrutiny. The Committee suggested that it was inappropriate to set such charges by regulation, particularly in the absence of any limits on the charges which could be set.

Accordingly, the Committee drew attention to the provisions, as they may be considered to involve 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:

> Registration of vehicles involved in interstate trade and commerce under the Federal Interstate Registration Scheme is an alternative to State registration. To set charges which are far in excess of State registration charges would be counter-productive since operators would merely maintain State registration. Charges set under the Charge Act will be consistent with charges presently being paid by B-Doubles operating interstate in eastern Australia. In the circumstances I do not believe that there is a need to set maximum levels of charges for the purposes of this legislation.

The Committee thanks the Minister for this response. While the Committee is able to understand the rationale behind the Minister's argument that, in his view, maximum levels of charges are not necessary, the Committee notes that the argument relies on the levels of charges set by the States. In particular, the Committee suggests that it operates on the relative levels of the various charges set by the States, on the one hand, and the Commonwealth, on the other. In the sense that, according to the Minister's response, the Commonwealth charges will be set by reference to the State charges, the Committee suggests that this could be seen as an abrogation of power by the Commonwealth Parliament.

SERVICE AND EXECUTION OF PROCESS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 15 May 1991 by the Attorney-General.

The Bill proposes to insert a new Part 3A into the Service and Execution of Process Act 1901, to enable Royal Commissions and other investigative tribunals to serve subpoenas on persons interstate, and to provide for the enforcement of subpoenas to give evidence to investigative tribunals.

The Committee dealt with the Bill in Alert Digest No. 9 of 1991, in which it made various comments. The Attorney-General responded to those comments in a letter dated 3 June 1991. Though the Committee notes that the Senate passed the Bill on 13 August 1991, the Committee's comments and the Attorney's response may still be of interest to Senators. Relevant parts of the response are, therefore, discussed below. A copy of the letter is also attached to this report.

Adjournment of proceedings for 'a reasonable time'
Clause 5 - proposed new subsection 19Z(3)

In Alert Digest No. 9, the Committee noted that clause 5 of the Bill proposes to insert a new Part 3A into the Service and Execution of Process Act 1901. The Committee observed that Division 4 of proposed new Part 3A deals with the execution of warrants issued by or out of a court or investigative tribunal and that proposed new section 19Z sets out the procedure to be followed after a person has been apprehended pursuant to a warrant.

The Committee noted that proposed new subsection 19Z(1) provides that, '[a]s soon as practicable after being apprehended', a person is to be brought before a magistrate and that proposed new subsection (2) provides that a copy of the warrant, if it is available, must be produced to the magistrate. The Committee also noted that proposed new subsection (3) provides that if a copy of the warrant is not produced, the magistrate may:

(a) order that the person be released; or

(b) adjourn the proceedings for such reasonable time, not exceeding 7 days, as the magistrate specified and remand the person on bail or in such custody as the magistrate specifies.

The Committee suggested that this meant that if, for whatever reason, the warrant for the apprehension of the person is not produced at the initial appearance, a person may be remanded (on bail or in custody) for up to 7 days, in order to allow the arresting officers time to produce the warrant.

The Committee suggested that 7 days may be regarded as an excessive period time for a person to be remanded, possibly in custody, without the relevant warrant being produced. The Committee also suggested if the warrant was not available at the time that the person was apprehended then it might be considered more appropriate that such a warrant be produced within, say, 1 or 2 days.

In making this comment, the Committee also noted that this power is to be exercised by a magistrate and that the magistrate is to have the discretion to release the person or to remand the person on bail or in custody. In addition, the Committee noted that proposed new subsection 19Z(4) provides that if the warrant is not produced by the time the proceeding resumes (ie after the remand, not exceeding 7 days), the magistrate must order that the person be released. The

Committee suggested that this would, presumably, encourage the arresting officers to produce the warrant as soon as possible.

Nevertheless, the Committee indicated that it was concerned about the possibility of persons being remanded in custody for up to 7 days as a result of a failure on the part of an arresting authority to produce the relevant warrant in court. Accordingly, the Committee indicated that it would appreciate the Attorney-General's advice as to the need for the provision in question and the reason for the 7 day limit.

The Attorney-General has responded as follows:

> The provision has been included to enable the magistrate to check the validity of the warrant, its terms and that the person has been lawfully apprehended under it.
>
> As the Committee has noted, if the warrant is not produced there are 3 options open to the magistrate -
>
> . to release the apprehended person;
>
> . to remand that person on bail; or
>
> . to remand that person in custody.
>
> It should be noted 7 days is not the period for which the proceedings will be adjourned and hence the period for which the person will be remanded.
>
> The period of 7 days is merely an upper limit which has been included in the Bill as a protection for the apprehended person.
>
> Under the Bill, the proceedings must be adjourned for reasonable time.
>
> What is a reasonable time will depend upon the circumstances of each case, in particular what would be a reasonable time to enable the warrant, or a copy of it, to be sent to the appropriate place.

The Attorney goes on to say:

> In order to minimise the time that an apprehended person may possibly be remanded the Bill, in proposed new sections 19E and 19Z, permits production of a facsimile copy of the warrant. This is likely in most cases both to minimise the likelihood that a copy of the warrant will not be available when the person is taken before the magistrate and, where a copy is not available, to be a strong factor in determining what is a reasonable period for the adjournment.
>
> The 7 day upper limit, which was recommended by the Law Reform Commission ('LRC') in its report Service and Execution of Process takes account of the possibility that a person may be apprehended in a remote location.
>
> The Commonwealth has consulted extensively with the States and Territories about the LRC's report, particularly on the practical implications for them.
>
> The Government announced last year that as a result of its consideration of the LRC's report the Service and Execution of Process Act 1901 will be repealed and replaced. I am hopeful that subject to competing legislative priorities, that replacement Bill will be introduced late this year.
>
> The Amendment Bill brings forward part of the proposals for the replacement Bill. As I mentioned in my Second Reading Speech, the Chairman of one State Royal Commission (the Western Australian Royal Commission into Commercial Activities of Government) has informed the Government he considers that, without the powers to be conferred by the Amendment Bill, the Commission's work may be restricted in some important respects.

The Attorney concludes by saying:

> The Amendment Bill is scheduled for debate in the House of Representatives on Monday 3 June. It must be passed by both Houses of Parliament during the present sittings in order to be of substantial benefit to the Western Australian Royal Commission and other current Royal Commissions.

> As mentioned above, all consultations with the States and Territories have been on the basis of a 7 day upper limit. It is not practicable in the time available to obtain from the States and Territories a considered view on whether practical problems might result in remote areas if a shorter upper limit were set nor, if there is to be a shorter upper limit, what it should be.
>
> I emphasise, however, that the period of remand, if any, is not 7 days but a reasonable period not exceeding 7 days.
>
> In view of the concern expressed by the Committee the Commonwealth will consult the States and Territories, in the context of the replacement Service and Execution of Process Bill, to see whether a shorter upper limit for production of the warrant might be possible.

The Committee thanks the Attorney-General for this detailed response and for his undertaking to consult with the States and Territories on the issue of a shorter upper limit. The Committee looks forward to hearing of the results of this consultation in due course.

SOCIAL SECURITY (DISABILITY AND SICKNESS SUPPORT) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister Representing the Minister for Social Security.

The Bill proposes to amend the Social Security Act 1991 and the Health Insurance Act 1973 to effect a restructuring of income support for the disabled and sick. The changes in this Bill are based widely on the report of the Social Security Review, entitled 'Income Support for People with Disabilities'.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Minister for Social Security responded to those comments in a letter dated 16 July 1991. 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. 10, the Committee noted that subclause 2(1) of the Bill provides that Parts 1 and 2 of the Bill are to be taken to have commenced on 1 July 1991. The Committee noted that, depending on (if and) when the Bill is passed, this may involve some degree of retrospective operation. However, the Committee also noted that the amendments proposed by those Parts are either formal or technical in nature. Accordingly, the Committee made no further comment on the clause.

However, the Minister has told the Committee that the conclusion that the

proposed retrospective amendments are either formal or technical in nature is 'not entirely accurate'. The Minister advises that

> clause 11 implements a Budget 1990 initiative to limit the overseas portability of invalid pensions as of 1 July 1991. At present, provided a person receiving an invalid pension submits a departure certificate and remains qualified he or she can continue to receive an invalid pension indefinitely while overseas. Clause 11 will limit overseas payment of invalid pension to one year except where the pensioner is "severely disabled", a term defined in clause 3(b) of the Bill.

The Minister goes on to say:

> There will be no action taken to implement clause 11 until the legislation is in force and no overpayments in respect of the period from 1 July until implementation will be recovered.

The Committee thanks the Minister for this additional information and notes his assurance that there will be no retrospective recovery of overpayments arising as a result of the proposed amendment.

Provision of tax file numbers
Clauses 13 and 17 - proposed new sections 111, 112, 130 131, 676 and 703

In Alert Digest No. 10, the Committee noted that clause 13 of the Bill proposes to repeal and replace Part 2.3 of the Social Security Act 1991. The Committee noted that that proposed new Part deals with disability support pensions. It includes several proposed new subsections (111, 112, 130 and 131) which would require a person to supply his or her tax file number (or that of his or her partner) in relation to the payment of certain benefits.

The Committee noted that clause 17 of the Bill proposes to repeal and replace Part 2.14 of the Social Security Act. That proposed new Part deals with sickness allowances. The Committee noted that it includes two proposed new subsections (676 and 703) which would require a person to supply his or her tax file number (or that of his or her partner) in relation to the payment of certain benefits.

The Committee indicated that the provisions are similar in effect to provisions which it has previously drawn attention to, most recently in Alert Digest No. 7 of 1991, in relation to provisions in the Social Security (Job Search and Newstart) Amendment Bill 1991. As the Committee observed at that time, while such provisions may be seen as necessary to prevent persons defrauding the social security system, they may also be considered as unduly intrusive upon a person's privacy. Accordingly, the Committee drew the provisions to Senators' attention, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister has responded as follows:

> The data-matching program is authorised by the Data-matching Program (Assistance and Tax) Act 1990. The collection of TFNs [tax file numbers] from recipients and partners of recipients of the current invalid pension and sickness benefit is sanctioned by the Social Security Act 1947 (the 1947 Act). This policy has been carried across into the new Parts 2.3 and 2.14 of the Bill for the same reasons as were applicable when the data-matching program was first introduced on 1 January 1991.
>
> Disability support pension and sickness allowance are to be means tested; that is the rate of payment for which a person is qualified is dependent on what income he or she receives. For members of a couple the partner's income is also taken into account.

The Minister goes on to say:

> The Government decided some time ago to introduce a data-matching program in which the income information people disclose to paying agencies such as the Department of Social Security is to be checked automatically against the income information they disclose to th Australian Taxation Office (ATO) and other paying agencies. For this to be done efficiently and to prevent persons from defrauding the social security system the TFNs of both the recipient and his or her partner can be required.

The Minister concludes by saying:

> It should also be noted that these provisions would provide an opportunity for my Department to assist many of its clients who currently have problems with TFN provisions. Some individuals, for example, have difficulty in obtaining a TFN because of proof of identity requirements. These provisions would allow my Department to act as agent for the ATO to assist clients who have difficulty in obtaining a TFN by accepting applications on behalf of the ATO and conducting necessary proof of identity checks. As my Department currently conducts its own proof of identity checks, this would not constitute any increased intrusiveness from the client's point of view. Indeed, disabled people, persons with language difficulties and new entrants to the workforce, eg school leavers, should all find benefit in my Department's involvement in the TFN application process.

The Committee thanks the Minister for this response.

SOCIAL SECURITY LEGISLATION AMENDMENT ACT (NO. 2) 1991

The Bill for this Act was introduced into the House of Representatives on 30 May 1991 by the Minister Representing the Minister for Social Security.

The Bill proposed to amend:

- the Social Security Act 1947, to make a benefit payable (from 15 April 1991) to a person who holds an extended eligibility (spouse) entry permit;
- the Social Security Act 1991, to make it correspond to the Social Security Act 1947 as in force on 30 June 1991;
- the Social Security Act 1991, in relation to the indexation of maintenance income free areas and pharmaceutical allowances, the portability of wife's and class B widow's pensions and to give effect to a reciprocal social security agreement with the Netherlands; and
- the National Health Act 1953 and Data-matching Program (Assistance and Tax) Act 1990, to make minor technical amendments.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Minister for Social Security responded to those comments in a letter dated 16 July 1991. Though the Committee notes that the Bill was passed by the Senate on 19 June 1991, the Minister's response may still be of interest to Senators. A copy of the letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

Non-reviewable decision
Section 20 - new paragraph 1250(1)(m)

In Alert Digest No. 10, the Committee noted that clause 20 of the (then) Bill proposed to amend section 1250 of the Social Security Act 1991. The Committee noted that that section provides that certain decisions under the Act are not subject to review by the Social Security Appeals Tribunal. Clause 20 of the Bill proposed to add to the list of non-reviewable decisions which is contained in that section, decisions under subsection 1237(3) of the Act. The Committee noted that that subsection provides that the Minister may, by determination in writing, give directions to the Secretary in relation to the latter's power to waive debts.

The Committee noted that principle 1(a)(iii) of its terms of reference requires it to draw attention to provisions which make rights, liberties and obligations unduly dependent upon non-reviewable decisions. On that basis, the Committee drew Senators' attention to the provision.

The Minister responded as follows:

> *Subsection 1237(3) of the [Social Security] Act [1991] has the* same effect as subsection 251(1B) of the 1947 [Social Security] Act. It is necessary that the directions issued by the Minister under subsection 1237(3) are of a binding nature to avoid difficulties in reconciling decisions made by review bodies with departmental policy on effective debt management and control. The directions prescribe only the criteria to be applied when considering whether a debt should be waived. They do not outline any cases where waiver is not allowed, nor do they dictate a particular result in any single case.
>
> *The system in place prior to enactment of subsection 251(1B)* of the 1947 Act was based on non-statutory administrative criteria flowing from those issued by the Minister for Finance to delegates making decisions on waiver under the Audit Act 1901. Those criteria, which were in line with those applying in most other Commonwealth departments and agencies, were undermined over time by successive administrative review

> decisions. I do not believe that review bodies should be free to operate in this area according to principles of their own devising and so the Minister's directions under subsection 1237(3) should be applied consistently by both departmental staff and the review tribunals alike.

The Committee thanks the Minister for this response. The Committee notes that, in the last session of the Parliament, both section 1237 of the Social Security Act 1991 and section 251 of the Social Security Act 1947 were amended by the Senate so as to make the relevant directions issued by the Minister disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901. These amendments, which were subsequently accepted by the House of Representatives, addressed the concerns that the Committee had previously expressed in relation to the provisions in question.

TRANSPORT LEGISLATION AMENDMENT ACT 1991

The Bill for this Act was introduced into the House of Representatives on 29 May 1991 by the Minister for Land Transport.

This portfolio Act proposes to amend the following five Acts:

- Australian Maritime Safety Authority Act 1990;
- Australian National Railways Commission Act 1983;
- Civil Aviation Act 1988;
- Federal Airports Corporation Act 1986; and
- Protection of the Sea (Prevention of Pollution from Ships) Act 1983.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Minister for Land Transport responded to those comments in a letter dated 20 June 1991. The Bill was dealt with by the Senate on 21 June, before the Committee had had the opportunity to report on the Minister's response. However, with the concurrence of the Committee, the Senate had access to the response in the course of the debate.

Though the Bill has now been passed, the issues raised by the Committee and the Minister's responses to them may still be of interest to Senators. Accordingly, those issues are discussed below. A copy of the Minister's letter is also attached to this report.

Monitoring warrants
Section 12 - new section 32AD

In Alert Digest No. 10, the Committee noted that clause 12 of the (then) Bill proposed to insert a new Part IIIA into the Civil Aviation Act 1988. The Committee noted that that new Part would, if enacted, give the Civil Aviation Authority certain 'investigation powers'. In particular, the Committee noted that proposed new section 32AD would allow an 'investigator' appointed for the purposes of proposed Part IIIA to obtain a warrant for the purposes of 'monitoring' compliance with the Civil Aviation Act, the regulations issued under that Act and the Civil Aviation Orders. The Committee noted that such a warrant would authorise the investigator to enter the relevant premises for the purposes of monitoring compliance.

The Committee noted that an investigator would be able to obtain such a warrant without there being any suggestion of any offence being committed. The Committee noted that a warrant could only be issued by a magistrate and only after the magistrate has been satisfied (by information on oath) that it is reasonably necessary. The Committee also noted that, pursuant to paragraph 32AD(4)(c), it would be possible for such a warrant to be valid for up to one month after issue.

The Committee indicated that it was concerned both about the need for the warrants themselves and the necessity that they be valid for up to one month. Accordingly, the Committee sought some further information from the Minister on these matters.

The Minister responded as follows:

> The Air Safety Regulation Review Task Force in its second report, when noting the Civil Aviation Authority's responsibility for air navigation safety, voiced its concern over the lack of clearly defined legislative powers residing

with the Authority to meet this responsibility. The amendments currently proposed to the Civil Aviation Act 1988 are an attempt to fill this perceived need.

Compliance with Statutory safety requirements ensures that aircraft operators, by adopting required operating and maintenance practice, realise an acceptable level of safety for their aircraft. The Authority's responsibility for maintaining safe air navigation can only be achieved, however, if there is some assurance that these statutory requirements are being complied with by aircraft operators. The Authority, therefore, has an over-riding obligation to see that operators discharge their responsibilities adequately. This duty is discharged through the Authority's surveillance activities and day-to-day interaction with the aviation industry.

In practice, the extent of compliance with the statutory safety requirements by aircraft operators is influenced by the effectiveness of the Authority to monitor and guide the industry through its policies, guidelines and procedures, through education programs and in the power vested with the Authority to take effective remedial action when an operator is found not to be complying with legislative safety standards.

The Minister went on to say:

The statutory air safety requirements are numerous; a broad sample includes the following:

- commercial aircraft operators must have an adequate organisation, including trained staff, together with workshop and other equipment and facilities in order to ensure that airframes, engines, propellers, instruments, equipment and accessories are properly maintained at all times when they are in use;

- an aircraft operator must ensure that provision is made for the proper and periodic instruction of all maintenance personnel and must provide a training and checking organisation to ensure that members of the operator's operating crews

maintain their competency. The training programs, the training and checking organisation and the tests and checks provided by the organisation are all subject to the approval of the Authority; and

- aircraft maintenance can only be undertaken by persons who are licensed by the Authority. Such maintenance can usually only be carried out in premises that have been approved as being adequate for the purpose by the Authority.

In order to ensure compliance with such requirements, the Authority needs to be able to carry out quality assurance audits of aircraft operators, their facilities and authorised maintenance workshops. These audits are absolutely necessary to ensure that statutory requirements are being maintained and that the Australian public thereby continues to enjoy the highest level of aviation safety.

Normally, aircraft operators co-operate with the auditing process voluntarily. It is essential, however, that the Authority have some mechanism whereby it can carry out an audit when an operator refuses to co-operate and denies the Authority entry to premises. Clearly, if the Authority was not allowed entry, then it would be unable to carry out its statutory function to 'conduct safety regulation of civil aviation operations in Australia'.

The Minister concluded by saying:

The purpose of the monitoring provisions, and in particular the provisions relating to obtaining a warrant for the purposes of monitoring compliance with the Civil Aviation Act and subordinate legislation, is to enable the Authority to establish that the statutory safety requirements are being met by an aircraft operator and thereby avoiding potential air disasters.

The duration of one month for the warrant is not considered to be overly long owing to the considerable number of tasks and the time-consuming nature of the

work associated with the auditing process. Another relevant factor is that the auditing process periodically has to be carried out at maintenance premises situated in remote areas.

The Committee thanks the Minister for this detailed and informative response.

Abrogation of privilege against self-incrimination
Section 12 - new section 32AJ

In Alert Digest No. 10, the Committee noted that (then) proposed new subsection 32AJ(1) would, if enacted, allow an investigator who is in or on premises that he or she has entered pursuant to a warrant require a person to answer questions and produce documents. The Committee observed that failure to comply with such a requirement would attract a fine of up to $3000.

The Committee noted that, pursuant to proposed new subsection 32AJ(3), a person would not be entitled to refuse to answer such questions or produce such documents on the ground that to do so would tend to incriminate him or her. The Committee suggested that this was an abrogation of the privilege against self-incrimination. However, the Committee noted that proposed new subsection (3) goes on to provide that

> the answer to any question, or any book, record or document produced, or any information or thing obtained as a direct or indirect consequence of answering the question or producing the book, record or document is not admissible in evidence against the person in any criminal proceedings, other than proceedings for an offence against subsection (2).

The Committee indicated that, while the provision was in a form which it had previously been prepared to accept, it would appreciate the Minister's advice as to

the kind of information which might be sought pursuant to proposed new section 32AJ.

The Minister responded as follows:

> The inclusion of such a provision into the Civil Aviation Act was also recommended by the Air Safety Regulation Review Task Force in its second report. In reviewing the shortcomings in the investigative powers of the Authority, the Task Force noted that there was no obligation on persons to assist investigators or to answer their questions. The Task Force thus recommended that '(s)ubject to the protections suggested regarding self incrimination and inadmissibility of evidence, persons should be required to provide answers to authorised officers who are investigating breaches of air safety requirements'.
>
> Proposed section 32AJ provides that a person is obliged to answer an authorised investigator's questions and produce any books, records or documents requested by the investigator. If the person objects to doing so on the grounds of self-incrimination, and the investigator informs him/her of the obligation to answer the questions/produce the material, that person cannot refuse, without reasonable excuse, to answer the questions/produce the material, but the answer/material is essentially not admissible in proceedings against him/her.

The Minister went on to say:

> Such a power is appropriate for Authority investigators and is a provision commonly found in other legislation. For example, Bureau of Air Safety Investigation investigators have similar powers provided to them under the Air Navigation Regulations.
>
> The information which would be sought by investigators pursuant to this provision would relate to the maintenance and operation of aircraft. Such data, obtained from, for example, maintenance schedules, work sheets and oral statements from pilots and aircraft

personnel, would be used by investigators to establish whether the appropriate maintenance has been carried out on an aircraft, whether maintenance operations were performed in a suitable manner, whether proper checks were carried out on an aircraft at the required times, etc.

The Minister concluded by saying:

> Unequivocal access to all information relating to the maintenance and operation of aircraft is an essential part of the surveillance and enforcement function of the Authority. It is, therefore, fundamental to the fulfilment of the Authority's statutory functions that persons be required to answer questions and produce documents relating to the maintenance and operation of aircraft. The Authority would, otherwise, be hampered in the performance of its quality assurance audit and investigative roles to the detriment of air navigation safety in Australia.

The Committee thanks the Minister for this detailed and informative response.

Adoption of extrinsic material by regulation
Section 15 - new subsection 98(3A)

In Alert Digest No. 10, the Committee noted that clause 15 of the (then) Bill proposed to amend section 98 of the Civil Aviation Act, which sets out the regulation making power of that Act. The Committee noted that, among other things, clause 15 proposed to add a new subsection 98(3A), which provided:

> The regulations may make provision for or in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in a written instrument or other document, as in force at a particular time or from time to time.

The Committee noted that, by way of explanation, the Explanatory Memorandum stated:

> [T]his subclause ensures that the regulations can validly make provision for flight manuals, operations manuals, maintenance manuals, procedures manuals and other similar manuals relating to the safe operation of aircraft. The requirements for such manuals are set out in Annexes 6 and 8 to the Chicago Convention and such manuals are part of the regulatory system of all leading overseas aviation countries. Because such manuals were not previously expressly mentioned in the regulation making power in section 98 there was some legal doubt about the validity of Australian regulations relating to such manuals. This subclause, together with the validation provision in subclause 15(2), puts beyond doubt the validity of existing and future regulations relating to such manuals and will ensure that Australia continues to meet its international obligations in relation to the safety of air navigation.

The Committee indicated that, while it accepted the argument that it was essential that Australia meet its international obligations in relation to the safety of air navigation, it was equally essential that material which operated with the force of law was subject to scrutiny of Parliament. The Committee suggested that if the regulations were able to apply, adopt or incorporate matters contained in non-legislative instruments or documents 'as in force ... from time to time', the result would be to allow such extra-Parliamentary documents to be amended and to allow such amendments to have the force of law, without the Parliament having the opportunity to scrutinise them. The Committee stated that, in its opinion, the competing considerations here must be balanced by the Parliament.

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

The Minister responded as follows:

> The necessity for this amendment stems from recent advice received from the Attorney-General's Department that section 49A of the Acts Interpretation Act 1901 effectively prevents the Authority from requiring operators to comply with amendments to, amongst other similar technical documents, flight and operation manuals. The Civil Aviation Regulations currently empower the Authority to make necessary alterations to flight manuals, etc. and for persons to comply with such alterations.
>
> The flight manual is a basic technical, operational document required for all aircraft. It is also one of the Authority's primary regulatory tools and alterations to it are often required directly as the result of the discovery of defects in an aircraft affecting its safe operation.
>
> The manuals, being technical documents, are administrative rather than legislative in nature. Any alterations required to be made to them are generally changes to mechanical or operational requirements involving a high level of technical complexity.

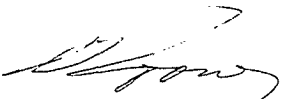
The Minister went on to say:

> Once alterations are made to these documents, the Authority notifies all relevant aircraft operators of the changes. This it generally does either by directly notifying operators and sending them a copy of the alteration or, when a broad class of aircraft is affected, through issuing a Civil Aviation Order setting out the amendment.
>
> Importantly, alterations to these documents are the means by which the Authority provides the most up-to-the-minute safety requirements for aircraft. The only practical mechanism to maintain Australia's foremost safety standards is via a mechanism which provides that amendments to the manuals have force of law once they are adopted. That is, via the mechanism proposed by new subsection 98(3A).

The Minister concluded by saying:

> The Authority (and previously, my Department) has been requiring aircraft operators and pilots to comply with flight and operation manuals (and subsequent amendments to such manuals) since the commencement of the regulation of air navigation in Australia in the 1920s. This is also standard practice in all leading overseas aviation countries and is well understood and accepted by the aviation industry. As a contracting state to the Convention on International Civil Aviation, Australia has an international obligation to provide for such manuals under Annexes 6 and 8 to the Convention. It is essential that there be no legal doubt about the Authority's power in this area. The purpose of this proposed amendment is to put beyond doubt the Authority's power to require aircraft operators to comply with amendments to technical aircraft manuals, such as flight manuals, in order to ensure that Australia continues to meet its international obligations in relation to the safety of air navigation.

The Committee thanks the Minister for this detailed and informative response. While the Committee finds the explanation put forward by the Minister to be quite appropriate, the Committee is nevertheless concerned about the possibility of statutory obligations being altered without notice being given. The Committee would, therefore, appreciate the Minister's further advice as to the extent to which these alterations are made public. In particular, the Committee seeks the Minister's advice as to whether a summary of recent alterations is published regularly by his Department in, say, the Department's annual report. If this is not the case, the Committee asks the Minister to consider whether such a practice might be adopted.



Barney Cooney
(Chairman)

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

- 1 AUG 1991

RECEIVED
13 AUG 1991
Senate Standing Ctte for the Scrutiny of Bills

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

Dear Senator Barney

I refer to comments made by the Senate Standing Committee for the Scrutiny of Bills in the Scrutiny of Bills Alert Digest No 9 of 1991 (29 May), concerning some aspects of the Australian National University Bill 1991, which were referred to my office by Mr Argument on 30 May 1991.

The Committee commented that clause 47(11) of the Bill, which deals with the Australian National University's audit requirements, is formulated in such a way as to place no limit on the persons whom the Auditor-General may authorise to act on his or her behalf, and it recommended that there should be a limit on the persons or classes of persons so authorised.

The Office of Parliamentary Counsel (OPC) has advised that this is a standard provision worked out with the Auditor-General many years ago. I understand that there are over 100 instances of its use in the Commonwealth Statutes including, in particular, model sections 63G and 63L of the Audit Act, 1901, which are applicable to a large number of statutory authorities.

I believe it would be inappropriate to alter this provision in the Australian National University Bill. If a change is to be made, it should be made in the Audit Act as well as all other Acts containing the provision. As this would be a matter for consideration by the Minister for Finance, I have drawn his attention to the Committee's comments.

The Committee also commented on the taxation provisions of the Bill. Firstly, it noted that the exemption from taxation imposed by the Debits Tax Act, 1982 in subclause 48(2) is unnecessary. I have been advised by OPC that the subclause is redundant and have initiated action to have it removed from the Bill.

Parliament House Canberra ACT 2600 Telephone (06) 277 7540

Secondly, it noted that clause 48(3) allows the Governor-General to make regulations which, in effect, could amend entirely the substantive provisions of the primary legislation (i.e. clause 48(1)). It also noted that there is no indication of the kinds of eventualities which the provision is intended to cover. At present one regulation relating to payroll taxation is in force under this provision. I propose to amend the provision to provide explicitly that the University is subject to State and Territory Laws relating to such taxation.

The Bill is scheduled to be debated in the Senate during the week of 13-16 August 1991. I expect to have the amendments referred to above introduced on behalf of the Government at this time.

Yours sincerely

Peter Baldwin

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20 JUN 1991
Senate Standing Cttee for the Scrutiny of Bills

Attorney-General

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

90525

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

Dear Senator Cooney

I refer to the letter from the Secretary of the Senate Standing Committee for the Scrutiny of Bills Committee seeking my response to comments made by the Committee in Alert Digest No 10 of 1991 (5 June 1991) concerning the Corporations Legislation Amendment Bill 1991.

Set out below is my reply to the two matters on which the Committee has sought my further views in respect of this Bill.

Commencement by Proclamation
Sub clauses 2(3), (4), (10), (11) and (12)

On pages 24 to 26 of the relevant Digest, the Committee has considered the commencement of the provisions dealing with the winding up of the National Companies and Securities Commission and other transitional and consequential matters associated with its abolition.

The Committee has accepted the explanation in the Explanatory Memorandum that it would not be appropriate to make the provisions subject to the usual 6 month automatic commencement requirement because it is possible that not all the administrative action necessary to complete the winding up processes will be carried out within that time. However, the Committee has sought my further views on its suggestion that it may still be appropriate to make the provisions commence automatically after, say, a 12 month period.

I am sympathetic to the Committee's position that it is desirable, wherever possible, to fix a specified period beyond which legislation must come into operation.

However, in this particular case the operation of the provisions depends on the completion of certain administrative and accounting processes some of which involve matters beyond the control of the Government, including

consultation and agreement with States on the outcome of those administrative and financial processes. Because it is not possible to guarantee the completion of those processes within any specific period, and the provision would not effectively operate if brought into operation before those processes were completed, it has been necessary to provide for flexibility in the commencement of the provisions. However, having provided this explanation, I wish to reassure the Committee that the Commonwealth is seeking to resolve those matters as quickly as possible, and would expect that in the normal event these processes would be completed well inside 12 months.

"Henry VIII" clauses
Schedule 3 - proposed new sections 294A and 294B

The Committee has drawn attention on pages 26 and 27 of the relevant Alert digest to proposed new sections 294A and 294B in Schedule 3 of the Bill, which deals with the consolidation of accounts. The Committee suggests that these provisions "may be considered an inappropriate delegation of legislative power".

Proposed sections 294A and 294B deal with the definitions of "entity", "parent entity", "economic entity", "reporting entity" and "control". The sections define these terms by reference to an accounting standard dealing with the making out of consolidated accounts. The sections also allow regulations to define the terms "entity", "parent entity", "economic entity" and "reporting entity", as well as to make provision for determining whether or not an entity "controls" another entity.

A key aspect of the amendments contained in Schedule 3 will be to require the production by companies of consolidated accounts dealing with all the "entities" which they "control". In order to assist consideration of the structure of sections 294A and 294B, it might be helpful to review briefly the circumstances which have led the Government to propose the amendments set out in Schedule 3.

The amendments tackle some of the key failures of financial reporting requirements which came to light during the 1980s. The present law requires a company to prepare group accounts only in respect of the company and its "subsidiaries". This rule is technical and formal. It is also easily evaded. It has enabled unscrupulous company operators to disguise the true financial position of their companies by arranging their affairs in a manner that lies just beyond the reach of the rules. "Off-balance-sheet vehicles" like trusts and partnerships are not part of a group because the definition of "subsidiary" reaches only corporate entities. Similarly, companies which are 49.9% owned by another are said not to be part of the other's group because a key element of the definition of subsidiary focusses on the technicality of 50% ownership of shares, even though the rest of the share register might be so structured as to give the 49.9% shareholder complete effective control.

To prevent technical evasion of this nature, and to ensure adequate disclosure of the true financial position of companies, it is necessary to substitute new rules for consolidated accounts. Clearly, the new rules must be of general application, so as to close off any new potential loopholes. At the same time, they must be flexible enough to adapt to evolving business practices. They must also be capable of being refined quickly, should the need arise, given the significant change represented by the adoption of broad rules in a previously technical area.

The Australian Accounting Standards Board, and its predecessor under the co-operative scheme, the Accounting Standards Review Board, have been considering for some time how to ensure that consolidation is made compulsory in those cases where it is appropriate, but not in others. They have in the proposed Standard 1024 developed a series of definitions which are designed to spread the consolidation net as broadly as necessary without imposing needless expense which would occur, for example, if each company in a chain of wholly-owned subsidiaries was required to produce a separate set of consolidated accounts.

Given these considerations, the approach taken in sections 294A and 294B is to adopt key definitions in Standard 1024. In my view, this approach has the following significant advantages.

(a) It takes advantage of work already done. Standard 1024 has been developed by the Boards over a period of some years. An exposure draft was issued in September 1987 and a professional standard in June 1990, prior to the release in December 1990 of a Standard proposed to be made legally enforceable under the Corporations Law. The Standard therefore reflects the advantage of a lengthy deliberation and public comment. It is appropriate to draw on that process of consultation by adopting the definitions in the Standard, rather than trying to develop new definitions at this stage.

(b) It makes the Corporations Law simpler and easier to understand in its statement of the principle of compulsory consolidation for all controlled entities, leaving the detailed application of that principle to be spelt out in the Standard. The definitions in the proposed Standard are detailed and are supported by lengthy passages of commentary designed to spell out their application in a variety of special cases. They necessarily involve economic concepts, not readily able to be translated into a statute. Further, the definitions in the standard are constructed by use of a number of cross-references; if they were to be incorporated into the Corporations Law, the length and detail of the Law would need to be substantially increased to include all the cross-referenced material.

(c) It is flexible. If any further refinements to the definitions need to be effected to meet evolving business practices, these can be made quickly by the Australian Accounting Standards Board through amendments to the definitions in the Standard, and these amendments will apply automatically, without the need to await amendment of the Corporations Law. However, in this regard I also note that both Accounting Standards and the Regulations may be disallowed by Parliament in accordance with the normal procedures applicable to sub-ordinate instruments.

The existence of regulation-making powers enables the amended Corporations Law to operate effectively even if, for whatever reason, an accounting standard is delayed. The regulation-making powers also represent a further safeguard against unintended consequences of the new wide-ranging rules. Once a financial year has ended, the Board loses any power to apply a new amending standard in respect of that year (Corporations Law, subsection 285(2)). If a need to refine the definitions emerges only as companies commence to prepare their financial statements after the end of a financial year, this refinement will be able to be effected by regulation.

In the light of these factors I consider that the approach adopted in the Bill to establish the legal framework requiring the consolidation of accounts which applies the detailed technical and conceptual framework of an accounting standard represents an appropriate mechanism in which to effectively and conveniently give effect to such accounting concepts in the law.

Yours sincerely

MICHAEL DUFFY

Transport and Communications

Minister for Land Transport

The Hon Bob Brown MP

Parliament House
Canberra ACT 2600

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13 AUG 1991
Senate Standing Committee for the Scrutiny of Bills

13 AUG 1991

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

Dear Senator Cooney

I refer to the comments contained in the Scrutiny of Bills Alert Digest No 10 of 1991 relating to the Interstate Road Transport Amendment Bill 1991 and the Interstate Road Transport Charge Amendment Bill 1991.

The Federal Government is committed to a program of reform in the land transport sector. The introduction of B-Doubles on a national basis forms an integral part of this reform. Resultant productivity gains to be made from the wider use of these vehicles should encourage greater competition and lower prices for transport services, objectives which are consistent with the Government's micro-economic reform agenda for the transport industry. In order to enable the potential gains to be offered by B-Doubles to be fully realised, it is essential that they be able to operate throughout Australia under uniform operating conditions.

Equally, in seeking to deliver the benefits to be derived from wider use of these vehicles, the Government also needs to ensure that they contribute equitably towards the additional costs they impose on publicly-provided infrastructure. The current limits under the Interstate Road Transport Charge Act would constrain charges for road use to $5 000 which is considerably below charges being paid by B-Doubles currently operating interstate in eastern Australia under State registration. The registration fees are road use charges related to the costs imposed on the road system and not general revenue or taxation measures.

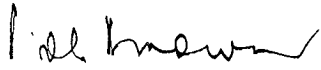
In response to your concern in relation to the Interstate Road Transport Charge Amendment Bill, I provide the following comments. Registration of vehicles involved in interstate trade and commerce under the Federal Interstate Registration Scheme is an alternative to State registration. To set charges which are far in excess of State registration charges would be counter-productive since operators would merely maintain State registration. Charges set under the Charge Act will be consistent with charges presently being paid by B-Doubles operating

interstate in eastern Australia. In the circumstances I do not believe that there is a need to set maximum levels of charges for the purposes of this legislation.

With regard to your concern about the Interstate Road Transport Amendment Bill, I can advise you that the Bill was debated in the House of Representatives on 6 June 1991. In the course of this debate, the Opposition moved an amendment to the Bill to require that determinations made under new subsection 43A(2) be tables in both Houses of Parliament and be subject to disallowance during a period of 15 sitting days from that time. The proposed amendment has been accepted. The concerns raised by the Committee in relation to these determinations would appear to have been satisfied by the amendment.

I would appreciate inclusion of these comments in your Report to the Senate prior to debate of the Bills.

Yours sincerely



BOB BROWN

Attorney-General

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

- 3 JUN 1991

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 on the Service and Execution of Process Amendment Bill 1991 contained in the Scrutiny of Bills Alert Digest No.9 of 1991 dated 29 May 1991.

As you will recall, the Service and Execution of Process Amendment Bill will insert a new Part 3A into the Service and Execution of Process Act 1901 to enable subpoenas to give evidence before State and Territory Royal Commissions and other investigative tribunals to be served interstate.

The new Part will enable interstate execution of a warrant issued in respect of non compliance with such a subpoena.

Under the new Part, after being apprehended interstate, the person is to be taken, as soon as practicable, before a magistrate in the State or Territory of apprehension. At that time, the warrant or a copy of it, if available, is to be produced to the magistrate. If the warrant or a copy of it is not produced, the magistrate is to be able to adjourn the proceedings for such reasonable time, not exceeding 7 days, as the magistrate specifies. The person, during that 7 day period, may be remanded on bail or in custody. If the warrant or a copy of it is not produced when the proceedings resume, the person must be released.

The Committee states that "7 days may be regarded as an excessive period of time for a person to be remanded, possibly in custody, to enable the warrant to be produced. If the warrant is not available at the time that the person is apprehended then it might be considered more appropriate that such a warrant be produced within, say, 1 or 2 days."

The Committee has asked for my advice "as to the need for the provision in question and the reason for the 7 day limit".

The provision has been included to enable the magistrate to check the validity of the warrant, its terms and that the person has been lawfully apprehended under it.

As the Committee has noted, if the warrant is not produced there are 3 options open to the magistrate -

- to release the apprehended person;
- to remand that person on bail; or
- to remand that person in custody.

It should be noted 7 days is not the period for which the proceedings will be adjourned and hence the period for which the person will be remanded.

The period of 7 days is merely an upper limit which has been included in the Bill as a protection for the apprehended person.

Under the Bill, the proceedings must be adjourned for a reasonable time.

What is a reasonable time will depend upon the circumstances of each case, in particular what would be a reasonable time to enable the warrant, or a copy of it, to be sent to the appropriate place.

In order to minimise the time that an apprehended person may possibly be remanded the Bill, in proposed new sections 19E and 19Z, permits production of a facsimile copy of the warrant. This is likely in most cases both to minimise the likelihood that a copy of the warrant will not be available when the person is taken before the magistrate and, where a copy is not available, to be a strong factor in determining what is a reasonable period for the adjournment.

The 7 day upper limit, which was recommended by the Law Reform Commission ('LRC') in its report Service and Execution of Process takes account of the possibility that a person may be apprehended in a remote location.

The Commonwealth has consulted extensively with the States and Territories about the LRC's report, particularly on the practical implications for them.

The Government announced last year that as a result of its consideration of the LRC's report the Service and Execution of Process Act 1901 will be repealed and replaced. I am hopeful that subject to competing legislative priorities, that replacement Bill will be introduced late this year.

The Amendment Bill brings forward part of the proposals for the replacement Bill. As I mentioned in my Second Reading Speech, the Chairman of one State Royal Commission (the Western Australian Royal Commission into Commercial Activities of Government) has informed the Government he considers that, without the powers to be conferred by the Amendment Bill, the Commission's work may be restricted in some important respects.

The Amendment Bill is scheduled for debate in the House of Representatives on Monday 3 June. It must be passed by both Houses of Parliament during the present sittings in order to be of substantial benefit to the Western Australian Royal Commission and other current Royal Commissions.

As mentioned above, all consultations with the States and Territories have been on the basis of a 7 day upper limit. It is not practicable in the time available to obtain from the States and Territories a considered view on whether practical problems might result in remote areas if a shorter upper limit were set nor, if there is to be a shorter upper limit, what it should be.

I emphasize, however, that the period of remand, if any, is not 7 days but a reasonable period not exceeding 7 days.

In view of the concern expressed by the Committee the Commonwealth will consult the States and Territories, in the context of the replacement Service and Execution of Process Bill, to see whether a shorter upper limit for production of the warrant might be possible.

Yours sincerely

MICHAEL DUFFY

COMMONWEALTH OF AUSTRALIA

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13 AUG 1991

Senate Standing C... for the Scrutiny of Bills

MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

16 JUL 1991

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

Dear Senator Cooney Barney

On 5 June 1991 your Committee's Secretary drew attention to the comments on the Social Security (Disability and Sickness Support) Amendment Bill 1991 (the Disability Bill) and the Social Security Legislation Amendment Bill (No. 2) 1991 (Bill No. 2) in its Alert Digest No. 10 of 1991.

The Disability Bill

. Subclause 2(1) - Retrospectivity

The Committee noted that subclause 2(1) contemplates some possible retrospective operation of Parts 1 and 2 of the Bill. The Committee makes no further comment in the belief that the amendments proposed by Parts 1 and 2 are either formal or technical in nature.

This is not entirely accurate in that clause 11 implements a Budget 1990 initiative to limit the overseas portability of invalid pensions as of 1 July 1991. At present, provided a person receiving an invalid pension submits a departure certificate and remains qualified he or she can continue to receive an invalid pension indefinitely while overseas. Clause 11 will limit overseas payment of invalid pension to one year except where the pensioner is "severely disabled", a term defined in clause 3(b) of the Bill.

There will be no action taken to implement clause 11 until the legislation is in force and no overpayments in respect of the period from 1 July until implementation will be recovered.

Clauses 13 and 17 - proposed new sections 111, 112, 130, 131, 676 and 703 : Provision of tax file numbers

The Committee expressed concern that the new Parts 2.3 and 2.14 of the Social Security Act 1991 (the Act) include requirements that a person provide to the Secretary his or her tax file number (TFN) and that of the person's partner as a condition of payment of disability support pension or sickness allowance. The Committee commented that, although such provisions may be seen as necessary to prevent persons defrauding the social security system, they may also be considered as unduly intrusive upon a person's privacy.

The data-matching program is authorised by the Data-matching Program (Assistance and Tax) Act 1990. The collection of TFNs from recipients and partners of recipients of the current invalid pension and sickness benefit is sanctioned by the Social Security Act 1947 (the 1947 Act). This policy has been carried across into the new Parts 2.3 and 2.14 of the Bill for the same reasons as were applicable when the data-matching program was first introduced on 1 January 1991.

Disability support pension and sickness allowance are to be means tested; that is the rate of payment for which a person is qualified is dependent on what income he or she receives. For members of a couple the partner's income is also taken into account.

The Government decided some time ago to introduce a data-matching program in which the income information people disclose to paying agencies such as the Department of Social Security is to be checked automatically against the income information they disclose to the Australian Taxation Office (ATO) and other paying agencies. For this to be done efficiently and to prevent persons from defrauding the social security system the TFNs of both the recipient and his or her partner can be required.

It should also be noted that these provisions would provide an opportunity for my Department to assist many of its clients who currently have problems with TFN provisions. Some individuals, for example, have difficulty in obtaining a TFN because of proof of identity requirements. These provisions would allow my Department to act as agent for the ATO to assist clients who have difficulty in obtaining a TFN by accepting applications on behalf of the ATO and conducting necessary proof of identity checks. As my Department currently conducts its own proof of identity checks, this would not constitute any increased intrusiveness from the client's point of

view. Indeed, disabled people, persons with language difficulties and new entrants to the workforce, eg school leavers, should all find benefit in my Department's involvement in the TFN application process.

. Clauses 13 and 17 - proposed new sections 134 and 727 : Abrogation of privilege against self-incrimination

The Committee commented on the notification provisions in sections 132, 133, 725 and 726 and new subsections 134(1) and 727(1) have the effect of not excusing persons from providing information under the notification sections on the ground that the information provided would tend to incriminate them. The Committee indicated that these provisions would generally be regarded as an abrogation of the privilege against self-incrimination.

The Committee acknowledged, however, that such information is not admissible in evidence against a person in criminal proceedings other than proceedings arising under, or as a result of, certain provisions in sections 132, 133, 725 and 726.

As the Committee previously accepted the form of these provisions, I note that the Committee has chosen to make no further comment on this issue.

Bill No. 2

. Subclauses 2(2) and (5)

The Committee notes that subclause 2(2) of this Bill provides that Part 2 of the Bill is to be taken to have commenced on 15 April 1991. The Committee also notes that subclause 2(5) provides that Part 5 is to be taken to have commenced on 1 March 1991. Despite this the Committee makes no further comment on these clauses because their effect is beneficial to claimants.

. Clause 20 - proposed new paragraph 1250(1)(m): non-reviewable decision

The Committee notes that clause 20 of this Bill provides for an addition to the list in section 1250 of the Act of decisions not open to review by the Social Security Appeals Tribunal. The addition would make decisions under subsection 1237(3) of the Act non-reviewable. That subsection permits the Minister, by determination in

writing, to give directions to the Secretary in relation to the Secretary's power to waive debts. This Committee draws attention to this provision as a provision which may make rights, liberties and obligations unduly dependent on non-reviewable decisions.

Subsection 1237(3) of the Act has the same effect as subsection 251(1B) of the 1947 Act. It is necessary that the directions issued by the Minister under subsection 1237(3) are of a binding nature to avoid difficulties in reconciling decisions made by review bodies with departmental policy on effective debt management and control. The directions prescribe only the criteria to be applied when considering whether a debt should be waived. They do not outline any cases where waiver is not allowed, nor do they dictate a particular result in any single case.

The system in place prior to enactment of subsection 251(1B) of the 1947 Act was based on non-statutory administrative criteria flowing from those issued by the Minister for Finance to delegates making decisions on waiver under the Audit Act 1901. Those criteria, which were in line with those applying in most other Commonwealth departments and agencies, were undermined over time by successive administrative review decisions. I do not believe that review bodies should be free to operate in this area according to principles of their own devising and so the Minister's directions under subsection 1237(3) should be applied consistently by both departmental staff and the review tribunals alike.

Yours sincerely

Graham Richardson

GRAHAM RICHARDSON

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21 JUN 1991
Senate Standing Cttee for the Scrutiny of Bills

Transport and Communications

Minister for Land Transport

The Hon. Bob Brown MP

Parliament House
Canberra ACT 2600

20 JUN 1991

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

Dear Senator

I refer to the Scrutiny of Bills Alert Digest No. 10 of 1991 (5 June) concerning some aspects of the Transport Legislation Amendment Bill 1991, which was referred to my Office for comment by Mr Argument on 6 June 1991.

Monitoring warrants
Clause 12 - proposed new section 32AD

The Committee questioned both the need for the warrants and also why they should be valid for one month.

The Air Safety Regulation Review Task Force in its second report, when noting the Civil Aviation Authority's responsibility for air navigation safety, voiced its concern over the lack of clearly defined legislative powers residing with the Authority to meet this responsibility. The amendments currently proposed to the Civil Aviation Act 1988 are an attempt to fill this perceived need.

Compliance with statutory safety requirements ensures that aircraft operators, by adopting required operating and maintenance practice, realise an acceptable level of safety for their aircraft. The Authority's responsibility for maintaining safe air navigation can only be achieved, however, if there is some assurance that these statutory requirements are being complied with by aircraft operators. The Authority, therefore, has an over-riding obligation to see that operators discharge their responsibilities adequately. This duty is discharged through the Authority's surveillance activities and day-to-day interaction with the aviation industry.

In practice, the extent of compliance with the statutory safety requirements by aircraft operators is influenced by the effectiveness of the Authority to monitor and guide the industry through its policies, guidelines and procedures, through education programs and in the power vested with the Authority to take effective remedial action when an

operator is found not to be complying with legislative safety standards.

The statutory air safety requirements are numerous; a broad sample includes the following:

- commercial aircraft operators must have an adequate organisation, including trained staff, together with workshop and other equipment and facilities in order to ensure that airframes, engines, propellers, instruments, equipment and accessories are properly maintained at all times when they are in use;

- an aircraft operator must ensure that provision is made for the proper and periodic instruction of all maintenance personnel and must provide a training and checking organisation to ensure that members of the operator's operating crews maintain their competency. The training programs, the training and checking organisation and the tests and checks provided by the organisation are all subject to the approval of the Authority; and

- aircraft maintenance can only be undertaken by persons who are licensed by the Authority. Such maintenance can usually only be carried out in premises that have been approved as being adequate for the purpose by the Authority.

In order to ensure compliance with such requirements, the Authority needs to be able to carry out quality assurance audits of aircraft operators, their facilities and authorised maintenance workshops. These audits are absolutely necessary to ensure that statutory requirements are being maintained and that the Australian public thereby continues to enjoy the highest level of aviation safety.

Normally, aircraft operators co-operate with the auditing process voluntarily. It is essential, however, that the Authority have some mechanism whereby it can carry out an audit when an operator refuses to co-operate and denies the Authority entry to premises. Clearly, if the Authority was not allowed entry, then it would be unable to carry out its statutory function to 'conduct safety regulation of civil aviation operations in Australia'.

The purpose of the monitoring provisions, and in particular the provisions relating to obtaining a warrant for the purposes of monitoring compliance with the Civil Aviation Act and subordinate legislation, is to enable the Authority to establish that the statutory safety requirements are being met by an aircraft operator and thereby avoiding potential air disasters.

The duration of one month for the warrant is not considered to be overly long owing to the considerable number of tasks

and the time-consuming nature of the work associated with the auditing process. Another relevant factor is that the auditing process periodically has to be carried out at maintenance premises situated in remote areas.

Abrogation of privilege against self-incrimination
Clause 12 - proposed new section 32AJ

The Committee notes that proposed section 32AJ is drafted in a form which it has previously been prepared to accept, but has requested my advice as to the kind of information that might be sought pursuant to this provision.

The inclusion of such a provision into the Civil Aviation Act was also recommended by the Air Safety Regulation Review Task Force in its second report. In reviewing the shortcomings in the investigative powers of the Authority, the Task Force noted that there was no obligation on persons to assist investigators or to answer their questions. The Task Force thus recommended that '(s)ubject to the protections suggested regarding self incrimination and inadmissibility of evidence, persons should be required to provide answers to authorized officers who are investigating breaches of air safety requirements'.

Proposed section 32AJ provides that a person is obliged to answer an authorised investigator's questions and produce any books, records or documents requested by the investigator. If the person objects to doing so on the grounds of self-incrimination, and the investigator informs him/her of the obligation to answer the questions/produce the material, that person cannot refuse, without reasonable excuse, to answer the questions/produce the material, but the answer/material is essentially not admissible in proceedings against him/her.

Such a power is appropriate for Authority investigators and is a provision commonly found in other legislation. For example, Bureau of Air Safety Investigation investigators have similar powers provided to them under the Air Navigation Regulations.

The information which would be sought by investigators pursuant to this provision would relate to the maintenance and operation of aircraft. Such data, obtained from, for example, maintenance schedules, work sheets and oral statements from pilots and aircraft personnel, would be used by investigators to establish whether the appropriate maintenance has been carried out on an aircraft, whether maintenance operations were performed in a suitable manner, whether proper checks were carried out on an aircraft at the required times, etc.

Unequivocal access to all information relating to the maintenance and operation of aircraft is an essential part of the surveillance and enforcement function of the

Authority. It is, therefore, fundamental to the fulfilment of the Authority's statutory functions that persons be required to answer questions and produce documents relating to the maintenance and operation of aircraft. The Authority would, otherwise, be hampered in the performance of its quality assurance audit and investigative roles to the detriment of air navigation safety in Australia.

Adoption of extrinsic material by regulation
Clause 15 - proposed new subsection 98(3A)

The Committee, whilst acknowledging that this provision will allow Australia to meet its international obligations in relation to the safety of air navigation, expressed concern that it would allow matter to be incorporated into regulations without being subject to Parliamentary scrutiny.

The necessity for this amendment stems from recent advice received from the Attorney-General's Department that section 49A of the Acts Interpretation Act 1901 effectively prevents the Authority from requiring operators to comply with amendments to, amongst other similar technical documents, flight and operation manuals. The Civil Aviation Regulations currently empower the Authority to make necessary alterations to flight manuals, etc. and for persons to comply with such alterations.

The flight manual is a basic technical, operational document required for all aircraft. It is also one of the Authority's primary regulatory tools and alterations to it are often required directly as the result of the discovery of defects in an aircraft affecting its safe operation.

The manuals, being technical documents, are administrative rather than legislative in nature. Any alterations required to be made to them are generally changes to mechanical or operational requirements involving a high level of technical complexity.

Once alterations are made to these documents, the Authority notifies all relevant aircraft operators of the changes. This it generally does either by directly notifying operators and sending them a copy of the alteration or, when a broad class of aircraft is affected, through issuing a Civil Aviation Order setting out the amendment.

Importantly, alterations to these documents are the means by which the Authority provides the most up-to-the-minute safety requirements for aircraft. The only practical mechanism to maintain Australia's foremost safety standards is via a mechanism which provides that amendments to the manuals have force of law once they are adopted. That is, via the mechanism proposed by new subsection 98(3A).

The Authority (and previously, my Department) has been requiring aircraft operators and pilots to comply with flight and operation manuals (and subsequent amendments to such manuals) since the commencement of the regulation of air navigation in Australia in the 1920s. This is also standard practice in all leading overseas aviation countries and is well understood and accepted by the aviation industry. As a contracting state to the Convention on International Civil Aviation, Australia has an international obligation to provide for such manuals under Annexes 6 and 8 to the Convention. It is essential that there be no legal doubt about the Authority's power in this area. The purpose of this proposed amendment is to put beyond doubt the Authority's power to require aircraft operators to comply with amendments to technical aircraft manuals, such as flight manuals, in order to ensure that Australia continues to meet its international obligations in relation to the safety of air navigation.

I trust these comments satisfactorily address the Committee's concerns.

Yours sincerely

BOB BROWN

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWELFTH REPORT

OF

1991

21 AUGUST 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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 1991

The Committee has the honour to present its Twelfth Report of 1991 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:

Interstate Road Transport Amendment Bill 1991

Social Security (Rewrite) Amendment Act 1991

INTERSTATE ROAD TRANSPORT AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Land Transport.

The Bill proposes to provide for the registration and regulation (under the Federal Interstate Registration Scheme) of prime movers which are to be used as part of a B-double combination. The Bill also provides for the making of regulations covering roadworthiness, designation of routes and technical requirements.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Minister for Land Transport responded to those comments in a letter dated 13 August 1991. This response was subsequently discussed by the Committee in its Eleventh Report of 1991. In the light of matters which have subsequently been drawn to the Committee's attention, the following further comments are offered.

Ministerial determinations
Clause 7

In Alert Digest No. 10, the Committee noted that clause 7 of the Bill proposes to insert a new section 43A into the Interstate Road Transport Act 1945. That proposed new section provides:

> (1) The Minister may determine, in writing, that certain roads or categories of roads are to be routes for the carriage of passengers or goods between prescribed places or for any purpose that is incidental to carriage of that kind.

(2) The Minister may determine, in writing, conditions to which the operation of a B-double on a federal route is subject.

(3) The Minister must cause a notice of a determination made under this section to be published in the *Gazette*.

The Committee noted that clause 5 of the Bill proposes to insert a new section 12B into the Interstate Road Transport Act. That proposed new section would allow regulations to be promulgated to govern the operation of B-doubles (which are defined in proposed new section 3A - they are a type of motor vehicle).

The Committee noted that proposed new paragraph 12B(2)(c) provides that the regulation may prohibit the operation of a B-double in breach of conditions determined under proposed new subsection 43A(2). The Committee suggested that, if this was the case, those determinations could have an effect which approaches that of legislation. The Committee suggested that, if this was so, it was appropriate that the determinations be, at least, tabled in the Parliament and, perhaps, should be subject to disallowance.

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

The Minister responded as follows:

> ... I can advise you that the Bill was debated in the House of Representatives on 6 June 1991. In the course of this debate, the Opposition moved an amendment to the Bill to require that determinations made under new subsection 43A(2) be tabled in both Houses of Parliament and be subject to disallowance during a period of 15 sitting days from that time. The proposed amendment has been accepted. The concerns raised by the Committee in relation to these determinations would appear to have been satisfied by the amendment.

It has been drawn to the Committee's attention that, in fact, the amendment referred to by the Minister was not moved in the House of Representatives. Rather, as a result of the Bill proceeding in the House under a guillotine motion, the text of the proposed amendment was incorporated in Hansard during the Second Reading debate on the Bill (see House of Representatives, Hansard, 6 June 1991, p4977). An amendment in identical terms was subsequently moved in and passed by the Senate on 16 August 1991 (see Journals of the Senate, No. 105, 16 August 1991, p1385). As the Minister's original response suggested, the Government did not oppose the amendment.

The Minister has provided a further response on this matter, dated 19 August 1991, which confirms the account outlined above. A copy of the letter is attached to this report. The Committee thanks the Minister for his further assistance with the Bill.

SOCIAL SECURITY (REWRITE) AMENDMENT ACT 1991

The Bill for this Act was introduced into the House of Representatives on 16 May 1991 by the Minister representing the Minister for Social Security.

The Act amends the Social Security Act 1991 (which commenced on 1 July 1991) to provide for amendments made by:

- the Social Welfare (Pharmaceutical Benefits) Amendment Act 1990;
- the Social Security and Veterans' Affairs Legislation Amendment Act (No. 2) 1990; and
- the Social Security Legislation Amendment Act 1990.

The Act covers areas concerning tax file numbers, deeming (loans and deposits), the liquid assets test for sickness beneficiaries, debt recovery, the employment entry payment for sole parent pensioners, disaster relief payments, the extension of qualification criteria for remote area allowance and the carer pension, the pharmaceutical supplement allowance and provides for international social security agreements with the United Kingdom and Malta.

The Committee dealt with the Bill in Alert Digest No. 9 of 1991, in which it made various comments. The Minister for Social Security responded to those comments in a letter dated 15 August 1991. Though the Bill was actually passed by the Senate on 19 June, the Minister's response may still be of interest to Senators. Accordingly, relevant parts of the response are discussed below. A copy of that letter is attached to this report.

Provision of tax file numbers
Proposed new sections 46A, 46B, 97A, 97B, 150A, 150B, 210A, 210B, 257A, 257B, 320A, 367A, 412A, 412B, 463A, 463B, 670B, 734A, 734B, 846A, 846B, 900C, 900D, 1039A and 1039B

In Alert Digest No. 9, the Committee noted that clause 3 of the (then) Bill would, if enacted, insert the various amendments proposed by Schedule 1 into the Social Security Act 1991. The Committee noted that those proposed amendments reflected amendments to the legislation made in the Budget sittings of 1990. The Committee noted that, of those amendments, the proposed new sections listed above all involved requirements that a person provide their tax file number in relation to the payment of a social security benefit. As it had observed previously in relation to similar provisions (and, indeed, as the Committee observed in relation to the legislation which originally effected these proposed amendments - see Alert Digest No. 5 and Alert Digest No. 9 of 1990), the Committee suggested that while such provisions might be considered necessary in order to prevent beneficiaries from defrauding the social security system, they might also be regarded as intrusive into personal privacy.

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

The Minister responded as follows:

> TFNs [tax file numbers] are collected from claimants and recipients and their partners for use in the data-matching program authorised by the Data-matching Program (Assistance and Tax) Act 1990. The policy allowing the collection of TFNs has already been sanctioned by Parliament for the [Social Security Act 1947] and is not simply being transferred into the [Social Security Act 1991].

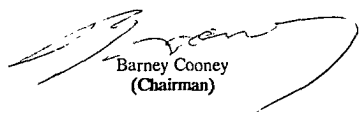
The Minister went on to say:

> In income testing a payment under the Act, a person's income, and his or her partner's income, is taken into account to determine the rate of the person's payment. The Government decided some time ago to introduce a data-matching program in which the income information that people disclose to paying agencies such as the Department of Social Security is to be checked automatically against the income information they disclose to the Australian Taxation Office (ATO) and other paying agencies. For this to be done efficiently, and to prevent people from defrauding the social security system, both partners' TFNs may be required.

The Minister concluded by saying:

> It should also be noted that these provisions, while requiring people to provide TFN information, also allow my Department to assist in that task. Some people, for example, may have difficulty in obtaining a TFN because of proof of identity requirements. The TFN provisions being transferred from the [Social Security Act 1947] allow my Department to act as agent for the ATO to assist people by accepting applications on behalf of the ATO and conducting the necessary proof of identity checks. Since my Department already conducts its own proof of identity checks, any inconvenience for clients is minimised and there is no increased intrusiveness from a practical point of view. Indeed, disabled people, people with language difficulties and new entrants to the workforce such as school leavers should all find benefit in my Department's involvement in the TFN application process.

The Committee thanks the Minister for this response.



Barney Cooney
(Chairman)

Transport and Communications
Minister for Land Transport

The Hon. Bob Brown MP

Parliament House
Canberra ACT 2600

19 AUG 1991

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

Dear Senator Cooney

I am writing to provide you with further advice in relation to the Opposition motion to amend the Interstate Road Transport Amendment Bill 1991.

The Bill was debated in the House on 6 June 1991. At that time the Opposition incorporated an amendment to the Bill in Hansard in relation to conditions to be imposed on designated routes. A copy of the motion is attached for your information.

As you are aware, the Bill was under guillotine and there was insufficient time for the motion to be considered in Committee. The Bill consequently passed through the House without amendment.

Nevertheless, I indicated during the debate on the Interstate Road Transport Charge Amendment Bill 1991 that the Government was prepared to accept the amendment.

The second reading debate of the Bill resumed in the Senate on 16 August. The Opposition amendment (identical to that proposed in the House) was considered in Committee of the Whole and was resolved in the affirmative. The Bill, incorporating the amendment, will be returned to the House on 20 August.

I hope that this advice will clarify the situation.

Yours sincerely

BOB BROWN

1990-91

HOUSE OF REPRESENTATIVES

INTERSTATE ROAD TRANSPORT AMENDMENT BILL 1991

(Amendment to be moved by Mr Hawker)

Clause 7, page 4, at the end of proposed clause 43A add the following subclauses:

" '(4) The Minister shall cause a copy of a determination under subsection (2) to be laid before each House of the Parliament within 15 sitting days of that House after the determination is published in the Gazette.' ".

" '(5) If either House of the Parliament, within 15 sitting days of that House after a copy of a determination has been laid before that House, passes a resolution disapproving of the determination, then the determination shall not have any force or effect on or after the day on which the resolution was passed.' ".

COMMONWEALTH OF AUSTRALIA

MINISTER FOR SOCIAL SECURITY
PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

15 AUG 1991

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

Dear Senator Cooney

On 30 May 1991, your Committee's Secretary drew attention to the comments on the Social Security (Rewrite) Amendment *Bill 1991 (the Bill) in its Alert Digest No 9 of 1991.*

The comments relate to clause 3 of the Bill which proposes the insertion of various new sections affecting most types of payments under the Social Security Act 1991 (the Act). The new sections causing concern introduce certain requirements for claimants and recipients to provide their tax file numbers (TFNs) and their partners' TFNs as a condition of payment. The Committee commented that, while such provisions may be considered necessary to prevent people from defrauding the social security system, they may also be regarded as intrusive into personal privacy.

As the Committee noted, these proposed insertions into the Act mirror amendments made to the Social Security Act 1947 (the 1947 Act) during the Budget Sittings of 1990. The Committee made the same comments on that occasion and also on the introduction of the Social Security (Job Search and Newstart) Amendment Bill 1991 which included equivalent provisions for the new job search and newstart allowances.

TFNs are collected from claimants and recipients and their partners for use in the data-matching program authorised by the Data-matching Program (Assistance and Tax) Act 1990. The policy allowing the collection of TFNs has already been sanctioned by Parliament for the 1947 Act and is now simply being transferred into the new Act.

In income testing a payment under the Act, a person's income, and his or her partner's income, is taken into account to determine the rate of the person's payment. The Government decided some time ago to introduce a data-matching program in which the income information that people disclose to paying agencies such as the Department of Social Security is to be checked automatically against

the income information they disclose to the Australian Taxation Office (ATO) and other paying agencies. For this to be done efficiently, and to prevent people from defrauding the social security system, both partners' TFNs may be required.

It should also be noted that these provisions, while requiring people to provide TFN information, also allow my Department to assist in that task. Some people, for example, may have difficulty in obtaining a TFN because of proof of identity requirements. The TFN provisions being transferred from the 1947 Act allow my Department to act as agent for the ATO to assist people by accepting applications on behalf of the ATO and conducting the necessary proof of identity checks. Since my Department already conducts its own proof of identity checks, any inconvenience for clients is minimised and there is no increased intrusiveness from a practical point of view. Indeed, disabled people, people with language difficulties and new entrants to the workforce such as school leavers should all find benefit in my Department's involvement in the TFN application process.

Yours sincerely

Graham Richardson

GRAHAM RICHARDSON

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

THIRTEENTH REPORT

OF

1991

4 SEPTEMBER 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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

THIRTEENTH REPORT OF 1991

The Committee has the honour to present its Thirteenth Report of 1991 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 (Aviation) Bill 1991

Freedom of Information Bill 1991

Insurance Laws Amendment Bill 1991

CRIMES (AVIATION) BILL 1991

This Bill was introduced into the Senate on 14 August 1991 by the Minister for Justice and Consumer Affairs.

The Bill proposes to consolidate and consequently repeal the 4 Acts forming the current legislative package relating to aviation crimes, namely:

- the Crimes (Hijacking of Aircraft) Act 1972;
- the Civil Aviation (Offenders on International Aircraft) Act 1970;
- the Crimes (Protection of Aircraft) Act 1973; and
- the Crimes (Aircraft) Act 1963.

The Committee dealt with the Bill in Alert Digest No. 13 of 1991, in which it made various comments. The Attorney-General responded to those comments in a letter dated 3 September 1991. Though the Bill was passed by the Senate (with amendments) on 21 August, the Attorney's response may still be of interest to Senators. A copy of the letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

Power to remand a person in custody
Clauses 39 and 40

In Alert Digest No. 13, the Committee noted that clause 39 of the Bill provides:

> (1) Where:
> (a) a person is brought or appears before a magistrate under this Act; and

(b) a warrant of the kind described in paragraph 38(b) [ie a warrant for arrest for the purposes of criminal or extradition proceedings in relation to an offence under the Bill] for the arrest of the person is not produced to the magistrate;

the magistrate must:

(c) if satisfied that more time is reasonably required for deciding whether criminal or extradition proceedings should be started against the person - remand the person, either in custody or on bail, for a period not longer than 7 days; or

(d) if not satisfied - order that the person be released from custody.

(2) A person remanded for a period under subsection (1) must be brought before a magistrate at the end of that period.

(3) If a person remanded on bail under subsection (1) does not appear before a magistrate in accordance with the person's recognizance, a magistrate may issue a warrant for the arrest of the person and for bringing the person before a magistrate.

Clause 40 then provides:

(1) Where a person remanded in custody under section 39 is still held in that custody at the end of the prescribed period, the person may apply to the Supreme Court of the State or Territory in which he or she is so held to be released.

(2) Where, on an application by a person under subsection (1), the court is satisfied that the Attorney-General has been given reasonable notice of the making of the application, the court must, unless reasonable cause is shown for delaying the person's release, order that the person be released from custody.

(3) In this section:

"prescribed period", in relation to a person, means 2 months after:

(a) the date of the order under section 39 under which the person is held in custody; or

(b) if the person has applied for a writ of *habeas corpus* - the day on which that application, or any appeal relating to it, is finally determined;

whichever is later.

The Committee noted that 'remand' is defined in clause 3 of the Bill to include 'further remand'.

Two aspects of these provisions caused the Committee some concern. First, the Committee suggested that the effect of the provisions is to allow a person to be remanded in custody, albeit by a magistrate, for up to 2 months (with renewals every 7 days), without there ever having been a warrant issued for the arrest or extradition of the person. The Committee noted that the only basis for this continued confinement is that the magistrate must be satisfied that more time is required before the relevant authorities decide whether or not to commence criminal or extradition proceedings. The Committee indicated that though it appears from the Explanatory Memorandum that these provisions do no more than re-draft the existing provisions dealing with the types of offences with which the Bill deals, this power to remand in custody may, nevertheless, be considered an undue trespass on personal rights and liberties.

Second, the Committee indicated that it was unclear about the operation of subclause 40(1) and, in particular, the effect on that subclause of the definition of 'prescribed period' in subclause 40(3). The Committee was unsure about which is the relevant 'order' under section 39 from which the 2 month 'prescribed period' runs pursuant to paragraph (3)(a). Similarly, the Committee was unsure as to whether the effect of paragraph (3)(b) is to permit the continued detention of a person for up to 2 months after an application for a writ of *habeas corpus* has been finally determined in favour of the applicant. The Committee indicated that while this latter interpretation of the provision would seem improbable, it was of the view that, on the face of the legislation, the interpretation is plausible. In any event, the Committee suggested that the intention of the clause is not clear.

The Committee indicated that it would appreciate the Attorney-General's further views on the need for this particular power to remand and, in particular, on the interpretations of clause 40 set out above.

In relation to the Committee's comments on clause 39, the Attorney-General provided the following response:

> The Alert Digest suggests that the Committee is concerned that this power under clause 39 may be an undue trespass on personal rights and liberties.
>
> With respect, I do not agree. While the effect of clauses 39 and 40 is that a person may be the subject of a succession of orders under which he or she may be remanded in custody for a total period of up to 2 months, it is important to note that an extended period of detention will only arise where the test set out in paragraph 39(1)(c) is satisfied, and that that test will be the subject of re-evaluation every 7 days by a magistrate.
>
> Clearly, the personal rights and liberties of an alleged offender dealt with under clause 39 will be affected, but not, in my view, unduly or without justification. The reason that clause 39 is required arises from the nature of the offences dealt with by the Bill. Many of those offences are proscribed in implementation of Australia's obligations under international instruments dealing with the security of international civil aviation. Typically, those instruments embody the principle under which countries agree to "extradite or prosecute" alleged offenders. In cases where, for example, Australia's only ground for exercising jurisdiction is that the alleged offender is apprehended on Australian territory, Australia's obligation to prosecute is expressed to arise where the alleged offender is not extradited to another country with which the offence is closely connected (say, on the grounds that the conduct constituting the offence was committed in that country's territory or involved that country's nationals or aircraft). It may take some time both for the position of another interested country on the question of extradition to be ascertained, and to complete the preparatory work required to allow extradition proceedings to be set in train. If extradition is not sought or is unsuccessful, time may be required for criminal proceedings to be instituted. Clause 39 simply allows a magistrate to remand the person to

allow such time as may reasonably be required to allow a decision to be made whether to extradite or prosecute. In this respect, clause 39 simply re-enacts provisions currently found in the three Acts implementing international instruments that are to be repealed as a consequence of the consolidation effected by the Bill.

In relation to the Committee's comments on clause 40, the Attorney-General offered the following response:

The Committee has also commented on two aspects of the definition of "prescribed period" appearing in subclause 40(3). First, in relation to paragraph (a) of that definition, the Committee is unsure about which the relevant order made under section 39 from which the 2 months of the "prescribed period" begins to run. The Government took note of this concern and successfully moved an amendment in the Senate to paragraph 40(3)(a) so as to make it clear that, in any case where more than one order for the remand of a person is made by a magistrate under clause 39, the period at the end of which that person may apply to be released from custody will be calculated from the date of the first order. The provision now reads -

> "(a) the date of the order under section 39 under which the person is held in custody or, if there is more than one such order, the date of the first such order."

Secondly, the Committee is unsure whether the effect of paragraph 40(3)(b) is to permit the continued detention of a person for up to 2 months after an application for a writ of habeas corpus has been finally determined in favour of the applicant. Senator Tate noted in the Committee stage of the Bill's progress through the Senate that clause 40 does not affect the substantive law on habeas corpus. Certainly, where a person held in custody under an order made under clause 39 successfully applies for a writ of habeas

corpus, there is nothing in the Bill to prevent compliance with such a writ.

The Committee thanks the Attorney-General for this response and for his assistance with the Bill.

FREEDOM OF INFORMATION AMENDMENT BILL 1991

This Bill was introduced into the Senate on 14 August 1991 by the Minister for Justice and Consumer Affairs.

The Bill proposes to implement a number of recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs in its 1987 Report on the Operation and Administration of Freedom of Information Legislation.

The Committee dealt with the Bill in Alert Digest No. 13 of 1991, in which it made various comments. The Attorney-General responded to those comments in a letter dated 3 September 1991. Though the Bill was passed by the Senate on 22 August, the Attorney's comments may still be of interest to Senators. A copy of the letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Subclause 29(2)

In Alert Digest No. 13, the Committee noted that clause 29 of the Bill proposes to amend section 41 of the Freedom of Information Act 1982, which governs the release of documents affecting personal privacy. According to the Explanatory Memorandum, the amendments propose to replace the 'limited and uncertain' concept of 'information relating to personal .. affairs' with the term 'personal information' which is defined in clause 3(d) of the Bill. The Committee noted that the amendments also detail the circumstances in which information on a person provided by psychologists, marriage guidance counsellors or social workers can be released to the person. According to the Explanatory Memorandum, these

amendments are proposed by way of implementing a recommendation of the Senate Standing Committee on Legal and Constitutional Affairs.

The Committee noted that subclause 29(2) provides:

> The amendments made by this section apply to any documents in respect of which a request for access was or is made under this Act before or after the commencement of this section, other than a request that was finally disposed of before the commencement of this section.

The Committee noted that this means that the amendments, if enacted, would be able to operate, in effect, retrospectively, to determine applications for access to personal information made prior to the commencement of this Bill.

The Attorney-General has provided the following response:

> Clause 29(2) provides that amendments made by clause 29(1) apply to requests for access to information whether they are received before or after the commencement of the Bill. Among other amendments, clause 29(1) extends the category of documents in respect of which an agency may require an applicant to nominate a medical practitioner or other qualified person to whom access may be given in place of the applicant. Access through a qualified person will be appropriate where the agency considers that direct access by the applicant may be detrimental to the applicant's mental well being. Such a response may be appropriate in respect of requests on hand in an agency at the time the Bill comes into operation. Clause 29(2) therefore provides that clause 29(1) applies to all requests, other than a request that was finally disposed of by the agency prior to the commencement of the Bill.

The Committee thanks the Attorney-General for this response.

INSURANCE LAWS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 June 1991 by the Minister Assisting the Treasurer.

The Bill is one of a package of six Bills concerning protection of life and general insurance policy holders. The Bill proposes to amend the Insurance Act 1973 and Life Insurance Act 1945 to:

- provide measures to disqualify a person who has been bankrupt or who has been convicted of an offence relating to insurance or dishonest conduct from appointment to a senior management position with a life or general insurance company; and
- enhance provisions dealing with investigations, appointment of inspectors and the giving of directions to insurance companies.

The Committee dealt with the Bill in Alert Digest No. 11 of 1991, in which it made various comments. The Treasurer responded to those comments in a letter dated 14 July 1991. A copy of that letter was tabled in the Senate for the information of Senators on 22 August 1991, as it was anticipated that the Bill was about to be debated on that day. A copy of the letter is also attached to this report. Relevant parts of the response are also discussed below.

Reversal of the onus of proof
Clauses 24 and 46

In Alert Digest No. 11, the Committee noted that clause 24 of the Bill proposes to insert a new section 117A into the Insurance Act 1973. Proposed new section 117A, if enacted, would prohibit bankrupts and persons convicted of certain offences from acting as directors or principal executive officers of 'authorised insurers'. Proposed new subsections 117A(3) and (4), respectively, would make it an offence for a body corporate or a foreign body corporate to permit such a person to be or act as a director, etc. of the body corporate. The Committee noted that, in each case, a fine of up to $25,000 is applicable to an offence.

Proposed new subsection 117A(5) provides:

> In a prosecution under subsection (3) or (4), it is a defence if the defendant proves that:
>
> (a) the defendant did not know, and had no reasonable grounds to suspect, that the person was a disqualified person; and
>
> (b) the defendant had made all reasonable efforts to ascertain whether the person was a disqualified person.

The Committee noted that clause 46 of the Bill proposes to insert a new section 146A into the Life Insurance Act 1945. That proposed new section, if enacted, would prohibit bankrupts and persons convicted of certain offences from acting as directors or principal executive officers of registered life insurers. Subsections (3), (4) and (5) of the proposed new section are in similar terms to subsections (3), (4) and (5) of proposed new section 117A of the Insurance Act.

The Committee suggested that these provisions, in each case, involve a reversal of the onus of proof, as they would require a body corporate charged with an offence

to prove that it did not know and had no reasonable grounds to suspect that a person was not entitled to be appointed as a director, etc. The Committee noted that, ordinarily, it is incumbent on the prosecution to prove all the elements of an offence, of which, knowing involvement in an offence would ordinarily be one. Further, the Committee noted that the effect of the provisions would appear to be to make bodies corporate criminally liable for what amounts to a failure to take reasonable care (ie in ensuring that a director, etc. is not a disqualified person).

In addition, the Committee noted that, in each case, the prohibition is against a disqualified person being or acting as a director, principal executive officer, etc. Bearing in mind the discussion above, the Committee suggested that this would appear to impose on an existing body corporate to which the legislation relates an obligation to make reasonable efforts to ascertain that their existing directors and principal executive officers are not disqualified persons. The Committee indicated that it would appreciate the Minister's advice as to whether or not this is the case and, if so, how much time a body corporate would be allowed in order to make inquiries about the past conduct of its directors and principal executive officers.

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

The Treasurer has responded as follows:

> In my view these provisions are very important from the viewpoint of ensuring that there is effective protection available to the insuring public and I believe that the provisions fall within guidelines previously established by the Committee for acceptance of reversal of the burden of proof. More specifically, I believe that reversal of the persuasive burden is justified in this case because:

- it is peculiarly within the knowledge of the company whether they knew or had reasonable grounds to suspect that a person was prohibited from appointment. This would also be the case in relation to the steps the company had taken in order to ascertain the status of the relevant person; and

- it would be extremely difficult for the prosecution to establish the contrary position.

It should also be mentioned that the offence provisions are only applicable to a body corporate and therefore would not appear to impinge on personal rights or liberties. Taking account of this consideration and the other points discussed above, I consider that there is clear justification for a reversal of the burden of proof in this case and that the provisions would not appear to be in breach of the Committee's terms of reference.

In addition, it is in an insurance company's own interests to make enquiries about its directors. These provisions will provide an insurer with the justification to require disclosure of information from, and to make appropriate enquiries of, its directors.

In view of the above, I believe that the matters raised by the Committee are not of concern in this particular case.

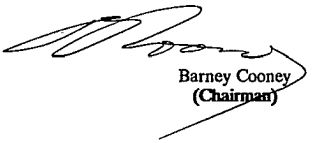
The Treasurer goes on to say:

With respect to the Committee's query regarding the extension of these provisions to existing directors, I confirm that insurers will be obliged to ascertain that their existing directors and principal executive officers are not disqualified persons.

A reasonable period of time will be allowed to enable companies to make appropriate enquiries of their existing directors, etc. In the administration of these provisions it is envisaged that a period of at least 90 days from the date of commencement would be allowed and that such a period should be adequate for this to be achieved. This period would, of course, be in addition to the

approximately 3 to 4 months notice the companies will receive from the date of the introduction of the Bill in the House of Representatives on 6 June 1991 to its eventual commencement.

The Committee thanks the Treasurer for this response.



Barney Cooney
(Chairman)

Attorney-General

RECEIVED
3 SEP 1991
Senate Standing Cttee for the Scrutiny of Bills

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

SEC91/11718:MW

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

Dear Senator Cooney

I refer to the letter of 22 August 1991 from the secretary of your Committee to Senator Tate's office drawing attention to comments on the Crimes (Aviation) Bill 1991 contained in Alert Digest No 13 of 1991.

The Committee's substantive comments relate to clauses 39 and 40 of the Bill. Clause 39 deals with a situation where a person reasonably suspected of having committed a specified offence is brought before a magistrate but where a warrant for the arrest of the person for the purposes of criminal or extradition proceedings has not been produced. In such a case, the magistrate may either order the person's release from custody or, if satisfied that more time is reasonably required for deciding whether to start criminal or extradition proceedings against that person, remand the person in custody or on bail for up to 7 days. The Alert Digest suggests that the Committee is concerned that this power under clause 39 may be an undue trespass on personal rights and liberties.

With respect, I do not agree. While the effect of clauses 39 and 40 is that a person may be the subject of a succession of orders under which he or she may be remanded in custody for a total period of up to 2 months, it is important to note that an extended period of detention will only arise where the test set out in paragraph 39 (1) (c) is satisfied, and that that test will be the subject of re-evaluation every 7 days by a magistrate.

Clearly, the personal rights and liberties of an alleged offender dealt with under clause 39 will be affected, but not, in my view, unduly or without justification. The reason that clause 39 is required arises from the nature of the offences dealt with by the Bill. Many of those offences are proscribed in implementation of Australia's obligations under international instruments dealing with the security of international civil aviation. Typically, those instruments embody the principle under which countries agree to "extradite or prosecute" alleged offenders. In cases where, for example, Australia's only ground for exercising jurisdiction is that the alleged offender is apprehended on Australian territory, Australia's obligation to prosecute is expressed to arise where the alleged

offender is not extradited to another country with which the offence is closely connected (say, on the grounds that the conduct constituting the offence was committed in that country's territory or involved that country's nationals or aircraft). It may take some time both for the position of another interested country on the question of extradition to be ascertained, and to complete the preparatory work required to allow extradition proceedings to be set in train. If extradition is not sought or is unsuccessful, time may be required for criminal proceedings to be instituted. Clause 39 simply allows a magistrate to remand the person to allow such time as may reasonably be required to allow a decision to be made whether to extradite or prosecute. In this respect, clause 39 simply re-enacts provisions currently found in the three Acts implementing international instruments that are to be repealed as a consequence of the consolidation effected by the Bill.

The Committee has also commented on two aspects of the definition of "prescribed period" appearing in subclause 40(3). First, in relation to paragraph (a) of that definition, the Committee is unsure about which is the relevant order made under section 39 from which the 2 months of the "prescribed period" begins to run. The Government took note of this concern and successfully moved an amendment in the Senate to paragraph 40(3)(a) so as to make it clear that, in any case where more than one order for the remand of a person is made by a magistrate under clause 39, the period at the end of which that person may apply to be released from custody will be calculated from the date of the first order. The provision now reads -

> "(a) the date of the order under section 39 under which the person is held in custody or, if there is more than one such order, the date of the first such order".

Secondly, the Committee is unsure whether the effect of paragraph 40(3)(b) is to permit the continued detention of a person for up to 2 months after an application for a writ of habeas corpus has been finally determined in favour of the applicant. Senator Tate noted in the Committee stage of the Bill's progress through the Senate that clause 40 does not affect the substantive law on habeas corpus. Certainly, where a person held in custody under an order made under clause 39 successfully applies for a writ of habeas corpus, there is nothing in the Bill to prevent compliance with such a writ.

The Committee also commented that clause 29(2) of the Freedom of Information Bill 1991 is retrospective in its operation. Clause 29(2) provides that amendments made by clause 29(1) apply to requests for access to information whether they are received before or after the commencement of the Bill. Among other amendments, clause 29(1) extends the category of documents in respect of which an agency may require an applicant to nominate a medical practitioner or other qualified person to whom access may be given in place of the applicant. Access through a qualified person will be appropriate where the agency considers that direct access by the applicant may be detrimental to the applicant's mental well being. Such a response may be appropriate in respect of requests on hand in an agency at the time the Bill comes into

operation. Clause 29(2) therefore provides that clause 29(1) applies to all requests, other than a request that was finally disposed of by the agency prior to the commencement of the Bill.

Yours sincerely

MICHAEL DUFFY

RECEIVED
24 JUL 1991
Senate Standing Cttee
for the Scrutiny of Bills

TREASURER
PARLIAMENT HOUSE
CANBERRA 2600

14 JUL 1991

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. 11 of 1991, and in particular to the comments made by your Committee on the Insurance Laws Amendment Bill 1991.

I note that the Committee has drawn the attention of Senators to provisions of clauses 24 and 46 of the Bill (providing defences for a general or life insurance company which appoints a prohibited person) which involve a reversal of the onus of proof. These provisions would require a body corporate charged with an offence to prove that it did not know, and had no reasonable grounds to suspect, that a person was not entitled to be appointed as a director, etc.

In my view these provisions are very important from the viewpoint of ensuring that there is effective protection available to the insuring public and I believe that the provisions fall within guidelines previously established by the Committee for acceptance of reversal of the burden of proof. More specifically, I believe that reversal of the persuasive burden is justified in this case because:

- it is peculiarly within the knowledge of the company whether they knew or had reasonable grounds to suspect that a person was prohibited from appointment. This would also be the case in relation to the steps the company had taken in order to ascertain the status of the relevant person; and

- it would be extremely difficult for the prosecution to establish the contrary position.

It should also be mentioned that the offence provisions are only applicable to a body corporate and therefore would not appear to impinge on personal rights or liberties. Taking account of this consideration and the other points discussed above, I consider that there is clear justification for a reversal of the burden of proof in this case and that the provisions would not appear to be in breach of the Committee's terms of reference.

In addition, it is in an insurance company's own interests to make enquiries about its directors. These provisions will provide an insurer with the justification to require disclosure of information from, and to make appropriate enquiries of, its directors.

In view of the above, I believe that the matters raised by the Committee are not of concern in this particular case.

With respect to the Committee's query regarding the extension of these provisions to existing directors, I confirm that insurers will be obliged to ascertain that their existing directors and principal executive officers are not disqualified persons.

A reasonable period of time will be allowed to enable companies to make appropriate enquiries of their existing directors, etc. In the administration of these provisions it is envisaged that a period of at least 90 days from the date of commencement would be allowed and that such a period should be adequate for this to be achieved. This period would, of course, be in addition to the approximately 3 to 4 months notice the companies will receive from the date of the introduction of the Bill in the House of Representatives on 6 June 1991 to its eventual commencement.

Yours sincerely

John Kerin

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

1991

11 SEPTEMBER 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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

FOURTEENTH REPORT OF 1991

The Committee has the honour to present its Fourteenth Report of 1991 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:

Carriage of Goods by Sea Bill 1991

CARRIAGE OF GOODS BY SEA BILL 1991

This Bill was introduced into the Senate on 14 August 1991 by the Minister for Shipping and Aviation Support.

The Bill proposes to repeal the Sea-Carriage of Goods Act 1924 and update Australia's marine cargo liability regime to take account of international developments since 1924.

The Committee dealt with the Bill in Alert Digest No. 13 of 1991, in which it made various comments. The Minister for Shipping and Aviation Support responded to those comments in a letter dated 3 September 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Subclause 2(2)

In Alert Digest No. 13, the Committee noted that Part 3 of the Bill deals with the application of the 'Hamburg Rules', which are the substantive provisions of the Hamburg Convention on the Carriage of Goods by Sea. These rules govern the liability of ocean carriers for any loss or damage to cargo which occurs while the cargo is in their possession. Schedule 2 of the Bill sets out the text of the rules.

The Committee noted that subclause 2(2) of the Bill provides that Part 3 and Schedule 2 are to commence

> on a day to be fixed by Proclamation, being a day not sooner then the day on which the Hamburg Convention enters into force in respect of Australia.

By way of explanation for this method of commencement, the Explanatory Memorandum states:

> The Hamburg Rules will be proclaimed at some future unspecified time to be fixed by the Government of the day. The delay in implementation of the Hamburg Rules is necessary as they have not yet come into force internationally and do not provide a viable alternative marine cargo liability regime at this stage. The Hamburg Rules will enter into force one year after the 20th contracting party accedes to the Convention. As at 1 August 1991, 19 countries have acceded to the Hamburg Convention. None of Australia's major trading partners have become contracting States.
>
> Delaying proclamation to a date to be fixed ensures that a future Government retains discretion to examine and to decide upon the appropriateness of implementing the Hamburg Rules, taking into account international acceptance of the Rules and domestic interests. This approach gives a signal to our major trading partners, some of which are considering the application of the Hamburg Rules, of Australia's support for the Hamburg Rules as the appropriate international marine cargo liability regime.

The Committee noted that this explanation accords with the requirements of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, as the need for commencement by Proclamation is related to a particular eventuality. However, the Committee also noted that there would be no obligation on the government of the day to ratify the convention to which the Hamburg Rules relate. The Committee noted that, similarly, there would be no obligation on that government to proclaim the relevant parts of the Bill if and when the Hamburg Rules enter into force. The Committee suggested that, in that sense, the commencement of those parts remains within the discretion of the government of the day, which will, no doubt, have to take into account the prevailing 'domestic interests'. The Committee observed that it was not unlikely that those domestic interests will differ over the time which will elapse between the passage of the Bill and the proclamation of the relevant parts.

The Committee noted its long-standing concern about legislation, or parts of legislation, which is passed by the Parliament, subject to commencement by Proclamation, without there being any requirement that the necessary Proclamation be made. Given that concern, and in the light of the discussion above, the Committee indicated that it would appreciate the Minister's views as to whether it would be appropriate in the present case to include a sunset-type provision, to the effect that if the relevant parts are not proclaimed within a certain time, then they would be repealed. Further, the Committee indicated that if this was an acceptable course of action, it would also appreciate the Minister's views as to what period of time would be appropriate.

The Minister has provided the following response:

> I accept in principle the Committee's concerns about the open ended nature of the Proclamation procedure specified in the Bill. However, I would like to reiterate that it is this Government's policy that Australia will accede to the Hamburg Convention when the time is right. A "classic" sunset clause which provides for repeal within a certain period is therefore not consistent with this policy.
>
> There is also a difficulty in specifying an appropriate period of time. The Hamburg Rules are not yet in force internationally. This will occur one year after the 20th Contracting Party has acceded to the Convention, and at 1 August 1991 there were only 19 accessions. It is therefore impossible to predict with any certainty when the Hamburg Rules will have international force.

The Minister goes on to say:

> The question of an amendment to this part of the legislation was also discussed by the Senate Standing Committee on Transport, Communications and Infrastructure where unanimous agreement was reached on an amendment, a copy of which is attached.

Sub-clause 3 provides that if the Hamburg Rules provisions (Part 3 and Schedule 2) are not proclaimed within three years of the Bill receiving the Royal Assent, both Houses of Parliament will reconsider the question of the commencement or repeal of these provisions and may pass resolutions to the effect that:

- Part 3 and Schedule 2 are to commence; or
- the question will be reconsidered after a further 3 years; or
- Part 3 and Schedule 2 are to be repealed.

Sub-clause 4 gives effect to whichever option is chosen and sub-clause 5 provides for consequential amendments in the event that the Hamburg Rules are repealed.

The Minister concludes by saying:

> I believe that this amendment addresses the Scrutiny of Bills Committee's concerns by specifying a series of actions to be undertaken in relation to the status of the Hamburg Rules, as well as providing for the regular review of the Hamburg Rules provisions in the legislation.

The proposed amendment to which the Minister refers is in the following terms:

> (3) If a Proclamation under subsection (2) is not made within 3 years after the day on which this Act receives the Royal Assent, each House of the Parliament may consider the question of the commencement or repeal of Part 3 and Schedule 2, and may pass a resolution:
>
> (a) that Part 3 and Schedule 2 are to commence; or
> (b) that the question be reconsidered, in accordance with this section, after a further period of 3 years; or
> (c) that Part 3 and Schedule 2 be repealed.

(4) If each House passes the same resolution, the resolution takes effect accordingly on the day on which it is passed by the second of the Houses to pass it.

(5) If a resolution that Part 3 and Schedule 2 be repealed takes effect under subsection (4), this Act has effect as if:

(a) paragraph 3(2)(b); and

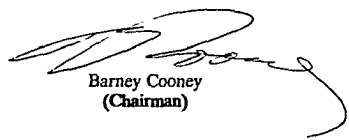
(b) the definitions of 'Hamburg Convention' and 'Hamburg Rules' in subsection 4(1);

were omitted on the day on which the resolution takes effect.

While the Committee appreciates this attempt to address the concerns raised in Alert Digest No. 13, the Committee suggests that the proposed amendment does not entirely solve the problem. First, pursuant to the proposed amendment, the further involvement of the Parliament in this matter would be permissive rather than imperative. Proposed new subclause (3) provides that each House of the Parliament 'may' consider the question of the commencement or repeal of Part 3 and Schedule 2 and 'may' subsequently pass a relevant resolution. However, there is no obligation to do so.

Second, the proposed amendment relies on both Houses passing the same resolution and does not allow for the possibility of a disagreement between the Houses. In the case of such a disagreement, it would appear that Part 3 and Schedule 2 would continue to be unproclaimed and unrepealed.

The Committee thanks the Minister for his assistance in this matter and suggests that, given the Minister's willingness to address its concerns, some further thought be given to the form of the amendment.



Barney Cooney
(Chairman)

Minister for Shipping
and Aviation Support

RECEIVED
4 SEP 1991
Senate Standing Cttee
for the Scrutiny of Bills

Parliament House
Canberra ACT 2600
Australia
Tel. (06) 277 7040
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3 SEP 1991

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

Dear Senator

I refer to the comments made by your Committee on the Carriage of Goods by Sea Bill 1991, which were contained in the *Scrutiny of Bills Alert Digest* Number 13 of 1991 (21 August 1991).

The Committee was concerned that the provisions in the Bill relating to the Proclamation of the Hamburg Rules (Part 3 and Schedule 2) were discretionary and not tied to any eventuality, so that the result might be that no Proclamation of that part of the legislation would ever be made.

You sought my views on the possible inclusion of a sunset-type provision which would provide that if the Hamburg Rules were not proclaimed within a certain time, they would be repealed. Advice was also sought on what period of time I considered appropriate.

I accept in principle the Committee's concerns about the open ended nature of the Proclamation procedure specified in the Bill. However, I would like to reiterate that it is this Government's policy that Australia will accede to the Hamburg Convention when the time is right. A "classic" sunset clause which provides for repeal within a certain period is therefore not consistent with this policy.

There is also a difficulty in specifying an appropriate period of time. The Hamburg Rules are not yet in force internationally. This will occur one year after the 20th Contracting Party has acceded to the Convention, and at 1 August 1991 there were only 19 accessions. It is therefore impossible to predict with any certainty when the Hamburg Rules will have international force.

The question of an amendment to this part of the legislation was also discussed by the Senate Standing Committee on Transport, Communications and Infrastructure where unanimous agreement was reached on an amendment, a copy of which is attached.

Sub-clause 3 provides that if the Hamburg Rules provisions (Part 3 and Schedule 2) are not proclaimed within three years of the Bill receiving the Royal Assent, both Houses of Parliament will reconsider the question of the commencement or repeal of these provisions and may pass resolutions to the effect that:

- Part 3 and Schedule 2 are to commence; or
- the question will be reconsidered after a further 3 years; or
- Part 3 and Schedule 2 are to be repealed.

Sub-clause 4 gives effect to whichever option is chosen and sub-clause 5 provides for consequential amendments in the event that the Hamburg Rules are repealed.

I believe that this amendment addresses the Scrutiny of Bills Committee's concerns by specifying a series of actions to be undertaken in relation to the status of the Hamburg Rules, as well as providing for the regular review of the Hamburg Rules provisions in the legislation.

Yours sincerely

(Bob Collins)

1990-91

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

CARRIAGE OF GOODS BY SEA BILL 1991

(Amendments to be moved on behalf of the Opposition)

(1) Clause 2, page 1, subclause (2), line 8, before "Part 3" insert "Subject to this section,".

(2) Clause 2, page 1, add at the end of the clause the following subclauses:

"(3) If a Proclamation under subsection (2) is not made within 3 years after the day on which this Act receives the Royal Assent, each House of the Parliament may consider the question of the commencement or repeal of Part 3 and Schedule 2, and may pass a resolution:

(a) that Part 3 and Schedule 2 are to commence; or
(b) that the question be reconsidered, in accordance with this section, after a further period of 3 years; or
(c) that Part 3 and Schedule 2 be repealed.

"(4) If each House passes the same resolution, the resolution takes effect accordingly on the day on which it is passed by the second of the Houses to pass it.

"(5) If a resolution that Part 3 and Schedule 2 be repealed takes effect under subsection (4), this Act has effect as if:

(a) paragraph 3(2)(b); and
(b) the definitions of 'Hamburg Convention' and 'Hamburg Rules' in subsection 4(1);

were omitted on the day on which the resolution takes effect.".

1[90]329.WS[pt] 28.8.91

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT

OF

1991

9 OCTOBER 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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

FIFTEENTH REPORT OF 1991

The Committee has the honour to present its Fifteenth Report of 1991 to the Senate.

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

AUSSAT Repeal Bill 1991

Carriage of Goods by Seas Bill 1991

Superannuation Legislation Amendment Act 1991

AUSSAT REPEAL BILL 1991

This Bill was introduced into the House of Representatives on 5 September 1991 by the Minister for Transport and Communications.

The Bill proposes to:

- appropriate monies from the Consolidated Revenue Fund to pay out existing obligations of AUSSAT prior to its sale;
- empower the Treasurer to guarantee AUSSAT's borrowings;
- prevent AUSSAT's tax losses in income years prior to the sale being used as a tax deduction for income tax purposes from the time of sale; and
- repeal the *AUSSAT Act 1984* and make consequential amendments to other Acts.

The Committee dealt with the Bill in Alert Digest No. 15 of 1991, in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 8 October 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Adoption or incorporation in the legislation of extrinsic material
Clause 11, Schedule 2

In Alert Digest No. 15, the Committee noted that clause 11 of the Bill provides for various proposed amendments to the telecommunications legislation to be made,

(f) a written agreement or arrangement or an instrument or writing made unilaterally.

(5) Nothing in this section limits the generality of anything else in it.

(6) Since this section deals differently with the topic dealt with by section 49A of the *Acts Interpretation Act 1901*, that section does not apply in relation to an instrument under this Act.

The Committee noted three aspects of this proposed new section. First, if enacted, it would allow for the application, adoption or incorporation, with or without modification of 'matter contained in any other instrument or writing whatever'.

Second, the proposed new section would also allow this application, adoption or incorporation to be effected by instrument, rather than by regulation. However, the Committee also noted that all the relevant 'instruments' under the existing legislation appear to be 'disallowable instruments' for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Third, proposed new subsection 407(6) proposes, in effect, to disapply section 49A of the *Acts Interpretation Act*. That section provides:

Prescribing matters by reference to other instruments

49A. (1) Where an Act authorizes or requires provision to be made for or in relation to any matter by regulations, the regulations may, unless the contrary intention appears, make provision for or in relation to that matter by applying, adopting or incorporating, with or without modification;

(a) the provisions of any Act, or of any regulations, as in force at a particular time or as in force from time to time; or
(b) any matter contained in any other instrument or writing as in force or existing

> at the time when the first-mentioned regulations take effect;
>
> but, unless the contrary intention appears, regulations shall not, except as provided by this subsection, make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.
>
> (2) In this section **"regulations"** means regulations or rules under an Act.

The Committee suggested that the effect of section 49A is to prevent ('unless otherwise provided') the application, adoption or incorporation of 'any matter contained in an instrument or other writing as in force or existing from time to time'. In other words, the only material which can be applied, adopted or incorporated as it is in force at the time (ie with any amendments taken into account) is material which is contained in an Act or in regulations.

The Committee noted that, by way of explanation for the proposed new section 407, the Explanatory Memorandum states:

> The usual rule under section 49A of the *Acts Interpretation Act 1901* is that in relation to matters contained in instruments other than Commonwealth regulations or Acts, those matters can only be adopted or incorporated as existing at a particular time. The reason for this rule is that if it does not apply, documents adopted and thereby having the force of law can be amended without the Parliament being given the opportunity to scrutinise them. However, the Parliament has passed laws allowing exceptions to this rule in particular cases.
>
> It is proposed that an exception be allowed in the case of the Telecommunications Act because of the rapid pace of technological change in the field of telecommunications and its global nature. For example,

it is envisaged that conditions of carrier licences declared under section 64 or 65 will require carriers to comply with relevant technical standards set by international bodies such as the CCITT (the International Telegraph and Telephone Consultative Committee of the International Telecommunications Union), the requirements of which are updated from time to time. Licence conditions would need to be updated continuously if they could not apply existing international standards as they are developed to apply to new types of services. The rapid pace of technological change in relation to telecommunications means that new standards relating to technical engineering matters such as the configuration for interfaces between different networks are constantly being developed and updated.

Another example of the need for the provision relates to AUSTEL technical standards - it is envisaged that carrier licence conditions will require the carriers to comply with AUSTEL technical standards. Without the benefit of the amendment, licence conditions will need to be changed each time AUSTEL prepares a new standard or updates an existing standard.

Also, the National Code under section 117 which will provide for environmental and planning standards may need to incorporate other instruments by reference such as Australian standards, including standards of the Australian Standards Association, or particular State standards or international standards) and it may be desirable, in the case of particular standards, for changes to such standards to automatically have effect for the purpose of the code. There are currently no appropriate existing technical standards for masts and towers under any State or Territory law, as they are used for telecommunications facilities which historically have not been subject to such laws. Accordingly, it may be necessary for the National Code to require carriers to comply with standards for masts and towers upon their being developed by the Commonwealth in conjunction with the States.

The Committee indicated that, while this explanation appears to be reasonable, it was concerned about the range of material which might be applied, adopted or incorporated in this way. In particular, the Committee was concerned that there is no indication of what kinds of 'technical standards' will be applied, nor of what 'international bodies' might set these standards. The Committee indicated that it and, indeed, the Senate would be assisted if the Minister could provide further information on these matters.

The Minister has provided the following further information on 'technical standards':

> AUSTEL is responsible for the determination, and compliance with technical standards for customer equipment, the connection of customers to the telecommunications network, customer cabling and interconnection by the carriers and other service providers. It is involved also in the development of voluntary standards and codes of practice.
>
> Since its establishment in July 1989, AUSTEL has determined 18 technical standards (contained in 20 volumes), with two draft standards nearing completion (Attachment A [reproduced at the end of this Report]). In line with the rapid expansion in communications technology, standards are also being considered for digital cellular mobile telephones, advanced cordless telephone and integrated cabling systems for buildings. It is likely that the development of standards will continue in line with accelerating technological development.
>
> The standards were produced by 22 Working Groups which were established to assist in the development and review process. The Groups comprise representatives from users, suppliers, carriers, Standards Australia, electricity supply authorities and relevant Government departments.
>
> AUSTEL established the Standards Advisory Committee (SAC) to provide assistance in the review of the initial

16 Technical Standards determined in the first month of its operation and for the creation of new standards. Original participants in the inaugural September 1989 meeting were AUSSAT, OTC Limited, Telecom, the Australian Council of Trade Unions (ACTU), Australian Electronic Industries Association (AEIA), Australian Federation of Consumer Organisations (AFCO), Australian Information Industries Association (AIIA), Australian Telecommunications Users Group (ATUG) and Standards Australia. A representative of the Electricity Supply Association of Australia was subsequently invited to join in recognition of the significance of earthing and electrical safety aspects.

Standards are developed to comply with both national and international obligations and requirements. They can be used to protect the integrity of the telecommunications network or to protect and ensure the safety of personnel working on or using the services of a network. Standards can ensure the interoperability of customer equipment or cabling with networks and also ensure compliance with recognised international standards concerning interfacing of customer equipment and customer cabling to the telecommunications network.

All customer equipment connected to a telecommunications network requires an AUSTEL permit (which performs a similar function to the Telecom authorisations that existed prior to July 1989). To apply for a permit, the process involves equipment being tested by an accredited test house against AUSTEL technical standards. The test report, permit application and permit fee are then submitted to AUSTEL. If the application is assessed by AUSTEL to comply with the relevant technical standards, a permit is issued. Except for those specific classes that require extra endorsement under the Industry Development Arrangements, the permit issued has ongoing effect and is not renewable annually.

The Minister concludes by saying:

Developing and implementing technical standards

involves a major consultative process. The Working Groups of experts review matters on a case-by-case basis and report back to the SAC. SAC, in turn, reviews the determination and findings of each Working Group and makes a recommendation which has to be agreed to by the Government. While many of the interested parties are represented on the working groups and on SAC, the public also has the chance to comment as part of this general consultative process.

It is anticipated that existing standards would be revised from time to time in line with rapid developments in communications technology and services.

The Minister has provided the following further information as to what 'international bodies' might set technical standards:

The main international organisation responsible for setting telecommunications standards is one of the two major consultative committees of the International Telecommunications Union (ITU) - the CCITT (Consultative Committee on International Telegraph and Telephone). The CCITT reviews and recommends influential international standards to the ITU to meet the ITU's function of establishing equipment and systems operating standards.

The CCITT is composed of 18 Study Groups which determine and review standards and these are contained in 11 substantial volumes which contain over 60 standards as at the last Plenary Session. As with the AUSTEL standards, the rapidly changing telecommunications environment means that standards are constantly in need of review and/or development.

A list of topic questions to be considered by the CCITT Work Groups from 1989-92 is attached for your information (Attachment B [reproduced at the end of this Report]). Issues considered include services such as telex, mobile and ISDN, tariffs, frequency interference and various other types of technical regulatory matters.

> As an ITU Signatory, AUSTEL can adopt globally accepted standards. Both the Radiocommunications and Telecommunications legislation provide for the ITU Convention and regulations to be taken into account by those implementing local laws.

In addition, the Committee was concerned that it will be difficult for the individuals and organisations to whom these standards would apply to know what the relevant standards are at a particular time. The Committee has maintained the view that it is important for people to know or to be able to ascertain what the law is. Noting that there would be scope for, say, international standards to apply 'as they are in force from time to time', the Committee indicated that it would appreciate the Minister's advice as to how any changes to an international standard will be notified to those to whom they apply.

The Minister has provided the following response:

> Under the *Telecommunications Act 1991*, AUSTEL's technical standards are disallowable instruments which must be published in the *Gazette*. Public comment and review form a major part of the process of disseminating information to relevant individuals and organisations on any changes to standards.
>
> AUSTEL and various other interested parties are members of CCITT Work Groups and any changes to international standards are notified to the relevant parties in Australia. AUSTEL would be the main disseminator of such information in its capacity as ITU signatory.

The Minister concludes his response to the matters raised by the Committee by saying:

> As indicated, this continual process of establishing and reviewing technical standards at both the national and international level involves a great deal of time,

manpower and administration. It also concerns highly technical and complex issues. If these technical standards cannot be applied as they exist from time to time, licensing conditions would need to be updated every time a standard is revised or a new standard is made.

The Committee thanks the Minister for his detailed response and for his assistance with the Bill.

CARRIAGE OF GOODS BY SEA BILL 1991

This Bill was introduced into the Senate on 14 August 1991 by the Minister for Shipping and Aviation Support.

The Bill proposes to repeal the *Sea-Carriage of Goods Act 1924* and update Australia's marine cargo liability regime to take account of international developments since 1924.

The Committee dealt with the Bill in Alert Digest No. 13 of 1991, in which it made various comments. The Minister for Shipping and Aviation Support responded to those comments in a letter dated 3 September 1991. The Committee discussed the Minister's response in its Fourteenth Report of 1991, in which it made some further comments. The Minister responded to those further comments in a letter dated 4 October 1991. A copy of that letter is attached to this report. Relevant parts of the further response are also discussed below.

Commencement by Proclamation
Subclause 2(2)

In Alert Digest No. 13, the Committee noted that Part 3 of the Bill deals with the application of the 'Hamburg Rules', which are the substantive provisions of the Hamburg Convention on the Carriage of Goods by Sea. These rules govern the liability of ocean carriers for any loss or damage to cargo which occurs while the cargo is in their possession. Schedule 2 of the Bill sets out the text of the rules.

The Committee noted that subclause 2(2) of the Bill provides that Part 3 and Schedule 2 are to commence

> on a day to be fixed by Proclamation, being a day not sooner than the day on which the Hamburg Convention enters into force in respect of Australia.

By way of explanation for this method of commencement, the Explanatory Memorandum states:

> The Hamburg Rules will be proclaimed at some future unspecified time to be fixed by the Government of the day. The delay in implementation of the Hamburg Rules is necessary as they have not yet come into force internationally and do not provide a viable alternative marine cargo liability regime at this stage. The Hamburg Rules will enter into force one year after the 20th contracting party accedes to the Convention. As at 1 August 1991, 19 countries have acceded to the Hamburg Convention. None of Australia's major trading partners have become contracting States.
>
> Delaying proclamation to a date to be fixed ensures that a future Government retains discretion to examine and to decide upon the appropriateness of implementing the Hamburg Rules, taking into account international acceptance of the Rules and domestic interests. This approach gives a signal to our major trading partners, some of which are considering the application of the Hamburg Rules, of Australia's support for the Hamburg Rules as the appropriate international marine cargo liability regime.

The Committee noted that this explanation accords with the requirements of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, as the need for commencement by Proclamation is related to a particular eventuality. However, the Committee also noted that there would be no obligation on the government of the day to ratify the convention to which the Hamburg Rules relate. The Committee noted that, similarly, there would be no obligation on that government to proclaim the relevant parts of the Bill if and when the Hamburg Rules enter into force. The Committee suggested that, in that sense, the commencement of those parts remains

within the discretion of the government of the day, which will, no doubt, have to take into account the prevailing 'domestic interests'. The Committee observed that it was not unlikely that those domestic interests will differ over the time which will elapse between the passage of the Bill and the proclamation of the relevant parts.

The Committee noted its long-standing concern about legislation, or parts of legislation, which is passed by the Parliament, subject to commencement by Proclamation, without there being any requirement that the necessary Proclamation be made. Given that concern, and in the light of the discussion above, the Committee indicated that it would appreciate the Minister's views as to whether it would be appropriate in the present case to include a sunset-type provision, to the effect that if the relevant parts are not proclaimed within a certain time, then they would be repealed. Further, the Committee indicated that if this was an acceptable course of action, it would also appreciate the Minister's views as to what period of time would be appropriate.

In his letter of 3 September, the Minister provided the following response:

> I accept in principle the Committee's concerns about the open ended nature of the Proclamation procedure specified in the Bill. However, I would like to reiterate that it is this Government's policy that Australia will accede to the Hamburg Convention when the time is right. A "classic" sunset clause which provides for repeal within a certain period is therefore not consistent with this policy.
>
> There is also a difficulty in specifying an appropriate period of time. The Hamburg Rules are not yet in force internationally. This will occur one year after the 20th Contracting Party has acceded to the Convention, and at 1 August 1991 there were only 19 accessions. It is therefore impossible to predict with any certainty when the Hamburg Rules will have international force.

The Minister went on to say:

> The question of an amendment to this part of the legislation was also discussed by the Senate Standing Committee on Transport, Communications and Infrastructure where unanimous agreement was reached on an amendment, a copy of which is attached [not reproduced in this report].
>
> Sub-clause 3 provides that if the Hamburg Rules provisions (Part 3 and Schedule 2) are not proclaimed within three years of the Bill receiving the Royal Assent, both Houses of Parliament will reconsider the question of the commencement or repeal of these provisions and may pass resolutions to the effect that:
>
> - Part 3 and Schedule 2 are to commence; or
> - the question will be reconsidered after a further 3 years; or
> - Part 3 and Schedule 2 are to be repealed.
>
> Sub-clause 4 gives effect to whichever option is chosen and sub-clause 5 provides for consequential amendments in the event that the Hamburg Rules are repealed.

The Minister concluded by saying:

> I believe that this amendment addresses the Scrutiny of Bills Committee's concerns by specifying a series of actions to be undertaken in relation to the status of the Hamburg Rules, as well as providing for the regular review of the Hamburg Rules provisions in the legislation.

The proposed amendment to which the Minister referred is in the following terms:

> (3) If a Proclamation under subsection (2) is not made within 3 years after the day on which this Act receives the Royal Assent, each House of the Parliament

may consider the question of the commencement or repeal of Part 3 and Schedule 2, and may pass a resolution:

(a) that Part 3 and Schedule 2 are to commence; or
(b) that the question be reconsidered, in accordance with this section, after a further period of 3 years; or
(c) that Part 3 and Schedule 2 be repealed.

(4) If each House passes the same resolution, the resolution takes effect accordingly on the day on which it is passed by the second of the Houses to pass it.

(5) If a resolution that Part 3 and Schedule 2 be repealed takes effect under subsection (4), this Act has effect as if:
(a) paragraph 3(2)(b); and
(b) the definitions of 'Hamburg Convention' and 'Hamburg Rules' in subsection 4(1);
were omitted on the day on which the resolution takes effect.

In its Fourteenth Report, the Committee suggested that, while it appreciated this attempt to address the concerns raised in Alert Digest No. 13, the proposed amendment did not entirely solve the problem. The Committee made two points.

First, the Committee noted that, pursuant to the proposed amendment, the further involvement of the Parliament in this matter would be permissive rather than imperative. Proposed new subclause (3) provides that each House of the Parliament 'may' consider the question of the commencement or repeal of Part 3 and Schedule 2 and 'may' subsequently pass a relevant resolution. However, the Committee noted that there is no obligation to do so.

Second, the Committee noted that the proposed amendment relies on both Houses passing the same resolution and does not allow for the possibility of a disagreement

between the Houses. The Committee suggested that, in the case of such a disagreement, it would appear that Part 3 and Schedule 2 would continue to be unproclaimed and unrepealed.

The Committee thanked the Minister for his assistance with the matter but suggested that, given the Minister's willingness to address its concerns, some further thought be given to the form of the amendment.

The Minister has provided the following further response:

> The Committee correctly pointed out that, firstly, the proposed amendment did not make it mandatory for Parliament to consider the commencement or repeal of these provisions, or pass any of the possible resolutions. Secondly, the Committee was understandably concerned that the proposed amendment did not provide a procedure for resolving a situation where both Houses disagreed and did not pass the same resolution.
>
> I would like to thank the Committee for drawing these matters to my attention. I am currently in the process of revising the amendment in the light of approaches made by the Opposition, and the points raised by the Committee will be taken into account.
>
> I am confident that the revised amendment will satisfy the concerns of the Committee and provide a "trigger" for the Hamburg Rules provisions which is consistent with Government policy and legislative drafting principles.
>
> Once the amendment has been finalised I will formally reply to the Committee enclosing a copy.

The Committee thanks the Minister for this further response and for his agreement to revise the proposed amendment in the light of the Committee's further comments.

SUPERANNUATION LEGISLATION AMENDMENT ACT 1991

The Bill for this Act was introduced into the House of Representatives on 29 May 1991 by the Minister for Finance.

The Act amends the following Acts relating to superannuation for Commonwealth sector employees:

- *Superannuation Act 1976;*
- *Superannuation Act 1990;*
- *Superannuation Benefits (Supervisory Mechanisms) Act 1990;* and
- *Superannuation (Productivity Benefit) Act 1988.*

The amendments:

- bring the 1976 Commonwealth Superannuation Scheme into line with Occupational Superannuation Standards;
- streamline the administration of the above Acts;
- remove anomalies in benefit provisions; and
- make amendments of a technical nature.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Minister for Finance responded to those comments in a letter dated 3 October 1991. A copy of that letter is attached to this report. Though the Bill was passed by the Senate on 20 August 1991, the Minister's response may nevertheless be of interest to Senators. Relevant parts of the response are set out below.

Retrospectivity
Subclauses 2(4) and clause 59

In Alert Digest No. 10, the Committee noted that subclause 2(4) of the (then) Bill provided that clauses 10, 11 and 60 were to be taken to have commenced on 1 April 1991. Those clauses proposed to amend the *Superannuation Act 1976*. The Committee noted that, though the Explanatory Memorandum contained no statement to that affect, it appeared that the retrospective operation of the clauses would be beneficial to persons other than the Commonwealth. In the absence of such a statement, the Committee indicated that it would appreciate the Minister's confirmation that this is the case.

The Minister responded as follows:

> I confirm that this will be the case. These clauses will limit the circumstances in which a benefit classification certificate may be issued to a person who is a member of the scheme under the Superannuation Act 1976 (the 1976 Act) after 30 March 1991.
>
> When a benefit classification certificate applies to a person, invalidity or death benefits payable to or in respect of that person from the scheme may be reduced. Limiting the circumstances in which certificates will be issued will therefore have a beneficial effect.

The Committee thanks the Minister for this response.

The Committee also noted that clause 59 of the Bill proposed to amend section 168 of the *Superannuation Act 1976*, in order to allow regulations made for the purposes of sections 126, 180 or 183 or that Act to

> be expressed to have taken effect from and including a day not earlier than the day of that commencement.

The Committee noted that this means that such regulations could operate retrospectively. However, the Committee noted that such regulations could only be made within 12 months of the commencement of clause 59 (which commenced on Royal Assent).

The Committee noted that the Explanatory Memorandum offered little assistance as to the need for the capacity to make retrospective regulations or the likely effect of such retrospectivity. The Committee indicated that it would appreciate the Minister's assistance in relation to these matters.

The Minister responded as follows:

> This capacity has been sought because many of the benefit provisions for the scheme under the 1976 Act are provided for in modifications to the Act made by regulations. Sections 126, 180 and 183 provide for such modifications.

The Minister goes on to say:

> Section 126 of the 1976 Act provides for modifications in relation to persons who were, prior to joining the scheme under that Act, a member of a superannuation scheme. This power has been used to provide for increased benefits for certain such persons.
>
> Sections 180 and 183 of the 1976 Act provide for modifications in relation to persons who had accrued rights under the Superannuation Act 1922 (the superseded Act) and who were compulsorily transferred to the scheme under the 1976 Act. These powers have been used to make modifications which have the effect of protecting those rights.
>
> Regulations made under these provisions modify provisions of the Act that are being amended by the Bill and it will be necessary to amend those modifications to reflect the changes made by the Bill.

> One example of the changes that will be required relates to the amendments to the 1976 Act proposed by clause 36 of the Bill. That clause inserts Part VIB in the 1976 Act to provide that certain persons who are entitled to an age or early retirement pension may elect to postpone those benefits. As the modifications included in regulations made under section 183 provide for the payment of benefits on age or early retirement, consequential amendments to those regulations are necessary in relation to persons who wish to postpone those benefits.

The Minister concluded by saying:

> It is appropriate that any amendments to these regulations required as a consequence of the amendments in the Bill take effect from the same date as the provisions in the Bill. Unfortunately pressure of time does not permit the making of those amendments prior to the passage of the Bill. As has been the practice in the case of earlier amendments to the Act, clause 59 provides for a limited period in which to make the necessary amendments with retrospective effect.
>
> The amendments to the Regulations will have the effect of treating those persons specifically covered by the regulations in a manner consistent with the treatment of persons covered only by the unmodified Act.

The Committee thanks the Minister for this response.

'Henry VIII' clause
Section 4 - definition of 'deferred annuity'

In Alert Digest No. 10, the Committee noted that clause 4 of the (then) Bill proposed to amend section 3 of the *Superannuation Act 1976*. Among other things, it proposed to insert the following definition:

'**deferred annuity**' *means an annuity that cannot be surrendered or assigned by the person in respect of whom it was purchased until that person attains the age of 55 years and under which benefits are payable to, or in respect of, the person only in one or more of the following circumstances:*

(a) the person retired from the workforce and attained an age of not less than 55 years;
(b) the retirement of the person from the workforce before attaining the age of 55 years on the ground of permanent invalidity;
(c) the death of the person;
(d) the permanent departure of the person from Australia;
(e) such other circumstances as the Insurance and Superannuation Commissioner within the meaning of the *Occupational Superannuation Standards Act 1987* approves;
(f) such circumstances as are prescribed;

The Committee indicated that paragraph (f) was what it would ordinarily regard as a 'Henry VIII' clause. The Committee noted that the clause (if enacted) would appear to allow the Governor-General (acting on the advice of the Executive Council) to make regulations prescribing 'circumstances' which would make what would otherwise be an annuity a 'deferred annuity'. The Committee suggested that the clause, in effect, would allow the operation of the primary legislation to be amended by subordinate legislation.

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

The Minister concluded by noting:

> Any regulations made under any of the provisions of the Bill will, of course, be disallowable.

The Committee thanks the Minister for his response.

Barney Cooney
(Chairman)

Minister for Transport
and Communications

RECEIVED
8 OCT 1991
Senate Standing C'tte
for the Scrutiny of Bills

Parliament House
Canberra ACT 2600
Australia
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8 OCT 1991

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

Dear Senator Cooney

I refer to Mr Stephen Argument's letter of 12 September 1991 which provided comments contained in the Scrutiny of Bills Alert Digest No. 15 of 1991 (11 September 1991) which expressed concern with the proposed section 407 of the AUSSAT Repeal Bill 1991. I thank the Committee for bringing these issues to my attention.

The following information addresses the Committee's specific concerns.

1. Technical Standards

The Committee was concerned that there is no indication in the Explanatory Memorandum of what kinds of "technical standards" will be applied and requested further information on this matter.

AUSTEL is responsible for the determination, and compliance with technical standards for customer equipment, the connection of customers to the telecommunications network, customer cabling and interconnection by the carriers and other service providers. It is involved also in the development of voluntary standards and codes of practice.

Since its establishment in July 1989, AUSTEL has determined 18 technical standards (contained in 20 Volumes), with two draft standards nearing completion (Attachment A). In line with the rapid expansion in communications technology, standards are also being considered for digital cellular mobile telephones, advanced cordless telephone and integrated cabling systems for buildings. It is likely that the development of standards will continue in line with accelerating technological development.

The standards were produced by 22 Working Groups which were established to assist in the development and review process. The Groups comprise representatives from users, suppliers, carriers, Standards Australia, electricity supply authorities and relevant Government departments.

AUSTEL established the Standards Advisory Committee (SAC) to provide assistance in the review of the initial 16 Technical Standards determined in the first month of its operation and for the creation of new standards. Original participants in the inaugural September 1989 meeting were AUSSAT, OTC Limited, Telecom, the Australian Council of Trade Unions (ACTU), Australian Electronic Industries Association (AEIA), Australian Federation of Consumer Organisations (AFCO), Australian Information Industries Association (AIIA), Australian Telecommunications Users Group (ATUG) and Standards Australia. A representative of the Electricity Supply Association of Australia was subsequently invited to join in recognition of the significance of earthing and electrical safety aspects.

Standards are developed to comply with both national and international obligations and requirements. They can be used to protect the integrity of the telecommunications network or to protect and ensure the safety of personnel working on or using the services of a network. Standards can ensure the interoperability of customer equipment or cabling with networks and also ensure compliance with recognised international standards concerning interfacing of customer equipment and customer cabling to the telecommunications network.

All customer equipment connected to a telecommunications network requires an AUSTEL permit (which performs a similar function to the Telecom authorisations that existed prior to July 1989). To apply for a permit, the process involves equipment being tested by an accredited test house against AUSTEL technical standards. The test report, permit application and permit fee are then submitted to AUSTEL. If the application is assessed by AUSTEL to comply with the relevant technical standards, a permit is issued. Except for those specific classes that require extra endorsement under the Industry Development Arrangements, the permit issued has ongoing effect and is not renewable annually.

Developing and implementing technical standards involves a major consultative process. The Working Groups of experts review matters on a case-by-case basis and report back to the SAC. SAC, in turn, reviews the determination and findings of each Working Group and makes a recommendation which has to be agreed to by the Government. While many of the interested parties are represented on the working groups and on SAC, the public also has the chance to comment as part of this general consultative process.

It is anticipated that existing standards would be revised from time to time in line with rapid developments in communications technology and services.

2. International Standards

The Committee also queried what "international bodies" might set technical standards.

The main international organisation responsible for setting telecommunications standards is one of the two major consultative committees of the International Telecommunications Union (ITU) - the CCITT (Consultative Committee on International Telegraph and Telephone). The CCITT reviews and recommends influential international standards to the ITU to meet the ITU's function of establishing equipment and systems operating standards.

The CCITT is composed of 18 Study Groups which determine and review standards and these are contained in 11 substantial volumes which contain over 60 standards as at the last Plenary Session. As with the AUSTEL standards, the rapidly changing telecommunications environment means that standards are constantly in need of review and/or development.

A list of topic questions to be considered by the CCITT Work Groups from 1989-92 is attached for your information (Attachment B). Issues considered include services such as telex, mobile and ISDN, tariffs, frequency interference and various other types of technical regulatory matters.

As an ITU Signatory, AUSTEL can adopt globally accepted standards. Both the Radiocommunications and Telecommunications legislation provide for the ITU Convention and regulations to be taken into account by those implementing local laws.

3. Public Knowledge of Standards

The Committee expressed concern over the difficulty for individuals and organisations of knowing what were the relevant standards that applied to them at a particular point in time. It requested advice as to how any changes to international standards would be notified.

Under the Telecommunications Act 1991, AUSTEL's technical standards are disallowable instruments which must be published in the Gazette. Public comment and review form a major part of the process of disseminating information to relevant individuals and organisations on any changes to standards.

AUSTEL and various other interested parties are members of CCITT Work Groups and any changes to international standards are notified to the relevant parties in Australia. AUSTEL would be the main disseminator of such information in its capacity as ITU signatory.

4. Comments on Clause 9

The Committee identified an omission from subclause 9(2) of the Bill.

This printing error was corrected prior to the Bill being introduced and, consequently, does not appear on copies of the Bill as read a first time.

As indicated, this continual process of establishing and reviewing technical standards at both the national and international level involves a great deal of time, manpower and administration. It also concerns highly technical and complex issues. If these technical standards cannot be applied as they exist from time to time, licensing conditions would need to be updated every time a standard is revised or a new standard is made.

I trust this addresses the Committee's concerns on the AUSSAT Repeal Bill 1991.

Yours sincerely

KIM C. BEAZLEY

TECHNICAL STANDARDS

NO	TITLE
001	Safety Requirements for Customer Equipment
002	Analogue Interworking and Non-Interference Requirements for Customer Equipment Connected to the Public Switched Telephone Network
003	Customer Switching Systems Connected to the Public Switched Telephone Network
004	Voice Frequency Performance Requirements for Customer Equipment
005	Cellular Mobile Telephone System Air Interface Compatibility
006	General Requirements for Customer Equipment Connected to the Non-switched Public Network
007	General Requirements for Customer Equipment Connected to the Public Telex Network
008	Requirements for Authorised Cabling Products
009	Installation Requirements for Customer Cabling (Wiring Rules)
010	General Premises and Domestic Premises Cablers Licence and Inspection Requirements
011	Abbreviations, Definitions and Terms Used in Technical Standards
012	General Requirements for Interconnection of Private Networks with the Public Switched Telephone Network
013.1	General Requirements for Customer Equipment Connected to ISDN Basic Rate Access, Vol 1: Customer Equipment Access Interface Specifications

16/7/91

Attachment 1
Page 1

TECHNICAL STANDARDS

NO	TITLE
013.2	General Requirements for Customer Equipment Connected to ISDN Basic Rate Access, Vol 2: Conformance Testing Specifications.
014.1	General Requirements for Customer Equipment Connected to ISDN Primary Rate Access, Vol 1: Customer Equipment Access Interface Specifications
014.2	General Requirements for Customer Equipment Connected to ISDN Primary Rate Access, Vol 2: Conformance Testing Specifications
015	General Requirements for Analogue Video Equipment Connected to a Public Telecommunications Network
016	General Requirements for Customer Equipment Connected to a 2048 kbit/s Telecommunications Service
017	General Requirements for Customer Equipment Connected to the Public Data Network (draft)
018	Digital Cellular Mobile Telecommunications System - Mobile Equipment
019	Radio Equipment and Systems Cordless Telephones - CT2 CAI
020	Requirements of the RF Interface of Private Satellite Earth Station Equipment Accessing the AUSSAT Satellite Network (draft)

16/7/91

ATTACHMENT B

LIST OF QUESTIONS TO BE STUDIED DURING THE STUDY PERIOD OF 1989-1992 AND THEIR ALLOCATION TO STUDY GROUPS

STUDY GROUP I

Question	Short title
1/I	Regulatory provisions
2/I	Official service documents
3/I	Terminology
4/I	Telegram service
5/I	Phototelegraph services
6/I	Telemessage service
7/I	Telex service
8/I	Mobile telephone, telegraph, telematic and data services
9/I	Teletex service
10/I	General service framework for document communication
11/I	A general service framework for inter-active modes to be used by telematic services with document transfer capabilities
12/I	Bureaufax service
13/I	Subscriber facsimile service
14/I	Facsimile store-and-forward services
15/I	Message handling services
16/I	International public directory services
17/I	Audiovisual services
18/I	Videotex service
19/I	International public data transmission services
20/I	International multi-destination telecommunication services via satellite
21/I	New services on the ISDN
22/I	Broadband services on the ISDN
23/I	Existing telematic and data transmission services on the ISDN

Question	Short title
24/I	Suitability of new services and facilities to meet the needs of users
25/I	"International telephone instructions" and operation of telephone relations
26/I	New international telecommunication services
27/I	Customer satisfaction and efficiency when using world-wide telecommunications
28/I	Symbols, pictograms and keypad layout
29/I	Customer control procedures in the PSTN and ISDN
30/I	User indications in the PSTN and the ISDN
31/I	Human factors aspects of access to voice and non-voice terminals using public terminals
32/I	Human factors issues of new telecommunications services
33/I	Computerized directory assistance for numbers in foreign countries
34/I	International telecommunication credit card service

STUDY GROUP II

Question	Short title
1/II and 2/II	(Spare numbers)
3/II	Network operational aspects of international telephone service
4/II	International interconnection of mobile services and the PSTN
5/II	Evolution of numbering and numbering plan interworking for ISDN era
6/II	Evolution of routing plan in the ISDN era
7/II	Non-voice aspects of networks during transition from PSTN to ISDN
8/II	Service quality of networks (PSTN/ISDN)
9/II	International network management
10/II	Traffic measurement requirements on telecommunications networks
11/II	Terms and definitions for QOS, dependability and traffic engineering
12/II	Traffic, operational and network planning objectives of common channel signalling networks
13/II	Design alternatives for telecommunication networks
14/II	Methods for forecasting international traffic
15/II	Traffic models and measurements for traffic offered to network and grade of service
16/II	Application of traffic measurements in telecommunication networks
17/II	Traffic reference models for ISDN traffic engineering
18, II	Grade of service during and after a total failure of network components or traffic peak conditions
19/II	Call oriented models for the serveability performance in networks
20/II	Serveability performance and service integrity of telecommunication services
21/II	CCITT Handbook(s) on application and implementation of Recommendations on quality of service

STUDY GROUP III

Question	Short title
1/III	General principles for the lease of international private telecommunication circuits
2/III	Special conditions for the lease of *continental* telecommunication circuits for private service
3/III	Special conditions for the lease of *intercontinental* telecommunication circuits for private service
4/III	Tariff principles for the leasing of international transmission facilities intended for the transmission of data by digital techniques
5/III	Development of tariff principles for international telecommunication services to meet the specific requirements of certain categories of users
6/III	General tariff and accounting principles applicable to data communication on public data networks
7/III	Tariff principles and accounting arrangements for public data communication services on public packet-switched networks
8/III	Tariff principles and accounting arrangements applicable to public data communication services in public circuit-switched networks
9/III	General tariff and accounting principles for the different public data communication networks interworking options
10/III	Tariff principles in the international public telegram service
11/III	Tariff principles in the international public telemessage service
12/III	Tariff principles for the international telex service
13/III	Tariff principles for international public facsimile services
14/III	Tariff principles for the international Teletex service
15/III	Tariff and international accounting principles to be applied in the Videotex services
16/III	Charging and accounting principles in the international telephone service
17/III	Occasional provision of circuits for international sound and television programme transmissions

Question	Short title
18/III	Leased international sound and television programme circuits
19/III	General tariff principles for mobile telecommunications services
20/III	Tariff and accounting principles for services not covered by specific Questions
21/III	Charging and accounting principles to be applied to the services offered by an integrated services digital network (ISDN)
22/III	General charging and accounting principles for non-voice services provided by interworking between the ISDN and existing public data networks
23/III	Tariff and accounting principles to be applied to permanent and reserved services within the ISDN
24/III	General charging and accounting principles to be applied to multi-point-to-point international telecommunication services via satellite
25/III	General charging and accounting principles to be applied to two-way multiple access international telecommunication services via satellite
26/III	General consideration of the tariff and accounting provisions of D-Series Recommendations in the light of the content of the new International Telecommunication Regulations adopted by the WATTC-88
27/III	Cost studies for determining the basic tariff components for telecommunication services
28/III	Cost studies for determining the basic tariff components for sound and television programme transmissions
29/III	Methodology to be followed for the determination of costs and the establishment of national tariffs
30/III	Terms and definitions for the Recommendations dealing with tariff and accounting principles
31/III	Amendments and additions to be made to Recommendation C.1 relating to telecommunication statistics

32/III

33/III Charging and accounting principles to be applied to [illegible] telecommunications

STUDY GROUP IV

Question	Short title
1/IV	Terminology and definitions
2/IV	Use of the CCITT Man-Machine Language for maintenance
4/IV	Maintenance of mobile telecommunications systems
5/IV	Standardized information exchange between administrations
6/IV	Maintenance philosophy, principles and strategy for networks and services
7/IV	Keeping Volume IV of the CCITT Book up to date
8/IV	Assessment of network performance and exchange of information for maintenance purposes
9/IV	Restoration of failed international exchanges, transmission systems, path, etc.
10/IV	Measuring instrument specifications
11/IV	Transmission measuring equipment and associated maintenance test access lines
12/IV	Maintenance of international sound-programme circuits
13/IV	Maintenance of international television circuits
14/IV	General maintenance organization
15/IV	Maintenance of international videoconference circuits
16/IV	Maintenance of digital blocks, sections and paths; mixed analogue/digital systems, and analogue groups, supergroups etc.
17/IV	Designation of international circuits, groups, blocks etc. and related information
18/IV	Maintenance of telephone type circuits (other than leased or special circuits)
19/IV	Maintenance of leased and special circuits with analogue presentation at the users premises
20/IV	Maintenance aspects of data transmission systems, leased and special circuits with digital presentation at the users premises
21/IV	Maintenance of ISDNs
23/IV	Telecommunication Management Networks (TMNs) and their relationship to associated network elements

STUDY GROUP V

Question	Short title
1/V	Arrangement and purpose of protective components fitted at main distribution frames and other connection points
5/V	Protection policy against over-voltages
6/V	Coordinated protection schemes for telecommunication cables
7/V	Characteristics and testing of protective components and assemblies
8/V	Interference testing and measurement
11/V	Disturbance to telecommunications circuits from power-line carrier systems
13/V	Unbalance of telephone installations
15/V	Magnitudes of harmonics in power and traction lines and methods to reduce their effects
16/V	Levels of voltages and currents related to disturbances from power and traction installations
17/V	Electromagnetic compatibility (EMC) of telecommunications networks and equipment
18/V	Radiated radio frequency interference and telecommunications equipment and systems
19/V	Conducted radio frequency interference on telecommunication equipment and systems
20/V	Survey on provisions intended to mitigate adverse effects (danger and disturbance) of electromagnetic origin
21/V	Test to be carried out on repeaters or regenerators to check the efficiency of protection from external interference with local or remote power feeding
22/V	Protection of telecommunication lines and installations against lightning
24/V	Earthing in telecommunication systems
26/V	Directives concerning the protection of telecommunication lines against harmful effects from electric power and electrified railway lines

STUDY GROUP VI

Question	Short title
1/VI	Conductive plastic materials as protective covering for metal cable sheaths
2/VI	Fire safety of telecommunication installation
3/VI	Application of computers and micro-processors to the construction, installation and protection of telecommunication cables
4/VI	Coordinated protection schemes for telecommunication cables
5/VI	Amendments and additions to the Handbook "Outside plant technologies for public networks
6/VI	Copper networks for ISDN services
7/VI	Optical fibre cable installation
8/VI	Optical fibre cable restoration
9/VI	Optical fibre cable construction
10/VI	Performance tests for optical fibre cables and associated hardware
11/VI	Optical fibre cables inside buildings
12/VI	Optical fibre cable distribution network
13/VI	Passive optical components

STUDY GROUP VII

Question	Short title
1/VII	Standardization of the technical characteristics of user classes of service, international data transmission services and optional user facilities in public data networks (PDNs) and ISDNs and the categories of access for DTEs to such services
2/VII	Call progress signals
3/VII	Technical characteristics of connectionless services in public networks
4/VII	Network performance and Quality of Service in Data Communications Networks
5/VII	Testing and verification of data communication protocols
6/VII	Further study on Recommendations for DTE/DCE interfaces for circuit switched service (X.20, X.20 *bis*, X.21, X.21 *bis*, X.22) and study on access to the CSPDN through telephone networks
7/VII	Further study of DTE/DCE interfaces for terminals operating in the packet mode
8/VII	Study of DTE/DCE interface procedures for dissimilar terminal interworking
9/VII	Principles of maintenance in user-network interfaces for public data networks
10/VII	General technical principles for interworking between public networks or between public networks and other networks for the provision of data services
11/VII	Arrangements generic to different interworking (circuit and packet modes) between public networks or between public networks and other networks, for the provision of data services
12/VII	Management aspects of interworking between public networks, and between public networks and other networks when involved in the provision of data services
13/VII	Interworking between public data networks (circuit switched and packet switched) and ISDNs and between ISDNs, for the provision of data services
14/VII	Interworking between public data networks and the telex network
15/VII	Arrangements for interworking between networks other than ISDNs and telex, for the provision of data services

Question	Short title
16/VII	Packet mode signalling between public networks providing data transmission services
17/VII	Arrangements for CSPDNs interworking and associated inter-network signalling
18/VII	Message handling systems
19/VII	Framework for support of distributed applications
20/VII	Directory systems
21/VII	Numbering plan for public data networks
22/VII	Routing principles for public data networks
23/VII	Open Systems Interconnection (OSI) Architecture
24/VII	Open Systems Interconnection (OSI) Management
25/VII	Open Systems Interconnection (OSI) Application Layer
26/VII	Open Systems Interconnection (OSI) Presentation and Session Layers
27/VII	Open Systems Interconnection (OSI) Transport and Network Layers
28/VII	Open Systems Interconnection (OSI) Data Link and Physical Layers
29/VII	Application of formal description techniques to X-Series Recommendations
30/VII	Support of X-Series interfaces in an ISDN and new interface aspects for data services in ISDNs
31/VII	Requirements and arrangements for the provision of data services in ISDNs
32/VII	Continue the preparation of definitions which arise during the study of all Questions entrusted to Study Group VII
33/VII	Revision of Recommendations

STUDY GROUP VIII

Question	Short title
1/VIII	Revision of Recommendations
2/VIII	Definitions
3/VIII	Study of telephone-type circuit dependent problems in facsimile transmission
4/VIII	Group 4 facsimile apparatus
5/VIII	Choice of modulation techniques to be used with Telematic services connected to the PSTN
6/VIII	Terminal characteristics for Mixed Mode and Processable Mode
7/VIII	Digital phototelegraphy equipment
8/VIII	Coding of alphanumeric characters and associated control functions for Telematic services
9/VIII	Protocols for Interactive audiovisual services
10/VIII	Terminal characteristics and standardized options for the Teletex terminals
11/VIII	Conversion
12/VIII	Telematic interworking
13/VIII	Development of conformance procedures to ensure the international compatibility of Teletex
14/VIII	Syntax aspects of interactive Videotex
15/VIII	Protocol aspects of interactive Videotex
16/VIII	Common components for image communications
17/VIII	Terminal characteristics and protocols for Telematic services on ISDN
18/VIII	Group 3 facsimile apparatus
19/VIII	Operational structure application profiles
20/VIII	Imaging conversion rules interworking between different facsimile apparatus groups
21/VIII	Development of session control procedures for Telematic services
22/VIII	Network independent basic transport protocol for Telematic application

Question	Short title
23/VIII	Equipment characteristics and protocols for audiographic conferencing
24/VIII	Communication Application Profiles
25/VIII	Enhancement to the application rules to physical, data link and network layer protocols for Telematic applications
26/VIII	Document Application profiles for Teletex, Facsimile Group 4 and message handling services
27/VIII	Document architecture, Transfer and Manipulation

STUDY GROUP IX

Question	Short title
1/IX	Revision of Recommendations
2/IX	Mobile (-satellite) service transmission standards and the interconnection of mobile (-satellite) telegraph and telematic services with the international telex network
3/IX	Quality, reliability and availability of telegraph transmission
4/IX	Transmission standards for terminal equipment using modulation rates up to 300 bauds
7/IX	Automatic maintenance tests of telegraph circuits
8/IX	Technical aspects of the store and forward service for telex subscribers
9/IX	Standardization of modems for telegraph TDM system in the R-Series Recommendations
10/IX	TDM systems for telegraphy employing a new technique of multiplexing
11/IX	Definitions concerning telegraph networks and terminals
12/IX	Statistical muldexes and muldexes/concentrators
14/IX	Code and speed dependent TDM systems
15/IX	Interworking between the telex and Teletex services
16/IX	Further standardization of signalling systems
17/IX	Integration of the telex network with other networks that use common channel signalling, particularly ISDN
18/IX	Use of data networks for provision of the international telex service
19/IX	Network plans for telegraph networks
20/IX	Interworking between telex and services provided on other networks
21/IX	Various telex network facilities to be provided in real time
22/IX	Unavailability of telex terminals/store and forward units/non-telex terminals
23/IX	Expanded coding techniques for text transmission over the international telex networks
24/IX	Transmission aspects of data communication networks
25/IX	Numbering plan for telex networks

STUDY GROUP X

Question	Short title
1/X	Reorganization and extension of existing Recommendations Z.311 to Z.323
2/X	New Recommendations and maintenance of existing Recommendations to account for centralized environments
3/X	Supplementing international standardization work to enhance the use of CCITT MML in interfacing to telecommunication networks
4/X	Improved methodology to specify Human-Machine Interface (HMI)
5/X	Specification of the Human-Machine Interface to support the management of telecommunication networks
6/X	Support environment for telecommunication systems through their lifetime
7/X	Software quality, software testing and verification for telecommunication systems
8/X	Maintenance of SDL
9/X	Specification and description techniques needed for telecommunication systems
10/X	Quality assurance, testing and verification for telecommunications specifications
11/X	Harmonization of the use of SDL and CHILL
12/X	Maintenance, training, compliance and promotion aspects of CHILL

STUDY GROUP XI

Question	Short title
1/XI	New switching and signalling techniques
2/XI	Signalling and OAM protocol architecture
3/XI	Switching functions and signalling information flows for implementation of basic and supplementary services
4/XI	Switching functions and signalling information flows for implementation of OAM functions
5/XI	Application of the Stage 2 Recommendations to the signalling protocols for services
6/XI	Application of the Stage 2 Recommendations to the signalling protocols for OAM
7/XI	Updating of Q-Series Recommendations
8/XI	Structure and use of Signalling System No 7 networks
9/XI	Common channel Signalling System No.7 - Signalling Connection Control Part
10/XI	Evolution of the ISDN User Part
11/XI	Call control and bearer control protocols in Signalling System No.7 for the full range of ISDN telecommunication services
12/XI	Transaction capabilities
13/XI	Signalling System No., Operation, Maintenance, and Administration Part (OMAP)
14/XI	Signalling System No., protocol testing and test specification
15/XI	Guidelines for implementing Signalling System No.7 in national networks
16/XI	Interworking of Signalling Systems
17/XI	Signalling for existing and future land mobile networks
18/XI	Interworking with mobile satellite networks
19/XI	Signalling requirements for new transmission equipments
20/XI	Updating and enhancements of ISDN user-network interface call control protocol
21/XI	Updating and enhancements of ISDN user-network interface data link layer protocol

Question	Short title
22/XI	ISDN user-network protocol (DSS 1) conformance
23/XI	Common channel Signalling System No.7 - Message Transfer Part
24/XI	Enhancement and extension of the Q.500-Q.544 series of Recommendations on digital exchanges
25/XI	Protocols for remote operation of specific OAM applications
26/XI	Definitions for switching and signalling

STUDY GROUP XII

Question	Short title
1/XII	Future programme of work
2/XII	Hands-free telephony
3/XII	Definitions in the field of telephonometry and of characteristics of international connections and circuits
4/XII	Updating of the CCITT telephonometric and transmission planning Handbooks
5/XII	Speech synthesis/recognition systems
6/XII	Harmonization of G.100-Series of Recommendations
7/XII	Models for predicting transmission quality from objective measurements
8/XII	Improvement of the methods for the determination of loudness ratings
9/XII	Sidetone
10/XII	Speech transmission characteristics for digital handset telephones
11/XII	Transmission degradation introduced by interaction between voice operated devices
12/XII	Artifical mouths and ears
13/XII	Methods for the evaluation of non-linear distortions
14/XII	Application for the artificial voice
15/XII	Loudness rating, algorithm and application rules
16/XII	Impedance strategy in the local network
17/XII	Actual and preferred speech levels in telephone connections
18/XII	Transmission performance of digital systems
19/XII	Recommended values for loudness ratings
20/XII	Wideband telephony
21/XII	Relative level at the boundary between national systems and the international chain
22/XII	International telephone conference
23/XII	Coupling of hearing aids to telephone receivers
24/XII	Integration of mobile systems into the public switched network

Question	Short title
25/XII	Transmission impairments in the evolving mixed analogue/digital and I[illegible] networks
26/XII	Setting objectives for mixed analogue/digital circuits
27/XII	Talker echo, propagation time and stability in telephone networks, ISDN and interconnection with ISDN
28/XII	Listener echo (receive and echo) in the public switched telephone networks
29/XII	Transmission plan aspects of the interworking between PSTN and ISDN in the evolving network
30/XII	Methods for evaluating the transmission performance of digital telephone sets

Question	Short title
20/XV	Characteristics of digital cross-connect equipment
21/XV	16 kbit/s speech signal encoding and extension to other bandwidths and bit rates
22/XV	Encoding of stored digitized voice signals
23/XV	Encoding of speech signals into bit rates of less than 16 kbit/s
24/XV	Speech packetization systems
25/XV	Characteristics of monitoring points on digital transmission equipments and systems
26/XV	Harmonization and update of the texts in Recommendations in Volume III of the Blue Book insofar as they relate to transmission equipment metallic cables and systems
27/XV	Terminology for transmission equipment, media and systems
28/XV	Characteristics of new multiplexing equipment for the digital hierarchy as given in G.702
29/XV	Characteristics of digital systems on optical fibre cables for the synchronous hierarchy
30/XV	Performance characteristics of PCM and ADPCM channels at voice frequencies
31/XV	Guide for the application of new technologies in local networks
32/XV	Enhancement and extension of the Q.550-Series of Recommendations on the transmission performance of digital exchanges

STUDY GROUP XVII

Question	Short title
1/XVII	Supplement to the vocabulary for data transmissions
2/XVII	Measurements on telephone-type circuits used for data transmission between subscribers
3/XVII	Modems for the transmission of data and other digital signals on the General Switched Telephone Network (GSTN) and on two-wire telephone-type leased circuits
4/XVII	Modems for the transmission of data and other digital signals on four-wire telephone-type leased circuits
5/XVII	Error control in modems
6/XVII	Characteristics of a device used to interface a DTE to digital channels other than ISDN
8/XVII	Measuring criteria for telephone-type circuits appropriate to their use for transmission of data signals
9/XVII	Network management
11/XVII	Support of DTEs (TE2) with V-Series type interfaces on an ISDN, and interworking of DTEs with modems on PSTNs with TE2s and TE1s on ISDNs
12/XVII	Comparative tests of data communication equipments for use over telephone-type circuits
13/XVII	Interchange circuits
14/XVII	Refinement and extension of Recommendation V.5 *bis* functions and protocols
15/XVII	Data transmission over intercontinental switched telephone connections
18/XVII	Revision of the existing Series-V Recommendations
22/XVII	Digital performance of data transmission services using V-Series modems over the telephone network
23/XVII	General data communication interface

STUDY GROUP XVIII

Question	Short title
1/XVIII	General aspects of ISDN
2/XVIII	Asynchronous Transfer Mode (ATM)
3/XVIII	Network aspects of digital hierarchies
4/XVIII	Network application of Synchronous Digital Hierarchy with reference to the Network Node Interface (NNI)
5/XVIII	General aspects of Quality of Service and network performance in digital networks including ISDNs
6/XVIII	Network performance objectives for ISDN circuit mode information transfer
7/XVIII	Performance objectives for timing and controlled slips (synchronization), filter, wander and propagation delay
8/XVIII	Network performance objectives for ISDN connection, processing and packet mode information transfer
9/XVIII	Performance objectives for ISDN availability
10/XVIII	Impact of signal processing on ISDN
11/XVIII	Interworking of ISDNs with other networks, including compatibility checking and terminal selection
12/XVIII	Interworking between networks using different digital hierarchies - Layer 1 functionality
13/XVIII	Network capabilities for the support of broadband services in ISDNs
14/XVIII	ISDN network capabilities for the support of additional and/or new services
15/XVIII	ISDN packet mode bearer services - services and user-network interface aspects
16/XVIII	ISDN architecture and functional principles, characterization methods and reference configurations (including user-network interfaces)
17/XVIII	ISDN Protocol Reference Model
18/XVIII	ISDN Connection Types
19/XVIII	Network capabilities for the integration of mobile network services into the ISDN

Question	Short title
20/XVIII	Layer 1 characteristics of ISDN interfaces and ISDN access
21/XVIII	Vocabulary for ISDNs
22/XVIII	Broadband ISDN influence on principles for video encoding
23/XVIII	Guidelines for implementing ISDN field trials in developing countries

RECEIVED
8 OCT 1991
Senate Standing C'tte for the Scrutiny of Bills

Minister for Shipping and Aviation Support

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

4 OCT 1991

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

Dear ~~Senator Cooney~~

I refer to the further comments on the proposed revision of the Hamburg Rules' "trigger" mechanism contained in the Carriage of Goods by Sea Bill 1991, documented in the *Senate Standing Committee for the Scrutiny of Bills'* Fourteenth Report of 1991 dated 11 September 1991.

The Committee was concerned that the amendment to the Bill which I proposed in my response of 3 September 1991 did not go far enough in addressing the potential problem of the Proclamation of the Hamburg Rules provisions of the Bill never occurring.

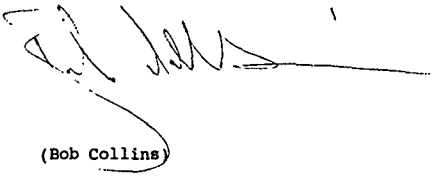
The Committee correctly pointed out that, firstly, the proposed amendment did not make it mandatory for Parliament to consider the commencement or repeal of these provisions, or pass any of the possible resolutions. Secondly, the Committee was understandably concerned that the proposed amendment did not provide a procedure for resolving a situation where both Houses disagreed and did not pass the same resolution.

I would like to thank the Committee for drawing these matters to my attention. I am currently in the process of revising the amendment in the light of approaches made by the Opposition, and the points raised by the Committee will be taken into account.

I am confident that the revised amendment will satisfy the concerns of the Committee and provide a "trigger" for the Hamburg Rules provisions which is consistent with Government policy and legislative drafting principles.

Once the amendment has been finalised I will formally reply to the Committee enclosing a copy.

Yours sincerely



(Bob Collins)

RECEIVED
4 OCT 1991
Senate Standing Cttee for the Scrutiny of Bills

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 6 June 1991 to my Private Secretary from the Secretary of the Committee concerning the Committee's comments on the Superannuation Legislation Amendment Bill 1991.

The Committee has sought my advice on three aspects of the Bill.

Firstly the Committee has sought my confirmation that the retrospective commencement of clauses 10, 11 and 60 of the Bill, provided for in subclause 2(4), will be beneficial to persons other than the Commonwealth.

I confirm that this will be the case. These clauses will limit the circumstances in which a benefit classification certificate may be issued to a person who is a member of the scheme under the Superannuation Act 1976 (the 1976 Act) after 30 March 1991.

When a benefit classification certificate applies to a person, invalidity or death benefits payable to or in respect of that person from the scheme may be reduced. Limiting the circumstances in which certificates will be issued will therefore have a beneficial effect.

The Committee has sought my assistance in relation to the provision, in clause 59, for regulations under sections 126, 180 and 183 of the 1976 Act to be made with retrospective effect. The Committee sought advice on the need for this capacity and the likely effect of such retrospectivity.

Finally, the Committee has drawn my attention to the possible inappropriate delegation of legislative power in paragraph (f) of the definition of 'deferred annuity' as proposed to be inserted in the 1976 Act by clause 4.

Certain benefits under the 1976 Act may be paid to a person only in circumstances provided for in the Occupational Superannuation Standards (OSS). Where the OSS does not permit the payment of the benefit to the person, the benefit must be preserved. One of the means by which the benefit may be preserved and still satisfy the OSS is by the purchase of a deferred annuity which may then be paid to the person only in circumstances prescribed in the OSS Regulations.

The definition of deferred annuity in the 1976 Act is intended to reflect the requirements of the OSS Regulations in relation to deferred annuities. Those requirements are complex and are varied from time to time. Because of this complexity and because those requirements can be varied through delegated legislation, it was not considered appropriate to make reference to the OSS Regulations in the definition.

In the circumstances, it was decided that the most appropriate and effective way to ensure continuing adherence to, and consistency with, the OSS was to provide a regulation making power under the definition. This power can then be exercised if, and when, the OSS Regulations are amended.

It is not intended that the circumstances prescribed in the regulation be other than those provided for in the OSS Regulations. Furthermore any circumstances which are prescribed will extend the circumstances in which a deferred annuity may be paid to a person and therefore will be beneficial. As this is the case and as the OSS are already provided for in delegated legislation this does not appear to be an inappropriate delegation of legislative power.

Any regulations made under any of the provisions of the Bill will, of course, be disallowable.

I trust this advice will assure you that the Bill does not conflict with any matters included in the terms of reference of the Committee.

Yours sincerely

Ralph Willis

03 OCT 1991

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF

1991

16 OCTOBER 1991

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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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

SIXTEENTH REPORT OF 1991

The Committee has the honour to present its Sixteenth Report of 1991 to the Senate.

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

Community Services and Health Legislation Amendment Act 1991

Constitution Alteration (Alterations of the Constitution on the Initiative of the Electors) 1990

Crimes (Bribery and Corruption) Amendment Bill 1990

Health Legislation (Pharmaceutical Benefits) Amendment Act 1991

Therapeutical Goods (Charges) Amendment Act 1991

COMMUNITY SERVICES AND HEALTH LEGISLATION AMENDMENT ACT 1991

The Bill for this Act was introduced into the House of Representatives on 30 May 1991 by the Minister for Community Services and Health.

The Act amends:

- the *Health Insurance Act 1973,* to:
  - insert a new definition of 'professional service'; and
  - require the proprietor of a pathology laboratory whose approval has been revoked to inform referring practitioners and patients that a Medicare benefit will not be payable in respect of pathology services;

- the *National Health Act 1953* and the *Nursing Homes and Hostels Legislation Amendment Act 1986,* to:
  - enable more information about nursing homes to be publicly available;
  - provide a new penalty for nursing homes not complying with conditions of approval; and
  - make technical amendments; and

- the *Therapeutic Goods Act 1989,* to:
  - decentralise the administration of the Individual Patient Usage Scheme;
  - allow for the payment of evaluation fees by instalments where goods are being considered for registration in the Australian Register of Therapeutic Goods (ARTG);

- ensure that individual therapeutic goods that have been 'grouped' will retain their status as separate goods for certain purposes; and
- enable regulations to be promulgated to impose fees for processing the release of information in the ARTG.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Minister for Health, Housing and Community Services responded to those comments in a letter dated 14 October 1991. A copy of that letter is attached to this report. Though the Committee notes that the Bill was assented to on 26 June 1991, the Minister's response may nevertheless be of interest to Senators. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Subsection 2(2)

In Alert Digest No. 10, the Committee noted that subclause 2(2) of the (then) Bill provided that clause 14 was to commence at the same time as section 7 of the *Nursing Homes and Hostels Legislation Amendment Act 1986*. The Committee noted that, pursuant to subsection 2(4) of that Act, section 7 was to come into operation on a date fixed by Proclamation.

In relation to subclause 2(2) of the Bill before it, the Committee noted that the Explanatory Memorandum stated:

> Subclause 2 ensures that the amendments to the National Health Act concerning the definition of government nursing home, and the amendment to the Nursing Homes and Hostels Legislation Amendment Act commence at the same time as the commencement of section 7 of the Nursing Homes and Hostels Legislation Amendment Act, which has not yet been proclaimed.

The Committee noted that, in relation to clause 14, the Explanatory Memorandum stated:

> This is a technical amendment which amends s139B of the Principal Act. It makes the prescribed list of Government nursing homes a disallowable instrument. It replaces a previous similar amendment which was originally to have been made by section 22 of the Nursing Homes and Hostels Legislation Amendment Act 1986. The previous amendment was to have commenced by Proclamation, but has not been proclaimed, it is repealed by Clause 16 of this Bill.

The Committee indicated that it was concerned about subclause 2(2) for two reasons. First, given the fact that the commencement of the relevant clause was, in effect, open-ended, the Committee suggested that it was in conflict with the general rule set out in Office of Parliamentary Drafting Instruction No. 2 of 1989. That drafting instruction provides that, as a general rule, a restriction should be placed on the time within which an Act or provisions of an Act can be proclaimed.

The Committee noted that paragraph 6 of the drafting instruction states that clauses providing for commencement by Proclamation but without any restriction as to when such Proclamation must be made,

> should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The Committee noted that, in the case before it, the event upon which the commencement of clause 14 of the Bill depended was the proclamation of a piece of Commonwealth legislation. The Committee suggested that this was not an 'unusual' circumstance in the same way that the enactment of complementary State legislation could be considered to be.

The second area of concern to the Committee related to the history of the provision in question. According to the Explanatory Memorandum, clause 14 was intended to replace a 'previous similar amendment' which was to have commenced by Proclamation 'but [which is] not yet proclaimed'. The Committee noted that the Explanatory Memorandum went on to say that the previous similar amendment was to be repealed by clause 16 of the Bill.

The Committee was disturbed by several aspects of this explanation. First, the Committee considered that the explanation given was far from clear. The Committee indicated that, though it believed that it now understood what was intended by the clause and why it was considered to be necessary, the paragraphs in the Explanatory Memorandum relating to clause 14 were not especially helpful. In particular, the Committee suggested that the final sentence on page 8 did not make sense.

Second, the Committee noted that the provision appeared to be attempting to correct a previous error using a similar legislative mechanism to that which facilitated the failure to proclaim which had, in turn, led to the amendment being necessary. The Committee suggested that, in the circumstances, amendment of the legislation in the same way might be considered to be unwise.

Finally, the Committee was concerned that the failure to proclaim the provision of the *Nursing Homes and Hostels Legislation Amendment Act 1986* to which the commencement of clause 14 of this Bill related, had been identified in the Return to Order relating to Unproclaimed Legislation on the seven occasions on which such a Return to Order had been made to date (referring to *Journals of the Senate* for 24 November 1988, 12 April 1989, 27 November 1989, 30 May 1990, 15 November 1990, 30 May 1991). The Committee noted that those Returns to Order (or at least, those made after the first such Return) were made pursuant to a resolution of the Senate on 29 November 1988, which provides:

> 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.

The Committee indicated that it was imperative the amendment which clause 14 proposed to make was finalised. In addition (and bearing in mind the unfortunate history of the provision upon which the commencement of clause 14 was to depend), the Committee recorded its in principle concern that the commencement of clause 14 was to be, in effect, open-ended. Accordingly, the Committee drew attention to subclause 2(2) of this Bill, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister responded as follows:

> Section 7 of the [*Nursing Homes and Hostels Amendment Act 1986*] has now been proclaimed. It, and consequentially section 14 of the [*Community Services and Health Legislation Amendment Act 1991*], commenced on 1 August 1991.
>
> Section 14 had an open ended commencement date because several steps had to be taken simultaneously to give effect to the provision without a gap in the payment arrangements for Government nursing homes.
>
> These were:
>
> 1) issuing of a notice by the Minister listing the Government nursing homes;
>
> 2) amendment of the National Health Regulations to terminate the old method of defining Government homes; and
>
> 3) proclamation of section 7 of the [*Nursing Homes and Hostels Amendment Act*].

> Uncertainty over the exact date on which the [*Community Services and Health Amendment Act*] would commence made this very difficult to arrange administratively. It was administratively easier to determine a day for the transition from the old provisions to the new without a gap in payments occurring.

The Committee thanks the Minister for this response and records its satisfaction that this matter finally appears to have been resolved.

'Henry VIII' provision
Clause 10 - proposed new paragraph 45DC(2)(c)

In Alert Digest No. 10, the Committee noted that clause 10 of the (then) Bill proposed to insert two new sections into the *National Health Act 1953*. The proposed new sections related to the provision to the public of information about approved nursing homes. They provided for release of the following information:

> (a) details of action taken by the Minister, whether before or after the commencement of this section, in relation to the nursing home under section 40AA, 40AD, 43A, 44, 44A, 45A, 45E or 45EA;
>
> (b) details of any action the Minister intends to take in relation to the nursing home under section 40AA, 40AD, 43A, 44, 44A, 45A, 45E or 45EA;
>
> (c) such other information (if any) as is specified in the regulations.

The Committee indicated that paragraph (c) was what it would generally consider to be a 'Henry VIII' clause, as it would allow the range of information which could be made available to the public pursuant to the primary legislation to be, in effect, amended by subordinate legislation.

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

The Minister responded as follows:

> This section is intended to provide for release of information concerning action taken, or intended, to close down a nursing home, suspend an approval, or vary the conditions of approval of a home.
>
> It is intended to be used in situations where standards of care are so poor that the health and welfare of frail aged residents is threatened. Release of information is crucial to being able to transfer these residents to other accommodation.
>
> It is not possible to predict exactly which information has to be released to enable residents' welfare to be protected. Often a very quick decision has to be made in these circumstances. The use of regulations, which are disallowable by the Parliament, enable fast, decisive action to be taken when necessary to protect frail aged residents of nursing homes. I am not aware of any other legislative procedure which would enable the taking of such immediate action to protect such frail aged residents.

The Committee thanks the Minister for this response.

Fee for release of information
Clause 32 - proposed new subsections 61(8A) and (8B)

In Alert Digest No. 10, the Committee noted that clause 32 of the (then) Bill proposes to add three new subsections to section 61 of the *Therapeutic Goods Act 1989*. The Committee noted that the proposed new subsections 61(8A) and (8B) would allow the Governor-General (acting on the advice of the Executive Council) to make regulations providing for the charging of fees in relation to applications for

information pursuant to subsection 61(6) of the Act. The Committee noted that provision was also made for the payment of deposits in relation to such applications. The Committee also noted that there was no limit in the proposed new subsections on the level of fee which the regulations could set. The Committee suggested that this may have been considered a matter which, without some sort of upper limit, should not be left to the regulations.

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

The Minister responded as follows:

> The Committee has also noted that the [Community Services and Health Amendment Act] inserts provisions in the Therapeutic Goods Act (TG Act) to allow regulations to be made providing for the charging of fees in relation to applications for information pursuant to subsection 61(6) of the TG Act. The Committee commented that the amendments did not contain a limit on the level of fee which the regulations could set.
>
> I wish to assure the Committee that these amendments were made only to enable the Therapeutic Goods Administration to recover costs for processing applications for information, by setting fees identical to those that are charged under the *Freedom of Information Act 1982* for processing the release of comparable documents or information.

The Committee thanks the Minister for this response and notes his assurance concerning the level of fees that will be set.

The Committee notes that, while the Minister's responses on this (now) Act have been most informative, they have been provided almost four months after the legislation has been passed. Clearly, if the information had been provided prior to

the legislation being passed, the debate on the matters raised by the Committee could have been more informed.

CONSTITUTION ALTERATION (ALTERATIONS OF THE CONSTITUTION ON THE INITIATIVE OF THE ELECTORS) 1990

This Bill was introduced into the House of Representatives on 11 October 1990 by Mr Mack as a Private Member's Bill.

The Bill proposes to alter the Constitution by allowing electors to propose an alteration and have that proposal decided at the time of a general election. Further, the Bill intends to minimise costs to the taxpayer:

- by presenting the proposal only at a general election;
- providing checks and balances to ensure that the procedure is not hindered; and
- giving electors options on how to proceed when presenting a proposal.

The Committee dealt with the Bill in Alert *Digest* No. 8 of 1990, in which it made various comments. Mr Mack responded to those comments in a letter dated 25 October 1990. However, the Committee has not reported on the Bill to date because it has not been introduced into the Senate.

The Bill was removed from the House of Representatives *Notice Paper* on 11 April 1991, pursuant to Sessional Order 104B. However, since Mr Mack's response may still be of interest to Senators, a copy of the letter is attached to this report. Relevant parts of the response are also discussed below.

General comment

In Alert Digest No. 8 of 1990, the Committee noted that the Bill contained several (apparent) errors. First, the Committee noted that the word 'Act' was omitted from clause 1 of the Bill and, consequently, from the short title. Second, the Committee noted that the headings on pages 3, 5, 7, 9, 11 and 13 refer to '1980' instead of '1990'. Finally, the Committee noted that, as the relevant provisions in the Constitution are presently set out, there might be some difficulty in identifying paragraphs 3, 4, 5 and 6 of section 128 in proposed new section 129(24). The Committee suggested that, similarly, difficulties might be encountered in identifying paragraphs 5 and 6 of section 128 in proposed new section 130.

In relation to the omission of the word 'Act' from clause 1 of the Bill, Mr Mack responded as follows:

> The omission of the word 'Act' from clause 1 of the bill and consequently from the short title was not an error. I refer you to Browning's 'House of Representatives Practice' at page 34 where the following statement is made:
>
> > The short title of a bill proposing to alter the Constitution, in contradistinction to all other bills, does not contain the word 'Act' during its various stages ... While the proposed law is converted to an 'Act' after approval at referendum and at the point of assent, in a technical sense it is strictly a constitutional alteration and its short title remains unchanged.

The Committee thanks Mr Mack for this response. The Committee has been supplied with some further material on this subject which may also be of information to Senators. In a letter to Mr Ian Cochran, Clerk-Assistant (Table), House of Representatives, dated 11 December 1990, Mr Ian Turnbull QC, First Parliamentary Counsel, said this:

I made inquiries from Archives, and discovered to my surprise that the Attorney-General's Department (which of course incorporated the Division of the Parliamentary Draftsman) seems to have kept very few files on Constitution Alteration Bills. I found nothing directly on the point in those files that I was able to locate.

However, the file of the *Constitution Alteration (Senate Elections) 1906* (Act No. 1, 1907) throws some light on the subject.

In the first draft, written in longhand, the short title was a follows:

> This Act may be cited as the *Constitution Amendment Act 1906.*

This was changed (also in longhand) to:

> This Act may be cited as the First Amendment (Senate Elections)'.

(Note -

1. No earlier Constitution Alteration Bill had been submitted to the electors.

2. No year was added at the end of this title at this point.

   A further change was made 3 days later, so that the short title then read:

   > This Act may be cited as the *Constitution Alteration (Senate Elections) 1907.*

3. The year [shown] was 1907, yet the draft was dated 31 July 1906. It appears that at some later stage the [reference to the] year was changed to 1906, as it so appears in Act No. 1, 1907.)

The original draft, and the later changes, all appeared to be in Sir Robert Garran's handwriting. You will recall that he was both the Parliamentary Draftsman and the Secretary to the Attorney-General's Department.

It seems fairly clear from the changes that, after the first draft,

> Sir Robert changed the short title to indicate that the law was different from an ordinary Act passed by the Parliament.
>
> In my view there is merit in this approach. Whatever may be the true nature of a Constitution Alteration, it is not an Act of the Parliament in the ordinary sense. It has the same force as the Constitution, and cannot be repealed or amended by the Parliament.

The Committee thanks Mr Turnbull (and Mr Cochran) for passing on this fascinating background material on Constitution Alterations.

As to the reference to '1980' instead of '1990', Mr Mack advised:

> The reference to '1980' instead of '1990' on pages 3, 5, 7, 9, 11, and 13 of the introduced print of the bill was corrected in the House of Representatives headed print available at the second reading.

In relation to the possible difficulties regarding section 128, Mr Mack responded as follows:

> Your Committee commented on possible difficulties in identifying paragraphs 3, 4, 5, and 6 of section 128 of the Constitution because of the manner in which they are referred to in proposed new sections 12(24) and 130 of my bill. I take this to be a concern at th lack of parentheses in the references to those paragraphs of section 128 of the Constitution as they appear in proposed new sections 129(24) and 130(5). Again, this was a defect of the introduced print of the bill which was corrected in the House of Representatives headed print available at second reading.

The Committee thanks Mr Mack for his response on these matters. While the Committee accepts the explanations given, it should be remembered that the Committee's scrutiny is based on the introduction copy (or 'unheaded print') of a bill, which contained the errors and difficulties referred to.

CRIMES (BRIBERY AND CORRUPTION) AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 6 December 1990 by Mr Peacock as a Private Member's Bill.

The Bill proposes to implement recommendations made by the Committee for the Review of Commonwealth Criminal Law in its November 1990 report. Its provisions include the modernising of Commonwealth criminal law relating to bribery and corruption of judicial officers, parliamentarians and public servants.

The Committee dealt with the Bill in Alert Digest No. 13 of 1990, in which it made various comments. Mr Peacock responded to those comments in a letter dated 13 December 1990. However, the Committee has not reported on the Bill to date because it has not been introduced into the Senate.

The Bill was removed from the House of Representatives *Notice Paper* on 16 May 1991, pursuant to Sessional Order 104B. However, since Mr Peacock's response may still be of interest to Senators, a copy of the letter is attached to this report. Relevant parts of the response are also discussed below.

Reversal of the onus of proof
Proposed new subsections 43(2), 44(2), 55(4) and 59(3)

In Alert Digest No. 13 of 1990, the Committee noted that proposed new subsection 43(1) would, if enacted, make it an offence for a person who knows an offence has been committed to impede intentionally the apprehension, prosecution or conviction of the person who committed the offence. In particular, it would be an offence for a person to make a threat or give a benefit to another person in order

to induce them to either withhold information or provide information which the person giving the information knows to be false. Similarly, it would be an offence to receive or agree to receive a benefit in return for either withholding information or giving information known to be false.

Pursuant to proposed new subsection 43(2), if a person is charged with an offence under subsection (1) which involves the receipt of a benefit, it is a defence if the defendant proves that the benefit amounted only to the making good of any loss or injury caused by the original offence (ie the offence to which the 'inducement' relates). Similarly, it is a defence if the person proves that the benefit was only reasonable compensation for any loss or injury caused by the offence.

The Committee noted that by requiring the person charged, in effect, to prove that a benefit is not an inducement but compensation for loss or injury suffered, the proposed new subsection 43(2) reverses the onus of proof. The Committee noted that it is ordinarily incumbent on the prosecution to prove the elements of an offence. The Committee suggested that, in this case, the proposed new subsection would appear to excuse the prosecution, in certain circumstances, from proving that a payment was, in fact, an inducement.

The Committee noted that proposed new subsection 44(1), if enacted, would make it an offence to ask for, receive or obtain or to agree to receive or obtain a benefit in return for concealing the commission of an offence, frustrating the prosecution of an offence (by withholding information or otherwise) or providing false information about an offence. Pursuant to proposed new subsection 44(2), it is a defence to an offence under subsection (1) if a person can prove that a benefit was the making good of a loss or injury or reasonable compensation for a loss or injury caused by the original offence. The Committee noted that the onus would be on the defendant to provide this, however.

The Committee noted that proposed new subsection 55(1) would, if enacted, make it an offence for a current or former Commonwealth officer to ask for, receive or obtain or to agree to receive or obtain a benefit as a reward or inducement for any act performed in their capacity as an officer. Pursuant to proposed new subsection 55(4), if in a prosecution for an offence under subsection (1) 'it appears that the receipt of the benefit ... would be likely to have influenced the officer to act contrary to his or her duty', then, 'in the absence of evidence to the contrary', the benefit is to be taken to be an inducement for performing the act to which the offence relates. The Committee noted that it would be incumbent on the defendant to adduce evidence to the contrary. The Committee suggested that, in that sense, there appeared to be a reversal of the onus of proof.

Finally, the Committee noted that proposed new subsection 59(1) would, if enacted, make it an offence for a member or a former member of the Parliament to ask for, receive or obtain a benefit as a reward or inducement for any act performed in their capacity as a member. Similarly, pursuant to proposed subsection 59(4), the receipt of a benefit is assumed, in the absence of evidence to the contrary, to be an inducement for performing the act to which the offence relates. The Committee suggested that, as with the provisions discussed above, there would appear to be a reversal of the onus of proof.

Each of the proposed new subsections referred to above appeared to involve a reversal of the onus of proof. Accordingly, they were drawn to Senators' attention as they may have been considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Mr Peacock responded as follows:

> The factual matters referred to in those subsections, whilst being essential elements of the offences, are matters that ordinarily will be within the knowledge of the defendant. Thus, it would be difficult for the prosecution to present evidence of

them. It is appropriate in this type of situation that the evidential burden of proof shift to the defendant.

However, the prosecution would not be entirely absolved from producing some evidence of those facts. Jordan C.J. in De Gioa v. Darling Island Stevedoring & Lighterage Co. Ltd (1941) 42.S.R. (N.S.W.) 1 at 4 noted that an exception to the ordinary rule regarding the burden of proof exists where:

> ... some of the facts essential to the plaintiff's case are peculiarly within the knowledge of the defendant, and it is, in the nature of things, difficult for the plaintiff to produce evidence of them. Such a state of things does not absolve the plaintiff from adducing some evidence of those facts; but where it exists it is legitimate for the trial judge to hold that very slight evidence pointing to their existence may be treated as sufficient to justify a jury in holding that they do exist if, but only if, there is no explanation of that evidence by the defendant.

Furthermore, in this type of situation the defendant can discharge the burden by bringing sufficient evidence to satisfy the tribunal of fact on the balance of probabilities.

Similar statements in the context of criminal cases can be found in Francis v. Flood [1978] 1 N.S.W. L.R. 113 and R. v. Garnet-Thomas [1974] 1 N.S.W. L.R. 702.

Although I appreciate that any legislation which alters the ordinary rule as to the onus of proof ought be a matter of concern, in all the circumstances I am of the view that the reversal contained in these subsections is justified.

The Committee thanks Mr Peacock for his response and for his assistance with the Bill.

HEALTH LEGISLATION (PHARMACEUTICAL BENEFITS) AMENDMENT ACT 1991

The Bill for this Act was introduced into the House of Representatives on 30 May 1991 by the Minister for Community Services and Health.

The Act amends the *Health Insurance Commission Act 1973* and the *National Health Act 1953*, in order to streamline the administration of the Pharmaceutical Benefits Scheme.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Minister for Health, Housing and Community Services responded to those comments in a letter dated 14 October 1991. A copy of that letter is attached to this report. Though the Committee notes that the Bill was assented to on 27 June 1991, the Minister's response may nevertheless be of interest to Senators. Relevant parts of the response are therefore discussed below.

Retrospectivity
Subclauses 2(2) and (3)

In Alert Digest No. 10, the Committee noted that subclause 2(2) of the (then) Bill provided that subclause 10(1) was to be taken to have commenced on 1 January 1991. The Committee noted that the amendments proposed by subclause 10(1) appeared to be beneficial to persons other than the Commonwealth (though the Explanatory Memorandum gave no indication of this). Accordingly the Committee made no further comment on the subclause.

The Minister has confirmed that this is the case.

The Committee noted that subclause 2(3) provided that certain other provisions were to commence on 1 July 1991. The Committee noted that, depending on (if and) when the Bill was passed, this might also involve a degree of retrospective operation.

The Minister has noted that, given that the Act received the Royal Assent on 27 June 1991, no retrospective operation was involved.

Provision of information by 'relevant authorities'
Clause 4 - proposed new paragraph 8D(3)(b)

In Alert Digest No. 10, the Committee noted that clause 4 of the Bill proposed to insert a new section 8D into the *Health Insurance Commission Act 1973*. The Committee noted that that new section dealt with the provision of computer facilities and the programming of the Health Insurance Commission's computer system. The Committee noted that proposed new paragraph 8D(3)(b) provided:

> [F]or the purpose of carrying out the function referred to in paragraph (a), [ie 'ensuring that the Commission's computer system is appropriately programmed to supply status information to persons accessing the system through dedicated computer facilities and to no other persons'] [the Commission may obtain] from the relevant authority the requisite information about each person:
>
> (i) to whom or in respect of whom there is payable a pension, allowance or other benefit under the *Social Security Act 1991* or the *Veterans' Entitlements Act 1986*, and
>
> (ii) who is, because he or she is entitled to that pension, allowance or benefit, a concessional beneficiary (within the meaning of Part VII of the *National Health Act 1953*) or a pensioner for the purposes of that Act.

The Commission is also to revise and keep up to date such information.

The Committee noted that this provision, if enacted, would appear to authorise the exchange of certain information held on individuals. The Committee indicated that though this exchange of information would, presumably, be subject to both the relevant secrecy and confidentiality provisions of the Acts mentioned, as well as any relevant provisions of the *Privacy Act 1988,* it was concerned that this clause might also facilitate the exchange of personal information. The Committee suggested that, as such, it might be considered an undue trespass on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. The Committee indicated that it would, therefore, appreciate some further information from the Minister on both the need for the amendment and the kind of information which might be sought.

The Minister responded as follows:

> The term 'requisite information', used in paragraph 8D(3)(b) of the *Health Insurance Commission Act 1973,* is defined in subsection 8D(1) of that Act. The definition lists the information to be supplied by the Departments of Social Security and Veterans' Affairs to the Health Insurance Commission.
>
> This information is required by the Health Insurance Commission so that it can accurately assess patients' entitlements under the Pharmaceutical Benefits Scheme and to enable it to program its computer facilities to supply 'status information' on request to approved suppliers.
>
> The term 'status information' is defined in subsection 84(1) of the *National Health Act 1953.* It is far more limited [than] the [definition of] 'requisite information', simply being a statement of the level of benefit to which a person is entitled under the Pharmaceutical Benefits Scheme, ie, information that the person is -
>
> . entitled to benefits free of charge; or
> . entitled to benefits at the concessional rate; or

- entitled to benefits at the general rate; or
- not recorded as an 'eligible person' within the meaning of the *Health Insurance Act 1973.*

The transfer of the 'requisite information' from the two Departments to the Health Insurance Commission is indeed subject to the relevant secrecy and confidentiality provisions of the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* as well as relevant provisions of the *Privacy Act 1988.* The matter has also been the subject of extensive consultation with the Privacy Commissioner who has approved in principle the arrangements for the transfer of the information, subject to the safeguards contained in the [*Health Legislation (Pharmaceutical Benefits) Amendment Act 1991*].

The Committee thanks the Minister for this response.

The Committee notes that, while the Minister's responses on this (now) Act have been most informative, they have been provided almost four months after the legislation has been passed. Clearly, if the information had been provided prior to the legislation being passed, the debate on the matters raised by the Committee could have been more informed.

THERAPEUTIC GOODS (CHARGES) AMENDMENT ACT 1991

The Bill for this Act was introduced into the House of Representatives on 30 May 1991 by the Minister for Community Services and Health.

The Act amends the *Therapeutic Goods (Charges) Act 1989,* to reflect amendments made to the *Therapeutic Goods Act 1989* by the Community Services and Health Legislation Amendment Bill 1991. Primarily, the amendments concern the continuing application of a single set of annual registration or listing charges to a 'group' of therapeutic goods included in the Australian Register of Therapeutic Goods.

The Committee dealt with the Bill in Alert Digest No. 10 of 1991, in which it made various comments. The Minister for Health, Housing and Community Services responded to those comments in a letter dated 14 October 1991. Though the Committee notes that the Bill was assented to on 26 June 1991, the Minister's response may nevertheless be of interest to Senators. A copy of that letter is therefore attached to this report. Relevant parts of the response are also discussed below.

Fixing charges by regulation
Clause 3 - proposed new subsection 4(1A)

In Alert Digest No. 10, the Committee noted that clause 3 of the (then) Bill proposed to insert a new subsection 4(1a) into the *Therapeutic Goods (Charges) Act 1989.* That new subsection would allow the application of a charge (by regulation) in relation to 'grouped' therapeutic goods. The Committee noted that there was no limit as to the level of any such charge. As a result, the Committee

suggested that this may not be an appropriate matter to be left to the regulations.

The Committee noted that in its *Eighteenth Report of 1989* it made similar comments in relation to clause 4 of the (then) Therapeutic Goods (Charges) Bill 1989. Accordingly, the Committee drew attention to the clause, as it may have been considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister responded as follows:

> The level of charges prescribed by regulations is set following consultation with industry through the Industry and Government Consultative Committee. That Committee was established by the Minister for Aged, Family and Health Services as an informal forum through which consultation could take place. Membership of the Committee includes representatives of the four major industry associations, the Department of Industry, Technology and Commerce and the Department of Finance. The terms of reference allow the Committee to consult on a range of regulatory matters, including the level of charges and fees that should apply under the Therapeutic Goods legislation. Through the Committee the views of the industry are always canvassed before action is taken to change the level of charges under the Therapeutic Goods (Charges) Act or fees under the Therapeutic Goods Act.

The Committee thanks the Minister for this response.

The Committee notes that, while the Minister's responses on this (now) Act have been most informative, they have been provided almost four months after the legislation has been passed. Clearly, if the information had been provided prior to the legislation being passed, the debate on the matters raised by the Committee could have been more informed.

Barney Cooney
(Chairman)

DEPUTY PRIME MINISTER AND
MINISTER FOR HEALTH, HOUSING AND COMMUNITY SERVICES

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Senator B. Cooney
Chairman
Senate Standing Committee for
the Scrutiny of Bills
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1661 130 91

Dear Senator Cooney

I refer to the Committee's comments on the Community Services and Health Legislation Amendment Bill 1991, the Health Legislation (Pharmaceutical Benefits) Amendment Bill 1991 and the Therapeutic Goods (Charges) Amendment Bill 1991, contained in the Scrutiny of Bills Alert Digest No. 10 of 1991 dated 5 June 1991.

I apologise for the delay in this reply to the Committee. I should note that each of these bills have now become Acts, and I have therefore referred to them as Acts in my reply to the Committee, which is set out below.

Community Services and Health Legislation Amendment Act 1991 (the CS&H Amendment Act).

The Committee expressed concern that the commencement of section 14 of the Act was, by virtue of subsection 2(2), effectively open ended, as it commenced on the date of proclamation of section 7 of the Nursing Homes and Hostels Legislation Amendment Act 1986. (the NHH Amendment Act).

The Committee was also concerned to ensure that the amendment should commence as soon as possible.

Section 7 of the NHH Amendment Act has now been proclaimed. It, and consequentially section 14 of the CS&H Amendment Act, commenced on 1 August 1991.

Section 14 had an open ended commencement date because several steps had to be taken simultaneously to give effect to the provision without a gap in the payment arrangements for Government nursing homes.

These were:

1) issuing of a notice by the Minister listing the Government nursing homes;

2) amendment of the National Health Regulations to terminate the old method of defining Government homes; and

3) proclamation of section 7 of the NHH Amendment Act 1986.

Uncertainty over the exact date on which the CS&H Amendment Act would commence made this very difficult to arrange administratively. It was administratively easier to determine a day for the transition from the old provisions to the new without a gap in payments occurring.

The Committee commented on section 10 of the CS&H Amendment Act, which, inter alia, inserts a new paragraph 45DC(2)(c). The Committee commented that this paragraph would allow the range of information about approved nursing homes which, pursuant to the National Health Act as amended by the CS&H Amendment Act, could be released to the public to subsequently be amended by Regulation. The Committee was concerned that this amendment would allow subordinate legislation to broaden provisions which have been specifically circumscribed in the primary legislation.

This section is intended to provide for release of information concerning action taken, or intended, to close down a nursing home, suspend an approval, or vary the conditions of approval of a home.

It is intended to be used in situations where standards of care are so poor that the health and welfare of frail aged residents is threatened. Release of information is crucial to being able to transfer these residents to other accommodation.

It is not possible to predict exactly which information has to be released to enable residents' welfare to be protected. Often a very quick decision has to be made in these circumstances. The use of regulations, which are disallowable by the Parliament, enables fast, decisive action to be taken when necessary to protect frail aged residents of nursing homes. I am not aware of any other legislative procedure which would enable the taking of such immediate action to protect such frail aged residents.

The Committee has also noted that the CS&H Amendment Act inserts provisions in the Therapeutic Goods Act (TG Act) to allow regulations to be made providing for the charging of fees in relation to applications for information pursuant to subsection 61(6) of the TG Act. The Committee commented that the amendments did not contain a limit on the level of fee which the regulations could set.

I wish to assure the Committee that these amendments were made only to enable the Therapeutic Goods Administration to recover costs for processing applications for information, by setting fees identical to those that are changed under the Freedom of Information Act 1982 for processing the release of comparable documents or information.

Health Legislation (Pharmaceutical Benefits) Amendment Act 1991 (the PB Amendment Act).

The Committee noted that subsection 2(2) of the PB Amendment Act provides for the retrospective commencement of subsection 10(1). The Committee is correct in commenting that the amendments contained in subsection 10(1) are beneficial to persons other than the Commonwealth.

The Committee also noted that subsection 2(3) provided for certain other provisions to commence on 1 July 1991. The PB Amendment Act received Royal Assent on 27 June 1991, therefore the question of retrospectivity in relation to those amendments did not arise.

The Committee has also commented on section 4 of the PB Amendment Act which inserts a new section 8D into the Health Insurance Commission Act 1973. The Committee is concerned that the new section would appear to authorise the exchange of certain information held on individuals and might facilitate the exchange of personal information. The Committee has asked me for further information on both the need for this amendment and the kind of information that might be sought.

The term "requisite information", used in paragraph 8D(3)(b) of the Health Insurance Commission Act 1973, is defined in subsection 8D(1) of that Act. The definition lists the information to be supplied by the Departments of Social Security and Veterans' Affairs to the Health Insurance Commission.

This information is required by the Health Insurance Commission so that it can accurately assess patients' entitlements under the Pharmaceutical Benefits Scheme and to enable it to program its computer facilities to supply "status information" on request to approved suppliers.

The term "status information" is defined in subsection 84(1) of the National Health Act 1953. It is far more limited that the "requisite information", simply being a statement of the level of benefit to which a person is entitled under the Pharmaceutical Benefits Scheme, i.e., information that the person is -

- entitled to benefits free of charge; or
- entitled to benefits at the concessional rate; or
- entitled to benefits at the general rate; or
- not recorded as an "eligible person" within the meaning of the Health Insurance Act 1973.

The transfer of the "requisite information" from the two Departments to the Health Insurance Commission is indeed subject to the relevant secrecy and confidentiality provisions of the Social Security Act 1991 and the Veterans' Entitlements Act 1986 as well as relevant provisions of the Privacy Act 1988. The matter has also been the subject of extensive consultation with the Privacy Commissioner who has approved in principle the arrangements for the transfer of the information, subject to the safeguards contained in the PB Amendment Act.

Therapeutic Goods (Charges) Amendment Act 1991. (TG (Charges) Amendment Act).

The Committee has expressed concerns that section 4 of the TG (Charges) Amendment Act inserts a new provision in the Therapeutic Goods (Charges) Act to allow for the application of charges (by regulation) for "grouped" therapeutic goods with no limit as to the level of such charges. The Committee's concern was that this may not be an appropriate matter to be left to the regulations.

The level of charges prescribed by regulations is set following consultation with industry through the Industry and Government Consultative Committee. That Committee was established by the Minister for Aged, Family and Health Services as an informal forum through which consultation could take place. Membership of the Committee includes representatives of the four major industry associations, the Department of Industry, Technology and Commerce and the Department of Finance. The terms of reference allow the Committee to consult on a range of regulatory matters, including the level of charges and fees that should apply under the Therapeutic Goods legislation. Through the Committee the views of the industry are always canvassed before action is taken to change the level of charges under the Therapeutic Goods (Charges) Act or fees under the Therapeutic Goods Act.

I trust the above comments address the Committee's concerns regarding these three Acts.

Yours sincerely

Brian Howe

BRIAN HOWE

ARLIAMENT O AJS ALIA
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TM:PP

25th October 1990.

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

Dear Senator Cooney,

I note your Committee's reference at page 12 of the "Scrutiny of Bills Alerty Digest" (No. 8 of 1990, 17th October) to certain "apparent errors" in my Constitution alteration (Alterations of the Constitution on the Initiative of the Electors Bill) 1990.

The omission of the word "Act" from clause 1 of the bill and consequently from the short title was not an error. I refer you to Browning's "House of Representatives Practice" at page 34 where the following statement is made:

"The short title of a bill proposing to alter the Constitution, in contradistinction to all other bills, does not contain the word 'Act' during its various stages ... While the proposed law is converted to an 'Act' after approval at referendum and at the point of assent, in a technical sense it is strictly a constitutional alteration and its short title remains unchanged."

The reference to '1980' instead of '1990' on pages 3, 5, 7, 9, 11, and 13 of the introduced print of the bill was corrected in the House of Representatives headed print available at the second reading.

Your Committee commented on possible difficulties in identifying paragraphs 3, 4, 5, and 6 of section 128 of the Constitution because of the manner in which they are referred to in proposed new sections 129(24) and 130 of my bill. I take this to be a concern at the lack of parentheses in the references to those paragraphs of section 128 of the Constitution as they appear in proposed new sections 129(24) and 130(5). Again, this was a defect of the introduced print of the bill which was

corrected in the House of Representatives headed print available at second reading.

In accordance with what I understand to be previous practice of the Committee, it would be appreciated if you could arrange for my response to appear in the next issue of the "Scrutiny of Bills Alert Digest".

I appreciate the Committee's interest in my bill.

Yours sincerely,

Ted Mack

TED MACK.

PARLIAMENT OF AUSTRALIA
HOUSE OF REPRESENTATIVES

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HON. ANDREW PEACOCK, M.P.
MEMBER FOR KOOYONG
SHADOW ATTORNEY-GENERAL
SHADOW MINISTER FOR JUSTICE

RECEIVED
14 DEC 1990
Senate Standing Cttee
for the Scrutiny of Bills

ASP/SG/GM D:1312

13 December 1990

Dear Senator Cooney,

The Secretary to the Senate Standing Committee for the Scrutiny of Bills has drawn to my attention comments on the Crimes (Bribery and Corruption) Amendment Bill 1990 contained in the *Scrutiny of Bills Alert Digest No. 13*.

A concern has been expressed that proposed subsections 43(2), 44(2), 55(4) and 59(3) may have the effect of reversing the onus of proof by requiring a defendant to lead evidence on certain matters by way of exculpation.

The factual matters referred to in those subsections, whilst being essential elements of the offences, are matters that ordinarily will be within the knowledge of the defendant. Thus, it would be difficult for the prosecution to present evidence of them. It is appropriate in this type of situation that the evidential burden of proof shift to the defendant.

However, the prosecution would not be entirely absolved from producing some evidence of those facts. Jordan C.J. in De Gioa v. Darling Island Stevedoring & Lighterage Co. Ltd (1941) 42. S.R. (N.S.W.) 1 at 4 noted that an exception to the ordinary rule regarding the burden of proof exists where:

> "... some of the facts essential to the plaintiff's case are peculiarly within the knowledge of the defendant, and it is, in the nature of things, difficult for the plaintiff to produce evidence of them. Such a state of things does not absolve the plaintiff from adducing some evidence of those facts; but where it exists it is legitimate for the trial judge to hold that very slight evidence pointing to their existence may be treated as sufficient to justify a jury in holding that they do exist if, but only if, there is no explanation of that evidence by the defendant."

.../2

Furthermore, in this type of situation the defendant can discharge the burden by bringing sufficient evidence to satisfy the tribunal of fact on the balance of probabilities.

Similar statements in the context of criminal cases can be found in Francis v. Flood [1978] 1 N.S.W. L.R. 113 and R. v. Garnet-Thomas [1974] 1 N.S.W. L.R. 702.

Although I appreciate that any legislation which alters the ordinary rule as to the onus of proof ought be a matter of concern, in all the circumstances I am of the view that the reversal contained in these subsections is justified.

Would you please let me know whether you have any queries with respect to the above.

Yours sincerely,

(Andrew Peacock)

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF

1991

6 NOVEMBER 1991

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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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

SEVENTEENTH REPORT OF 1991

The Committee has the honour to present its Seventeenth Report of 1991 to the Senate.

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

Broadcasting Amendment Act 1991

Electoral and Referendum Amendment Bill 1991

Rice Levy Bill 1991

Special Broadcasting Service Bill 1991

BROADCASTING AMENDMENT ACT 1991

The Bill for this Act was introduced into the House of Representatives on 12 September 1991 by the Minister for Transport and Communications.

The Act amends the *Broadcasting Act 1942* to:

- require that the Australian Broadcasting Tribunal (ABT) be given prior written notice of acquisition of interests which may breach ownership and control rules of the Act;
- increase the ABT's powers to gather information on the ownership and control arrangements for media outlets, in order to assist the ABT in determining whether the ownership and control rules of the Act have been, or are likely to be, contravened; and
- strengthen the Federal Court's power to protect licensees and other companies and to prevent, or prevent the continuation of, contraventions of the ownership and control rules, either on an interim basis to enable proposed acquisitions of interests to be appropriately investigated or on a more permanent basis.

The Committee dealt with the Bill in Alert Digest No. 16 of 1991, in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 14 October 1991. Though the Committee notes that the Bill passed the Senate on 17 October 1991, the Minister's response may nevertheless be of interest to Senators. A copy of that letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clauses
Clauses 5 and 6 - proposed new sections 90HC and 92EC

In Alert Digest No. 16, the Committee noted that clause 5 of the (then) Bill proposed to insert new sections 90HA, 90HB and 90HC into the *Broadcasting Act 1942*. The Committee noted that proposed new section 90HA would, if enacted, require a person who holds, or proposes to acquire, an interest in a commercial radio licence that may contravene the Broadcasting Act to notify the Australian Broadcasting Tribunal of that interest. The Committee noted that proposed new section 90HB would require the Tribunal to have regard to the 'associates' of a person (as defined in proposed section 90HA) in exercising its powers under the section. The Committee also noted, however, that proposed section 90HC would allow the Tribunal to disregard certain classes of associates for the purposes of proposed sections 90HA and 90HB. It provides:

> **Exempt classes of associates**
> 90HC(1) The Tribunal may, by notice published in the *Gazette*, determine that a specified class of associates is to be disregarded for the purposes of sections 90HA and 90HB.
>
> (2) The Tribunal may only make such a determination if it is satisfied that the interests that are or may be held by that class of associates are not like to contribute to contraventions of this Part by persons with whom they are associated.
>
> (3) A determination is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

The Committee indicated that this was what it would generally consider to be a 'Henry VIII' clause, as it would allow the Tribunal to, in effect, alter the definition of 'associates' set out in proposed new section 90HA. It would, therefore, allow the effect of the primary legislation to be altered by a determination of the Tribunal.

The Committee noted that, by way of explanation for this provision, the Explanatory Memorandum stated:

> This provision will allow the ABT the flexibility to exclude persons with interests of minimal concern. When the ABT exercises this power, the instrument will be tabled in, and is subject to disallowance by either House of Parliament.

The Committee noted that, similarly, proposed new section 93EC provided that certain classes of 'associates' may be disregarded for the purposes of proposed new sections 92EA and 92EB, which would require persons who hold or propose to acquire certain interests in a commercial television licence to notify the Tribunal. These classes of interests could be disregarded on the determination of the ABT. Such a determination would be a disallowable instrument for the purposes of the *Acts Interpretation Act 1901.*

Two aspects of these provisions caused the Committee concern. The first was the fact that they are 'Henry VIII' clauses, to which the Committee maintains an in-principle objection. The second aspect of concern was that the definition of 'associates' in proposed new subsections 90HA(10) and 92EA(10) is very wide. The Committee noted that proposed new section 90HA(10), for example, states:

> For the purposes of this section, a person is the **associate** of another person if the first person:
>
> (a) is related to the other person by blood or marriage; or
> (b) is the de facto spouse of the other person; or
> (c) is related to the de facto spouse of the other person by blood or marriage;
> (d) is, or has been, at any time during the past 5 years:
> (i) a partner of the other person; or
> (ii) an employee or employer of the other person; or
> (iii) if the other person is a company - an officer of that company; or

(iv) if the other person is a company holding a commercial radio licence or a commercial television licence - the holder of interests in that company amounting to a prescribed interest in that licence; or

(v) a legal, financial or accounting adviser or representative on retainer to the other person or one who has acted in that capacity for the other person on more than one occasion; or

(vi) a beneficiary under a trust of which the other person is a trustee or a beneficiary; or

(vii) acting, or intended, accustomed or expected to act (whether under an arrangement or understanding or not), in accordance with the directions, instructions or wishes, or in concern with, the other person; or

(viii) if the other person is a company - a related company; or

(ix) an associate of an associate of the other person (including an associate of the other person by any other application or applications of this subparagraph).

The Committee indicated that it would appreciate the Minister's advice as to why it is necessary for such a wide definition. The Committee also drew Senators' attention to the clauses, as they may have been considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister responded as follows:

> As you are aware, the purpose of the Bill is to ensure that the ABT [Australian Broadcasting Tribunal] is in a position to examine both actual and proposed acquisitions of prescribed interests in media outlets and to seek Federal Court orders to protect the public interest in respect of those acquisitions, if necessary. The notification requirements are one aspect of those powers, aimed at ensuring that, if all other sources of information fail to identify a potential contravention of the ownership or control rules of the Act, the person proposing to acquire the interest, and any associate of the person, are

required to notify the proposal and existing interests within a time frame that will allow the ABT to examine the details, seek further information under section 89X and, if necessary, apply to the Court.

It is important to note that the notification requirement is simply that; a notification requirement.

The actual nature of the rights and wrongs of any acquisition will still be determined by the principles set out in the current Act, whereby 'associates' will only have their interests aggregated if section 89KA of the Act applies, ie if they are, in fact, acting together for the purpose of establishing control over a media outlet.

However, the recent history of ownership and control arrangements for media outlets demonstrates that the reality of ownership interests or control arrangements can be, and often is, buried under contrived schemes. In view of the restricted time frame for decisions, it is essential that the ABT should have as much relevant information as possible, as soon as possible, on which to base a decision to exercise its powers. In view of the substantial nature of those powers, it is also in the interests of parties to be frank and open with the ABT to prevent disruption of their activities.

The Minister went on to say:

Since the obligation is simply to notify, and the inconvenience of that must be weighed against a substantial issue of public interest, it is reasonable that it should be cast more widely that similar obligations under other Acts, which deem associate relationships to create actual joint control. This ensures that all aspects of acquisitions likely to contravene the Act can be examined by the ABT to establish the reality of the situation, without relying on legal fictions as the other Acts do. The rights of the people affected are protected by the confidentiality requirements of proposed section 17AA.

However, because the definitions of associates are wide (to ensure that the ABT is able to examine all factors likely to be relevant to its decision), it is likely that there will be some cases where notice will be unlikely to afford useful information to the ABT. The Government has no wish for the people concerned to be inconvenienced if the policy objectives of the Act would not be served. However, it recognises that, as the information will be used for the purposes of the ABT and processed by them, and as the circumstances require the specific

> experience of the ABT as the only body able to assess what is or is not likely to be relevant, only the ABT can decide when information is not required. Proposed sections 90HC and 92EC recognise this fact.

The Minister concluded by saying:

> I do not share the Secretary's view that those provisions partake in any way in the nature of a 'Henry VIII' clause. The ABT is able to exempt persons from the obligation to provide it with information, but the Parliament retains the ultimate say through its powers of disallowance.
>
> I consider the amendments to be appropriate, consistent with your terms of reference and essential to enable an issue of substantial public concern to be addressed effectively and efficiently.

The Committee thanks the Minister for this detailed response.

Two points should be noted. First, the Committee reminds the Minister that it is the Committee's view that these are 'Henry VIII' clauses, and not that of the Secretary. Second, the Committee indicates that it remains of the view that these are 'Henry VIII' clauses, as they permit the amendment of the operation of the primary legislation by subordinate legislation.

ELECTORAL AND REFERENDUM AMENDMENT BILL 1991

This Bill was introduced into the Senate on 12 September 1991 by the Minister for Administrative Services.

The Bill proposes to enact recommendations made by the Joint Standing Committee on Electoral Matters in its Report No 3 (which flowed from its Inquiry into the Conduct of the 1987 Federal Election and the 1988 Referendums) not already given effect administratively or by regulation.

The Committee dealt with the Bill in Alert Digest No. 16 of 1991, in which it made various comments. The Minister for Administrative Services responded to those comments in a letter dated 25 October 1991. 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 / strict liability offence
Clause 27 - proposed new subsection 339(4) of the *Commonwealth Electoral Act 1918*

In Alert Digest No. 16, the Committee noted that clause 27 of the Bill proposes to amend section 39 of the *Commonwealth Electoral Act 1918*, which sets out various offences relating to ballot papers. The Committee noted that paragraph 27(1)(c) proposes to add three new subsections to section 339. Proposed new subsections (3) and (4) provide:

> (3) A person must not:
>
> (a) make a statement in his or her nomination paper that is false or misleading in a material particular; or

(b) omit from a statement in his or her nomination paper any matter or thing without which the statement is misleading in a material particular.

Penalty: Imprisonment for 6 months.

(4) In a prosecution of a person for an offence against subsection (3), it is a defence if the person proves that he or she:

(a) did not know; and
(b) could not reasonably be expected to have known;

that the statement to which the prosecution relates was false or misleading.

The Committee suggested that these provisions involve a reversal of the onus of proof. The Committee noted that while proposed new subsection (4) provides a statutory defence to an offence (ie that a person did not know and could not reasonably be expected to know that a statement was false or misleading) under proposed new subsection (3), it places the onus of proving this defence on the defendant. The Committee noted that it is generally incumbent on the prosecution to prove all the elements of an offence, including matters going to the accused's intent to commit an offence and suggested that, as the provision is drafted, the offence takes on the appearance of one of strict liability.

The Committee drew Senators' attention to the clause, 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 Minister has responded as follows:

> The creation of such an offence was recommended by the Joint Standing Committee on Electoral Matters at paragraph 3.64 of its Report No. 3 ('The 1987 Federal Election'). The Committee noted at paragraph 3.40 of the Report that the Australian Electoral Commission had been advised by the Director of Public Prosecutions

that under the law as it stands it would be necessary, in order to obtain a conviction of a candidate for making a false statement in his or her nomination paper, for the candidate to admit that 'he had turned his mind to the question of section 44 (iv) of the Constitution, that he had concluded that he was disqualified, and that he deliberately signed a declaration to contrary effect'. The DPP noted that such a confession was unlikely to be obtained.

While the creation of strict liability offences is not something to be undertaken lightly, there is a strong case for so proceeding in this particular context. The recommendation of the Joint Standing Committee on Electoral Matters was made against the background of the steps which had to be taken in the aftermath of the discovery early in 1988 that Mr Robert Wood had been ineligible for election to the Senate. The recount of votes which was required to identify the person who was properly elected to the Senate position which Mr Wood had occupied was a costly process, which in other circumstances could have severely disrupted the day-to-day working of the Parliament. Given the potential for such disruption, there is a clear case for imposing the strictest possible sanctions to discourage persons from approaching the nomination process with a reckless disregard for the accuracy of statements made in nomination forms.

The Minister goes on to say:

The Committee ... also referred in its comment to the fact that under proposed subsection 339(4), a statutory defence will be available to a defendant who can prove that he or she:

(a) did not know; and

(b) could not reasonably be expected to have known;

that the statement to which the prosecution relates was false or misleading.

While the Committee was concerned that this represents a reversal of the normal onus of proof, the absence of such a reversal of the onus of proof would give rise to the same sorts of evidential problems as were noted by the Director of Public Prosecutions in his advice to the Australian Electoral Commission referred to above.

The Committee thanks the Minister for this response.

Reversal of the onus of proof
Clause 42 - proposed new section 140A of the *Referendum (Machinery Provisions) Act 1984*

In Alert Digest No. 16, the Committee noted that clause 42 of the Bill proposes to insert a new section 140A into the *Referendum (Machinery Provisions) Act 1984*. That proposed new section provides:

> In proceedings for an offence against section 45 of this Act [which deals with compulsory voting], an averment by the prosecutor contained in the information of complaint is taken to be proof of the matter averred in the absence of evidence to the contrary.

The Committee suggested that this is a reversal of the onus of proof, as the provision would (if enacted) require a defendant to prove that matters averred to by the prosecutor were not, in fact, correct. The Committee noted that, ordinarily, it would be incumbent on the prosecution to prove all the matters contained in the averment.

The Committee indicated that it strongly disapproves of this type of provision. In making this statement, the Committee noted that the Senate Standing Committee on Constitutional and Legal Affairs (as it then was), in its influential report entitled The burden of proof in criminal proceedings (Parliamentary paper no 319/1982), also indicated its disapproval of the use of such provisions. The Committee noted that, in that report, the Constitutional and Legal Affairs Committee recommended that '[a]s a matter of legislative policy averment provisions should be kept to a minimum.' (at para 7.16 of the report).

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 Minister has responded as follows:

> The new provision is made necessary by the amendments to section 45 of the *Referendum (Machinery Provisions) Act 1984*, which replace the current scheme for the enforcement of compulsory voting with a 'penalty notice' scheme. Under the penalty notice scheme, there will be no requirement on voters to provide a statement of their reasons for failing to vote, nor will there be an offence of failing to reply to notices sent to apparent non-voters. Prosecutions of non-voters who do not take either the option of paying the prescribed $20 penalty or the option of offering valid and sufficient reasons for failing to vote would be impracticable without an averment provision of the type proposed, since the prosecution would be unable in any particular case to prove the absence of a valid and sufficient reason for the failure to vote. The reversal of the onus of proof is in effect required because the matters which would be deemed to be proved fall within the specific knowledge of the defendant.

The Committee thanks the Minister for this response. However, for several reasons, the Committee retains its concern about the provision. First, the Committee reiterates its in-principle objection to the use of such provisions and its belief that their use should be kept to a minimum.

Second, the Committee notes that, in the Minister's opinion, prosecutions for the relevant offences would be 'impracticable' without an averment provision. However, the Committee notes that this appears to be largely a result of the penalty notice scheme which is to be put in place by the amendments to section 45 of the *Referendum (Machinery Provisions) Act 1984* to which the Minister refers. In other words, if the scheme were differently framed, these averments might not be required.

Finally, the Committee notes that, according to the Minister's response, the averments will relate to matters which are 'within the specific knowledge of the defendant'. This means that, on the scheme proposed, matters peculiarly within the defendant's knowledge are to be deemed to be proved by way of their being averred to by the prosecutor.

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

RICE LEVY BILL 1991

This Bill was introduced into the House of Representatives on 4 September 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to apply a levy to rice produced in Australia (and delivered to a rice processor) to raise funds for a research and development program.

The Committee dealt with the Bill in Alert Digest No. 15 of 1991, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 30 September 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clause
Paragraph 3(1)(b)

In Alert Digest No. 15, the Committee noted that clause 3 of the Bill sets out various definitions for the purposes of the Bill. 'Leviable rice' is defined in subclause 3(1) as

> rice of a variety that is:
> (a) specified in the Schedule; or
> (b) prescribed by the regulations as leviable rice for the purposes of this Act

The Committee suggested that this means that the definition of 'leviable rice', which is of particular importance for the operation of the legislation, could be, in effect, amended by regulation. The Committee indicated that, as such, it is an example of what the Committee would ordinarily consider to be a 'Henry VIII' clause, as it would allow the amendment of primary legislation by subordinate legislation.

The Committee drew Senators' attention to the clause as it may be regarded as 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 intention of the Bill is to impose a levy on those varieties of rice which the industry wishes to be levied for the purpose of funding research and development expenditure. The varieties to be levied can only be included in regulations on the recommendation of a rice industry body.
>
> The list of rice varieties grown in Australia may vary periodically as new varieties are grown and existing varieties cease to be grown.

The Minister concludes by saying:

> Given the relatively short period of time between industry decisions to grow a new variety of rice and its actual production, it was considered that amendment of the Schedule by regulation was the most effective and efficient way to ensure all relevant varieties of rice were subject to the levy.

The Committee thanks the Minister for this response.

SPECIAL BROADCASTING SERVICE BILL 1991

This Bill was introduced into the House of Representatives on 12 September 1991 by the Minister for Transport and Communications.

The Bill proposes to establish the Special Broadcasting Service (SBS) as a statutory authority, setting out the SBS's Charter, structure, powers and responsibilities.

The Committee dealt with the Bill in Alert Digest No. 16 of 1991, in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 14 October 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Subclause 2(2)

In Alert Digest No. 16, the Committee noted that clause 53 of the Bill, if enacted, would allow the Special Broadcasting Service to engage 'such employees as are necessary for the performance of its functions and the exercise of its powers' and to determine the terms and conditions of employment of such employees. The Committee noted that subclause 2(2) of the Bill provides that clause 53 is to commence 'on a day to be fixed by Proclamation'.

The Committee suggested that this was 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 a Proclamation pursuant to subclause 2(2) must be made. The Committee noted that, by way of explanation, the Explanatory Memorandum states:

> Until [clause 53] commences, the staff will continue to be employed under the *Public Service Act 1922* (see clause 52). Clause 81(3) requires the SBS to consult with relevant unions before determining the new terms and conditions. The staffing provision will commence on a date to be proclaimed to allow the SBS time to consult with relevant unions and finalise the new arrangements.
>
> The standard provision requiring commencement within 6 months if commencement has not been earlier proclaimed has not been included as it is possible that the consultations with the unions will take longer than this. The Bill does not, therefore, impose a time limit for the commencement of the provision.

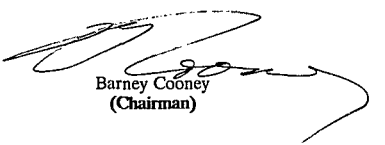
The Committee suggested that, while this explanation is, on its face, perfectly reasonable, it is nevertheless preferable to limit the time within which a Proclamation must be made. The Committee suggested that, if six months is not sufficient time, then perhaps a 12 month period (or some other period) is appropriate, rather than simply leaving the period open-ended.

The Committee indicated that it would appreciate the Minister's views on this suggestion.

The Minister has responded as follows:

> The reason [that the provision is open-ended] is to allow time for the SBS to consult the relevant unions without the pressure inherent in a legislative requirement to achieve a mutually satisfactory outcome by a particular date.
>
> A similar open ended provision is included in the ABC Act.
>
> If the Government considers the consultations are excessively protracted and wishes the parties to reach agreement by a particular date, the provisions would allow the Governor-General to proclaim a specified date in the future for that purpose.

The Committee thanks the Minister for this response.



Barney Cooney
(Chairman)

RECEIVED
16 OCT 1991
Senate Standing Cttee for the Scrutiny of Bills

Minister for Transport and Communications

Parliament House
Canberra ACT 2600
Australia
Tel. (06) 277 7200
Fax. (06) 273 4106

14 OCT 1991

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

Dear Senator Cooney

I refer to a letter from the Secretary of your Committee to my Senior Adviser dated 10 October 1991 relating to the Broadcasting Amendment Bill 1991 and the Special Broadcasting Service Bill 1991. I will deal with each Bill separately.

Broadcasting Amendment Bill 1991

The attached Scrutiny of Bills Alert Digest seeks my advice about why such a wide definition of "associates" is provided for in proposed subsections 90HA(10) and 92EA(10)of the Broadcasting Act 1942 (Act) and, further, why a power has been provided for the Australian Broadcasting Tribunal (ABT) to limit the application of the definition by a disallowable instrument.

As you are aware, the purpose of the Bill is to ensure that the ABT is in a position to examine both actual and proposed acquisitions of prescribed interests in media outlets and to seek Federal Court orders to protect the public interest in respect of those acquisitions, if necessary. The notification requirements are one aspect of those powers, aimed at ensuring that, if all other sources of information fail to identify a potential contravention of the ownership or control rules of the Act, the person proposing to acquire the interest , and any associate of the person, are required to notify the proposal and existing interests within a time frame that will allow the ABT to examine the details, seek further information under section 89X and, if necessary, apply to the Court.

It is important to note that the notification requirement is simply that; a notification requirement.

The actual nature of the rights and wrongs of any acquisition will still be determined by the principles set out in the current Act, whereby "associates" will only have their interests aggregated if section 89KA of the Act applies, ie if they are, in fact, acting together for the purpose of establishing control over a media outlet.

However, the recent history of ownership and control arrangements for media outlets demonstrates that the reality of ownership interests or control arrangements can be, and often is, buried under contrived schemes. In view of the restricted time frame for decisions, it is essential that the ABT should have as much relevant information as possible, as soon as possible, on which to base a decision to exercise its powers. In view of the substantial nature of those powers, it is also in the interests of parties to be frank and open with the ABT to prevent disruption of their activities.

Since the obligation is simply to notify, and the inconvenience of that must be weighed against a substantial issue of public interest, it is reasonable that it should be cast more widely that similar obligations under other Acts, which deem associate relationships to create actual joint control. This ensures that all aspects of acquisitions likely to contravene the Act can be examined by the ABT to establish the reality of the situation, without relying on legal fictions as the other Acts do. The rights of the people affected are protected by the confidentiality requirements of proposed section 17AA.

However, because the definitions of associates are wide (to ensure that the ABT is able to examine all factors likely to be relevant to its decision), it is likely that there will be some cases where notice will be unlikely to afford useful information to the ABT. The Government has no wish for the people concerned to be inconvenienced if the policy objectives of the Act would not be served. However, it recognises that, as the information will be used for the purposes of the ABT and processed by them, and as the circumstances require the specific experience of the ABT as the only body able to assess what is or is not likely to be relevant, only the ABT can decide when information is not required. Proposed sections 90HC and 92EC recognise this fact.

I do not share the Secretary's view that those provisions partake in any way in the nature of a "Henry VIII" clause. The ABT is able to exempt persons from the obligation to provide it with information, but the Parliament retains the ultimate say through its powers of disallowance.

I consider the amendments to be appropriate, consistent with your terms of reference and essential to enable an

issue of substantial public concern to be addressed effectively and efficiently.

Special Broadcasting Service Bill 1991

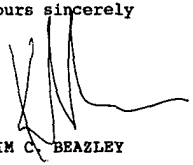
The letter further asks the reason why no time limit is imposed during which the staffing provisions of the Bill must be proclaimed.

The reason is to allow time for the SBS to consult the relevant unions without the pressure inherent in a legislative requirement to achieve a mutually satisfactory outcome by a particular date.

A similar open ended provision is included in the ABC Act.

If the Government considers the consultations are excessively protracted and wishes the parties to reach agreement by a particular date, the provisions would allow the Governor-General to proclaim a specified date in the future for that purpose.

Yours sincerely



KIM C. BEAZLEY

SENATOR THE HON. NICK BOLKUS
Minister for Administrative Services

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

Dear Colleague

I write in response to the comments made in Scrutiny of Bills Alert Digest No. 16 of 1991 (9 October 1991) on certain aspects of the Electoral and Referendum Amendment Bill 1991.

The first comment noted that the amendments made by clause 46 of the Bill to the Electoral and Referendum Amendment Act 1989 will, under subclause 2(3) of the Bill, be deemed to have come into effect on 30 September 1990. I note that the Committee appears from its comment to be satisfied with the reason for this proposed retrospectivity which was set out in the Explanatory Memorandum, and would only add that the proposed amendments do not in any way affect any rights or duties of any individual.

The second comment made related to clause 27 of the Bill, which will insert in the Commonwealth Electoral Act 1918 a new subsection 339(3) creating a strict liability offence of making a false or misleading statement in a nomination paper. The creation of such an offence was recommended by the Joint Standing Committee on Electoral Matters at paragraph 3.64 of its Report No. 3 ("The 1987 Federal Election"). The Committee noted at paragraph 3.40 of the Report that the Australian Electoral Commission had been advised by the Director of Public Prosecutions that under the law as it stands it would be necessary, in order to obtain a conviction of a candidate for making a false statement in his or her nomination paper, for the candidate to admit that "he had turned his mind to the question of section 44(iv) of the Constitution, that he had concluded that he was disqualified, and that he deliberately signed a declaration to contrary effect". The DPP noted that such a confession was unlikely to be obtained.

While the creation of strict liability offences is not something to be undertaken lightly, there is a strong case for so proceeding in this particular context. The recommendation of the Joint Standing Committee on Electoral Matters was made against the background of the steps which had to be taken in the aftermath of the discovery early in 1988 that Mr Robert Wood had been ineligible for election to the Senate. The recount of votes which was required to identify the person who was properly elected to the Senate position which Mr Wood had occupied was a costly process, which in other circumstances could have severely disrupted the day-to-day working of the Parliament. Given the potential for such disruption, there is a

clear case for imposing the strictest possible sanctions to discourage persons from approaching the nomination process with a reckless disregard for the accuracy of statements made in nomination forms.

The Committee for the Scrutiny of Bills also referred in its comment to the fact that under proposed subsection 339(4), a statutory defence will be available to a defendant who can prove that he or she:

(a) did not know; and

(b) could not reasonably be expected to have known;

that the statement to which the prosecution relates was false or misleading.

While the Committee was concerned that this represents a reversal of the normal onus of proof, the absence of such a reversal of the onus of proof would give rise to the same sorts of evidential problems as were noted by the Director of Public Prosecutions in his advice to the Australian Electoral Commission referred to above.

The third comment of the Committee for the Scrutiny of Bills related to clause 42 of the Bill, which will insert a new section 140A in the Referendum (Machinery Provisions) Act 1984. That provision will deem the averments of the prosecutor in an information laid in respect of a failure to vote at a referendum to be proved in the absence of evidence to the contrary. The new provision is made necessary by the amendments to section 45 of the Referendum (Machinery Provisions) Act 1984, which replace the current scheme for the enforcement of compulsory voting with a "penalty notice" scheme. Under the penalty notice scheme, there will be no requirement on voters to provide a statement of their reasons for failing to vote, nor will there be an offence of failing to reply to notices sent to apparent non-voters. Prosecutions of non-voters who do not take either the option of paying the prescribed $20 penalty or the option of offering valid and sufficient reasons for failing to vote would be impracticable without an averment provision of the type proposed, since the prosecution would be unable in any particular case to prove the absence of a valid and sufficient reason for the failure to vote. The reversal of the onus of proof is in effect required because the matters which would be deemed to be proved fall within the specific knowledge of the defendant.

Yours sincerely

NICK BOLKUS

25 OCT 1991

Minister for Primary Industries and Energy
Simon Crean, MP

30 SEP 1991

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

Dear Senator Cooney

I refer to the comment of the Standing Committee for the Scrutiny of Bills Alert Digest No 15 of 1991 concerning the Rice Levy Bill 1991.

The Committee has noted that the Bill depends for its operation on the concept of 'leviable rice' which is defined in the Bill to include varieties of rice prescribed by regulation as leviable rice.

The intention of the Bill is to impose a levy on those varieties of rice which the industry wishes to be levied for the purpose of funding research and development expenditure. The varieties to be levied can only be included in regulations on the recommendation of a rice industry body.

The list of rice varieties grown in Australia may vary periodically as new varieties are grown and existing varieties cease to be grown.

Given the relatively short period of time between industry decisions to grow a new variety of rice and its actual production, it was considered that amendment of the Schedule by regulation was the most effective and efficient way to ensure all relevant varieties of rice were subject to the levy.

I hope this information meets the Committee's concerns. Should you require further information the contact officer in my Department is Ms Judy Barfield, Crops Division (telephone 272 5675).

Yours sincerely

SIMON CREAN

Parliament House, Canberra ACT 2600. Telephone (06) 277 7520 Facsimile (06) 273 4120

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF

1991

13 NOVEMBER 1991

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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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

EIGHTEENTH REPORT OF 1991

The Committee has the honour to present its Eighteenth Report of 1991 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:

Health Insurance Amendment Bill 1991

Hearing Services Bill 1991

HEALTH INSURANCE AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 20 August 1991 by the Minister for Health, Housing and Community Services.

The Bill proposes to:

- reduce the level of medicare benefit for prescribed general practitioner services by a total of $3.50 (from 1 November 1991), $5.00 (from 1 November 1992) and $5.00 indexed (from 1 November 1993);
- enable medical practitioners to charge up to $3.50 for services when a patient assigns the right to payment of the medicare benefit to the practitioner;
- ensure that the patient contribution to the cost of a single professional service does not exceed the greatest permissible gap, initially to be $26.80;
- introduce new 'safety-net' arrangements for families and individuals;
- provide for the review of decisions made in respect of the refusal to issue additional or replacement 'safety-net' concession cards and in respect of the withdrawal and cancellation of these cards; and
- provide for the indexation of:
  - reduced medicare benefit from 1 November 1993;
  - the greatest permissible gap from 1 November 1991; and
  - family and individual 'safety nets' from 1 January 1993.

The Committee dealt with the Bill in Alert Digest No. 14 of 1991, in which it made various comments. The Minister for Health, Housing and Community Services responded to those comments in a letter dated 30 October 1991. Though the Committee notes that the Bill was passed by the Senate on 12 November 1991, the Minister's response may nevertheless be of interest to Senators. A copy of the letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clauses
Proposed new paragraph 10(2)(a) and clause 8

In Alert Digest No. 14, the Committee noted that clause 4 of the Bill proposes to omit subsections 10(2)-(6) of the *Health Insurance Act 1973* and substitute four new subsections. Section 10 of that Act deals with individuals' entitlements to medicare benefits. Subsection 10(1) provides:

> Where, on or after 1 February 1984, medical expenses are incurred in respect of a professional service rendered in Australia to an eligible person, medicare benefit calculated in accordance with sub-section (2) is payable, subject to and in accordance with this Act, in respect of that professional service.

The Committee noted that proposed new subsection 10(2) provides:

> (a) in the case of a service of the kind referred to in paragraph (da) of the definition of 'basic private table' or 'basic table' in subsection 4(1) of the *National Health Act 1953* **(not being a service, or a service in a class of services, that, under the regulations, is excluded from this paragraph)** - an amount equal to 75% of the Schedule fee; or
> (b) in any other case (not being a case to which paragraph (c) applies) - an amount equal to 85% of

the Schedule fee; or

(c) in the case of a prescribed GP service, where the patient is not a concessional beneficiary or a concessional beneficiary's dependant - an amount equal to 85% of the Schedule fee less:

(i) in the year beginning on 1 November 1991 - $3.50; or
(ii) in the year beginning on 1 November 1992 - $5; or
(iii) in the year beginning on 1 November 1993 or a later year beginning on 1 November - $5 indexed under section 10A. [Emphasis added]

The Committee suggested that the effect of proposed new paragraph 10(2)(a) would be to allow the Governor-General (on the advice of the Federal Executive Council) to issue regulations to exclude certain services or classes of services from the definition referred to and to, thereby, amend the definition set out in the primary legislation. The Committee indicated that this is, therefore, what it would consider to be a 'Henry VIII' clause, as it would allow the operation of the primary legislation to be amended by subordinate legislation.

The Committee also noted that clause 8 of the Bill (which is a 'transitional' provision) provides:

> (1) For the purposes of ensuring that no person is disadvantaged by the repeal of subsections 10(3), (4A), (5) and (6) of the [Health Insurance] Act, the regulations may provide for the application of those provisions in respect of the year beginning on 1 January 1991 subject to such modifications and adaptations as the regulations may provide.
>
> (2) The regulations may also provide for such other transitional arrangements as are necessary to facilitate the introduction of the amendments of the [Health Insurance] Act made by this Act.

The Committee suggested that this is also a 'Henry VIII' provision, as both subclauses (1) and (2) would, if enacted, allow the operation of the primary legislation to be amended by subordinate legislation. However, the Committee noted that the express purpose of the clause is to ensure that no individual is disadvantaged by the repeal of the subsections referred to.

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

In relation to the Committee's comments on proposed new paragraph 10(2)(a), the Minister has responded as follows:

> The parenthesised words [in paragraph 10(2)(a)] allow regulations to be issued to exclude certain services or classes of services from attracting a benefit of 75% of the Schedule fee such that they would instead attract 85% of the fee.
>
> I would like to point out that this provision is not being newly introduced to the Act. The only variations from paragraph 10(2)(a) of the [*National Health Act 1953*] are:
>
> - the replacement of the term 'professional service' with 'service', in accordance with the revised definitions proposed by Clause 3 of the Bill.
> - the replacement of the words 'the fee specified in the table in respect of the service in relation to the State in which the service is rendered' with 'the Schedule fee'. The reference to States is no longer necessary as there is now a uniform Schedule fee throughout Australia.

The Minister concludes by saying:

> The effect of the paragraph is identical [to that of *paragraph 10(2)(a) of the Principal Act*]. *This provision was* introduced in 1987 to allow for flexibility in the arrangements in, for example, the event of changes in technology or treatment practices by providing for regulations that may allow for certain services to attract the 85% rate of benefit. I do not believe it would be appropriate to use the current Amendment Bill to change the intention of this particular provision.

The Committee thanks the Minister for this response.

In relation to the Committee's comments on the transitional provisions contained in clause 8 of the Bill, the Minister has responded as follows:

> In view of the Committee's concerns, and in the interests of achieving clarity of intention I have decided to address the transitional arrangements in a more appropriate way through a package of modifications to the Bill which incorporates these provisions within the legislation itself. In this way legislative power should not be inappropriately delegated. These amendments will be introduced when the Bill is once again considered by the House of Representatives.

The Committee thanks the Minister for this response and notes that the transitional provisions of the Bill were, indeed, amended in the House of Representatives on 7 November 1991.

HEARING SERVICES BILL 1991

This Bill was introduced into the House of Representatives on 11 September 1991 by the Minister for Aged, Family and Health Services.

The Bill proposes to establish a Hearing Services Authority (to replace the National Acoustic Laboratories), with effect from 1 July 1992.

The Committee dealt with the Bill in Alert Digest No. 16 of 1991, in which it made various comments. The Minister for Aged, Family and Health Services responded to those comments in a letter dated 4 November 1991. Though the Committee notes that the Bill was passed by the Senate on 11 November 1991, the Minister's response may nevertheless be of interest to Senators. A copy of the letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clauses
Sub-clause 4(1) - definition of 'hearing products', subclause 5(1)(h) - definition of 'eligible persons'

In Alert Digest No. 16, the Committee noted that sub-clause 4(1) of the Bill defines the phrase 'hearing products' as including

(a) hearing aids; and
(b) alternate listening devices; and
(c) listening systems; and
(d) tests, procedures, documents and computer software associated with the provision of hearing services; and
(e) **such other products as the Minister determines to be hearing products within the meaning of this Act;** [emphasis added]

Sub-clause 4(3) provides that a determination under paragraph (e) of the above definition is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901.*

The Committee indicated that this is what it would generally consider to be a 'Henry VIII' clause, as the effect of the provision is that the Minister would be given the power to extend the meaning of the phrase 'hearing products' by subordinate legislation. While the Committee noted that the exercise of this discretion would be subject to parliamentary scrutiny by virtue of sub-clause 4(3), the Committee indicted that it nevertheless considered paragraph (e) of the definition of 'hearing products' to be a 'Henry VIII' clause, as it would allow the effect and application of primary legislation to be extended by delegated legislation.

Similarly, the Committee noted that sub-clause 5(1) of the Bill sets out in a series of paragraphs the classes of persons who are to be treated as 'eligible persons' for the purposes of the Bill. The Committee noted that one reason for this provision is that, by virtue of paragraph 8(1)(a) the Authority to be established by this Bill is to provide hearing services for such persons.

Paragraph (h) of sub-clause 5(1) provides that a category of eligible person for the purposes of the Bill is

> a person included in a class of persons that the Minister determines, in writing, to be eligible persons for the purposes of this Act.

Sub-clause 5(2) provides:

> A determination under paragraph (1)(h) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901.*

The Committee suggested that these provisions, when read together, mean that the Minister would have the power to extend, by subordinate legislation, the classes of persons who may be taken to be eligible persons for the purposes of the Bill, subject to parliamentary scrutiny and review. The Committee indicated that this was, therefore, also what it would generally consider to be a 'Henry VIII' clause, since it would allow the operation of aspects of the Bill to be extended by subordinate legislation.

The Committee drew Senators' attention to the provisions, as they may be considered 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:

> In the case of paragraph 4(1)(e), provision has been made to enable the Minister to determine additional hearing products within the meaning of the Act to enable new technological products to be made available to the Authority's eligible hearing impaired clients so that they will not be disadvantaged in comparison to other hearing impaired people. The instrument was specifically made subject to parliamentary scrutiny by virtue of sub-clause 4(3) so that the Parliament could satisfy itself that the hearing products were within the meaning of the definition in the Act.
>
> The intention was that additional hearing products required for eligible clients of the Hearing Services Authority could be more easily made available to clients by a new regulation than by amendment of the Act. It was simply seen as the most effective means, both in terms of Parliamentary time and being able to have a hearing product approved for the purposes of the Act, to ensure timely provision to clients.
>
> With respect to paragraph (h) of sub-clause 5(1), this was also seen as the most effective means of extending the eligibility for services provided by the Authority. It is not the intention of the program to include anyone other than those

> who would fall into similar a public interest category. Might I also add that any extension of the service to other public interest group would be in the form of a new policy proposal and therefore be approved by Cabinet before the extended group would be determined to be eligible for hearing services from the Authority. Again any determination under this provision would be disallowable by Parliament.

The Committee thanks the Minister for this response.

'Henry VIII' clause
Sub-clause 66(5)

In *Alert Digest* No. 16, the Committee noted that clause 66 of the Bill is concerned with the protection of the name 'National Acoustic Laboratories' and the acronym 'NAL' against unfair business competition. The Committee noted that, for this purpose, the clause creates a criminal offence, carrying a penalty of a fine of up to $3,000, if anyone should, without permission from Australian Hearing Services, use either of those names in their trade or business. The means by which the protection is given to the Authority is to prohibit the improper use of a 'protected name'. Sub-clause 66(5) provides that the phrase 'protected name' means:

> (a) "NAL"
> (b) "National Acoustic Laboratory"
> (c) such other names as are prescribed for the purposes of this section.

The Committee suggested that paragraph (c) of that definition would permit the phrase 'protected name' to be extended by regulation rather than by amendment to the primary legislation. The Committee indicated that it considered this power to extend the meaning of words by subordinate (rather than primary) legislation to be a 'Henry VIII' clause.

The Committee drew Senators' attention to the clause, 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:

> With regard to clause 66(5) the intention of this provision was merely to preserve the acronym "NAL", the name National Acoustic Laboratories and the "NAL logo". It was not intended that the protection extend to anything else and I am prepared to give an undertaking to amend the legislation during the next sittings, rather than postpone the passing of the legislation during this session.

The Committee thanks the Minister for this response and for his undertaking to amend the legislation in the light of its concerns.

Delegation to 'a person'
Clause 70

In Alert Digest No. 16, the Committee noted that clause 70 provides that Australian Hearing Services

> may, by written instrument, delegate to a person all or any of its powers under this or any other Act.

The Committee noted that the purpose of the Bill is to set up an Authority (to be known as 'Australian Hearing Services'), to bestow upon it the various functions listed in clause 8 and to grant it all the powers listed in clause 9.

The Committee noted that, as clause 70 reads, there is no limit as to qualifications or attributes on the person to whom the Authority may delegate any of the powers

listed in clause 9, or indeed any of the powers which may be conferred on the Authority by any other Act. Given the extensive range of powers that the Authority is granted by clause 9, the Committee suggested that it may be appropriate to limit the classes of person to whom those powers may be delegated.

The Committee also noted that the Explanatory Memorandum is misleading in its comments on clause 70. That memorandum describes clause 70 as follows:

> **Clause 70 - Delegation by Authority**
>
> This clause provides that the Authority may delegate any of its powers under this or any other Act to a person who is a member of the Authority or a member of the staff of the Authority.

The Committee observed that if clause 70 were in the terms so described, it would have no objection to that provision. However, the Committee drew Senators' attention to clause 70 in its present form as making rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

The Minister has responded as follows:

> ... I would confirm that it was our clear intention that the delegation of the powers of the Authority would be solely to a person who is a member of the Authority or a member of staff of the Authority. Since the Committee is of the view that this provision should be amended to more clearly reflect the intention of the delegation power, then I would further undertake to have this amended during the next session.
>
> This would enable the necessary amendments to be made before the legislation comes into effect on 1 July 1992.

The Committee notes that on 11 November 1991, an amendment to clause 70 of the Bill which addressed the Committee's concerns was moved in the Senate by Senator Patterson. That amendment was passed by the Senate on that date and was subsequently agreed to by the House of Representatives on 12 November 1991.

The Committee thanks the Minister for his assistance with the Bill.

Barney Cooney
(Chairman)

RECEIVED
4 NOV 1991
Senate Standing C'tte for the Scrutiny of Bills

DEPUTY PRIME MINISTER AND
MINISTER FOR HEALTH, HOUSING AND COMMUNITY SERVICES

Parliament House
CANBERRA ACT 2600

Telephone (06) 277 7680
Facsimile: (06) 273 4126

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

Dear Senator Cooney

The Secretary of the Standing Committee for the Scrutiny of Bills has brought to my attention comments contained in the Scrutiny of Bills Alert Digest No. 14 of 1991 (4 September 1991) concerning the Health Insurance Amendment Bill 1991. Now that the outcomes of the review of the Medicare reforms contained in the Bill have been determined, I would like to respond to the comments made by the Committee in respect to this Bill.

The Committee has suggested that the new paragraph 10(2)(a) proposed by Clause 4 and the transitional provisions contained in Clause 8 of the Bill may contain inappropriate delegation of legislative power. In particular, concern is expressed that these provisions comprise 'Henry VIII' clauses in that they allow the operation of the primary legislation to be amended by subordinate legislation.

The new paragraph 10(2)(a) provides:

> (a) in the case of a service of the kind referred to in paragraph (da) of the definition of 'basic private table' or 'basic table' in subsection 4(1) of the National Health Act 1953 (not being a service, or a service in a class of services, that, under the regulations, is excluded from this paragraph) - an amount equal to 75% of the Schedule fee;

The parenthesised words allow regulations to be issued to exclude certain services or classes of services from attracting a benefit of 75% of the Schedule fee such that they would instead attract 85% of the fee.

I would like to point out that this provision is not being newly introduced to the Act. The only variations from paragraph 10(2)(a) of the Principal Act are;

- the replacement of the term "professional service" with "service", in accordance with the revised definitions proposed by Clause 3 of the Bill.

- the replacement of the words "the fee specified in the table in respect of the service in relation to the State in which the service is rendered" with "the Schedule fee". The reference to States is no longer necessary as there is now a uniform Schedule fee throughout Australia.

The effect of the paragraph is identical. This provision was introduced in 1987 to allow for flexibility in the arrangements in, for example, the event of changes in technology or treatment practices by providing for regulations that may allow for certain services to attract the 85% rate of benefit. I do not believe it would be appropriate to use the current Amendment Bill to change the intention of this particular provision.

I have noted the views of the Committee in relation to the transitional provisions within Clause 8 of the Bill. These subclauses would, if enacted allow the operation of the primary legislation to be amended by subordinate legislation.

In view of the Committee's concerns, and in the interests of achieving clarity of intention I have decided to address the transitional arrangements in a more appropriate way through a package of modifications to the Bill which incorporates these provisions within the legislation itself. In this way legislative power should not be inappropriately delegated. These amendments will be introduced when the Bill is once again considered by the House of Representatives.

Yours sincerely

Brian Howe

BRIAN HOWE

Hon. Peter Staples MP
Minister for Aged, Family and Health Services

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Canberra ACT 2600
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Portfolio of
Health, Housing
and Community Services

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

Dear Senator

I refer to Scrutiny of Bills Alert Digest No. 16 of 1991 (9 October 1991), in relation to the Committee's comments on the Hearing Services Bill 1991.

The Hearing Services Bill 1991 was passed by the House of Representatives on 15 October and has passed to the Senate for introduction. I would now wish to respond to the matters raised by the Committee in respect to the Hearing Services Bill.

Firstly, the definition of "hearing products" in sub-clause 4(1) of the Bill, in particular paragraph (e) which provides that the Minister may determine hearing products in addition to those already listed in the definition to be hearing products within the meaning of the Act. The Committee sees this as a "Henry VIII" clause as it will allow the effect and application of primary legislation to be extended by delegated legislation.

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

As the Committee considers that the effect of sub-clause 5(2) would involve a similar breach, I will address both these provisions together.

In the case of paragraph 4(1)(e), provision has been made to enable the Minister to determine additional hearing products within the meaning of the Act to enable new technological products to be made available to the Authority's eligible hearing impaired clients so that they will not be disadvantaged in comparison to other hearing impaired people. The instrument was specifically made subject to parliamentary scrutiny by virtue of sub-clause 4(3) so that the Parliament could satisfy itself that the hearing products were within the meaning of the definition in the Act.

The intention was that additional hearing products required for eligible clients of the Hearing Services Authority could be more easily made available to clients by a new regulation than by amendment of the Act. It was simply seen as the most effective means, both in terms of Parliamentary time and being able to have a hearing product approved for the purposes of the Act, to ensure timely provision to clients.

With respect to paragraph (h) of sub-clause 5(1), this was also seen as the most effective means of extending the eligibility for services provided by the Authority. It is not the intention of the program to include anyone other than those who would fall into similar a public interest category. Might I also add that any extension of the service to other public interest group would be in the form of a new policy proposal and therefore be approved by Cabinet before the extended group would be determined to be eligible for hearing services from the Authority. Again any determination under this provision would be disallowable by Parliament.

With regard to clause 66(5) the intention of this provision was merely to preserve the acronym "NAL", the name National Acoustic Laboratories and the "NAL logo". It was not intended that the protection extend to anything else and I am prepared to give an undertaking to amend the legislation during the next sittings, rather than postpone the passing of the legislation during this session.

Finally, in respect of the Committee's comments on clause 70, I would confirm that it was our clear intention that the delegation of the powers of the Authority would be solely to a person who is a member of the Authority or a member of staff of the Authority. Since the Committee is of the view that this provision should be amended to more clearly reflect the intention of the delegation power, then I would further undertake to have this amended during the next session.

This would enable the necessary amendments to be made before the legislation comes into effect on 1 July 1992.

Yours sincerely

Peter Staples

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

NINETEENTH REPORT

OF

1991

27 NOVEMBER 1991

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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

NINETEENTH REPORT OF 1991

The Committee has the honour to present its Nineteenth Report of 1991 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:

Cash Transaction Reports Amendment Bill 1991

Federal Court of Australia Amendment Bill 1991

Financial Legislation Amendment Bill 1991

Law and Justice Legislation Amendment Bill (No. 2) 1991

CASH TRANSACTION REPORTS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 15 October 1991 by the Attorney-General.

The Bill proposes to:

- require cash dealers to report to the Cash Transaction Reports Agency (CTRA) all international funds transfer instructions, sent or received by them, which effect a payment of funds either in Australia or a foreign country;
- change the name of legislation (to the Financial Transaction Reports Act) and the agency (to the Australian Transaction Reports and Analysis Centre); and
- clarify the exact time when a person is required to report to a customs officer when bringing currency into or out of Australia.

The Committee dealt with the Bill in Alert Digest No. 18 of 1991, in which it made various comments. The Attorney-General responded to those comments in a letter dated 13 November 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clause
Clause 6 - proposed definition of 'international funds transfer instruction'

In Alert Digest No. 18, the Committee noted that clause 6 of the Bill proposes to insert various new definitions into clause 3 of the *Cash Transaction Reports Act*

1988. Included in those proposed amendments is the following definition:

> **'international funds transfer instruction'** means an instruction for a transfer of funds that is transmitted into or out of Australia electronically or by telegraph, but does not include an instruction of a prescribed kind.

The Committee indicated that this is what it would generally consider to be a 'Henry VIII' clause, as it would allow the definition contained in the primary legislation to be, in effect, amended (by having certain 'instructions' specifically excluded by the definition) by regulation.

The Committee drew Senators' attention to the clause, as it may be considered 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 primary aim of this Bill is to require the reporting of all international funds transfer instructions (IFTIs) to the Cash Transaction Reports Agency which come within the reporting obligation of proposed section 17B for analysis in relation to tax evasion, money laundering and other relevant criminal activity. However, some categories of IFTIs may prove to be of no law enforcement value and will need to be excluded to avoid overload of the CTRA. An example might be non-customer related transactions between a major cash dealer in Australia and its head office overseas. There is a need for each such case to be examined by law enforcement agencies on a case by case basis, to establish the potential law enforcement value of the information contained in the IFTIs of this kind, or conversely the risk to law enforcement from exclusion.

The Attorney goes on to say:

> The details of the operation of these reporting requirements are to be worked out in close consultation with the finance industry to ensure the smooth introduction and operation of the scheme and to maintain the co-operation of the finance industry which has been so evident to date. The ability to exclude certain types or classes of IFTIs, by reference to the transaction or to the cash dealer, by the regulations is necessary to keep the burden of compliance with these provisions by cash dealers appropriate to the benefit for law enforcement purposes to be gained from the information collected.

The Committee thanks the Attorney-General for this response.

'Henry VIII' clause
Clause 9 - proposed new subsection 17B(8)

In Alert Digest No. 18, the Committee noted that clause 9 of the Bill proposes to insert a new Division 3 into the *Cash Transaction Reports Act 1988*. That proposed new division deals with international funds transfer instructions and, if enacted, would require certain transactions to be reported within a certain time. Proposed new subclause 17B (8) provides that

> 'reporting time', in relation to an instruction means:
>
> (a) if the instruction is transmitted into Australia - 14 days after the day that the transmission is received or such later time as is specified in the regulations;
>
> (b) if the instruction is transmitted out of Australia - 14 days after the day that the instruction is transmitted or such later time as is specified in the regulations.

The Committee indicated that paragraphs (a) and (b) are what it would generally consider to be 'Henry VIII' clauses, as they would allow the definition contained in the primary legislation to be amended, in effect, by regulation.

The Committee drew attention to the provisions, as they 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 Attorney-General has responded as follows:

> Clause 9 is merely a procedural provision required to relieve some cash dealers from the primary obligation to report within the reporting time referred to, in appropriate circumstances. The need for this has been explained at page 9 of the Explanatory Memorandum to the Bill, and I quote:
>
> > Because these reporting requirements apply to telex messages which may be received or sent by cash dealers in remote locations in Australia, some practical difficulties might emerge in creating and forwarding reports to the CTRA (AUSTRAC). It is intended to deal with these kinds of situation by providing specifically for reporting times to fit the needs of those cash dealers.
>
> The regulations developed under this provision, in the same way as clause 6 discussed above, will be developed in close consultation with the cash dealers who will be affected by them. They will therefore be fully aware of their obligations to report at any time.

The Attorney goes on to say:

> In my view, the flexibility provided by these provisions is necessary to ensure that the legislation does not impinge unnecessarily upon commercial activity. This reflects the

> nature of the scheme which has been established by the Cash Transaction Reports Act 1988, itself. There are a number of provisions in the Act which include similar delegations, for example, the definitions of 'reporting period' and 'unit trust' in section 3 and subsection 10(5). These provisions have to date been used only sparingly and I am confident that the same restraint will be demonstrated in relation to the new provisions.

The Attorney concludes by saying:

> In conclusion, I consider it relevant that these regulations will be disallowable by the Parliament. This will allow for control by the Parliament of the delegation of power contained in the legislative provisions.

The Committee thanks the Attorney-General for this response and for his indication that the provisions in question will be used sparingly.

FEDERAL COURT OF AUSTRALIA AMENDMENT BILL 1991

This Bill was introduced into the Senate on 12 September 1991 by the Minister for Justice and Consumer Affairs.

The Bill proposes to provide for a new procedure in the Federal Court to allow a person to bring an action on behalf of a group of seven or more persons if the persons all have claims against the same respondent.

The Committee dealt with the Bill in Alert Digest No. 16 of 1991, without making any comment. However, the Committee has subsequently received two letters from the Business Council of Australia in relation to the Bill, suggesting that provisions in the Bill, in fact, infringe against the Committee's terms of reference. The Business Council has also issued a press release in relation to their concerns about the Bill. For the information of Senators, copies of the letters and the press release are attached to this report.

The essence of the Business Council's objection to the Bill is that (in their view) it allows a group of claimants to commence legal proceedings on behalf of a group of (unidentified) individuals without the consent of those individuals. In order to be excluded from such an action, a potential member of the group is required to 'opt out' of those proceedings. The Business Council suggest that this denies an individual the right to pursue an individual course of action and that, as such, it is a trespass on personal rights and liberties.

The Committee notes that this legislation was passed by the House of representatives on 26 November 1991, having previously been passed by the Senate on 13 November 1991. The Committee also notes that, in the Senate, various

concerns were expressed about the Bill, including those expressed by the Business Council, but the Bill was, nevertheless, passed (see Senate Hansard, 13 November 1991, pp 3015-33).

Though the Committee originally made no comment on the Bill, it has considered the Business Council's concerns. The Committee is not moved to comment further at this stage. In making this decision, the Committee notes that the legislation has been passed by both Houses of the Parliament with full knowledge of the concerns raised by the Business Council and after those concerns had been debated.

This situation raises some important issues for future consideration. While the Committee always welcomes any external input on legislation, it is clear that such input must be made at the time that the legislation is introduced if it is to be properly dealt with. In this case, of course, the fact that the Bill in question was first introduced in the Senate made the time constraints on the Committee even stricter. The problems raised by this situation may be a matter which the Committee will have to give further consideration.

The Committee thanks the Business Council for its submissions on this Bill.

FINANCIAL LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 10 October 1991 by the Minister Assisting the Treasurer.

The Bill proposes to:

- amend the *Currency Act 1965,* to provide the Treasurer with the authority to approve new coins, determine variations to design and/or other characteristics (by disallowable instrument), without reference to Executive Council; and
- amend the *Financial Corporations Act 1974,* to permit the Treasurer to:
  - delegate to the Governor/Deputy Governor of the Reserve Bank responsibility for varying and publishing the list of non-bank financial institutions which fall under the Act; and
  - publish the varied list as appropriate rather than being restricted to the *Gazette;* and
- repeal the *Special Employment-related Programs Act 1982.*

The Committee dealt with the Bill in Alert Digest No. 17 of 1991, in which it made various comments. The Parliamentary Secretary to the Treasurer responded to those comments in a letter received 13 November 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clauses
Clause 4 - Proposed new sections 13 and 13A of the *Currency Act 1965*

In Alert Digest No. 17, the Committee noted that clause 4 of the Bill proposes to repeal section 13 of the *Currency Act 1965* and replace it with sections 13 and 13A. Proposed new subsection 13(1) provides:

> **Standard composition of coins**
> 13.(1) Subject to paragraph (2)(a), the standard composition of the coins of the denominations specified in the Schedule is as specified in the Schedule.

Proposed new subsection 13(2) provides:

> (2) The Treasurer may, by signed instrument, determine that this Act is to have effect, on and after a day specified in the determination, as if:
> (a) a reference in the Schedule, opposite to the denomination of a coin, to the standard composition of coins of that denomination were a reference to such other standard composition as is specified in the determination; or
> (b) there were included in the Schedule a reference to a denomination of money specified in the determination and there were specified in the Schedule opposite to that denomination, as the standard composition of coins of that denomination, the standard composition that is specified in the determination.

The Committee noted that the existing section 13 provides:

> (1) The standard composition of the coins of the denominations specified in the Schedule is, subject to subsection (2), as specified in the Schedule and the standard weight of those coins is as prescribed.

(2) The regulations may, from time to time, provide that this Act shall have effect, on and after a date specified in the regulations, as if a reference in the Schedule, opposite to the denomination of a coin, to the standard composition of coins of that denomination were a reference to such other standard composition as is specified in the regulations and, where any such regulations are made, the standard composition specified in the regulations shall, on and after the date specified in the regulations and while the regulations remain in force, be deemed to be specified in the Schedule opposite to that denomination in lieu of the standard composition actually specified in the Schedule.

(3) Regulations made for the purposes of this section may specify more than one standard composition or weight in relation to coins of a particular denomination.

The Committee noted that this means that, currently, the composition of the coins is set out in the Act but can be varied by regulation, as can the standard weight.

The Committee noted that under the proposed new section 13, the composition of the coins would be, in effect, as set out in the Schedule or as the Treasurer otherwise determines. The Committee indicated that, as such, this was a 'Henry VIII' clause, as it would allow the requirements regarding composition set out in the primary legislation to be amended by subordinate legislation. The Committee also noted that such amendments could be made by Ministerial determination rather than by regulation, as is the case under the existing provision.

In making this comment, the Committee acknowledged that such Ministerial determinations would, pursuant to proposed new subclause 13(6), be disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*. However, the Committee also noted that, in general, such instruments are not as well drafted as regulations, nor as readily accessible.

Similarly, the Committee noted that proposed new section 13A provides:

> **Standard weight, design and dimension of coins**
>
> 13A. (1) The Treasurer may, by signed instrument, determine, on and after a day specified in the determination, the standard weight, the allowable variation from that standard weight, the design and the dimensions of a coin whose denomination is specified, or taken to be specified, in the Schedule.
>
> (2) The Treasurer may specify in a determination more than one standard weight, design or set of dimensions, in relation to a coin of a particular denomination.
>
> (3) Where the Treasurer specifies in a determination more than one standard weight in respect of a coin of a particular denomination, the Treasurer must specify in that determination an allowable variation in respect of each such standard weight.
>
> (4) A determination is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

The Committee suggested that, if enacted, this provision would allow matters such as the standard weight, the allowable variations from the standard weight, the design and the dimensions of the various coins specified in the Schedule to be amended by Ministerial determination. Under the existing section 13, standard weight could only be varied by regulation. The Committee suggested that, in either event, this is a 'Henry VIII' clause, as it would facilitate the amendment of the primary legislation by subordinate legislation.

The Committee noted that it has maintained an in principle objection to the use of 'Henry VIII' clauses. The Committee also noted that, in the present case, the 'Henry VIII' process was being made even less acceptable by changing the method of amendment from regulations to Ministerial determinations. The Committee

noted that, on the whole, regulations are well-drafted and, by virtue of their being published in the Statutory Rules series, relatively easy to find. The Committee suggested that the drafting of Ministerial determinations is often not up to this same standard and there is no such obligation to publish them, which can make them difficult to find.

The Committee indicated that it would appreciate the Treasurer's views as to why it is necessary to change the method of amendment from regulations to Ministerial determinations.

The Committee drew attention to these provisions, as they may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Parliamentary Secretary to the Treasurer has responded as follows:

> It may assist the Committee if I briefly outline the reasons for the earlier amendments to the Act, as well as those currently under consideration. Under the original provisions of the Act, each time a new coin denomination was introduced or the standard composition (metallic composition) of an existing coin was varied the Act had to be amended, although other coin characteristics eg design, weight and size could be varied by regulation.
>
> In 1981, in the context of amending the Act to provide for the issue of a new coin denomination, the opportunity was taken to amend the Act to enable all such matters to be determined in future by regulation. This was seen as providing for greater flexibility in the type of coin that could be issued without the need for additional legislation. The previous process was considered impractical from the viewpoint of enabling the Royal Australian Mint to develop its numismatic coin program, as approvals for new coins or variations to the composition of existing coins were required on a regular basis.

The reason for now changing the approval arrangements from regulations to disallowable instruments reflects the changed situation with regard to coinage. There has been a substantial increase in recent years in approvals sought for new coins and variations to coin characteristics with the expansion of the RAM's numismatic program and the production of precious metal coins by the Gold Corporation, a statutory authority of the Western Australian Government.

The practicalities of successfully issuing collector coins into what is an extremely competitive market demands, inter alia, elaborate marketing programmes, maintenance of tight production schedules and adherence to advertised release dates. In light of this and the increased administrative burden generated by the expansion of the number of collector coins being issued, it was recognised that there was a need to simplify the administrative process. Considerable administrative effort is required to make regulations.

The Parliamentary Secretary goes on to say:

The Committee's other concern relates to the view that instruments are not, in general, as well drafted nor as accessible as regulations. While I appreciate the Committee's concern in this regard, I would point out that the Attorney-General's Department will be closely involved in the drafting of the instruments. Moreover, as the basic format of the present regulations and the proposed instruments are expected to be very similar, I see no reason why the quality of the instruments should suffer in comparison.

As far as accessibility of instruments is concerned, while instruments under the Currency Act will not form part of the Statutory Rules series, the proposed amendments to the Act have been drafted so that all other avenues for scrutiny and accessibility currently applying to regulations made under the Act will also apply to instruments under the Act. The Treasurer's determinations will be tabled in both Houses of Parliament and be subject to disallowance, and will be published in the Gazette, as occurs at present.

> Furthermore, I would emphasise that it is important to the issuing bodies, the Royal Australian Mint and the Gold Corporation, that such documentation is both well drafted and accessible as they are required to demonstrate to overseas authorities, as well as their wholesalers and dealers, that their coins have legal tender status. It is of particular importance in the case of overseas authorities, as without that status being established, they would be unable to obtain the necessary sales taxation exemption to enable them to compete with other numismatic products internationally. I would emphasise that exports are an important component of sales of collector coins.

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

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the Senate on 7 November 1991 by the Minister for Justice and Consumer Affairs.

The Bill proposes to amend the following four Acts:

- the *Commonwealth Places (Application of Laws) Act 1970,* to ensure that State Policy, when investigating applied Commonwealth offences, are not bound by Part 1C of the Crimes Act;
- the *Family Law Act 1975,* to:
  - widen the Family Court's powers to make certain orders for children subject to State child welfare legislation; and
  - ensure a Family Court judge who becomes aware that a party has offered settlement is not disqualified from that case;
- the *Judiciary Act 1903,* to prevent the application of laws, in civil suits, to the Commonwealth and States to which they are not subject; and
- the *Trade Practices Act 1974,* to effect two minor drafting changes.

The Committee dealt with the Bill in Alert Digest No. 19 of 1991, in which it made various comments. The Acting Attorney-General responded to those comments in a letter dated 25 November 1991. 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. 19, the Committee indicated that it had some difficulty in comprehending what was meant by the proposed amendment to section 64 of the

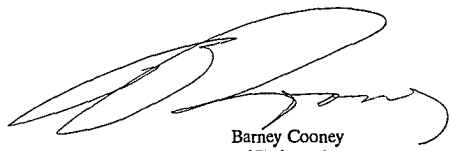
Judiciary Act. While the Committee found the explanation set out in the Explanatory Memorandum to be relatively clear, it had difficulty in ascribing that meaning to the actual wording of the proposed amendment. In particular, in relation to the reference to 'prescribed' State and Territory laws, members of the Committee recognised the potential for confusion about who might prescribe such laws, the Commonwealth or the States. The Committee indicated that it would greatly appreciate from the Attorney-General some further information on the proposed amendment by way of clarification of what is intended.

The Acting Attorney-General has responded as follows:

> It is clear that State or Territory laws could only be prescribed by a Commonwealth regulation made under the authority of the new s.64(2)(b). The Acts Interpretation Act 1901 (Cwlth.) (see s.17(q)) provides that the word 'prescribed' in a Commonwealth Act, unless the contrary intention appears, means prescribed by the Act or by regulations under the Act. I do not consider that this meaning would be displaced by a contrary intention manifest in the new provisions or elsewhere in the Judiciary Act.

The Committee thanks the Acting Attorney-General for this response.

The Committee notes that the amendments to the Judiciary Act proposed by the Bill were omitted by the Senate on 26 November 1991.



Barney Cooney
(Chairman)

Attorney-General

RECEIVED
13 NOV 1991
Senate Standing Cttee for the Scrutiny of Bills

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

CLE91/15710

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

Dear Senator Cooney,

I refer to Mr Argument's letter of 7 November 91 drawing my attention to the comments of the Standing Committee for the Scrutiny of Bills in Alert Digest No 18 of 1991 concerning the Cash Transaction Reports Amendment Bill 1991.

In particular the Committee has noted 2 clauses which might be considered as Henry VIII clauses, and therefore in possible breach of the Committee's principle 1(a)(iv) as an inappropriate delegation of legislative power. I will deal with these clauses in turn.

Clause 6 - proposed definition of 'international funds transfer instruction'

The primary aim of this Bill is to require the reporting of all international funds transfer instructions (IFTIs) to the Cash Transaction Reports Agency which come within the reporting obligation of proposed section 17B for analysis in relation to tax evasion, money laundering and other relevant criminal activity. However, some categories of IFTIs may prove to be of no law enforcement value and will need to be excluded to avoid overload of the CTRA. An example might be non-customer related transactions between a major cash dealer in Australia and its head office overseas. There is a need for each such case to be examined by law enforcement agencies on a case by case basis, to establish the potential law enforcement value of the information contained in the IFTIs of this kind, or conversely the risk to law enforcement from exclusion.

The details of the operation of these reporting requirements are to be worked out in close consultation with the finance industry to ensure the smooth introduction and operation of the scheme and to maintain the co-operation of the finance industry which has been so evident to date. The ability to exclude certain types or classes of IFTIs, by reference to the transaction or to the cash dealer, by the regulations is necessary to keep the burden of compliance with these provisions by cash dealers appropriate to the benefit for law

enforcement purposes to be gained from the information collected.

Clause 9 - proposed new subsection 17B(8): reporting time

Clause 9 is merely a procedural provision required to relieve some cash dealers from the primary obligation to report within the reporting time referred to, in appropriate circumstances. The need for this has been explained at page 9 of the Explanatory Memorandum to the Bill, and I quote:

> "Because these reporting requirements apply to telex messages which may be received or sent by cash dealers in remote locations in Australia, some practical difficulties might emerge in creating and forwarding reports to the CTRA (AUSTRAC). It is intended to deal with these kinds of situation by providing specifically for reporting times to fit the needs of those cash dealers."

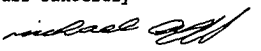
The regulations developed under this provision, in the same way as clause 6 discussed above, will be developed in close consultattion with the cash dealers who will be affected by them. They will therefore be fully aware of their obligations to report at any time.

In my view, the flexibility provided by these provisions is necessary to ensure that the legislation does not impinge unnecessarily upon commercial acitivity. This reflects the nature of the scheme which has been established by the Cash Transaction Reports Act 1988, itself. There are a number of provisions in the Act which include similar delegations, for exammple, the definitions of 'reporting period' and 'unit trust' in section 3 and subssection 10(5). These provisions have to date been used only sparingly and I am confident that the same restraint will be demonstrated in relation to the new provisions.

In conclusion, I consider it relevant that these regulations will be disallowable by the Parliament. This will allow for control by the Parliament of the delegation of power contained in the legislative provisions.

I hope this explanation satisfies the Committee's concerns and thank the Committee for its considered views on the Bill.

Yours sincerely



MICHAEL DUFFY

BUSINESS COUNCIL OF AUSTRALIA

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PRESIDENT

MR PETER McLAUGHLIN
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URGENT

FAX MESSAGE
PLEASE DELIVER IMMEDIATELY

****

TO: MR STEPHEN ARGUMENT
SECRETARY
SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FAX: 277 3289

FROM: CLIVE SPEED
ASSISTANT DIRECTOR

DATE: 24 OCTOBER 1991

Number of Pages: (including this page):

Dear Mr Argument

FEDERAL COURT OF AUSTRALIA AMENDMENT BILL 1991

On behalf of the 17 professional and business organisations listed in the attachment, we would like to draw the Committee's attention to aspects of the above Bill which we believe warrant examination by the Committee.

A central feature of the Bill is the "opt out" procedure which allows a small group of claimants to commence legal proceedings on behalf of an unidentified group of individuals without their consent. The individual has no say who should represent them in Court and has no say in any terms of the settlement. An individual is bound by the decision of the Court unless they "opt out" of the proceedings within a time period specified by the Court.

This procedure is quite different from the current practice of "opting in" which identifies individuals with similar claims, allows them to choose their representative, and a say in the conduct of the proceedings. The business community strongly supports this approach which applies in most comparable jurisdictions overseas and in the current Federal Court Rules.

In view of the implications of the "opt out" procedure for individual rights, and what we believe is a clear infringement of those rights, we urge the Committee to examine this Bill as a matter of urgency.

Representatives of the Group would be pleased to assist the Committee in its deliberations.

Yours sincerely

Association of Risk & Insurance Managers of Australia

Australian Chamber of Manufactures

Business Council of Australia

Insurance Council of Australia Limited

Retailers Council of Australia

Australian Institute of Company Directors

Motor Trades Association of Australia

Real Estate Institute of Australia

National Association of Forest Industries

The Australian Chamber of Commerce

Australian Finance Conference

Council of Small Business Organisations of Australia

Confederation of Australian Industry

Metal Trades Industry Association of Australia

The Employers Federation of NSW

Australian Pharmaceutical Manufacturers Association Inc

Proprietary Medicines Association of Australia

BUSINESS COUNCIL OF AUSTRALIA

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18 November 1991

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

Dear Senator Cooney

FEDERAL COURT OF AUSTRALIA AMENDMENT BILL

I refer to the Federal Court of Australia Amendment Bill 1991 which provides for the introduction of a far-reaching procedure for representative actions in the Federal Court.

While the Business Council supports measures to increase Court efficiency, we are concerned that the proposed 'opt out' procedure which allows a small group of people to take action on behalf of a class without their individual consent trespasses unduly on personal rights and liberties.

Although it is recognised that the proposed new representative procedure will require wide notification to enable persons wishing to 'opt out' to exercise such rights to do so, those who do not see such advertisements will be effectively denied their rights to 'opt out' and the procedure will invariably include some people in legal proceedings without their individual consent.

There are other features of the proposed legislation which the Council also considers to trespass unduly on personal rights and liberties. Under the 'opt out' procedure an individual would have no say in who represents them in Court, no say in the conduct of the action,and no say in any settlement negotiations. Further, unless an individual 'opts out', he or she is bound by the decision of the Court and the freedom to pursue an individual action is denied.

The Business Council is concerned that the short time allowed for public comment on this Bill (only one month) has prevented full debate about its wider implications. The Council considers that the 'opt out' procedure falls directly within your Committee's terms of reference and I would be grateful if the Committee would consider, as a matter of urgency, the issues I have raised with you.

Yours sincerely

for

Hugh Morgan, AO
Chairman
Business Law & Regulation Panel

BUSINESS COUNCIL OF AUSTRALIA

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PRESS RELEASE

MAJOR LAW FIRMS CRITICISE "OPT OUT" CLASS ACTIONS BILL

Australia's leading national law firms have expressed serious concerns about the Government's radical "opt out" class action Bill, presently before Federal Parliament. Following detailed analysis of the Bill the firms have concluded that the "opt out" procedure seriously challenges individual rights.

The firms Arthur Robinson & Hedderwicks, Baker & McKenzie, Clayton Utz, Mallesons Stephen Jaques and Sly & Weigall have also raised other concerns about the Bill which are covered in the following extracts.

> "Our concern is that in the attempt to assist the disadvantaged the scheme of the Bill may be merely exacerbating the problem. Clause 33Z(4)(a) requires a group member to establish his or her entitlement to a share in the damages awarded by the Court. This means that group members will still have to take a positive step to gain compensation and those who are disadvantaged either socially, intellectually or psychologically will still be hampered
>
> "The problem is further exacerbated by the provisions of Clause 33ZB. A person who fails to have the capacity to take a positive step to opt out of a representative action will automatically become a member of the class and will thereby become bound by the decision in the representative action. If the plaintiffs obtain a favourable result there may be no prejudice but if the plaintiffs fail it means that a person who has taken no positive step in either identifying himself or putting forward his claim will be bound by the adverse decision of the Court.
>
> "This appears to us to be neither equitable nor efficient."
>
> **BrianT. Wilson**
> **Managing Partner**
> **CLAYTON UTZ**

****

"In our view the existence of an opt out procedure will often lead to the institution of law suits, nominally on behalf of a large class composed of unidentified individuals, but which might in reality be conducted for the benefit of a small group of lawyers and their associates, substantially motivated by self interest. Such proceedings would be driven by those running them as opposed to the client group. We believe that this fairly summarises the United States experience with out out procedures."

Andrew M. Salgo
Partner
BAKER & McKENZIE

****

"This firm strongly opposes any form of class action which can be commenced, let alone concluded, without the consent of any person on whose behalf it is brought.

"Any procedure which permits class actions to be brought on behalf of persons who have not given their consent (particularly where those persons may not even be aware of the proceedings or proposed proceedings) can, in our view, not only impinge upon the rights of the individual involved, but can also give rise to undesirable practices on the part of those who originate and instigate the proceedings and who may be motivated by considerations other than the proper prosecution of a legitimate claim."

Tim Peken
Managing Partner
Dispute Resolution Division
SLY & WEIGALL

****

"The opt out system is another example of increasing interference with the individual rights of citizens. They should not be joined or named in a particular proceedings unless they provide their consent. Whilst they may not be named in the proceedings, it is possible that they will be named (without their knowledge), thus impinging on their right to privacy. In a democratic society citizens should be able to choose whether they want to be involved in particular litigation or proceedings. They should not have to go to court to assert this fundamental right.

"If the Government is concerned (and it should be) about costs and access to the courts there are other an more appropriate ways of dealing with these problems than the legislation that they have not put forward.

"All this legislation will do is increase the work for lawyers, particularly the ones who act for the unknown 'members of the class'."

Bob Baxt
Andrew Robson
ARTHUR ROBINSON & HEDDERWICKS

****

"In our view, a procedure for representative proceedings whereby the group members actively choose to be represented by the representative party is clearly preferable to the "opt out" procedure. The advantages of such a procedure are not only felt by the group members who have given their informed consent and respondents who are assured greater certainty, but also by the community at large which will not be burdened by the excessive costs of the Court playing a watch-dog role over the proceedings."

Rod Halstead
National Chairman
MALLESONS STEPHEN JAQUES

The Chairman of the Business Council's Business Law & Regulation Panel, Mr Hugh Morgan AO, today welcomed the comments by the law firms. Mr Morgan said that the analyses by Australia's leading law firms has confirmed business' worst fears about the "class action" Bill. "The disturbing feature of the Bill," he said "is that there has been very little public debate about its implications, which are only now being understood."

Mr Morgan called on the Government to defer further consideration of the legislation by the Parliament until the Government has an opportunity to fully consider the concerns expressed by the law firms, and allow full public debate.

Mr Morgan said that passage of the legislation should be suspended until proper consideration of its impact on individual rights could be made by the Senate Standing Committee for the Scrutiny of Bills, which has a mandate to ensure that legislative provisions do not trespass unduly on individual rights and liberties. Clearly, the "opt out" procedure, he said, will trespass upon such rights by including persons in legal proceedings without their individual consent.

25 November 1991

MEDIA CONTACTS:

NAME:	PHONE NO.
Mr Clive Speed Assistant Director	06 - 247 8208

TREASURER
PARLIAMENT HOUSE
CANBERRA 2600

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 opportunity to respond to the Committee's comments on the Financial Legislation Amendment Bill 1991 made in the Scrutiny of Bills Alert Digest No. 17 of 1991 (16 October 1991).

I note that the concerns of the Committee relate to the proposed amendments to the Currency Act 1965 (the Act) and essentially arise from its in principle objection to the use of what are termed 'Henry VIII' clauses in respect of the proposed new sections 13 and 13A of the Act. While recognising that the current use of regulations to approve new coins or to vary the standard composition of existing coins is also based on the use of this 'Henry VIII' process, it regards this process as being made even less acceptable by the proposed use of disallowable instruments rather than regulations.

As I understand it, the Committee's concerns on this latter aspect reflect its view that such instruments are generally less well drafted and less accessible than regulations. In light of this, it has sought advice on the necessity for using such a device.

It may assist the Committee if I briefly outline the reasons for the earlier amendments to the Act, as well as those currently under consideration. Under the original provisions of the Act, each time a new coin denomination was introduced or the standard composition (metallic composition) of an existing coin was varied the Act had to be amended, although other coin characteristics e.g design, weight and size could be varied by regulation.

In 1981, in the context of amending the Act to provide for the issue of a new coin denomination, the opportunity was taken to amend the Act to enable all such matters to be determined in future by regulation. This was seen as providing for greater flexibility in the type of coin that could be issued without the need for additional legislation. The previous process was considered impractical from the viewpoint of enabling the Royal Australian Mint to develop its numismatic coin program, as approvals for new coins or variations to the composition of existing coins were required on a regular basis.

The reason for now changing the approval arrangements from regulations to disallowable instruments reflects the changed situation with regard to coinage. There has been a substantial increase in recent years in approvals sought for new coins and variations to coin characteristics with the expansion of the RAM's numismatic program and the production of precious metal coins by the Gold Corporation, a statutory authority of the Western Australian Government.

The practicalities of successfully issuing collector coins into what is an extremely competitive market demands, inter alia, elaborate marketing programmes, maintenance of tight production schedules and adherence to advertised release dates. In light of this and the increased administrative burden generated by the expansion of the number of collector coins being issued, it was recognised that there was a need to simplify the administrative process. Considerable administrative effort is required to make regulations.

The Committee's other concern relates to the view that instruments are not, in general, as well drafted nor as accessible as regulations. While I appreciate the Committee's concern in this regard, I would point out that the Attorney-General's Department will be closely involved in the drafting of the instruments. Moreover, as the basic format of the present regulations and the proposed instruments are expected to be very similar, I see no reason why the quality of the instruments should suffer in comparison.

As far as accessability of instruments is concerned, while instruments under the Currency Act will not form part of the Statutory Rules series, the proposed amendments to the Act have been drafted so that all other avenues for scrutiny and accessability currently applying to regulations made under the Act will also apply to instruments under the Act. The Treasurer's determinations will be tabled in both Houses of Parliament and be subject to disallowance, and will be published in the Gazette, as occurs at present.

Furthermore, I would emphasise that it is important to the issuing bodies, the Royal Australian Mint and the Gold Corporation, that such documentation is both well drafted and accessible as they are required to demonstrate to overseas

authorities, as well as their wholesalers and dealers, that their coins have legal tender status. It is of particular importance in the case of overseas authorities, as without that status being established, they would be unable to obtain the necessary sales taxation exemption to enable them to compete with other numismatic products internationally. I would emphasise that exports are an important component of sales of collector coins.

I trust that the above satisfactorily answers the concerns of your Committee.

Yours sincerely

Bob McMullan
Parliamentary Secretary to the Treasurer

ACTING ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

25 NOV 1991

Dear Senator Cooney

I refer to the comments of the Senate Standing Committee for the Scrutiny of Bills contained in the Scrutiny of Bills Alert Digest No. 19 of 1991 (13 November 1991) concerning the Law and Justice Legislation Amendment Bill (No. 2) 1991.

The Committee has drawn attention to subclause 2(2) of the Bill which provides that the proposed amendment to the Judiciary Act 1974 is to commence on a date to be fixed by proclamation, and there is no limit as to when such a proclamation can be made. As noted by the Committee, a time limit for making the proclamation is not appropriate in relation to this amendment as a proclamation cannot be made until the relevant State legislation has been amended. I am pleased that the Committee is satisfied with this explanation.

However, I note that the Committee was also concerned about some other aspects of the amendments to the Judiciary Act.

In relation to the proposed amendments to section 64 of the Judiciary Act 1903, the Committee states that paragraph (b) of the proposed new subsection 64(2) may be regarded as an interference with personal rights and liberties, in so far as it would appear to allow the Commonwealth to exclude (by regulation) a person's right to damages from the Commonwealth for breach of a statutory duty under a State law. I note, however, the Committee's conclusion, on the basis of the explanation provided in the Explanatory Memorandum, that the provision would not appear to trespass unduly on existing rights. I respectfully agree with the Committee's conclusion.

In relation to the proposed Judiciary Act amendments, the Committee also requested further information by way of clarification of what is intended. The Committee mentioned, in particular, the possibility of confusion about who might prescribe laws for the purposes of the new section 64(2)(b) (the Commonwealth or the States).

It is clear that State or Territory laws could only be prescribed by a Commonwealth regulation made under the authority of the new s.64(2)(b). The Acts Interpretation Act 1901 (Cwlth.) (see s.17(q)) provides that the word 'prescribed' in a Commonwealth Act, unless the contrary

intention appears, means prescribed by the Act or by regulations under the Act. I do not consider that this meaning would be displaced by a contrary intention manifest in the new provisions or elsewhere in the Judiciary Act.

The Committee has also commented on the retrospectivity of the amendments to the Commonwealth Places (Application of Laws) Act 1970 and I note that the Committee is satisfied that the retrospective commencement of this amendment is appropriate.

Yours sincerely

(Michael Tate)

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

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWENTIETH REPORT

OF

1991

4 DECEMBER 1991

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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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

TWENTIETH REPORT OF 1991

The Committee has the honour to present its Twentieth Report of 1991 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:

Corporations Legislation Amendment Bill (No. 2) 1991

Migration Amendment Bill (No. 2) 1991

Repatriation Institutions (Staff) Bill 1991

Veterans' Affairs Legislation Amendment Bill (No. 2) 1991

CORPORATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Attorney-General.

The Bill proposes to amend:

- the *Corporations Legislation Amendment Act 1990;* and
- the *Corporations Act 1989,*

primarily to clarify certain aspects of the new national scheme for corporate regulation which came into operation on 1 January 1991.

The major amendments in the Bill concern:

- the introduction of fixed date settlement for market transactions;
- corporate fundraising;
- registration numbers of companies and registrable bodies; and
- miscellaneous substantive and technical amendments.

The Committee dealt with the Bill in Alert Digest No. 19 of 1991, in which it made various comments. The Attorney-General responded to those comments in a letter which was received on 3 December 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Schedule 6 - proposed new section 1368

In Alert Digest No. 19, the Committee noted that Schedule 6 of the Bill provides for the commencement and application of changes to the Corporations Law resulting from the Bill. Various nominated provisions are to be taken to have commenced on 1 January 1991, being the date on which the new corporations scheme commenced. The Committee noted that, though it is not set out in the part of the Explanatory Memorandum relating to this particular Schedule, it appeared that each of the amendments referred to is either of a technical nature or corrects a drafting error. The Committee indicated that it would appreciate the Attorney-General's confirmation that this is the case.

The Attorney-General has confirmed that each of the amendments contained in the Schedule are either of a technical nature or correct a drafting error. An attachment to the Attorney's letter gives more detail on those amendments. The Committee thanks the Attorney-General for this response.

General comment

The Committee also made a general observation that it did not find the Explanatory Memorandum particularly helpful in relation to this Bill, largely because of the difficulty in locating those parts of the memorandum relevant to the provisions which caused concern. The Committee suggested that an index, along the lines of those provided in explanatory memoranda produced within the Treasurer's portfolio in recent months, would have been of assistance.

The Attorney-General has responded as follows:

> Your comments concerning improvements to the format of the explanatory memorandum to make it more reader-friendly have been noted.

The Committee thanks the Attorney-General for this response.

MIGRATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 15 October 1991 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to:

- define 'offences against the Migration Act';
- permit the obtaining of information and documents about the identify and location of illegal entrants;
- provide for the making of regulations to authorise the Minister to limit the number of visas or permits of a particular class which may be granted in a financial year;
- create offences relating to the arranging of marriages or *de facto* relationships for the purposes of obtaining permits to remain in Australia;
- impose new penalties for arranging contrived marital relationships in order to gain Australian residence; and
- provide for the making of regulations in relation to certain matters to be specified by the Minister in a *Gazette* notice.

The Committee dealt with the Bill in Alert Digest No. 18 of 1991, in which it made various comments. The Minister has not yet responded to those comments. However, the Committee has received a submission from the Law Institute of Victoria which both endorses those comments and raises certain additional concerns. While the Committee does not consider the additional concerns to be within its terms of reference, they may, nevertheless, be of interest to Senators.

A copy of the Law Institute's submission is, therefore, attached to this report.

The Committee thanks the Law Institute of Victoria for its submission and for its interest in the work of the Committee.

REPATRIATION INSTITUTIONS (STAFF) BILL 1991

This Bill was introduced into the House of Representative on 6 November 1991 by the Minister for Veterans' Affairs.

The Bill, which complements the *Veterans' Affairs Legislation Amendment Bill (No. 2) 1991*, proposes to:

- effect the separation from Commonwealth employment of staff from the Repatriation General Hospitals when they are integrated into the State systems; and
- set out the terms and conditions for staff who either accept or reject offers of continuing employment with the States.

The Committee dealt with the Bill in Alert Digest No. 19 of 1991, in which it made various comments. The Minister for Veterans' Affairs responded to those comments in a letter dated 28 November 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clauses
Subclauses 3(2) and 4(3)

In Alert Digest No. 19, the Committee noted that clause 3 of the Bill sets out various definitions which are relevant to the remaining provisions of the Bill. One of the definitions set out is 'appropriate State institution'. The Committee noted that subclause 3(2) also provides:

> The Secretary to the Department may, in writing, declare an institution operated by a State or an authority of a State to be an appropriate State institution for the purposes of this Act.

The Committee indicated that this is what it would generally consider to be a 'Henry VIII' provision, as it would allow the Secretary to amend, in effect, the definition of 'appropriate State institution' set out in the primary legislation by declaring an institution which does not fit within the definition set out to, nevertheless, be an appropriate State institution for the purposes of the legislation. Moreover, the Committee noted that the instrument by which the Secretary would effect such a declaration would not be subject to any form of parliamentary scrutiny.

The Committee noted that, similarly, clause 4 of the Bill sets out a definition of 'affected employee'. Subclause 4(3) then provides:

> The Secretary to the Department may, in writing, determine that specified officers or employees employed, or usually employed, at a repatriation institution are not affected employees of the institution.

The Committee suggested that, if enacted, this provision would allow the Secretary to (by written determination) exclude from the operation of the legislation officers or employees who would otherwise come within the definition set out in the primary legislation. The Committee noted that such a determination would not be subject to any form of parliamentary scrutiny. The Committee suggested that, as with the determinations under subclause 3(2), such a determination should be tabled in both Houses of the Parliament and subject to disallowance by either House.

The Committee drew Senators' attention to the provisions, as they may be considered 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:

> I appreciate the Committee's concerns that these two clauses raise questions about whether the legislation inappropriately delegates legislative powers.
>
> In the light of your comments I have arranged for each of these sections to be re-examined.
>
> In the first instance, the discretionary power of the Secretary as set out in subclause 3(2) is established under the express authority of paragraph 3(1)(b). The exercise of the discretionary power contained in subclause 3(2) does not in any way alter the legislative provisions applicable to the interpretation of 'appropriate State institution' in paragraph 3(1)(a).
>
> Paragraph 3(1)(b) was inserted in anticipation of the need to protect the rights of certain former employees, that is, 'affected employees' whose offer of continuing employment by the State or an authority of a State is provided at institutions, other than former repatriation institutions, run by the State. As the precise circumstances and conditions under which the various State governments and authorities would offer such employment could not be predicted, it was not possible to frame a definition of 'appropriate State institution' which would cover all the potential situations which might arise.
>
> The provisions of paragraph 3(1)(b) and subclause 3(2) were thus inserted specifically to cover this situation and their operation is not seen as impinging in any way on the operation of paragraph 3(1)(a). Rather, subclause 3(2) extends the operation of the definition in certain circumstances. I understand that this form of delegation of legislative powers was approved by the Committee in

1985 as reported in Parliamentary Paper No. 317 of 1985 - The Operation of the Australian Senate Standing Committee for the Scrutiny of Bills 1981-1985.

In view of the fact that subclause 3(2) operates in a beneficial way to protect and preserve the rights of certain employees in situations which are not yet precisely definable, it would also seem that it is not necessary to subject the exercise of this discretionary power to Parliamentary scrutiny by making the relevant instrument disallowable. Indeed, to do so might result in the denial of an entitlement clearly encompassed within the meaning of the legislation as drafted.

The Minister goes on to say:

With regard to the discretionary powers outlined in subclause 4(3) the term 'affected employee' was deliberately defined broadly to encompass a person who is or was an employee of the Department who is employed at a repatriation institution, or usually employed at the institution but temporarily absent for any reason.

The reason for framing the definition in this way was to provide for the separation from the Commonwealth for all employees of the repatriation institutions and to encourage them to accept offers of employment from the State government.

There is, however, another category of employee which, while employed at a repatriation institution and would thus ordinarily come within the definition of 'affected employee' in subclause 4(1), are not actually staff of the institution. This includes, for example, members of the Central Development Unit at the Repatriation General Hospital in Heidelberg Victoria. The Central Development Unit is a specialist medical research unit staffed by outposted staff from the Central Office of the Department of Veterans' Affairs in Canberra. Subclause 4(3) was drafted to enable staff in this and similar situations to be excluded from the definition of 'affected employee' as and when the need arose.

The Minister concludes by saying:

> Accordingly, I do not agree that this subclause should be seen as being an inappropriate delegation of legislative power as it does no more than extend the definition in subclauses 4(1) and (2). The discretion outlined in subclause 4(3) is limited to very special circumstances and will operate in such a way as not to adversely affect the rights of any employee. Indeed, the provision is framed specifically with the intention of ensuring that no category of employee should improperly or unfairly be regarded as an 'affected employee'. This clause is thus seen as operating to extend, but not alter, the definition of 'affected employee' in certain instances.
>
> In the circumstances, while I appreciate your concerns in relation to these two provisions, I believe that in view of the very special nature of this legislation to effect the separation from the Commonwealth of employees who transfer to the States' hospital systems, and in the light of the very limited and favourable circumstance in which the discretions will operate, I do not propose to make any changes to the provisions as drafted.

The Committee thanks the Minister for this detailed response.

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 6 November 1991 by the Minister for Veterans' Affairs.

The Bill proposes numerous amendments to the Veterans' Affairs legislation, including provisions for:

- the maximum amount of earnings credit applicable to the ordinary income test, to be indexed in line with the consumer price index;
- extending the co-payment arrangements for pharmaceutical benefits under the Pharmaceutical Benefits Scheme to the Repatriation Pharmaceutical Benefits Scheme from 1 January 1991 and, consequently, payment of a fortnightly allowance to offset the patient contribution;
- changes in arrangements for payment of advances for pharmaceutical allowances;
- changes to include the areas of Iraq and Kuwait as 'operational areas' and specify the period during which certain areas are to be regarded as operational.

The Committee dealt with the Bill in Alert Digest No. 19 of 1991, in which it made various comments. The Minister for Veterans' Affairs responded to those comments in a letter dated 28 November 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity
Paragraphs 19(a), (b) and (d)

In Alert Digest No. 19, the Committee noted that clause 19 of the Bill provides:

> 19. Schedule 2 to the [*Veterans' Entitlements Act 1986*] is amended:
>
> (a) by omitting from Column 2 of item 5 "31 July 1962 to and including 11 January 1973" and substituting "28 May 1963 to and including 19 April 1967";
>
> *Commencement: Immediately after the commencement of the Veterans' Entitlements Act 1986*
>
> (b) by omitting from Column 2 of item 7 "7 July 1965" and substituting "17 August 1964";
>
> *Commencement: Immediately after the commencement of the Veterans' Entitlements Act 1986*
>
> (c) by inserting in Column 2 of item 10 "to and including 9 June 1991" after "1990";
>
> *Commencement: Day of Royal Assent*
>
> (d) by adding at the end the following:
>
> | | | |
> |---|---|---|
> | "11. | The area comprising Iraq and Kuwait | The period from and including 23 February 1991 to and including 9 June 1991". |
>
> *Commencement: 23 February 1991*

The Committee noted that Schedule 2 of the *Veterans' Entitlements Act 1986* describes and defines (in geographical and chronological terms) 'operational areas' and that these definitions are intrinsic to many of the benefits provisions of the legislation. The Committee noted that, while the effect of the proposed amendments would be retrospective, the Explanatory Memorandum indicates that they would be beneficial to veterans. Nevertheless, the Committee noted that the

amendment proposed by paragraph (a) would appear to disentitle veterans who served in the relevant area between 31 July 1962 and 27 May 1963 and between 20 April 1967 and 22 January 1973.

However, the Committee also noted that clause 20 of the Bill would appear to preserve the rights of any veterans who might otherwise be adversely affected by the amendments proposed by paragraph 19(a). The Committee noted that, according to the Explanatory Memorandum, the saving provisions operate in relation to claims applications or benefits granted on or after 7 November 1991 (the day after the legislation was introduced) and claims or applications not finally determined before 8 November 1991,

> in which case the claim or application will be determined as though the amendments proposed by clause 19 had not been made.

The Committee indicated that it would appreciate some further information on the intention and the effect of these proposed amendments. The Committee indicate that, in particular, it would appreciate the Minister's advice as to whether a person who served in a relevant area at a time which is to be excluded from the definition by these proposed amendments and who, say, sustained an injury which does not manifest itself until after 8 November 1991 would, as a result of the amendments, be denied a benefit under the legislation.

The Minister has responded as follows:

> In relation to your request for further information about the proposed changes to the operational areas and dates in Schedule 2 to the Veterans' Entitlements Act, the amendments to the commencing and closing dates for operational service in the Malayan campaign areas described in Items 5 and 7 of Schedule 2

represent the final changes arising out of the Federal Court decisions in Doessel and Davis.

You may recall that the Committee raised questions about similar changes to the Act contained in the Veterans Affairs Legislation Amendment Bill 1990 and on which I wrote to you in November last year explaining the reasons for these changes.

The explanation for the changes is that as a result of the Doessel and Davis decisions, which gave a different understanding to the meaning of the term 'allotted for duty', benefits could be obtained under the Act in respect of service which was not operational; an outcome that was never intended. Even with the Federal Court decisions in Doessel and Davis, this outcome would not have been possible except for the enactment of the Veterans' Entitlements Act in 1986 when the closing dates for operational service in respect of a number of the areas described in Schedule 2 were, for reasons which cannot be ascertained, changed to 11 January 1973; that being the end date for operational service in Vietnam.

These changes did not have any practical effect and did not change in any way the entitlement provisions relating to operational service. Nor were they intended to. It was not until the Federal Court changed the understanding of the term 'allotted for duty' that difficulties arose. Prior to that, 'allotted for duty' had a special meaning which linked the service associated with that allotment to service in an operational area during a period in which the nature of the service performed involved elements of risk and danger over and above those associated with normal peacetime defence service.

When the Federal Court decision attributed to 'allotted for duty' the ordinary meaning of being posted in accordance with the usual administrative arrangements applying in the armed forces, it became possible for a person who was posted to a unit, ship or base situated within any of the areas described in Schedule 2 before 11 January 1973, but after the period in which the area in question actually ceased to be operational, to qualify

as having met the prescribed conditions for operational service.

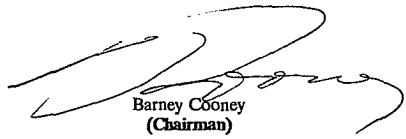
As I have indicated, this result, arising from the combination of the unexplained amendments to the closing dates in Schedule 2 when the Veterans' Entitlements Act was introduced in 1986 and the later Federal Court decisions in Daessel and Davis, was unintended. To have not acted to correct it would have been unconscionable.

A review was thus undertaken in consultation with the Department of Defence to determine the correct commencing and closing dates for operational service in respect of all the areas listed in Schedule 2. Some of these changes were made in the Budget sittings in 1990. However, at the time, Defence was still conducting enquiries through its various Service Offices and it has not been until now that the legislation could be amended to change the dates in relation to Malayan service in the areas described in items 5 and 7 to reflect the periods during which those areas were actually operational.

The Minister concludes by saying:

In answer to your final question about the operation of the savings provisions the situation is that the legislation will protect the rights and entitlements of those veterans who have established entitlement under the existing provisions or who have lodged claims or applications on or before 7 November 1991, but which are not finally determined before 8 November 1991. Your observation that a person who served in a relevant area at a time which is to be excluded from the definition by the proposed amendments and who sustained an injury which does not manifest itself until after 8 November 1991 would not be entitled to benefits under the act is correct. I should add, however, that the incidence of such cases is likely to be very small and that such persons would still have recourse to the usual compensation provisions applying to service personnel in peacetime.

The Committee thanks the Minister for this detailed response.



Barney Cooney
(Chairman)

Attorney-General

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

91/17982
No. 97149

Senator B. Cooney,
Chairman,
Standing Committee for the Scrutiny of Bills,
The Senate,
Parliament House,
CANBERRA A.C.T. 2600

Dear Senator Cooney,

I refer to the report of the Senate Standing Committee for the Scrutiny of Bills on the Corporations Legislation Amendment Bill (No. 2) 1991 contained in Alert Digest No. 19 of 1991.

The Committee referred to Schedule 6 of the Bill which provides for the commencement and application of changes to the Corporations Law resulting from the Bill. I now give the confirmation sought by the Committee that each of the amendments which are proposed to commence on 1 January 1991 are either of a technical nature or correct a drafting error. The attachment to this letter provides the explanations for each of these amendments.

Your comments concerning improvements to the format of the explanatory memorandum to make it more reader-friendly have been noted.

Yours sincerely,

MICHAEL DUFFY

ATTACHMENT

CORPORATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1991

SCHEDULE 6

A. EXPLANATIONS FOR EACH AMENDMENT LISTED IN SCHEDULE 6 WHICH IS TAKEN TO HAVE COMMENCED ON 1 JANUARY 1991

PROPOSED SECTION 1368

The definition of "property" in subsection 920(1)

The word "property" is defined in subsection 920(1) for the purpose of Part 7.10 (the National Guarantee Fund).

The amendment to the definition of "property" inserts "securities" in the definition.

This is relevant particularly to claims against the National Guarantee Fund under Division 8 of Part 7.10 relating to dealer insolvency. Section 963 requires the claimant to show that "property" was entrusted to or received by the dealer on behalf of or as trustee for a person. The amendment ensures the coverage of, for example, FAST securities for which certificates are not issued. The comparable definition in the Securities Industry Act referred to "money, securities, and documents of title to, and instruments of transfer relating to, securities". This amendment thus confirms that the coverage has not been reduced by any change of words from those in the Securities Industry Act 1980.

Since the amendment is technical in that it simply confirms the intention of the legislation, the Government considers that the amendment should be retrospective.

Subsection 927(5A)

Background

Sub-section 927(2) expressly empowers the Board of the Securities Exchanges Guarantee Corporation which manages the National Guarantee Fund to delegate all or any of its powers to a management sub-committee except the power to delegate (section 927), to determine that a payment be made from the Fund into a securities industry development account (section 944) and to determine that a late claim is not barred (subsections 954(5) (in Division 6) and 969(3) (in Division 8)).

Proposed amendment

It is proposed to insert subsection 927(5A) which provides that a delegation under section 927 continues in force even if there is a change in the membership of the Board or of the sub-committee. This amendment confirms the general law

relating to delegation. It is thus a technical amendment and as such the Government considers that it should be retrospective.

Paragraph 961A(b)

Background

Section 961A (in Division 7 of Part 7.10 - Unauthorised transfer) deals with claims on the National Guarantee Fund made under sections 957 and 958. So as to provide an appropriate jurisdictional nexus, it provides that a claim may not be made under sections 957 or 958 of the Law of a particular jurisdiction unless on the day of the unauthorised execution the dealer was carrying on a securities business in that jurisdiction or if the dealer was not so carrying on such a business on the day, the last securities business that the dealer carried on before that day was carried on in that jurisdiction.

Proposed amendment

The amendment inserts in paragraph 961A(b) a requirement that the dealer was not carrying on a securities business in any other jurisdiction on the day of the unauthorised execution. The amendment makes this provision consistent with the nexus provisions in proposed Divisions 6A, 6B and 6C and the proposed amendment to section 966A.

This is a technical amendment as such the Government considers that it should be retrospective. It does not change the practical effect of the provision.

Paragraph 966A(b)

Background

Section 966A deals with claims against the National Guarantee Fund in respect of insolvent members (Division 8 of Part 7.10). This section requires an appropriate nexus between the dealer and the jurisdiction to enable a claim to be made under the Law of that jurisdiction in respect of property entrusted to or received by a dealer who subsequently became insolvent (Division 8).

So as to provide an appropriate jurisdictional nexus, it provides that a claim cannot be made under Division 8 of the Law of a jurisdiction unless on the day the dealer became insolvent the dealer was carrying on a securities business in that jurisdiction or if the dealer was not so carrying on such a business on the day, the last securities business that the dealer carried on before that day was carried on in that jurisdiction.

Proposed amendment

The amendment inserts in paragraph 966A(b) a requirement that the dealer was not carrying on a securities business in any other jurisdiction on the day of the unauthorised execution.

The amendment makes this provision consistent with the nexus provisions in proposed Divisions 6A, 6B and 6C and mirrors the proposed amendment to section 961A.

This is a technical amendment and as such the Government considers that it should be retrospective. It does not change the practical effect of the provision.

Subparagraph 1069(1)(e)(iii)
Paragraph 1069(1)(f)

By subparagraph 1069(1)(e)(iii) of the Law, trust deeds for prescribed interests are required to contain a covenant binding the trustee or representative 'to keep proper books of account in relation to those prescribed interests'.

The previous corresponding provisions, subparagraph 168(1)(c)(ii) of the Companies Act and Codes, bound the trustee or representative to 'keep or cause to be kept proper books of account'.

Prior to 1 January 1991, it had been the practice for trustees to cause the management company to keep the books of account. The change of wording has given rise to a suggestion that trustees must now keep the books themselves. At the same time, many trustees have continued their former practice, and concerns have arisen that they may thereby have breached their obligations.

No change to the law in this area was intended with the commencement of the Law on 1 January 1991, and it seems desirable to allay any concerns about potential inadvertent liability by making the amendment retrospective to that date. No one will be disadvantaged by the retrospective application of the amendment. The amendment simply makes it clear that trustees are able to continue to cause the management company to keep the books of account and therefore is essentially technical in nature.

For similar reasons, the amendment to paragraph 1069(1)(f) which will bring it into line with paragraph 168(1)(ca) of the Companies Act and Codes, is also to be made retrospective to 1 January 1991.

Paragraphs (b) and (ba) of the definition of 'company' in s. 9
Subsection 261(1) (definition of "company")
Subsections 265(4), (5), (6) and (9)
Subsections 272(1) and (3)
Subsection 273(1) and (4)
Subsections 275(2) and (4)
Sections 275A, 276, 276AA and 276A

Proposed subs.1368(3) of the Corporations Law provides that the following provisions of the Law, as in force immediately after the commencement of s.8 of the Corporations Legislation Amendment Act (No.2) 1991, are taken to have commenced on 1 January 1991: paragraphs (b) and (ba) of the definition of

"company" in s.9; subs.261(1); subss.265(4), (5), (6) and (9); subs.272(1) and (3); subss.273(1) and (4); subss.275(2) and (4); and ss.275A, 276, 276AA and 276A.

These provisions all relate to Part 3.5 of the Corporations Law, which concerns the registration and priority of charges created by bodies corporate which are registered under the Law.

The need for the amendments was identified in consultation with the Law Council of Australia and two legal firms. The Law Council made a formal submission to the Attorney-General that certain deficiencies relating to Part 3.5 (which are all corrected by the amendments) needed to be remedied with retrospective effect to 1 January 1991.

The amendments correct a number of technical defects in the Corporations Law which have the potential effect of making certain charges void in Australian jurisdictions outside the place of incorporation of the company involved. These effects were not intended.

The amendments mainly relate to the special meaning of "company" in section 273 of the Corporations Law. They have the effect of extending the reach of the Corporations Law charges provisions to apply, for example, not only to property within the particular jurisdiction of companies incorporated within that jurisdiction, but also to property within that jurisdiction of companies incorporated in other Australian States and Territories. These amendments will ensure that the reach of the Corporations Law charges provisions will be exactly the same as the reach of the equivalent co-operative scheme provisions. Without these amendments, charges over a company's property located outside the State of incorporation of that company could be invalid under the law of the place where the property is located, even though the charges would be valid in the State where the company is incorporated.

The other amendments in the Schedule correct drafting errors, make more accurate references to the register of charges (given that it is now a computerised national register), and introduce more certain transitional provisions for the charges of bodies the status of which have been, or may in the future be, altered in various ways explained in the Explanatory Memorandum.

All of the amendments are technical in nature.

Retrospectivity to January 1991 will promote commercial certainty by avoiding the possibility of an unexpected loss of rights arising from the fact that the commercial community has reasonably assumed that the law relating to charges had not been altered upon the commencement of the Corporations Law. In its submission, the Law Council emphasised the potential for commercial uncertainty if the amendments were not made retrospective to 1 January 1991.

In terms of the criteria which the Committee has indicated

that it will apply to questions of retrospectivity, these amendments, in the Government's view, will both have a beneficial effect and redress minor technical deficiencies.

Paragraph (a) of the definition of 'clients' segregated account' in section 9

The proposed amendment to the definition of "clients' segregated account" clarifies that the account can be maintained, whether in Australia or elsewhere with an Australian bank.

The amendment confirms the original meaning which may not have been made clear. It is thus a technical amendment and the Government considers that it should be retrospective.

Section 369

The proposed amendment omitting the word "company" from the section reflects the fact that bodies corporate may be duly incorporated with limited liability or no liability under Australian laws which are not "Australian company laws" - for example, co-operatives legislation. As a result of this amendment, such bodies will be able to give notice of the fact of their limited liability or no liability status by the inclusion of the relevant words at the end of their names, as they are generally required to do by the legislation under which they are incorporated.

The amendment corrects a minor drafting error and gives s. 369 the same effect as its predecessor, section 566 of the Companies Act.

The other amendment to this section merely corrects a grammatical error.

The amendments to section 369 are thus technical and the Government considers that they should be retrospective.

Paragraph 874(1)(b)

Section 874 empowers the Court, on the application of the Commission to freeze the bank accounts of licensees and former licensees when certain criteria are met.

Paragraph 874(1)(b) describes one of these criteria - that there has been undue delay, or unreasonable refusal on the person's part in paying, applying or accounting for trust money as provided by "this Part" (Part 7.6).

The amendment to this paragraph inserts "or a corresponding previous law" after "Part".

It thus makes it clear that the provision applies where there has been a failure to comply with Part 7.6 or a corresponding previous law.

The amendment corrects a minor drafting error and the Government considers it should be retrospective.

Paragraph 1224(1)(c)

The proposed amendment makes the wording of this provision relating to clients' segregated accounts consistent with that used in section 9 (the definition of "client's segregated account") and section 1209.

This amendment clarifies the initial intention of the legislation. It is a technical amendment and the Government considers it should be retrospective.

B. APPLICATION OF CERTAIN CHANGES

PROPOSED SECTION 1369

Proposed sub-section 1369(1)

Section 959 determines how and when a claim against the National Guarantee Fund in respect of an unauthorised transfer of securities (under Division 7 of Part 7.10) may be made.

In Schedule 1 of this Bill it is proposed that the existing section 959 be repealed and a new section 959 (which provides a different procedure) be substituted.

Sub-section 1369(1) provides that claims under Division 7 of Part 7.10 in respect of a loss that a person became aware of before the commencement of that amendment must be made within the time limits and in the manner prescribed by section 959 as it was before the amendment commenced.

Sub-section 1369(2)

The effect of proposed 1369(2) is to ensure that the law applying to prospectuses issued before the commencement of the Bill continues to apply to those prospectuses. Accordingly, any rights and liabilities which may result from conduct prior to that commencement will be preserved.

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3 December 1991

Mr. Stephen Argument
Secretary
Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

(Facsimile: (06) 277 3289)

Dear Mr. Argument,

MIGRATION AMENDMENT BILL (NO.2) 1991

I attach the submission of the Law Institute of Victoria in relation to the Migration Amendment Bill (No.2) 1991 for your attention.

I understand that Senator Cooney wishes the submission to be distributed to all members of the Senate.

It would be appreciated if you would confirm this with Senator Cooney and attend to this matter.

Should you have any queries regarding the Law Institute's submission, please do not hesitate to contact me.

Yours faithfully,

LAURIE DALTON
Research Solicitor

LAW INSTITUTE OF VICTORIA

SUBMISSION ON THE MIGRATION AMENDMENT BILL (NO.2) 1991

EXECUTIVE SUMMARY

1. The penalties prescribed throughout the Bill appear to be grossly excessive.

2. Legal professional privilege should be expressly retained as a defence to a Notice served under proposed Section 22A(1).

3. A special defence should be available to qualified legal practitioners in relation to the provision of a document which is false or misleading in a material particular where that document has been supplied in accordance with a client's instructions.

4. The attempt of the legislature to bind the Crown raises serious issues of privacy which warrant further consideration.

5. Decisions to be made by the Minister with respect to providing further criteria for visas or permits based on limited quotas should be subject to parliamentary scrutiny.

6. Attempts to legislate in respect of marriages solemnised outside the jurisdiction of Australia may encounter constitutional difficulties.

7. The Law Institute opposes the reversal of the onus of proof onto persons arranging marriages to show they believed on reasonable grounds that the marriage would result in a genuine and continuing relationship.

8. Qualified legal practitioners providing information on clients' instructions should not carry responsibility for the truth or otherwise of instructions received in good faith.

LAW INSTITUTE OF VICTORIA

SUBMISSION ON THE MIGRATION AMENDMENT BILL (NO.2) 1991

1. Introduction

1.1 The Law Institute of Victoria appreciates the opportunity of commenting on the provisions of the Migration Amendment Bill (No. 2) 1991 (hereinafter referred to as "the Bill"). The purpose of this submission is to comment on certain provisions of the Bill now before the Federal Parliament and to seek certain amendments. The submission identifies a number of defects in those provisions and proposes alternative means of giving effect to their underlying policy.

1.2 The submission will be confined to the contents of the Bill without commenting on the underlying policy of strengthening the effectiveness of Australia's immigration border controls and the general approaches taken to achieve this objective.

2. Commentary

2.1 At the outset the Institute questions the appropriateness of the penalties imposed throughout the entire Bill. Firstly it is submitted that the penalties throughout appear to be grossly excessive given the nature of the offences. While the Institute appreciates the need for penalties to be set at such a level as to have a strong deterrent effect, it is nevertheless important to have at least some semblance of consistency and a sense of proportion when fixing penalties so as to make the punishment fit the crime and maintain the integrity

of the criminal justice system. It is submitted that each of the penalties stated within the Bill should be reviewed in the light of these comments. Secondly the Law Institute considers that each of the penalties should have a fixed amount maximum fine as an alternative to imprisonment, such fine also being set at an appropriate level.

Clause 3

2.2 Proposed Section 22A(1) gives the Minister power to obtain information and documents about illegal entrants if the Minister "has reason to believe" certain facts. It is submitted that the Minister should not be empowered to serve a notice under sub-section (1) where for any reason he does not actually believe those facts.. Accordingly the Section should commence with the words "If the minister believes upon reasonable grounds...".

2.3 Information, documents and copies of documents must be given to the Minister within the time specified in the notice under proposed sub-section 22A(1). The three references to "period" should all be preceded with the word "reasonable".

2.4 In proposed Section 22C the reference to "paragraph 22A(1)(c)" should be amended to delete the reference to paragraph (c) so as to refer to the whole of Section 22A(1). It is submitted that a person should be entitled to be paid reasonable compensation not only for making copies but also for providing information or documents pursuant to a notice under sub-section (1).

2.5 Proposed Section 22D provides a reasonable excuse defence for a failure to comply with a notice under Section 22A(1). However there is no specific defence open to qualified legal advisers and their clients on the ground of

legal professional privilege. The Law Institute is strongly of the opinion that the fundamental common law principle of legal professional privilege as expounded by the High Court of Australia in Baker v Campbell (1983) 153 C.L.R. 52 should not be abrogated by the provisions of Division 1A. It is submitted that the Minister should not be privy to the communications between a client and his or her legal adviser which are the subject of this privilege as this would prove to be a major disincentive to the full and frank disclosure of all relevant material facts by the client to the solicitor. Without such candour within the professional relationship, a client cannot be assured of receiving complete and accurate advice with respect to his or her legal obligations. It is submitted that, in order to clarify doubt which is otherwise certain to arise, the legislation should specifically state that the defence of legal professional privilege applies to both legal advisers and their clients who are in receipt of a notice under Section 22A(1).

2.6 It is suggested that the words at the commencement of Section 22D(2) "The following are 2 of the reasonable excuses for refusing or failing to comply with a notice:" should be deleted and substituted with the words "Within subsection (1) the reference to reasonable excuse includes but is not limited to the following:".

2.7 The word "or" should appear after the end of Section 22D(2)(a) to confirm that paragraphs (a) and (b) are to be read disjunctively.

2.8 The Law Institute is concerned that proposed Section 22G partially abrogates the long-standing common law privilege against self-incrimination. This privilege arises from the principle that one should not be compelled to answer questions which may prove to be an admission of guilt of a criminal offence and that it is for the prosecution to advance sufficient evidence of an offence

beyond reasonable doubt. While Section 22G maintains the safeguard that information or documents provided or obtained as a direct or indirect consequence are not admissible in criminal proceedings, the Institute would prefer to see the privilege retained without any abrogation whatsoever.

2.9 Proposed Section 22G contains ungrammatical wording the meaning of which is not at all clear. Is it intended by the wording of (a) that either the fact that information is given or the fact that the document or copy is produced is not admissible in evidence against the person? Is it intended that the information given or document or copy produced is not admissible. It is imperative that the wording be amended so as to clarify the intention of the legislature.

2.10 Proposed Section 22F prohibits the provision of a document pursuant to a notice which is false or misleading in a material particular. It is submitted that a further sub-section should be introduced providing a further defence where the document or copy is produced by a qualified legal practitioner on the instructions of his or her client. Legal practitioners generally are obliged to comply with their client's instructions regardless of whether or not they suspect the veracity of any statement made. To not have an appropriate defence for legal practitioners will result in them being in the embarrassing position of not only having to be advocates but also having to play the role of judge and jury.

2.11 Pursuant to proposed Section 22J, the Minister may retain possession of a document for as long as is necessary for the purposes of the Act. It is submitted that this time period should be qualified by inserting the word "reasonably" before the word "necessary" in sub-section (1).

2.12 *Proposed Section 22J(3) states* "The certified copy *must* be received in all courts and tribunals as evidence as if it were the original". This provision effectively deems a document to be original evidence. It is submitted that the certified copy should be admissible as if it were an original document but it should not be taken as proving the authenticity of the original document. While this may appear to be a mere fine point, it is foreseeable that circumstances could arise in which it assumes the greatest importance. Accordingly an amendment clarifying this point is warranted.

2.13 This Institute is particularly concerned at proposed Section 22K which provides that Division 1A is to bind the Crown in right of the Commonwealth, the States and the Territories. While this section attempts to clarify any ambiguity regarding the doctrine of shield of the crown, it raises serious issues of privacy in that a great deal of information is made available to Federal and State government agencies but at no time was it ever contemplated that the information would be made available for the purpose of assisting the Minister in investigations of this nature. For this reason it is submitted that this section should be deleted.

2.14 A further possible problem with proposed Section 22K is that arguably it could be constitutionally invalid as going beyond what is necessarily incidental to the heads of power in Section 51 of the Commonwealth Constitution. Some uncertainty and confusion may exist because of the possibility that this provision will be declared to be wholly or partially invalid.

Clauses 4 and 5

2.15 The purpose of proposed sub-section 23(3A) is to allow the Minister to prescribe a further criterion based on the number of visas granted of a particular class during a particular financial year. The notice is to be published in the Government Gazette. Any decisions made with respect to such notices would not be subject to any form of parliamentary scrutiny. The Law Institute agrees with the Senate Scrutiny of Bills Committee that it is preferable that such scrutiny is available having regard to the effect of such notices. Accordingly this provision amounts to an improper delegation of legislative power. *Proposed new Section 33(3A) makes substantially identical* amendments in relation to applications for entry permits. Accordingly the same comments are equally applicable to that sub-section. In addition the Institute is concerned that these provisions allow for such notices to be published in the Government Gazette on a retrospective basis.

2.16 In proposed Sections 23(3A) and 33(3A) the words "in spite of" should be deleted as being inappropriate and substituted with either "notwithstanding" or "regardless of".

2.17 Proposed Sections 23(3B) and 33(3B) provide that when a criterion prevents the grant in a financial year of any more visas or permits of a particular class, any outstanding applications for a visa or permit of that class is taken not to have been made. It is submitted that any such applications should be transferred over with priority to the following financial year and not simply lapse as if they were never made.

Clause 8

2.18 Paragraph (b) of the proposed definition of "preliminary permit" is uncertain and devoid of precision. It refers to a permit or a visa "that is usually applied for...". It is submitted that such a definition is unintelligible to many who are not familiar with the migration legislation in its entirety.

2.19 The Institute is concerned by the attempt of the Parliament in proposed Section 83C(2) to regulate marriages solemnized outside the jurisdiction of Australia, particularly as there may be a lack of conformity with the marriage customs and law of other jurisdictions. To regulate such marriages may well be beyond the constitutional jurisdiction of Australia.

2.20 The Law Institute opposes the reversal of the onus of proof in proposed Section 83D so as to require any person arranging a marriage between other persons for the purpose of assisting one of those persons to get a stay permit, to prove under sub-section (3) a belief on reasonable grounds that the marriage would result in a genuine and continuing relationship. It is submitted that this reversal of the onus of proof trespasses unduly on personal rights and liberties. Given the seriousness of the offence as indicated by the proposed penalty ($100,000 or imprisonment for 10 years, or both) it is important that the prosecution be required to prove all elements of the offence as is the case with all other serious offences.

2.21 The use of terminology relating to the arranging of marriages in proposed Section 83D(1) is unfortunate given that the words "arranged marriage" have another common meaning and connotation unrelated to that intended within this sub-section. The Institute suggests that a more appropriate wording might be "A person must not contrive a marriage..." as this avoids confusion

and more accurately denotes the type of conduct which the Parliament is seeking to prevent.

2.22 The defence in proposed Section 83D(3) requires that the defendant "believed on reasonable grounds" that the marriage would result in a genuine and continuing marital relationship. Accordingly a defendant who honestly held such a belief although without reasonable grounds would not be entitled to rely on that defence. It is submitted that a subjective standard should be applied by deleting the reference to "on reasonable grounds" and inserting the word "honestly" before "believed".

2.23 Proposed Section 83E deals with the arranging of a pretended de facto relationship. It is submitted that subjective knowledge or belief of the true situation should be the requirement without confusing the issue by including the objective standard "on reasonable grounds".

2.24 Legal practitioners once again can be placed in an invidious position by the application of proposed Section 83E. It is arguable that a legal practitioner, who suspects his or her client is not being truthful despite having warned the client of the consequences, and who complies with the client's instructions, may appear to have contravened this provision. Accordingly the Institute recommends that this proposed section be deleted, or at least provide a specific defence for legal practitioners who are acting on client's instructions.

2.25 Proposed Section 83F(1) creates an offence of applying for a stay permit on the ground of a marriage or de facto relationship when there is no intention to live permanently in a genuine and continuing marital relationship. Sub-section (3) creates a further offence of nominating an applicant where no such intention exists. It is submitted that qualified legal practitioners acting on their

clients' instructions should be specifically excluded from the operation of this section.

2.26 An offence of making a false or misleading statement is introduced by proposed Section 83G. Paragraph (3)(d) requires the person making the statement or giving the information to make appropriate inquiries to satisfy himself or herself that the statement or information was neither false nor misleading. This raises the concern of the extent to which legal practitioners are obliged to make enquiries to satisfy themselves of the truthfulness of material particulars provided by their clients. It is submitted that legal advisers acting on their clients' instructions should be totally exempt from the operation of this section. A legal practitioner should never be required to carry responsibility for the truth or otherwise of the instructions received in good faith.

Clause 9

2.27 In relation to proposed Section 181(1A) the same comments in relation to parliamentary scrutiny apply as expressed in relation to Clauses 4 and 5 above.

Minister for Veterans' Affairs
Ben Humphreys, MP
Member for Griffith

28 NOV 1991

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

Dear Senator Cooney

On 14 November 1991 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 19 of 13 November 1991 in relation to the Repatriation Institutions (Staff) Bill 1991 and the Veterans' Affairs Legislation Amendment Bill (No.2) 1991.

2. The concerns of the Committee in relation to the Repatriation Institutions (Staff) Bill 1991 (the Staff Bill) arise in respect of subclauses 3(2) and 4(3).

3. Clause 3 of the Staff bill deals with various interpretations and defines "**appropriate State institution**", in relation to a State to mean -

"(a) a repatriation institution in the State that has become an institution operated by the State or an authority of the State; or

(b) any other institution in the State declared under subsection (2) to be an appropriate State institution;"

4. The meaning of "affected employee" is set out in clause 4 and refers to officers or employees of the Department of Veterans' Affairs who are, or were at a particular time, including a time before commencement, employed at a repatriation institution even if temporarily absent from that institution for any reason.

5. Both of these clauses, as your Committee notes, are qualified by subclauses which give the Secretary to the Department of Veterans' Affairs certain discretionary powers. Subclause 3(2) provides that the Secretary to

the Department may, in writing, declare an institution operated by a State or authority of a State to be an appropriate State institution for the purposes of this Act. Similarly subclause 4(3) enables the Secretary to determine, in writing, that certain employees are not "affected employees" of a repatriation institution.

6. I appreciate the Committee's concerns that these two clauses raise questions about whether the legislation inappropriately delegates legislative powers.

7. In the light of your comments I have arranged for each of these sections to be re-examined.

8. In the first instance, the discretionary power of the Secretary as set out in subclause 3(2) is established under the express authority of paragraph 3(1)(b). The exercise of the discretionary power contained in subclause 3(2) does not in any way alter the legislative provisions applicable to the interpretation of "appropriate State institution" in paragraph 3(1)(a).

9. Paragraph 3(1)(b) was inserted in anticipation of the need to protect the rights of certain former employees, that is, "affected employees" whose offer of continuing employment by the State or an authority of a State is provided at institutions, other than former repatriation institutions, run by the State. As the precise circumstances and conditions under which the various State governments and authorities would offer such employment could not be predicted, it was not possible to frame a definition of "appropriate State institution" which would cover all the potential situations which might arise.

10. The provisions of paragraph 3(1)(b) and subclause 3(2) were thus inserted specifically to cover this situation and their operation is not seen as impinging in any way on the operation of paragraph 3(1)(a). Rather, subclause 3(2) extends the operation of the definition in certain circumstances. I understand that this form of delegation of legislative powers was approved by the Committee in 1985 as reported in Parliamentary Paper No.317 of 1985 - The Operation of the Australian Senate Standing Committee for the Scrutiny of Bills 1981-1985.

11. In view of the fact that subclause 3(2) operates in a beneficial way to protect and preserve the rights of certain employees in situations which are not yet precisely definable, it would also seem that it is not necessary to subject the exercise of this discretionary power to Parliamentary scrutiny by making the relevant instrument disallowable. Indeed, to do so might result in the denial of an entitlement clearly encompassed within the meaning of the legislation as drafted.

12. With regard to the discretionary powers outlined in subclause 4(3) the term "affected employee" was

deliberately defined broadly to encompass a person who is or was an employee of the Department who is employed at a repatriation institution, or usually employed at the institution but temporarily absent for any reason.

13. The reason for framing the definition in this way was to provide for the separation from the Commonwealth for all employees of the repatriation institutions and to encourage them to accept offers of employment from the State government.

14. There is, however, another category of employee which, while employed at a repatriation institution and would thus ordinarily come within the definition of "affected employee" in subclause 4(1), are not actually staff of the institution. This includes, for example, members of the Central Development Unit at the Repatriation General Hospital in Heidelberg Victoria. The Central Development Unit is a specialist medical research unit staffed by outposted staff from the Central Office of the Department of Veterans' Affairs in Canberra. Subclause 4(3) was drafted to enable staff in this and similar situations to be excluded from the definition of "affected employee" as and when the need arose.

15. Accordingly, I do not agree that this subclause should be seen as being an inappropriate delegation of legislative power as it does no more than extend the definition in subclauses 4(1) and (2). The discretion outlined in subclause 4(3) is limited to very special circumstances and will operate in such a way as not to adversely affect the rights of any employee. Indeed, the provision is framed specifically with the intention of ensuring that no category of employee should improperly or unfairly be regarded as an "affected employee". This clause is thus seen as operating to extend, but not alter, the definition of "affected employee" in certain instances.

16. In the circumstances, while I appreciate your concerns in relation to these two provisions, I believe that in view of the very special nature of this legislation to effect the separation from the Commonwealth of employees who transfer to the States' hospital systems, and in the light of the very limited and favourable circumstance in which the discretions will operate, I do not propose to make any changes to the provisions as drafted.

17. In relation to your request for further information about the proposed changes to the operational areas and dates in Schedule 2 to the Veterans' Entitlements Act, the amendments to the commencing and closing dates for operational service in the Malayan campaign areas described in Items 5 and 7 of Schedule 2 represent the final changes arising out of the Federal Court decisions in Doessel and Davis.

18. You may recall that the Committee raised questions about similar changes to the Act contained in the Veterans Affairs Legislation Amendment Bill 1990 and on which I wrote to you in November last year explaining the reasons for these changes.

19. The explanation for the changes is that as a result of the Doessel and Davis decisions, which gave a different understanding to the meaning of the term "allotted for duty", benefits could be obtained under the Act in respect of service which was not operational; an outcome that was never intended. Even with the Federal Court decisions in Doessel and Davis, this outcome would not have been possible except for the enactment of the Veterans' Entitlements Act in 1986 when the closing dates for operational service in respect of a number of the areas described in Schedule 2 were, for reasons which cannot be ascertained, changed to 11 January 1973; that being the end date for operational service in Vietnam.

20. These changes did not have any practical effect and did not change in any way the entitlement provisions relating to operational service. Nor were they intended to. It was not until the Federal Court changed the understanding of the term "allotted for duty" that difficulties arose. Prior to that, "allotted for duty" had a special meaning which linked the service associated with that allotment to service in an operational area during a period in which the nature of the service performed involved elements of risk and danger over and above those associated with normal peacetime defence service.

21. When the Federal Court decision attributed to "allotted for duty" the ordinary meaning of being posted in accordance with the usual administrative arrangements applying in the armed forces, it became possible for a person who was posted to a unit, ship or base situated within any of the areas described in Schedule 2 before 11 January 1973, but after the period in which the area in question actually ceased to be operational, to qualify as having met the prescribed conditions for operational service.

22. As I have indicated, this result, arising from the combination of the unexplained amendments to the closing dates in Schedule 2 when the Veterans' Entitlements Act was introduced in 1986 and the later Federal Court decisions in Doessel and Davis, was unintended. To have not acted to correct it would have been unconscionable.

23. A review was thus undertaken in consultation with the Department of Defence to determine the correct commencing and closing dates for operational service in respect of all the areas listed in Schedule 2. Some of these changes were made in the Budget sittings in 1990. However, at the time, Defence was still conducting

enquiries through its various Service Offices and it has not been until now that the legislation could be amended to change the dates in relation to Malayan service in the areas described in Items 5 and 7 to reflect the periods during which those areas were actually operational.

24. In answer to your final question about the operation of the savings provisions the situation is that the legislation will protect the rights and entitlements of those veterans who have established entitlement under the existing provisions or who have lodged claims or applications on or before 7 November 1991, but which are not finally determined before 8 November 1991. Your observation that a person who served in a relevant area at a time which is to be excluded from the definition by the proposed amendments and who sustained an injury which does not manifest itself until after 8 November 1991 would not be entitled to benefits under the act is correct. I should add, however, that the incidence of such cases is likely to be very small and that such persons would still have recourse to the usual compensation provisions applying to service personnel in peacetime.

25. I trust the above explanations meet the Committee's concerns. Should you require further information the contact officer in my Department is Fred Buckley, Legal Services Group, telephone number 2896540.

Yours sincerely

(BEN HUMPHREYS)

cc Stephen Argument
Secretary
Standing Committee for the
Scrutiny of Bills
SG49.5
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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWENTY-FIRST REPORT

OF

1991

11 DECEMBER 1991

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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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

TWENTY-FIRST REPORT OF 1991

The Committee has the honour to present its Twenty-First Report of 1991 to the Senate.

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

Bankruptcy Amendment Bill 1991

Civil Aviation (Carriers' Liability) Amendment Act 1991

Migration Amendment Bill (No. 2) 1991

National Rail Corporation Agreement Bill 1991

National Road Transport Commission Bill 1991

Therapeutic Goods Amendment Bill 1991

Transport and Communications Legislation Amendment Act 1991

BANKRUPTCY AMENDMENT BILL 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister Representing the Attorney-General.

The Bill proposes to amend the *Bankruptcy Act 1966,* to amend the provisions relating to discharge from and annulment of bankruptcy, contributions by bankrupts to the bankrupt estate from their income and the practice and procedure to be followed at meetings of creditors.

The Committee dealt with the Bill in Alert Digest No. 20 of 1991, in which it made various comments. The Minister for Justice and Consumer Affairs responded to those comments in a letter dated 4 November 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Clause 4 - Proposed new paragraph 6B(2)(a)

In Alert Digest No. 20, the Committee noted that clause 4 of the Bill proposes to repeal section 6A of the *Bankruptcy Act 1966* and replace it with proposed new sections 6A and 6B. The Committee noted that section 6A presently requires bankrupts and debtors to file statements of their financial affairs at the outset of bankruptcy proceedings or any of the other insolvency proceedings provided for under the Bankruptcy Act. The proposed new section 6A sets out new requirements to apply to bankrupts and debtors, essentially requiring them to file a statement of affairs with the Registrar in Bankruptcy.

The Committee noted that proposed new section 6B, if enacted, would impose similar requirements in relation to deceased estates which are being administered in bankruptcy. Pursuant to proposed new paragraph 6B(2)(a), a statement of affairs in relation to a deceased estate which is being administered in this way will be required to contain 'such information as is prescribed' for the purposes of the provision.

The Committee suggested that paragraph 6B(2)(a) could be regarded as an inappropriate delegation of legislative power, as it would appear to leave significant matters to the regulations. In addition, in order for the administrator of a deceased estate to work out their obligations under the Bankruptcy Act, it would require both the Act and the regulations to be consulted.

While the Committee accepted that this may be a matter which is appropriately left to the regulations, the Committee indicated that it would appreciate the Minister's advice as to what sorts of matters might be prescribed under the regulations.

The Minister has responded as follows:

> Proposed section 6B constitutes, in essence, a re-enactment of existing section 6A of the *Bankruptcy Act 1966* (the Act), which was inserted in 1987. The Bankruptcy Rules make provision under existing section 6A. The relevant rules are rules 30A, 78 and 87 and copies of these are attached for the information of the Committee (Attachment A) [reproduced at the rear of this Report). By virtue of subclause 51(3) of the Bill, those rules will remain in force after the commencement of the Bill, and it is not envisaged that they will be altered.

The Minister goes on to say:

> In developing the Bill, consideration was given to Senate Standing Order 24 to ensure that the requirement not to provide for inappropriate delegation of legislative power was infringed. Indeed, as the Committee has noted there is, in proposed new section 6A, a general statement of the matters which a bankrupt or debtor is required to include in his or her statement of affairs, and this covers the subject matters previous included in the Bankruptcy Rules in relation to statements of affairs. The Attorney-General's Department is undertaking a review of the Act, one of the objectives of which is to ensure that as far as possible, the important rights and obligations of bankrupts, debtors and others are specified in the principal legislation, rather than in subordinate legislation. The present Bill involved acceleration of various aspects of this review project. As I have indicated, I share the Committee's concerns about inappropriate delegation of legislative power. However, section 6B is proposed to be a re-enactment of existing section 6A of the Act, although confined to statements of affairs in relation to insolvency administrations outside bankruptcy proper and the administration of deceased estates in bankruptcy, because the circumstances or urgency in which the present Bill was brought forward precluded consideration being given to totally overhauling the law relating to statements of affairs.

The Committee thanks the Minister for this response.

Delegation to 'a person'
Clause 5 - proposed new section 12(4)

In Alert Digest No. 20, the Committee noted that clause 5 of the Bill proposes to add a new subsection 12(4) to the Bankruptcy Act. Section 12 sets out the functions of the Inspector-General in Bankruptcy. The Committee noted that proposed new

subsection (4) provides:

> The Inspector-General, ***or a person authorised in writing by the Inspector-General to exercise the powers of the Inspector-General under this subsection:***
>
> (a) is entitled to attend any meeting of creditors held under this Act; and
>
> (b) subject to section 64ZA [which, if enacted, would govern the voting entitlements to apply at creditors' meetings], is entitled to participate in any such meeting as the Inspector-General thinks fit. (emphasis added)

The Committee has consistently maintained an in-principle objection to unqualified delegations to 'a person'. The Committee noted that, as the clause is drafted, the Inspector-General could delegate his or her power under the provision to anybody, as long as the delegation is in writing.

The Committee drew Senators' attention to the clause, as it may be considered to make rights liberties and obligations subject to insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

The Minister has responded as follows:

> This proposed provision would specifically enable the Inspector-General or a person authorised by the Inspector-General to attend a meeting of creditors under the Act. The principal function of the Inspector-General in Bankruptcy is to oversight the general administration of personal insolvency by the Insolvency and Trustee Service Australia (ITSA), the Division of the Attorney-General's Department with responsibility for bankruptcy matters, and by private sector registered trustees. The Inspector-General may be directed by the Minister to

> make inquiries, and must give an annual report about the operation of the Act to the Minister for tabling in Parliament.
>
> The Inspector-General in Bankruptcy is given powers by the Act to undertake investigations and inquiries into matters such as the conduct of trustees and the affairs of bankrupts and debtors. It had been considered that this power extended to attendance by a person at a meeting of creditors, but doubts have recently arisen about this, and accordingly, it was considered desirable to put the matter beyond doubt.

The Minister goes on to say:

> As regards the Committee's contention that the proposed provision makes any right, liberty or obligation subject to insufficiently defined administrative powers, I point out that the proposed provision would merely enable the Inspector-General or a person authorised by him or her to attend a meeting of creditors, a necessary adjunct to the powers of the Inspector-General in carrying out the function of oversighting the administration of bankruptcy generally. The mere presence of the Inspector-General or his or her nominee at a meeting cannot, in my view, be said to affect any rights, liberties or obligations. Indeed, by proposed section 64ZA, the Inspector-General or nominee would specifically be precluded from voting at any meeting. Voting at a meeting is the only activity which is in any way determinative of the rights or obligations of persons.

The Committee thanks the Minister for this response but notes that the fact remains that the Inspector-General would, nevertheless, have an unfettered discretion to authorise anyone to act in his or her place.

'Henry VIII' clause
Clause 25 - proposed new paragraph 139T(2)(f)

In Alert Digest No. 20, the Committee noted that clause 25 of the Bill proposes to insert a new Division 4B into the Bankruptcy Act. That proposed new division deals with contributions by the bankrupt and recovery of property. The Committee noted that proposed new section 139T provides that the Official Receiver may vary a bankrupt's contribution if the bankrupt suffers hardship.

Proposed new subsection 139T(1) provides that if a bankrupt considers that, if required to pay the contribution set, he or she will suffer hardship for a reason or reasons set out in subsection (2), he or she may apply to the Official Receiver for a determination. The Committee noted that the reasons set out include illness or disability requiring on-going medical attention and costs which constitute a substantial part of his or her income, the requirement to pay the cost of child day-care in order to work, the cost of accommodation, the cost of substantial travelling expenses and the inability, due to unemployment, illness or injury, of the bankrupt's spouse to contribute to the cost of maintaining the bankrupt's household.

The Committee noted that paragraph 139T(2)(f) also provides for 'any other prescribed reason'. The Committee suggested that this may be considered to be a 'Henry VIII' clause, as it would allow the definition set out in the primary legislation to be, in effect, amended by regulation. However, the Committee noted that it may be a beneficial measure, in the sense that it may allow more people to take advantage of the hardship exemption. The Committee indicated that it would appreciate the Minister's advice as to whether or not this is the intention of the clause.

The Committee drew Senators' attention to the provision, as it may be considered 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:

> In my view, proposed paragraph 139T(2)(f) of the Act, which would enable the Official Receiver to authorise departure from the income contribution regime for prescribed reasons other than those specified in paragraphs 139T(2)(a) to (e), would not empower the prescription of matters inconsistent with those specified in the primary legislation, or in such a manner as to limit the operation of the specified reasons, as the Committee implies. Proposed section 139T is not expressed to be subject to the subordinate legislation, nor does the provision expressly empower the making of rules modifying, varying or limiting the provisions of the principal legislation.

The Minister goes on to say:

> Proposed subsection 139T(2) attempts to delineate in detail the circumstances of hardship which would justify departure from the proposed income contribution regime. However, it was considered that despite the fact that the proposed subsection sets out many reasonably foreseeable grounds for authorising departure from the contribution regime, circumstances which do constitute real hardship and which are not provided for in the subsection may arise in the future and there would be no flexibility to deal with those circumstances in the absence of a power to prescribe additional reasons, other than to bring forward further amendments to the Act. The provision is, as the Committee suggests, intended to be beneficial in that it will enable the range of hardship exemptions to be expanded quickly, should it prove necessary in the future to do so.

The Committee thanks the Minister for this response.

No requirement to notify right of review
Clause 25 and 26 - proposed new subsections 139T(5), 139ZE(6), 149P(6) and 149ZM(6)

In Alert Digest No. 20, the Committee noted that clauses 25 and 26 of the Bill propose to insert, respectively, a new Division 4B and a new Part VII into the Bankruptcy Act. The Committee noted that (as discussed above) the proposed new Division 4B relates to contributions by the bankrupt and recovery of property. The proposed new Part VII deals with discharge and annulment of bankruptcy and, if enacted, would replace the existing Part VII. The Committee noted that various provisions in the proposed new division and part raise a similar concern in relation to the absence of an obligation to notify appeal rights.

The Committee noted that proposed new section 139T, if enacted, would allow a bankrupt to apply to the Official Receiver to have their contributions varied on grounds of hardship. Proposed new subsection 139T(4) provides that the Official Receiver must decide such an application 'as soon as is practicable, and in any event not later that 30 days, after the day on which the application is received'. The Committee noted, however, subsection (5) goes on to provide:

> If the Official Receiver does not make a decision on the application within that period of 30 days, the Official Receiver is taken to have made a decision at the end of that period refusing the application.

The Committee suggested that the effect of proposed new subsection (5) is, therefore, to deem that an application has been refused if the Official Receiver has not made a decision within 30 days.

The Committee noted that proposed new subsection (6) would allow the Official Registrar to vary the contribution if he or she is satisfied that the bankrupt will

suffer hardship if required to pay the contribution. Proposed new subsection (7) requires the official Receiver to refuse an application if he or she is not satisfied that the bankrupt will suffer hardship.

The Committee noted that proposed new subsection (10) provides that, if the Official Trustee makes a determination under proposed new subsection (6), he or she must supply the bankrupt with a written notice setting out a) the decision, b) the evidence and other material on which the decision was based and c) the reasons for the decision. Proposed new subsection (11) provides that a statement issued pursuant to proposed new subsection (10) must include a statement advising the bankrupt that if they are dissatisfied with the decision they are entitled to apply to the Administrative Appeals Tribunal for review of the decision.

The Committee noted that proposed new subsections (13) and (14) deal further with the question of review by the Tribunal. Proposed new subsection (14) provides:

> An application may be made to the Administrative Appeals Tribunal for the review of a decision by the Official Receiver under this section.

The Committee suggested that the reference to a decision by the Official Receiver under the section would appear to include a 'deemed' decision pursuant to proposed subsection (5). However, unlike the situation applying to a decision pursuant to proposed subsection (6), there would appear to be no obligation on the Official Receiver to advise an unsuccessful applicant in these circumstances of the existence of this appeal right.

The Committee noted that subdivision G of proposed new Division 4B provides for review by the Inspector-General in Bankruptcy of assessments by the trustee of a bankrupt estate as to the bankrupt's income and contribution. As with proposed

new subsection 139T(5) above, proposed new subsection 139ZE(6) provides that if the Inspector-General fails to make a decision on an application for review within 60 days of the application being lodged, the Inspector-General is to be taken to have confirmed the original decision. The Committee suggested that, as above (and unlike other decisions referred to in the proposed new subdivision), while this 'deemed' decision would appear to be subject to review by the Administrative Appeals Tribunal, there appeared to be no obligation to notify a dissatisfied applicant of that right of review.

The Committee noted that, similarly, in clause 26, proposed new subsection 149P(6) deems the Inspector-General to have confirmed a decision in relation to certain notices of objection if he or she has not given a written notice of his or her decision within 60 days of an application for review being lodged. Proposed new subsection 149ZM(6) makes similar provision in relation to applications for review of a rejection of an application for early discharge. Despite such 'deemed' decisions being apparently to review by the Administrative Appeals Tribunal, the Committee suggested that there appeared to be no obligation to advise unsuccessful applicants of that right in such circumstances.

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

The Minister has responded as follows:

> As the Committee identifies, the purpose of all the quoted provisions is to deem a decision maker to have refused an application for the exercise of a power where the decision maker has not in fact made a decision within the time specified by the legislation. The Committee suggests that there appears to be no obligation for

> applicants for the exercise of a particular power to be advised of their rights to apply to the Administrative Appeals Tribunal for review where the decision maker has not made a determination within the specified time. The provision is designed to ensure that applications for the exercise of the relevant powers are dealt with expeditiously and effectively and persons are not prejudiced by bureaucratic delay.

The Minister goes on to say:

> In my view, the inclusion of a requirement for action to be taken, namely notification of the right of review, in provisions designed to deal with situations created by inaction or delay would be illogical. The Committee's concerns could be dealt with administratively, by advising persons who apply for the exercise of the relevant powers that the power in question must be exercised within the statutory time-frame or the application is deemed to have been refused. It follows from the existence of the right of review by the Administrative Appeals Tribunal in the legislation that proper administrative practice would be to draw attention to the fact that if a decision has not been made within a specified time, the decision is to be taken to be adverse to the applicant. There appears to be no compelling need for this to be specified in the legislation itself.

The Committee thanks the Minister for this response. However, the Committee would prefer that there be an obligation in the legislation to notify applicants of the fact that their application was deemed to be refused and that an avenue of appeal was available to them.

Reversal of the onus of proof
Clause 25 - proposed new subsection 139ZP(2)

In Alert Digest No. 20, the Committee noted that proposed new section 139ZL provides for the Official Receiver to issue a notice to the employer of a bankrupt requiring them to pay to the Official Receiver such amounts as are specified out of any monies due to the bankrupt. Proposed new subsection 139ZP(1) provides that an employer must not dismiss a bankrupt, injure the bankrupt in his or her employment or alter the bankrupt to the bankrupt's prejudice as a result of the giving of such a notice. The penalty for a breach is imprisonment for 6 months.

Subsection 139ZP(2) provides:

> In a prosecution for an offence against subsection (1), it is not necessary for the prosecutor to prove that the defendant's reason for the action charged was the giving of the notice but it is a defence to the prosecution if the defendant proves that the action was not taken because of the giving of the notice.

The Committee suggested that this is a reversal of the onus of proof, as it is ordinarily incumbent on the prosecution to prove all the elements of an offence. The Committee noted that, as the provision is drafted, a person who is accused of such an offence would have to prove his or her innocence of the offence.

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 Minister has responded as follows:

> Proposed section 139ZP is based directly upon section 57 of the *Child Support (Registration and Collection) Act 1988* which makes it an offence for an employer to dismiss, threaten to dismiss or otherwise prejudice an employee liable to make maintenance payments from his or her income. Subsection 57(2) of that Act also contains a reverse onus provision. The Child Support legislation provision, and the proposed section of the *Bankruptcy Act 1966* are intended to safeguard persons from arbitrary dismissal merely as a result of their particular status or legal obligations.

The Minister goes on to say:

> The reasons an employer may have for dismissing an employee are matters exclusively within the knowledge of the employer and could not readily be ascertained by investigation. This fact, combined with the consideration that arbitrary dismissal of an employee has most serious consequences for the employee, makes the reversal of the onus fo proof as provided for in proposed section 139ZP justifiable in the particular circumstances with which the legislation is concerned. In addition, it is considered that proof of the existence of the facts of dismissal and the issuing of a notice under proposed section 139ZL, would give rise to an inference which it is reasonable to require the defendant to rebut.

The Committee thanks the Minister for this response.

Strict liability offences
Clause 45 - proposed new sections 267A and 267C

In Alert Digest No. 20, the Committee noted that clause 45 of the Bill proposes to repeal section 267 of the Bankruptcy Act and to replace it with a series of new sections. Those proposed new sections relate to false and misleading declarations

and statements by debtors.

Proposed new section 267A provides:

> A bankrupt must not give a statement to the trustee under section 139U [which would require a bankrupt to provide evidence of their income] that is false or misleading in a material particular.
>
> Penalty: Imprisonment for 12 months.

Proposed new section 267C provides:

> A person must not:
>
> (a) in a statement given to the trustee under section 139U; or
>
> (b) pursuant to a requirement contained in a notice given to the person under subsection 6A(3) [which relates to omissions from a statement of affairs], paragraph 77C(1)(a) [which would give the Official Receiver power to obtain information or evidence] or section 139V [which would allow the trustee to require a bankrupt to provide additional evidence];
>
> provide information that is, or produce books that are, false or misleading in a material particular.
>
> Penalty: Imprisonment for 12 months.

The Committee suggested that these sections would appear to involve offences of strict liability, as they do not appear to allow for bankrupts providing information or making statements which, though in fact false, they genuinely believed (for good reason) to be true.

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

The Minister has responded as follows:

> The Committee suggests that proposed new sections 267A and 267C are strict liability offences, and that the mere doing by a person of the acts specified, whether intentionally or not, would expose the person to punishment. These offences correspond with other offence provisions in the *Bankruptcy Act 1966* such as section 265 which deals with the failure by a bankrupt to disclose the existence of property or to furnish all material particulars in statements about property the bankrupt is required to provide. These similar offences have been construed by the courts such that an offence is not committed if the defendant's act was inadvertent, rather than intentional.

The Minister goes on to say:

> Proposed sections 267A and 267C will make it an offence for a person to make statements, provide information or produce books under proposed sections 6A, 77C, 139U or 139V which are false or misleading in a material particular. These sections require the person who is under a duty to make a statement, provide information or produce books only to the extent that the person is able to do so. Similarly, a person making a statement about is or her income or likely income in relation to an income contribution period is bound only to provide particulars that are actually known to the person or which can readily be ascertained by him or her. The offences therefore can only be committed where the person actually possesses the information or books, but intentionally refuses to produce them, or where the person knows or can readily ascertain particulars about income, but nevertheless makes misrepresentations as to those particulars. It is

considered therefore that the proposed provisions do not create strict liability offences.

The Committee thanks the Minister for this response and for his assistance with the Bill.

CIVIL AVIATION (CARRIERS' LIABILITY) AMENDMENT ACT 1991

The Bill for this Act was introduced into the House of Representatives on 17 October 1991 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill proposed to amend the *Civil Aviation (Carriers' Liability) Act 1959* to:

- ratify Additional Protocol No. 3 of Montreal 1975 (which amends the Warsaw Convention of 1929), which increases international carriers' liability limits and establishes limits in terms of the International Monetary Fund's Special Drawing Rights (SDR);
- ratify Montreal Protocol No. 4 of Montreal 1975, which introduces modern cargo handling terminology;
- apply the increased liability limits for passenger death and injury to Australia's international airlines; and
- convert the Warsaw Convention and Hague Protocol Poincare gold franc liability limits to SDR.

The Committee dealt with the Bill in Alert Digest No. 18 of 1991, in which it made various comments. The Minister for Shipping and Aviation Support responded to those comments in a letter dated 9 December 1991. Though the Committee notes that this Bill was passed by the Senate on 27 November 1991 (and by the House of Representatives on 29 November), the Minister's response may nevertheless be of interest to Senators. A copy of that letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Subclauses 2(2) and (3)

In Alert Digest No. 18, the Committee noted that clause 2 of the (then) Bill provides:

> (1) Sections 1 to 10 and 14, 16 and 17 commence on the day on which this Act receives the Royal Assent.
>
> (2) Section 11 and subsections 13(1) and 15(1) commence on a day to be fixed by Proclamation, being a day not earlier than that on which the Montreal Protocol No. 3 enters into force for Australia.
>
> (3) Section 12 and subsections 13(2) and 15(2) commence on a day to be fixed by Proclamation, being a day not earlier than that on which the Montreal Protocol No. 4 enters into force for Australia.

The Committee noted that the effect of subclauses 2(2) and (3) was to make the commencement of several of the Bills most important clauses dependent on a Proclamation for their commencement. Further, and contrary to the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, the period within which such a Proclamation could be made was open-ended.

The Committee noted that Drafting Instruction No. 2 states that if the (6 month) time limit for Proclamation set down as the general rule is not to be followed, the reason for doing so should be set out in the Explanatory Memorandum to the Bill. In this case, the Committed suggested that the Explanatory Memorandum to the Bill offered little guidance, apart from noting that commencement of the relevant provisions is to be linked to Australia's ratification of the two protocols. However, the Committee noted that the Parliamentary Secretary's Second Reading speech on the Bill states:

> It is my understanding that should the United States Senate accept the supplemental compensation scheme (called the S-Plan) ... then it will support United States ratification of the Montreal Protocols Numbers 3 and 4 by the President. It is also my understanding that this ratification may be accompanied by a denunciation of the Warsaw Convention. Unless Australia also ratifies the Montreal Protocols, this action could expose Australian carriers, particularly Qantas, to unlimited liability in the United States.
>
> Since it is our firm belief that the US ratification of the two Protocols will lead to their early entry into force, they will in the not too distant future apply to carriage between Australia and the majority of countries. I understand that the US Senate may be voting on the Protocols in the near future.

The Committee noted that, while the explanation set out in the Second Reading speech seemed reasonable, there is, nevertheless, no obligation to proclaim the relevant sections once the Protocols enter into force. In this regard, the Committee noted that this situation is similar to that which the Committee drew attention to in relation to the Carriage of Goods by Sea Bill 1991 (Alert Digest No. 13 and Reports Nos. 14 and 15 of 1991). The Committee indicated that it would appreciate the Minister's views as to why the proclamation of the relevant provisions in this Bill could not be, in effect, 'sunsetted', by means of a provision similar to section 2 of what is now the *Carriage of Goods by Sea Act 1991.*

The Minister responded as follows:

> The *Carriage of Goods by Sea Act 1991* gives the force of law to the Hamburg Rules from a date to be fixed by Proclamation, being a day no sooner than the day on which the Hamburg Convention enters into force internationally, i.e., 1 November 1992. However, the Act also provides that if a Proclamation is not made within 3 years, the Hamburg Rules shall, in effect, commence

automatically (on 31 October 1994) unless Parliament decides otherwise. These provisions serve a twofold purpose. On the one hand they ensure that the relevant sections of the Act can be proclaimed once the Hamburg Convention enters into force if the Government of the day considers it to be in Australia's commercial interests. On the other hand, they ensure, subject to Parliament's veto, that the implementation of the Hamburg Rules' provisions of the Act will not be inordinately delayed.

The Minister went on to say:

> While there are obvious similarities between the two pieces of legislation, there are significant difference between the Hamburg Convention and the Montreal Protocols which necessarily have some bearing upon their commencement.
>
> The Hamburg Convention can be unilaterally applied by a country through its domestic legislation and does not require that country's trading partners to also implement it for its provisions to come into operation. Unlike the Hamburg Convention, the Montreal Protocols do not constitute a stand alone system. The Montreal Protocols amend and update the parent Warsaw Convention as amended by the Hague Protocol. The Warsaw system purports to limit the liability of international carriage between contracting parties. Thus Australia cannot unilaterally adopt the provisions of the Montreal Protocols, particularly those which increase the liability limits. To do so would affect the rights of other countries and would be in breach of Australia's obligations under the Warsaw Convention or the Warsaw Convention as amended by the Hague Protocol. In these circumstances it would have been inappropriate to adopt a 'sunset clause' similar to that contained in the *Carriage of Goods by Sea Act 1991*.

The Minister concluded by saying:

> I accept the Committee's concerns in relation to there being no obligation to proclaim the relevant sections once the Protocols enter into force. However, I can assure the Committee that it is Australia's intention to ratify the Montreal Protocols. It is likely that Australia will do so before the Protocols enter into force internationally in which case it will be incumbent upon Australia to proclaim the relevant provisions of the Bill when the Protocols enter into force. The Protocols will enter into force internationally when they have been ratified by 30 States. At present there are only 19 ratifications. There is necessarily some uncertainty as to precisely when the remaining ratifications will be forthcoming.

The Committee thanks the Minister for his response and for his assurance that it is Australia's intention to ratify the Montreal Protocol.

MIGRATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 15 October 1991 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to:

- define 'offences against the Migration Act';
- permit the obtaining of information and documents about the identify and location of illegal entrants;
- provide for the making of regulations to authorise the Minister to limit the number of visas or permits of a particular class which may be granted in a financial year;
- create offences relating to the arranging of marriages or *de facto* relationships for the purposes of obtaining permits to remain in Australia;
- impose new penalties for arranging contrived marital relationships in order to gain Australian residence; and
- provide for the making of regulations in relation to certain matters to be specified by the Minister in a *Gazette* notice.

The Committee dealt with the Bill in Alert Digest No. 18 of 1991, in which it made various comments. The Minister for Immigration, Local Government and Ethnic Affairs responded to those comments in a letter dated 3 December 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Requirement to provide information
Clause 3 - proposed new section 22A

In Alert Digest No. 18, the Committee noted that clause 3 of the Bill proposes to insert a new Division 1A into the *Migration Act 1958*. That proposed new division deals with the power to obtain information and documents about illegal entrants. The Committee noted that proposed new section 22A, if enacted, would allow the Minister, if he or she believes that a person has information or documents relevant to ascertaining the whereabouts of an illegal entrant, to issue a notice requiring the person to produce that information or those documents. Proposed new section 22D would make it an offence, punishable by imprisonment for up to 6 months, to fail to comply with such a notice without 'reasonable excuse'. Proposed new subclause 22D(2) sets out two possible 'reasonable excuses'.

The Committee drew Senators' attention to the provision, as it may be considered to trespass 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 provisions are a further step in the implementation of an enhanced compliance strategy announced by the Government in August 1990. They are aimed at reducing abuses of the migration system and, in particular, reducing Australia's illegal entrant population. Proposed new Division 1A introduced by the Bill will give the Government the power to obtain information and documents about the identity or whereabouts of illegal entrants.
>
> It must be remembered that the persons in respect of whom the information is sought have no right to be in Australia. They have breached migration laws and may also be receiving benefits which are normally available

only to persons legally in Australia.

The Government is sending a clear signal to illegal entrants, through these amendments, that they can no longer rely on anonymity and non-cooperation of relatives and associates to avoid detection by my department.

The department usually holds information about the initial destination only of arrivals (as provided on the incoming passenger card) or addresses subsequently volunteered on visa or entry permit applications. This information quickly becomes out of date.

The Minister goes on to say:

As you would expect, the majority of illegal entrants actively avoid contact with the Department. At present there is no legal basis for access to wider sources of information concerning their identity or whereabouts. Unless a clear power to gather such information is created, the Government is restricted in its efforts to further reduce the illegal entrant population.

Proposed section 22A creates the power to obtain necessary information for detection purposes. Under proposed sections 22B and 22C, persons called upon to provide such information would be compensated for any expenses they might incur.

The information collected would be used only to identify or to locate illegal entrants and bring them to account for their continued illegal presence in this country.

The Minister concludes by saying:

The new provisions, in my view, provide the Government with the minimum power necessary to enable it to deal effectively with the problem of determining the identity or whereabouts of illegal entrants.

The Committee thanks the Minister for this response. While the Minister has given the reasons behind the approach adopted in the amendment, the Committee continues to draw attention to the clause, 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.

Inappropriate delegation of legislative power
Clauses 4 and 5 - proposed new subsections 23(3A) and 33(3A)

In Alert Digest No. 18, the Committee noted that clauses 4 and 5 of the Bill propose to insert new subsections 23(3A) and (3B) and 33(3A) and (3B), respectively, into the Migration Act. The Committee noted that section 23 of the Migration Act sets out the matters in relation to visas that may be dealt with by the regulations. In particular, the Committee noted that subsection 23(2) provides that the regulations may provide that, subject to section 28 of the Act (which gives the Minister the power to suspend a visa application), a person is entitled to be granted a visa if the satisfy all the relevant criteria. The Committee noted that subsection 23 (3) provides that the criteria that may be prescribed include the criterion that the applicant receives the necessary score when assessed under the 'points system' set out in Subdivision B of Division 2 of the Act.

The Committee noted that proposed new subsection 23(3A) provides:

> In spite of section 49A of the *Acts Interpretation Act 1901*, a prescribed criterion for visas of a class may be the criterion that the grant of the visa would not cause the number of visas of that class granted in a particular financial year to exceed whatever number is fixed by the Minister, by notice published in the *Gazette*, as the maximum number of such visas that may be granted in that year (however the criterion is expressed).

The Committee noted that section 49A of the Acts Interpretation Act provides:

> (1) Where an Act authorises or requires provision to be made for or in relation to any matter by regulations, the regulations may, unless the contrary intention appears, make provision for or in relation to that matter by adopting or incorporating, with or without modification:
>
> (a) the provisions of any Act, or of any regulations, as in force at a particular time or as in force from time to time; or
> (b) any matter contained in any other instrument or writing as in force or existing at the time when the first-mentioned regulations take effect;
>
> but, unless the contrary intention appears, regulations shall not, except as provided by this subsection, make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force from time to time.
>
> (2) In this section, **"regulations"** means regulations or rules under an Act.

The Committee suggested that the effect of proposed new subsection (3A), if enacted, would be to allow the Minister to 'prescribe' a further criterion (based on numbers of visa applications granted in a financial year) to be satisfied by an applicant for a visa by publishing a notice in the *Gazette*. Such a notice would not be subject to any form of Parliamentary scrutiny. Given the effect of such a notice, the Committee suggested that it was preferable that such scrutiny is available.

The Committee noted that proposed new subsection 33(3A) proposes to make substantially identical amendments in relation to applications for entry permits.

The Committee drew Senator's attention to the clauses, as they may be considered 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:

> As I indicated in my Second Reading Speech to the House of Representatives, the Government announced on 30 April this year that a new 'special assistance' category had been added to the migration program for 1991-92. This category will target people in need who do not meet the refugee and other special humanitarian criteria but who the Government considers to have special humanitarian claims on this country.

The Minister goes on to say:

> The Government needs flexibility within the special assistance stream of the migration program to enable it to respond quickly to unforeseen and sudden developments of humanitarian concern to the Australian community. The gazettal mechanism set out in the Bill provides the necessary flexibility for managing program numbers.

The Minister concludes by saying:

> In my Second Reading Speech, I said that the use of the powers provided for in clauses 4 and 5 of the Bill would apply only to those classes of visas and entry permits where the use of the power was specifically permitted under the regulations. It will be the regulations in such cases which will contain the criterion that grants of visas or permits may not exceed the gazetted number.

The Committee thanks the Minister for this response.

Reversal of the onus of proof
Clause 8 - proposed new subsection 83D(3)

In Alert Digest No. 18, the Committee noted that clause 8 of the Bill proposes to insert a new Subdivision B into Division 3 of the Migration Act. That proposed new subdivision sets out various proposed new offences in relation to marriages and *de facto* relationships entered into with the purpose of obtaining permanent resident status. Proposed new section 83D provides:

> (1) A person must not arrange a marriage between other persons for the purpose of assisting one of those other persons to get a stay permit by satisfying a criterion for the permit because of the marriage.
>
> (2) Subsection (1) applies whether or not the purpose is achieved.
>
> (3) It is a defence to an offence against subsection (1) if the defendant proves that, although one purpose of the marriage was to assist a person to get a stay permit, the defendant believed on reasonable grounds that the marriage would result in a genuine and continuing marital relationship.

The Committee noted that an offence against the proposed new section would carry with it, on conviction, a penalty of $100 000 or imprisonment for 10 years or both.

The Committee suggested that proposed new subsection 83D(3) involves a reversal of the onus of proof, as it would require a defendant to prove that they believed that the marriage would result in a genuine and continuing marital relationship. The Committee noted that, ordinarily, it is incumbent on the prosecution to prove all the elements of an offence. The Committee suggested that, in the absence of this proposed subsection, the prosecution would presumably be required to prove that

the person did not believe on reasonable grounds that a genuine and continuing marital relationship would result from the marriage.

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 Minister has responded as follows:

> Proposed new section 83D is intended to discourage the distasteful practice of marriage-broking for the purpose of circumventing Australia's migration laws.
>
> Subsection 83D(3) does not reverse the onus of proof. Under subsection 83D(1), the prosecution would prove the offence if it showed that a person arranged a marriage between an Australian citizen or permanent resident and a non-citizen and that the purpose was to assist the non-citizen to satisfy requirements under the migration legislation for obtaining permanent residence in Australia. It is not an element of the offence that the person did not believe that a genuine and continuing relationship would result from the marriage.

The Minister goes on to say:

> Subsection 83D(3) was inserted because the Government recognised that there are persons in certain communities in Australia who, as a matter of custom, enter into 'arranged' marriages. If such marriages are arranged and purpose of the marriage is to obtain residence in Australia for one or other of the parties the offence would be committed. However, if the arranged marriage is also a genuine one that will provide a complete defence. That is the intention of subsection 83D(3).

The Committee thanks the Minister for this response and for his assistance with the Bill. While the Minister has given the reasons behind the approach adopted in the amendment, the Committee continues to draw attention to the clause, 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.

NATIONAL RAIL CORPORATION AGREEMENT BILL 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister Representing the Minister for Transport and Communications.

The Bill proposes to establish (further to a Shareholders' Agreement signed on 30 July 1991 at the Special Premiers' Conference) the National Rail Corporation as a company to conduct interstate rail freight operations in Australia on a commercial basis.

The Committee dealt with the Bill in Alert Digest No. 20 of 1991, in which it made various comments. The Minister for Land Transport responded to those comments in a letter dated 4 December 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Commencement by Proclamation
Clause 2

In Alert Digest No. 20, the Committee noted that clause 2 of the Bill provides:

> This Act commences on a day to be fixed by Proclamation.

The Committee noted that there is no limit as to the time within which such a Proclamation must be made. In that regard, the provision is contrary to the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. By way of explanation, the Explanatory Memorandum on the Bill states:

> [Proclamation] will occur when all the parties to the Agreement have enacted legislation approving the Agreement.

The Committee noted that, while the necessity to enact legislation may be considered an 'unusual circumstance' within the meaning of Drafting Instruction No. 2, there would, nevertheless, be no obligation to proclaim this piece of legislation once the other parties to the Agreement (ie New South Wales, Queensland, Victoria and Western Australia) have enacted legislation to approve the Agreement.

The Committee drew Senators' attention to the clause, as it may be considered 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:

> Clause 2 provides that the Act will commence on a date to be proclaimed. I understand the Committee's concern is that there is no time limit for this to occur.
>
> The clause was drafted in this fashion because it would have been inappropriate to suggest that the Commonwealth would act regardless of the passage of similar legislation in State Parliaments.
>
> It is clearly in the interests of all the Shareholders for legislation to be proclaimed and for the [National Rail Corporation] to commence operations as soon as possible. The Federal Government, which has been the driving force in the establishment of the NRC, has no intention of holding up this important part of its microeconomic reform process.

The Minister concludes by saying:

> I would like to take this opportunity to assure the Committee that the Bill, if passed by the Parliament, will be proclaimed as soon as possible following the passage of legislation in the Commonwealth, NSW, Victorian, Western Australian and Queensland Parliaments.

The Committee thanks the Minister for this response and for his assurance concerning the proclamation of the Bill.

General comment

The Committee noted that the Agreement which this legislation seeks to implement appears to raise the same sort of issues in terms of the power of the Commonwealth and State Parliaments as the Committee had discussed elsewhere in Alert Digest No. 20, in relation to the National Road Transport Commission Bill 1991. The Committee indicated that it would appreciate any views which the Minister might care to put on this matter.

The Minister has responded as follows:

> I will be writing to you separately in relation to the National Road Transport Commission Bill, but consider that it is not the same issue. There is no delegation of legislative power to the NRC by the Shareholders' Agreement.

The response referred to by the Minister is contained elsewhere in this report. The Committee thanks the Minister for this response and for his assistance with the Bill.

NATIONAL ROAD TRANSPORT COMMISSION BILL 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister Representing the Minister for Transport and Communications.

The Bill proposes to establish (further to an agreement signed on 30 July 1991 at the Special Premiers' Conference) the National Road Transport Commission as an independent statutory authority, responsible to a Ministerial Council.

The Committee dealt with the Bill in Alert Digest No. 20 of 1991, in which it made various comments. The Minister for Land Transport responded to those comments in a letter dated 10 December 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power
Clause 3, paragraph 8(1)(a), clauses 34 and 43

In Alert Digest No. 20, the Committee stated that it had received a detailed submission in relation to this Bill from the Road Transport Industry Forum. That submission suggested that the Bill involved a series of inappropriate delegations of legislative power.

The Committee noted that the submission stated:

> Clause 8(1)(a) of the Bill provides that the [National Road Transport Commission] has those functions and powers given to it by the Agreement. Clause 3 of the Bill defines the 'Agreement' as being the 'Agreement' set out

> in the Schedule [to the Bill] or, if that Agreement is amended, that Agreement as so amended.
>
> This definition, when read in conjunction with [paragraphs] 8(1)(a), (e) and (f) has a profound affect on the functions and powers of the Commission.
>
> In particular, the Commission can be given completely new functions and powers without any reference to the Parliament.
>
> The Ministerial Council could, for example, change the Agreement so that the Commission has the power to enter the premises of trucking companies without a warrant. It would then automatically have that power without the Federal Parliament being able to do anything about it.
>
> In essence, the Bill, working together with the Agreement, 'trespass(es) unduly on personal rights and liberties' and 'make(s) rights, liberties or obligations unduly dependent upon non-reviewable decisions'.

The Committee suggested that, while the example given by the submission indicated a potential for such a trespass on personal rights and liberties, this is probably better categorised as an inappropriate delegation of legislative power.

The Committee that the submission went on to say:

> Clause 34 of the Agreement would even prohibit the Government from introducing legislation to amend the Bill without the approval of the Ministerial Council.
>
> So, as it is set up, the Bill would allow the National Road Transport Commission and Governments acting through the Ministerial Council to completely escape Parliamentary scrutiny.
>
> This is not only very unusual and objectionable, but is also in conflict with [paragraphs] 14(3)(b) and ...

15(2)(b), which provide that decisions made by the Ministerial Council relating to the remuneration and benefits of members of the National Road Transport Commission are disallowable instruments and therefore subject to oversight by the Federal Parliament.

The submission suggested that

> [a]t a minimum, the powers of the Ministerial Council under [paragraphs] 8(1)(a), (e) and (f) should be made disallowable instruments to ensure that there is at least some opportunity for Parliamentary review.
>
> In addition, there is every case for the definition of 'Agreement' to be amended so that any amendments to the Agreement would need to be considered by Parliament before they would come into effect.

The Committee indicated that it would appreciate the Minister's views on the suggestion.

The Minister has responded as follows:

> One of the issues raised in the Alert Digest is the power of the Ministerial Council to amend the Heads of Government Agreement so that the Commission has coercive powers.
>
> The attached response clearly explains that the functions of the Commission are confined to matters of an advisory nature and that the powers that can be conferred upon it are limited to those that come within the executive power of government, such as power to make inquiries and form opinions.

The Minister goes on to say:

> Given the concerns of the Committee, however, the Government would consider changing the definition of Agreement in the Bill to ensure that there is no inappropriate delegation of legislative power.
>
> The following amendment has been proposed by the Australian Democrats and is considered appropriate:
>
> > Clause 3, page 2, definition of 'Agreement' - delete all words after 'set out in the Schedule'.

The Committee thanks the Minister for this response and for his indication that he considers the amendment set out above to be appropriate.

The Committee noted that the submission went on to say:

> Clause 43 of the Bill, working in conjunction with [paragraphs] 8(1)(e) and (f) ... also allows an unacceptable delegation of legislative power. Clause 43 provides for the Ministerial Council to delegate to one of its members any of its functions and powers under the Bill. Further, [paragraphs] 8(1)(e) and (f) provide for each Minister to confirm powers on the National Commission subject to the consent of the Ministerial Council. So it would be possible for the same Minister to act on behalf of the Council, under the delegation provided in clause 43, and also to refer State powers to the Commission under [paragraphs] 8(1)(e) or (f). This would provide no opportunity for Parliamentary review.
>
> It would seem more appropriate for the delegation power under clause 43 to exclude actions under clause 8.

The Committee indicated that it would appreciate the Minister's views on the suggestion.

The Minister, in an attachment to his letter, has provided the following response:

> The purpose of paragraphs 8(1)(e) and (f) is to indicate that the Commission's functions and powers may be extended by executive action on the part of Ministers acting collectively or singly. The functions and powers that may be conferred by executive action are limited to those that come within the executive power of government, for example, powers to make inquiries, to form opinions about questions of policy and to make reports or non-binding recommendations.
>
> Powers which may legally be referred by executive action do not include power to compel people to supply information or documents, or the power to make recommendations which have legal effect. These are powers that cannot be conferred on the Commission other than by legislative means.
>
> With specific reference to the example raised by the Committee, it is not possible for the Ministerial Council or individual Ministers to confer on the Commission power to enter premises: a delegation of this nature would need to be made by each of the respective State Parliaments pursuant to paragraph 8(1)(d).

The attachment goes on to say:

> Similarly, it is not possible to confer on the Commission powers of coercion, such as the power to enter premises, by amendment to the Heads of Government Agreement pursuant to paragraph 8(1)(a) of the Bill. The Courts are traditionally wary of provisions that do not directly confer functions and powers but provide for them to be conferred by someone other than Parliament. It is inconceivable that a court would, in the light of the general structure and intent of the legislation, read this paragraph as authorising the conferral of coercive powers, which are not mentioned, or even hinted at anywhere in the Bill. In interpreting legislation, the courts will assume that Parliament did not intend to encroach on the rights

> of ordinary citizens unless the language used is more specific.

The attachment concludes by saying:

> The provisions allowing for the delegation of Commission functions are also intended merely to facilitate the Commission in the performance of its functions. Any delegations of Commission power, which as previously outlined is only advisory in nature, require the agreement of all members of the Ministerial Council.

The Committee noted that submission concluded by saying:

> The National Road Transport Commission Bill proposes to set up structures and arrangements which will have far-reaching effects on the Australian community and the road transport industry. The National Road Transport Commission and the Special Premiers' Conference agreement could become the chief legislative instrument governing the activities of over 400,000 people directly or indirectly employed in the road transport industry.

The Committee thanked the Road Transport Industry Forum for this submission. As to the views expressed in the submission, the Committee indicated that it was concerned about the matters raised by the submission.

In making this comment, the Committee noted that the scheme which is to be set up by the Bill is, in some respects, similar to the national uniform companies and securities scheme which operated prior to the enactment of the Corporations Law. In relation to that scheme, the Committee suggested in its 1985-86 Annual Report that it

> [deprived] the Parliament of its role of a legislature and [placed] legislative power in the hands of the Ministerial Council. (Parliamentary paper no. 447/1986, at page 6)

The Committee suggested that this comment would appear to be equally applicable here. The Committee noted that while, as a matter of law, the Parliament would retain the right to reject legislation put forward by the Ministerial Council (since it is the Government rather than the Parliament which is a party to the Agreement), there would nevertheless be a certain amount of political pressure to pass such amendments in order to preserve the operation of the Agreement. Further, the Committee noted that the operation of the Agreement might also raise questions of accountability, in that this Ministerial Council arrangement could operate in such a way that no single Minister, Commonwealth or State, can be regarded as having responsibility for the legislation or the scheme it will set up.

The attachment to the Minister's response offers the following comments:

> The current Bill simply establishes the National Road Transport Commission. Substantive legislation to establish the regulatory and charging framework is to be introduced next year, following extensive consultative processes by the National Road Transport Commission.
>
> Establishing that framework requires the passage of legislation by the Commonwealth Parliament on behalf of the Australian Capital Territory with State Parliaments passing complementary legislation to adopt the law as applies in the Australian Capital Territory from time to time.
>
> This is intended to provide a legislative framework which will streamline the process of developing and maintaining a nationally-consistent operating environment for the road transport industry. It will avoid the current necessity for amendments to legislation/regulations in nine separate jurisdictions every time there is a need to modify some

detail of regulation relating to road transport. The current processes have been found wanting and have been heavily criticised by the industry over a long period.

The National Road Transport Commission is fully accountable through the Ministerial Council comprising Ministers from the participating jurisdictions. Where legislative change is required it will be subject to the processes and scrutiny of Federal parliament.

The Commonwealth is providing the legislative means to establish national arrangements based on genuine co-operation between the partners in the Federation. The Commonwealth Government has undertaken only to present to Parliament legislative proposals which have been through the Commission processes and not disapproved by the Ministerial Council.

The commission is also required under the legislation to provide annual reports to the responsible Commonwealth Minister and each member of the Ministerial Council for presentation to Federal and State Parliaments.

The Committee thanks the Minister for this detailed response and for his assistance with the Bill.

THERAPEUTIC GOODS AMENDMENT BILL 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister Representing the Minister for Health, Housing and Community Services.

The Bill proposes to amend the *Therapeutic Goods Act 1989*, to implement recommendations made by Professor Peter Baume in his Report on The Future of Drug Evaluation in Australia relating to the drug approval process.

The Committee dealt with the Bill in Alert Digest No. 20 of 1991, in which it made certain comments. The Committee has now reconsidered the Bill and makes the following additional comments.

Retrospectivity
Subclause 10(2)

Clause 10 of the Bill provides:

> 10.(1) Section 24 of the Principal Act is amended by omitting subsection (2) and substituting the following subsections:
>
> "(2)Subject to section 24D, an application for registration of therapeutic goods lapses if:
>
> (a) any part of the evaluation fee payable in respect of those goods remains unpaid at the end of the period of 2 months after the day on which the amount became due and payable; or

(b) the application contains information that is inaccurate or misleading in a material particular; or

(c) information given to the Secretary by, or on behalf of, the applicant in connection with the application, including information given for the purpose of a requirement under section 31, is inaccurate or misleading in a material particular; or

(d) the applicant fails to comply with a requirement under section 31 to give information consisting of individual patient data in relation to the goods.

(3) In this section, **'individual patient data'**, in relation to therapeutic goods, means information, derived from clinical trials, relating to individuals before, during and after the administration of the goods to those individuals, including, but not limited to, demographic, biochemical and haematological information."

(2) The amendment made by subsection (1) applies to applications made under section 23 of the Principal Act before the commencement of this Act as well as to applications made under that section after that commencement.

The Committee notes that the effect of subclause 10(2), if enacted, would be to apply the amendments proposed by subclause 10(1) retrospectively, to applications made prior to the enactment of the Bill.

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

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT ACT 1991

The Bill for this Act was introduced into the House of Representatives on 17 October 1991 by the Parliamentary Secretary to the Minister for Transport and Communications.

This omnibus Bill proposed to amend the following seven Acts administered within the Transport and Communications portfolio:

- *Australian Maritime Safety Authority Act 1990;*
- *Australian National Railways Commission Act 1983;*
- *Civil Aviation Act 1988;*
- *Federal Airports Corporation Act 1986;*
- *Navigation Act 1912;*
- *Parliamentary Proceedings Broadcasting Act 1946;* and
- *Trade Practices Act 1974.*

The Committee dealt with the Bill in Alert Digest No. 18 of 1991, in which it made various comments. The Minister for Shipping and Aviation Support responded to those comments in a letter dated 9 December 1991. Though the Committee noted that the Bill was passed by the Senate on 14 November (and by the House of Representatives on 14 November 1991) the Minister's response may nevertheless be of interest to Senators. A copy of that letter is, therefore, attached to this report. Relevant parts of the response are also discussed below.

Delegation to 'a person'
Clause 14 - proposed new subsection 98(3B) of the *Civil Aviation Act 1988*

In Alert Digest No. 18, the Committee noted that clause 14 of the (then) Bill proposed to insert a new subsection 98(3B) into the *Civil Aviation Act 1988*. Section 98 of the Civil Aviation Act sets out the regulation making power associated with the Act. Proposed new subsection (3B) provides:

> Nothing in this Act (including, in particular, paragraph 9(1)(a), subsection 13(4) and section 94) is to be taken to prevent regulations being made which provide for the delegation of:
>
> (a) a function conferred on the [Civil Aviation] Authority under paragraph 9(1)(a); or
> (b) a power of the Authority for or in connection with the performance of that function;
>
> to a person who is not a member or an officer.

The Committee noted that section 94 of the Civil Aviation Act sets out the (then) current limits on delegation by the Authority. It provides:

> The Authority may, by writing under its common seal, delegate all or any of its powers under this Act to:
>
> (a) a member;
> (b) the Chief Executive Officer;
> (c) an officer [which is defined in section 3 of the Act as a member of the staff of the Authority]; or
> (d) a person in respect of whose services arrangements under paragraph 91(3)(a) [which provides for secondments of personnel from the Australian Public Service and elsewhere] are in force.

The Committee suggested that the amendment would over-ride those limits and allow the Authority to delegate (under the regulations) any or all of its functions

(and the powers connected with those functions) to 'a person', without any limits on the attributes and qualifications of such a person. The Committee indicated that it had consistently drawn attention to such powers of delegation.

The Committee noted that, in relation to this particular provision, the Explanatory Memorandum to the Bill states:

> This amendment [would remove] any legal doubt about the Authority's power to delegate certain air safety functions under the Civil Aviation Regulations to industry bodies as has been done for at least the last 30 years.

The Committee indicated that while it appreciated that this may be a valid explanation for the provision being drafted in this way, it would appreciate the Minister's advice as to the 'certain air safety functions' involved and the 'industry bodies' to whom the functions were to be delegated. In particular, the Committee sought the Minister's advice as to what limits exist as to the persons who can, on behalf of those industry bodies, carry out those functions and, if there are none, how the power of delegation might be limited in order to allay the Committee's concerns.

The Minister responded as follows:

> The amendment enables the Civil Aviation Authority (CAA) to delegate certain air safety functions under the Civil Aviation Regulations to industry bodies. You have sought my advice as to which air safety functions are to be delegated, the industry bodies to whom they are to be delegated and what limits exist as to the persons who can, on behalf of those industry bodies, carry out those functions.
>
> This amendment simply clarifies the CAA's powers to engage in a practice which has been in existence since the

early 1940's and which enables aviation safety regulatory bodies (i.e., the CAA) and industry to function efficiently without any detriment to air safety.

The Minister went on to say:

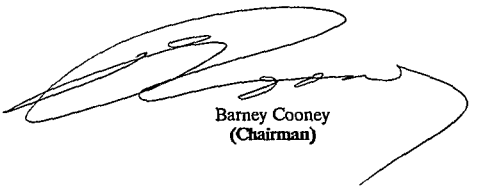
> The powers delegated to industry bodies are essentially technical in nature. They are delegated to persons recognised as having the necessary experience and ability to exercise those powers in a responsible manner. For the benefit of the Committee I have included a number of examples of the sorts of powers which have been delegated to industry.
>
> Firstly, the CAA's powers under subregulations 37(1) and (2) to approve a defect in, or damage to, an aircraft as a permissible unserviceability have been delegated to persons with relevant skill and experience and subject to detailed conditions. In the case of QANTAS the power has been delegated to senior aircraft engineering staff.
>
> Secondly, the CAA has delegated various powers to the Gliding Federation of Australia and similar sports aviation bodies enabling them to control the activities of their members. These powers include the power to issue certificates of registration and type approval in respect of gliders; the power to issue flight manuals for gliders; and the power to require members to register their aircraft under the Federation's rules rather than carry an Australian VH registration.
>
> Finally, the CAA has delegated its power under subregulation 40(1) to approve the use of a non-specified aircraft material in the servicing of aircraft to responsible people in the major airlines' maintenance organisation.

The Minister concluded by saying:

> The delegation of power does not imply an abdication of authority. The CAA undertakes regular surveillance of

delegates. If the power is not being properly exercised, the delegation will be withdrawn.

The Committee thanks the Minister for his response and for his assurance that delegations will be withdrawn if the relevant powers are found to be improperly exercised.



Barney Cooney
(Chairman)

Minister for Justice and Consumer Affairs
Senator the Hon. Michael Tate

- 4 DEC 1991

ITS91/17126

Dear Senator

I refer to the Senate Scrutiny of Bills Alert Digest 20/91 making comments about the Bankruptcy Amendment Bill 1991, presently before the Senate. The Committee has raised 6 matters of concern about provisions of the Bill in relation to which I provide the following response.

Clause 4 - Proposed new paragraph 6B(2)(a) - Inappropriate delegation of legislative power

Proposed section 6B constitutes, in essence, a re-enactment of existing section 6A of the *Bankruptcy Act 1966* (the Act), which was inserted in 1987. The Bankruptcy Rules make provision under existing section 6A. The relevant rules are rules 30A, 78 and 87 and copies of these are attached for the information of the Committee (Attachment A). By virtue of subclause 51(3) of the Bill, those rules will remain in force after the commencement of the Bill, and it is not envisaged that they will be altered.

In developing the Bill, consideration was given to Senate Standing Order 24 to ensure that the requirement not to provide for inappropriate delegation of legislative power was infringed. Indeed, as the Committee has noted there is, in proposed new section 6A, a general statement of the matters which a bankrupt or debtor is required to include in his or her statement of affairs, and this covers the subject matters previously included in the Bankruptcy Rules in relation to statements of affairs. The Attorney-General's Department is undertaking a review of the Act, one of the objectives of which is to ensure that as far as possible, the important rights and obligations of bankrupts, debtors and others are specified in the principal legislation, rather than in subordinate legislation. The present Bill involved acceleration of various aspects of this review project. As I have indicated, I share the Committee's concerns about inappropriate delegation of legislative power. However, section 6B is proposed to be a re-enactment of existing section 6A of the Act, although confined to statements of affairs in relation to insolvency administrations outside bankruptcy proper and the administration of deceased estates in bankruptcy, because the circumstances of urgency in which the present Bill was brought forward precluded consideration being given to totally overhauling the law relating to statements of affairs.

Clause 5 - proposed new section 12(4) - Delegation to a 'person'

This proposed provision would specifically enable the Inspector-General or a person authorised by the Inspector-General to attend a meeting of creditors under the Act. The principal function of the Inspector-General in Bankruptcy is to oversight the general administration of personal insolvency by the Insolvency and Trustee Service Australia (ITSA), the Division of the Attorney-General's Department with responsibility for bankruptcy matters, and by private sector registered trustees. The

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Inspector-General may be directed by the Minister to make inquiries, and must give an annual report about the operation of the Act to the Minister for tabling in Parliament.

The Inspector-General in Bankruptcy is given powers by the Act to undertake investigations and inquiries into matters such as the conduct of trustees and the affairs of bankrupts and debtors. It had been considered that this power extended to attendance by a person at a meeting of creditors, but doubts have recently arisen about this, and accordingly, it was considered desirable to put the matter beyond doubt.

As regards the Committee's contention that the proposed provision makes any right, liberty or obligation subject to insufficiently defined administrative powers, I point out that the proposed provision would merely enable the Inspector-General or a person authorised by him or her to attend a meeting of creditors, a necessary adjunct to the powers of the Inspector-General in carrying out the function of oversighting the administration of bankruptcy generally. The mere presence of the Inspector-General or his or her nominee at a meeting cannot, in my view, be said to affect any rights, liberties or obligations. Indeed, by proposed section 64ZA, the Inspector-General or nominee would specifically be precluded from voting at any meeting. Voting at a meeting is the only activity which is in any way determinative of the rights or obligations of persons.

Clause 25 - proposed paragraph 139T(2)(f) - 'Henry VIII clause'

In my view, proposed paragraph 139T(2)(f) of the Act, which would enable the Official Receiver to authorise departure from the income contribution regime for prescribed reasons other than those specified in paragraphs 139T(2)(a) to (e), would not empower the prescription of matters inconsistent with those specified in the primary legislation, or in such a manner as to limit the operation of the specified reasons, as the Committee implies. Proposed section 139T is not expressed to be subject to the subordinate legislation, nor does the provision expressly empower the making of rules modifying, varying or limiting the provisions of the principal legislation.

Proposed subsection 139T(2) attempts to delineate in detail the circumstances of hardship which would justify departure from the proposed income contribution regime. However, it was considered that despite the fact that the proposed subsection sets out many reasonably foreseeable grounds for authorising departure from the contribution regime, circumstances which do constitute real hardship and which are not provided for in the subsection may arise in the future and there would be no flexibility to deal with those circumstances in the absence of a power to prescribe additional reasons, other than to bring forward further amendments to the Act. The provision is, as the Committee suggests, intended to be beneficial in that it will enable the range of hardship exemptions to be expanded quickly, should it prove necessary in the future to do so.

Clauses 25 and 26 - proposed new subsections 139T(5), 139ZE(6), 149P(6) and 149ZM(6) - No requirement to notify right of review

As the Committee identifies, the purpose of all the quoted provisions is to deem a decision maker to have refused an application for the exercise of a power where the decision maker has not in fact made a decision within the time specified by the legislation. The Committee suggests that there appears to be no obligation for applicants for the exercise of a particular power to be advised of their rights to apply to the Administrative Appeals Tribunal for review where the decision maker has not made a determination within the specified time. The provision is designed to ensure that applications for the exercise of the relevant powers are dealt with expeditiously and effectively and persons are not prejudiced by bureaucratic delay.

In my view, the inclusion of a requirement for action to be taken, namely notification of the right of review, in provisions designed to deal with situations created by inaction or delay would be illogical. The Committee's concerns could be dealt with administratively, by advising persons who apply for the exercise of the relevant powers that the power in question must be exercised within the statutory time-frame or the application is deemed to have been refused. It follows from the existence of the right of review by the Administrative Appeals Tribunal in the legislation that proper administrative practice would be to draw attention to the fact that if a decision has not been made within a specified time, the decision is to be taken to be adverse to the applicant. There appears to be no compelling need for this to be specified in the legislation itself.

Clause 25 - proposed subsection 139ZP(2) - Reversal of the onus of proof

Proposed section 139ZP is based directly upon section 57 of the *Child Support (Registration and Collection) Act 1988* which makes it an offence for an employer to dismiss, threaten to dismiss or otherwise prejudice an employee liable to make maintenance payments from his or her income. Subsection 57(2) of that Act also contains a reverse onus provision. The *Child Support* legislation provision, and the proposed section of the *Bankruptcy Act 1966* are intended to safeguard persons from arbitrary dismissal merely as a result of their particular status or legal obligations.

The reasons an employer may have for dismissing an employee are matters exclusively within the knowledge of the employer and could not readily be ascertained by investigation. This fact, combined with the consideration that arbitrary dismissal of an employee has most serious consequences for the employee, makes the reversal of the onus of proof as provided for in proposed section 139ZP justifiable in the particular circumstances with which the legislation is concerned. In addition, it is considered that proof of the existence of the facts of dismissal and the issuing of a notice under proposed section 139ZL, would give rise to an inference which it is reasonable to require the defendant to rebut.

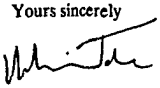
Clause 45 - proposed new sections 267A and 267C - Strict liability offences

The Committee suggests that proposed new sections 267A and 267C are strict liability offences, and that the mere doing by a person of the acts specified, whether intentionally or not, would expose the person to punishment. These offences correspond with other offence provisions in the *Bankruptcy Act 1966* such as section 265 which deals with the failure by a bankrupt to disclose the existence of property or to furnish all material particulars in statements about property the bankrupt is required to provide. These similar offences have been construed by the courts such that an offence is not committed if the defendant's act was inadvertent, rather than intentional.

Proposed sections 267A and 267C will make it an offence for a person to make statements, provide information or produce books under proposed sections 6A, 77C, 139U or 139V which are false or misleading in a material particular. These sections require the person who is under a duty to make a statement, provide information or produce books only to the extent that the person is able to do so. Similarly, a person making a statement about his or her income or likely income in relation to an income contribution period is bound only to provide particulars that are actually known to the person or which can readily be ascertained by him or her. The offences therefore can only be committed where the person actually possesses the information or books, but intentionally refuses to produce them, or where the person knows or can readily ascertain particulars about income, but nevertheless makes misrepresentations as to those particulars. It is considered therefore that the proposed provisions do not create strict liability offences.

I trust this information is of assistance to the Committee.

Yours sincerely



(Michael Tate)

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

Form of statement of affairs

30A. For the purposes of paragraphs 54 (1) (a), 55 (2) (b), 56 (2) (a), 56 (13) (a) and (b) and 57 (2) (a) of the Act, a statement of affairs shall be in a form approved by the Inspector-General for the purpose, and shall contain the following information:

(a) in respect of every statement of affairs:

(i) the name, address and date of birth of the debtor;

(ii) the debts and liabilities (including contingencies) owed by the debtor or, where the amount of a debt or liability is unknown and cannot reasonably be ascertained or quantified, a fair and reasonable estimate of the amount and a brief statement of the circumstances that prevent the amount being precisely stated, and in each case the year when the debt or liability was contracted and the creditor's name;

(iii) full particulars of property in which the debtor has an interest, either at law or in equity, including debts owed to the debtor, and trusts, mortgages or other charges over or affecting the property, or, where the amount of the debtor's interest is unknown and cannot reasonably be ascertained or quantified, a fair and reasonable estimate of the amount and a brief statement of the circumstances that prevent the amount being precisely stated;

(iv) all dispositions of property, including dates and the names of recipients and any consideration paid or payable to the debtor, made by the debtor in the period of 5 years preceding the date of the statement or the date of the bankruptcy (whichever is earlier);

(v) full particulars of any litigation (including the court, the nature of the litigation, the capacity of the debtor in the litigation, the amount in issue in the case of a liquidated claim, and any right or claim of the debtor to a set-off or counter-claim or to relevant insurance or other indemnity) in which the debtor is involved or which is pending against the debtor;

(vi) a description of any business in which the debtor is involved, or has been involved during the applicable period mentioned in subparagraph (iv);

(vii) particulars of the amounts and sources of all income received by the debtor in the period of 2 years preceding the date of the statement;

(viii) the names and ages of all persons dependent (wholly or in part) on the debtor, and the relationship of each dependant to the debtor;

(ix) a statement whether the debtor has ever previously been bankrupt or entered into a deed of arrangement, a deed of assignment or a composition under Part X of the Act or under the repealed Act, or any analogous overseas legislation; and

(b) in the case of a statement of affairs by a debtor who, during the period of 5 years preceding the date of the statement or the date of the bankruptcy (whichever is earlier), has been in business as a partner or sole proprietor, or has been a trustee of a trust that has carried on a business, or a director or other officer of a company that has been involved directly or indirectly in the carrying on of a business:

(i) a statement of the nature and type of business;

(ii) the registered or principal office of the business and all other addresses or locations at which the business is conducted, or has been conducted during the period of 5 years preceding the date of the statement or the date of the bankruptcy (whichever is earlier);

(iii) the location or locations of the books of account and records of the business and the name and address, or names and addresses, of the person or persons having custody or control of those books and records; and

(iv) the registered business name (if any).

Statement of affairs by joint debtors

30B. (1) Joint debtors, whether partners or not, shall file with the Registrar a statement of their joint affairs, in accordance with a form to be approved by the Inspector-General.

(2) The form mentioned in subrule (1) shall provide for the joint debtors to state the matters specified in subrule 78 (2).

Debtor's statement of affairs

78. (1) A statement under subparagraph 188 (2) (c) (i) of the Act shall be in a form to be approved by the Inspector-General, and verified by an affidavit in accordance with Form 10.

(2) The form mentioned in subrule (1) shall require the debtor to state:

(a) in relation to unsecured debts owed by the debtor:

(i) the name and address of each creditor and the amount (if any) owed by the creditor to the debtor;

(ii) the amount of each debt;

(iii) the year when the debt was contracted; and

(iv) the nature of the debt;

(b) in relation to secured debts owed by the debtor:

(i) the name and address of each creditor and the amount (if any) owed by the creditor to the debtor;

(ii) the amount of each debt and particulars of the security relating to it;

(iii) the date when the security was given;

(iv) the estimated present value of the security; and

(v) the estimated deficiency or surplus if the security were to be realised;

(c) in relation to current hire purchase agreements:

(i) the name and address of the finance company;

(ii) the date of the agreement;

(iii) particulars of the goods to which the agreement relates;

(iv) any arrears of payment under the agreement;

(v) the amount required to complete the agreement; and

(vi) the present value of the goods and the estimated deficiency or surplus if the goods were to be realised;

(d) in relation to the debtor's assets:

(i) cash on deposit with banks, building societies, credit or friendly societies and other financial organisations, including the name and address of each organisation;

(ii) cash in hand;

(iii) stock-in-trade, including its value and location;

(iv) value and location of trade fittings, fixtures, utensils, farming stock, growing crops, household furniture and effects, motor vehicles, leasehold property and other non-freehold property and, in relation to any mortgage charge or lien secured over the property, the amount of the security and the name and address of the owner of the security;

(v) freehold property, including its value and location and, in relation to any mortgage or charge secured over the property, the amount of the security and the name and address of the owner of the security;

(vi) any interest (vested or contingent) under a will, trust or deed of settlement;

(vii) any securities held by way of mortgage, bill of sale or the like, including details of the value of the security and the property secured; and

(viii) any other property or assets;

(e) particulars of contingent assets, contingent liabilities and any other liabilities, not otherwise stated;

(f) statements:

(i) that the debtor is not an undischarged bankrupt or insolvent under a Commonwealth Act or a State Act;

(ii) of any previous bankruptcy or that the debtor has never previously become a bankrupt;

(iii) of any previous composition with creditors or assignment or arrangement for the benefit of creditors, or that the debtor has never made any such composition, assignment or arrangement; and

(iv) that the debtor has not, during the past 5 years, carried on business on his or her own account, or in partnership, or a statement of any business or partnership carried on during that period with details of books of account kept in connexion with the business; and

(g) a summary of information required by the form to be provided:

Form of statement of affairs and affidavit

87. (1) A statement under paragraph 246 (1) (a) or subsection 247 (1) of the Act shall be in a form to be approved by the Inspector-General, and verified by an affidavit in accordance with Form 38.

(2) The form mentioned in subrule (1) shall require the person making the statement to state:

(a) in relation to the corpus account of the deceased person's estate:

(i) particulars of each amount received, including the name of the payer, the date received and the bank account into which the amount was paid; and

(ii) particulars of each amount paid, including the name of the payee, the date of payment and the bank account from which the amount was drawn;

(b) in relation to assets of the deceased person transferred to beneficiaries, the particulars of each of the assets transferred, the date of transfer and the name and address of the relevant beneficiary;

(c) in relation to the income account of the deceased person:

(i) particulars of each amount received, including the name of the payer, the date received and the bank account into which the amount was paid; and

(ii) particulars of each amount paid, including the name of the payee, the date of payment and the bank account from which the amount was drawn;

(d) in relation to unsecured debts owed by the deceased person:

(i) the name and address of each creditor and the amount (if any) owed by the creditor to the deceased person;

(ii) the amount of each debt;

(iii) the year when the debt was contracted; and

(iv) the nature of the debt;

(e) in relation to secured debts owed by the deceased person:

(i) the name and address of each creditor and the amount (if any) owed by the creditor to the deceased person;

(ii) the amount of each debt and particulars of the security relating to it;

(iii) the date when the security was given;

(iv) the estimated present value of the security; and

(v) the estimated deficiency or surplus if the security were to be realised;

(f) in relation to current hire purchase agreements;

(i) the name and address of the finance company;

(ii) the date of the agreement;

(iii) particulars of the goods to which the agreement relates;

(iv) any arrears of payment under the agreement;

(v) the amount required to complete the agreement; and

(vi) the present value of the goods and the estimated deficiency or surplus if the goods were to be realised;

(g) a statement of any other assets and liabilities, including contingent assets and liabilities, of the deceased person's estate.

RECEIVED
10 DEC 1991
Senate Standing C'tte for the Scrutiny of Bills

Minister for Shipping and Aviation Support

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-9 DEC 1991

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

Dear Senator Cooney

Thank you for your letter dated 7 November 1991 concerning the Civil Aviation (Carriers' Liability) Amendment Bill 1991 and the Transport and Communications Legislation Amendment Bill 1991. Although both Bills have since been passed by the Senate, I would like to record my responses to the points raised by the Committee.

In your letter you draw attention to a number of provisions in the Civil Aviation (Carriers' Liability) Amendment Bill which are to commence on Proclamation, and note that the period within which the Proclamation can be made is open-ended. The provisions to which you refer are those which give the force of law to the Montreal Additional Protocol No. 3 and the Montreal Protocol No. 4. These Protocols amend and update the parent Warsaw Convention as amended by the Hague Protocol.

You have sought my views as to why the proclamation of the relevant provisions in the Bill could not be "sunsetted" by means of a provision similar to section 2 of the *Carriage of Goods by Sea Act 1991*.

The *Carriage of Goods by Sea Act 1991* gives the force of law to the Hamburg Rules from a date to be fixed by Proclamation, being a day no sooner than the day on which the Hamburg Convention enters into force internationally, i.e., 1 November 1992. However, the Act also provides that if a Proclamation is not made within 3 years, the Hamburg Rules shall, in effect, commence automatically (on 31 October 1994) unless Parliament decides otherwise. These provisions serve a twofold purpose. On the one hand they ensure that the relevant sections of the Act can be proclaimed once the Hamburg Convention enters into force if the Government of the day considers it to be in Australia's commercial interests. On the other hand, they ensure,

subject to Parliament's veto, that the implementation of the Hamburg Rules' provisions of the Act will not be inordinately delayed.

While there are obvious similarities between the two pieces of legislation, there are significant differences between the Hamburg Convention and the Montreal Protocols which necessarily have some bearing upon their commencement.

The Hamburg Convention can be unilaterally applied by a country through its domestic legislation and does not require that country's trading partners to also implement it for its provisions to come into operation. Unlike the Hamburg Convention, the Montreal Protocols do not constitute a stand alone system. The Montreal Protocols amend and update the parent Warsaw Convention as amended by the Hague Protocol. The Warsaw system purports to limit the liability of international carriage between contracting parties. Thus Australia cannot unilaterally adopt the provisions of the Montreal Protocols, particularly those which increase the liability limits. To do so would affect the rights of other countries and would be in breach of Australia's obligations under the Warsaw Convention or the Warsaw Convention as amended by the Hague Protocol. In these circumstances it would have been inappropriate to adopt a "sunset clause" similar to that contained in the *Carriage of Goods by Sea Act 1991*.

I accept the Committee's concerns in relation to there being no obligation to proclaim the relevant sections once the Protocols enter into force. However, I can assure the Committee that it is Australia's intention to ratify the Montreal Protocols. It is likely that Australia will do so before the Protocols enter into force internationally in which case it will be incumbent upon Australia to proclaim the relevant provisions of the Bill when the Protocols enter into force. The Protocols will enter into force internationally when they have been ratified by 30 States. At present there are only 19 ratifications. There is necessarily some uncertainty as to precisely when the remaining ratifications will be forthcoming.

The second matter raised in your letter concerns amendments to section 98 of the *Civil Aviation Act 1988* contained in the Transport and Communications Legislation Amendment Bill 1991. The amendment enables the Civil Aviation Authority (CAA) to delegate certain air safety functions under the Civil Aviation Regulations to industry bodies. You have sought my advice as to which air safety functions are to be delegated, the industry bodies to whom they are to be delegated and what limits exist as to the persons who can, on behalf of those industry bodies, carry out those functions.

This amendment simply clarifies the CAA's powers to engage in a practice which has been in existence since the early

1940's and which enables aviation safety regulatory bodies (i.e., the CAA) and industry to function efficiently without any detriment to air safety.

The powers delegated to industry bodies are essentially technical in nature. They are delegated to persons recognised as having the necessary experience and ability to exercise those powers in a responsible manner. For the benefit of the Committee I have included a number of examples of the sorts of powers which have been delegated to industry.

Firstly, the CAA's powers under subregulations 37(1) and (2) to approve a defect in, or damage to, an aircraft as a permissible unserviceability have been delegated to persons with relevant skill and experience and subject to detailed conditions. In the case of QANTAS the power has been delegated to senior aircraft engineering staff.

Secondly, the CAA has delegated various powers to the Gliding Federation of Australia and similar sports aviation bodies enabling them to control the activities of their members. These powers include the power to issue certificates of registration and type approval in respect of gliders; the power to issue flight manuals for gliders; and the power to require members to register their aircraft under the Federation's rules rather than carry an Australian VH registration.

Finally, the CAA has delegated its power under subregulation 40(1) to approve the use of a non-specified aircraft material in the servicing of aircraft to responsible people in the major airlines' maintenance organisation.

The delegation of power does not imply an abdication of authority. The CAA undertakes regular surveillance of delegates. If the power is not being properly exercised, the delegation will be withdrawn.

Yours sincerely

(Bob Collins)

MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

PARLIAMENT HOUSE
CANBERRA, A.C.T. 2600

3 DEC 1991

The Chairman
Standing Committee for the Scrutiny
of Bills
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

MIGRATION AMENDMENT BILL (No 2) 1991

I refer to the comments of the Committee on the Migration Amendment Bill (No 2) 1991 contained in Scrutiny of Bills Alert Digest No 18 of 1991 (6 November 1991).

My comments in respect of each of the Committee's objections are presented below in the order raised by the Committee.

Clause 3 - Proposed New Section 22A
(Requirement to provide information)

The Committee considers this provision to trespass on personal rights and liberties, in breach of principle 1(a)(i) of its terms of reference. The Committee's precise objection to the provision is not clear from the Digest.

The provisions are a further step in the implementation of an enhanced compliance strategy announced by the Government in August 1990. They are aimed at reducing abuses of the migration system and, in particular, reducing Australia's illegal entrant population. Proposed new Division 1A introduced by the Bill will give the Government the power to obtain information and documents about the identity or whereabouts of illegal entrants.

It must be remembered that the persons in respect of whom the information is sought have no right to be in Australia. They have breached migration laws and may also be receiving benefits which are normally available only to persons legally in Australia.

The Government is sending a clear signal to illegal entrants, through these amendments, that they can no longer rely on anonymity and non-cooperation of relatives and associates to avoid detection by my department.

The department usually holds information about the initial destination only of arrivals (as provided on the incoming passenger card) or addresses subsequently volunteered on visa or entry permit applications. This information quickly becomes out of date.

As you would expect, the majority of illegal entrants actively avoid contact with the Department. At present there is no legal basis for access to wider sources of information concerning their identity or whereabouts. Unless a clear power to gather such information is created, the Government is restricted in its efforts to further reduce the illegal entrant population.

Proposed section 22A creates the power to obtain necessary information for detection purposes. Under proposed sections 22B and 22C, persons called upon to provide such information would be compensated for any expenses they might incur.

The information collected would be used only to identify or to locate illegal entrants and bring them to account for their continued illegal presence in this country.

The new provisions, in my view, provide the Government with the minimum power necessary to enable it to deal effectively with the problem of determining the identity or whereabouts of illegal entrants.

Clause 4 and 5 - Proposed new subsections 23(3A) and 33(3A)
(Inappropriate delegation of legislative power)

The Committee believes this provision may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(i) of its terms and reference.

As I indicated in my Second Reading Speech to the House of Representatives, the Government announced on 30 April this year that a new 'special assistance' category had been added to the migration program for 1991-92. This category will target people in need who do not meet the refugee and other special humanitarian criteria but who the Government considers to have special humanitarian claims on this country.

The Government needs flexibility within the special assistance stream of the migration program to enable it to respond quickly to unforeseen and sudden developments of humanitarian concern to the Australian community. The gazettal mechanism set out in the Bill provides the necessary flexibility for managing program numbers.

In my Second Reading Speech, I said that the use of the powers provided for in clauses 4 and 5 of the Bill would apply only to those classes of visas and entry permits where the use of the power was specifically permitted under the regulations. It will be the regulations in such cases which will contain the criterion that grants of visas or permits may not exceed the gazetted number.

Clause 8 - Proposed new subsection 83D(3)
(Reversal of the onus of proof)

The Committee considers this provision involves a reversal of the onus of proof and therefore trespasses unduly on personal rights and liberties, in breach of principle 1(a)(i) of its terms of reference.

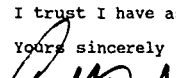
Proposed new section 83D is intended to discourage the distasteful practice of marriage-broking for the purpose of circumventing Australia's migration laws.

Subsection 83D(3) does not reverse the onus of proof. Under subsection 83D(1), the prosecution would prove the offence if it showed that a person arranged a marriage between an Australian citizen or permanent resident and a non-citizen and that the purpose was to assist the non-citizen to satisfy requirements under the migration legislation for obtaining permanent residence in Australia. It is not an element of the offence that the person did not believe that a genuine and continuing relationship would result from the marriage.

Subsection 83D(3) was inserted because the Government recognised that there are persons in certain communities in Australia who, as a matter of custom, enter into 'arranged' marriages. If such marriages are arranged and a purpose of the marriage is to obtain residence in Australia for one or other of the parties the offence would be committed. However, if the arranged marriage is also a genuine one that will provide a complete defence. That is the intention of subsection 83D(3).

I trust I have assisted the Committee with these comments.

Yours sincerely



Gerry Hand

Transport and Communications
Minister for Land Transport

The Hon. Bob Brown MP

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

- 4 DEC 1991

Dear Senator Cooney

The Committee's Alert Digest No. 20 of 1991 raises two matters concerning the National Rail Corporation Agreement Bill 1991. The first relates to the commencement of the Act by proclamation and the second relates to delegation of legislative power.

Clause 2 provides that the Act will commence on a date to be proclaimed. I understand the Committee's concern is that there is no time limit for this to occur.

The clause was drafted in this fashion because it would have been inappropriate to suggest that the Commonwealth would act regardless of the passage of similar legislation in State Parliaments.

It is clearly in the interests of all the Shareholders for legislation to be proclaimed and for the NRC to commence operations as soon as possible. The Federal Government, which has been the driving force in the establishment of the NRC, has no intention of holding up this important part of its microeconomic reform process.

I would like to take this opportunity to assure the Committee that the Bill, if passed by the Parliament, will be proclaimed as soon as possible following the passage of legislation in the Commonwealth, NSW, Victorian, Western Australian and Queensland Parliaments.

The Committee also noted that the Shareholders' Agreement appears to raise similar issues in terms of the power of the Commonwealth and State Parliaments as those it raised in the context of its concerns about the National Road Transport Commission Bill. I understand that in that case the Committee is concerned about what it considers to be the inappropriate delegation of legislative power to a Ministerial Council.

I will be writing to you separately in relation to the National Road Transport Commission Bill, but consider that it is not the same issue. There is no delegation of legislative power to the NRC by the Shareholders' Agreement.

I trust this satisfies the Committee's concerns.

Yours sincerely

Bob Brown

BOB BROWN

Transport and Communications

Minister for Land Transport

The Hon. Bob Brown MP

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Senator B Cooney
Chairman
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Dear Senator Cooney

I refer to the comments contained in the Scrutiny of Bills Alert Digest No. 20 of 1991 (27 November 1991) concerning the National Rail Corporation Agreement Bill 1991 and the National Road Transport Commission Bill 1991.

A detailed response to the Committee's comments concerning the National Road Transport Commission Bill is attached. A response to the Committee's concerns regarding the National Rail Corporation Agreement Bill 1991 has been provided under *separate cover*.

One of the issues raised in the Alert Digest is the power of the Ministerial Council to amend the Heads of Government Agreement so that the Commission has coercive powers.

The attached response clearly explains that the functions of the Commission are confined to matters of an advisory nature and that the powers that can be conferred upon it are limited to those that come within the executive power of government, such as power to make inquiries and form opinions.

Given the concerns of the Committee, however, the Government would consider changing the definition of Agreement in the Bill to ensure that there is no inappropriate delegation of legislative power.

The following amendment has been proposed by the Australian Democrats and is considered appropriate:

Clause 3, page 2, definition of 'Agreement' - delete all words after "set out in the Schedule".

I trust that the advice provided will be of assistance to the Committee.

Yours sincerely

Bob Brown

BOB BROWN

10 DEC 1991

SENATE SCRUTINY OF BILLS COMMITTEE

ALERT DIGEST COMMENTS ON NATIONAL ROAD TRANSPORT COMMISSION BILL 1991

OVERVIEW

The Road Transport Industry Forum submission does not reflect an understanding of the intention of the legislation and the background to its development.

The legislation has been drafted so as to provide the Commission with the functions and powers agreed to by Heads of Government at the July 1991 Special Premiers' Conference.

Although the Commission is being established under Commonwealth legislation, the Commission is not, and should not be considered an arm of the Commonwealth Government.

The Commission is an independent statutory authority. It has been established in this manner to secure the confidence and agreement of the States.

The legislation has been drafted in close consultation with all participants. The States, the Australian Capital Territory and the Australian Local Government Association have approved the form and content of the Bill.

STRUCTURE AND FUNCTIONS

The current Bill simply establishes the National Road Transport Commission. Substantive legislation to establish the regulatory and charging framework is to be introduced next year, following extensive consultative processes by the National Road Transport Commission.

Establishing that framework requires the passage of legislation by the Commonwealth Parliament on behalf of the Australian Capital Territory with State Parliaments passing complementary legislation to adopt the law as applies in the Australian Capital Territory from time to time.

This is intended to provide a legislative framework which will streamline the process of developing and maintaining a nationally-consistent operating environment for the road transport industry. It will avoid the current necessity for amendments to legislation/regulations in nine separate jurisdictions every time there is a need to modify some detail of regulation relating to road transport. The current processes have been found wanting and have been heavily criticised by the industry over a long period.

The National Road Transport Commission is fully accountable through the Ministerial Council comprising Ministers from the participating jurisdictions. Where legislative change is required it will be subject to the processes and scrutiny of Federal Parliament.

The Commonwealth is providing the legislative means to establish national arrangements based on genuine co-operation between the partners in the Federation. The Commonwealth Government has undertaken only to present to Parliament legislative proposals which have been through the Commission processes and not disapproved by the Ministerial Council.

The Commission is also required under the legislation to provide annual reports to the responsible Commonwealth Minister and each member of the Ministerial Council for presentation to Federal and State Parliaments.

SPECIFIC CONCERNS

The first issue raised by the Committee relates to paragraphs 8(1)(a),(e) and (f) of the Bill, which provide that additional powers may be conferred on the Commission by Heads of Government (by amending the Heads of Government Agreement), by the Ministerial Council or, with the consent of the Council, by individual State Ministers. The framework of the Bill makes it very clear that the functions of the Commission are confined to matters of an advisory nature, and the referral framework established under sub-section 8(1) is intended merely to permit the Commission to carry out this function more effectively.

The purpose of paragraphs 8(1)(e) and (f) is to indicate that the Commission's functions and powers may be extended by executive action on the part of Ministers acting collectively or singly. The functions and powers that may be conferred by executive action are limited to those that come within the executive power of government, for example, powers to make inquiries, to form opinions about questions of policy and to make reports or non-binding recommendations.

Powers which may legally be referred by executive action do not include power to compel people to supply information or documents, or the power to make recommendations which have legal effect. These are powers that cannot be conferred on the Commission other than by legislative means.

With specific reference to the example raised by the Committee, it is not possible for the Ministerial Council or individual Ministers to confer on the Commission power to enter premises: a delegation of this nature would need to be made by each of the respective State Parliaments pursuant to paragraph 8(1)(d).

Similarly, it is not possible to confer on the Commission powers of coercion, such as the power to enter premises, by amendment to the Heads of Government Agreement pursuant to paragraph 8(1)(a) of the Bill. The Courts are traditionally wary of provisions that do not directly confer functions and powers but provide for them to be conferred by someone other than Parliament. It is inconceivable that a court would, in the light of the general structure and intent of the legislation, read this paragraph as authorising the conferral of coercive powers, which are not mentioned, or even hinted at anywhere in the Bill. In interpreting legislation, the courts will assume that Parliament did not intend to encroach on the rights of ordinary citizens unless the language used is more specific.

The provisions allowing for the delegation of Commission functions are also intended merely to facilitate the Commission in the performance of its functions. Any delegations of Commission power, which as previously outlined is only advisory in nature, require the agreement of all members of the Ministerial Council.

Under the Heads of Government Agreement, the Commonwealth has agreed only to consider road transport legislation recommended by the Commission and approved by the Council. This undertaking was taken in the context of negotiations with the States when agreeing to establish the Commission. The State and Australian Capital Territory Governments have also conceded powers in order to establish the Commission. It should be noted again, however, that all legislation proposed by the Commission and approved by the Council must be passed by the Commonwealth Parliament to become law.

Any changes to these arrangements would not be in accordance with the spirit of the Special Premiers' Conference process, the Heads of Government Agreement or the co-operative approach encompassed in the decision to establish the Commission. To include a provision limiting the powers of the Ministerial Council by disallowable instrument would change the character of the Commission and the power sharing framework within which it has been established.

In summary, the Bill before the Parliament only provides for the establishment of the National Road Transport Commission. The introduction of a national heavy vehicle registration scheme will be the subject of separate legislation expected to be brought before Federal Parliament for consideration during Autumn sittings 1992.

This will be the substantive legislative base for establishing a uniform operating environment for the road transport industry and it (and regulations made under it) will be subject to scrutiny of the Parliament.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

TWENTY-SECOND REPORT

OF

1991

18 DECEMBER 1991

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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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

TWENTY-SECOND REPORT OF 1991

The Committee has the honour to present its Twenty-Second Report of 1991 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:

Industrial Relations Legislation Amendment Bill (No. 3) 1991

INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL (NO. 3) 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister for Industrial Relations.

The Bill proposes to amend:

- the *Commonwealth Employees Rehabilitation and Compensation Act 1988* and *Occupational Health and Safety (Commonwealth Employment) Act 1991,* to separate the regulatory and service functions currently performed by Comcare;
- the *Industrial Chemicals (Notification and Assessment) Act 1989,* to allow importers or manufacturers of the same industrial chemical to make joint application for an assessment certificate for the chemical;
- the *Long Service Leave (Commonwealth Employees) Act 1976,* to enable regulations to be made to provide that certain payments are excluded from 'salary' for the purposes of calculating long service leave entitlements;
- the *Navigation Act 1912,* to enable regulations to be made to effect the Medical Examination (Seafarers) Convention, 1946 (No. 73), the Accommodation of Crews Convention (Revised), 1949 (No. 92) and the Accommodation of Crews (Supplementary Provisions) Convention 1970; and
- the *Pipeline Authority Act 1973,* to correct a minor drafting error.

The Committee dealt with the Bill in Alert Digest No. 20 of 1991, in which it made various comments. The Minister for Industrial Relations responded to those

comments in a letter dated 11 December 1991. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

'Henry VIII' clause
Clause 36 - proposed new section 8A of the *Long Service Leave (Commonwealth Employees) Act 1976*

In Alert Digest No. 20, the Committee noted that clause 36 of the Bill proposes to insert a new section 8A into the *Long Service Leave (Commonwealth Employees) Act 1976*. That proposed new section provides:

> The regulations may:
>
> (a) provide that payments of a specified kind are not included in salary; or
>
> (b) specify the extent to which payments of a specified kind are not included in salary; or
>
> (c) prescribe the circumstances in which payments of a specified kind are not included in salary;
>
> for the purposes of this Act or a provision of this Act.

The Committee indicated that this is what it would generally consider to be a 'Henry VIII' clause, as it would allow the definition of 'salary' for the purposes of the Act to be, in effect, amended by regulation.

The Committee drew Senators' attention to the clause, as it may be considered 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:

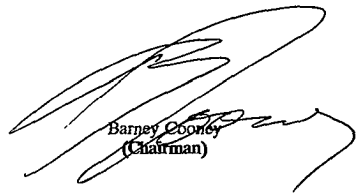
> Proposed section 8A of the Act is not inconsistent with the scheme of the Act, and, indeed, is properly regarded as the counterpart of the present section 8. The Act uses the term 'salary', but does not define what it means. Instead, section 8 of the Act allows regulations to be made providing that allowances not forming part of salary in its ordinary sense, may nevertheless be treated as salary under the Act. Proposed section 8A represents the other side of the same coin, in that it will enable the making of regulations providing that specified payments otherwise forming part of salary, are not to be taken into account under the Act, in whole or part, or are not to be taken into account in prescribed circumstances.
>
> This scheme has its precedents in Commonwealth legislative practice. Section 5 of the Superannuation Act 1976 provides for regulations to be made in relation to the treatment of payments as salary, or their exclusion from salary, for the purposes of that Act. (See also the definition of 'basic salary' in rule 2.1.1 of the Rules for the Administration of the Superannuation Scheme under the Superannuation Act 1990).

The Minister goes on to say:

> Such provisions are necessary. In order to effectively treat an amount as salary, or exclude it from such treatment, the mechanism adopted needs to be able rapidly to respond to events, such as the making of industrial agreements or awards, while preserving parliamentary scrutiny. Attempting to handle the matter by way of enactments would be insufficiently responsive for this purpose. Dealing with it by way of regulation is both responsive and preserves Parliament's ability to scrutinise and, if necessary, disallow.
>
> Moreover, proposed section 8A will enable effect to be given to long standing Commonwealth policy that 'disability' allowances such as shift penalty payments should not be payable during long service leave, as no disability is experienced by employees on such leave. It had originally

been thought that, this was the effect of the Act, as no regulations have been made under section 8 of the Act to specify such allowances as salary for long service leave purposes (only skill and qualification allowances have been so specified). However, that view is now open to some doubt.

The Committee thanks the Minister for this response.



Barney Cooney
(Chairman)

RECEIVED
11 DEC 1991
Senate Standing C'tte for the Scrutiny of Bills

MINISTER FOR INDUSTRIAL RELATIONS

PARLIAMENT HOUSE,
CANBERRA, A C T 2600

11 DEC 1991

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

Dear Senator Cooney *Barney,*

I refer to the comments made by the Senate Standing Committee for the Scrutiny of Bills, in Scrutiny of Bills Alert Digest No. 20 of 1991 27 November 1991, on the proposed new section 8A of the Long Service Leave (Commonwealth Employees) Act 1976 (the Act). The Committee has noted that the proposed section is what it would consider to be a "Henry VIII" clause.

Proposed section 8A of the Act is not inconsistent with the scheme of the Act, and, indeed, is properly regarded as the counterpart of the present section 8. The Act uses the term "salary", but does not define what it means. Instead, section 8 of the Act allows regulations to be made providing that allowances not forming part of salary in its ordinary sense, may nevertheless be treated as salary under the Act. Proposed section 8A represents the other side of the same coin, in that it will enable the making of regulations providing that specified payments otherwise forming part of salary, are not to be taken into account under the Act, in whole or part, or are not to be taken into account in prescribed circumstances.

This scheme has its precedents in Commonwealth legislative practice. Section 5 of the Superannuation Act 1976 provides for regulations to be made in relation to the treatment of payments as salary, or their exclusion from salary, for the purposes of that Act. (See also the definition of "basic salary" in rule 2.1.1 of the Rules for the Administration of the Superannuation Scheme under the Superannuation Act 1990).

Such provisions are necessary. In order to effectively treat an amount as salary, or exclude it from such treatment, the mechanism adopted needs to be able rapidly to respond to events, such as the making of industrial agreements or awards, while preserving parliamentary scrutiny. Attempting to handle the matter by way of *enactments would be insufficiently responsive for this purpose. Dealing with it by* way of regulation is both responsive and preserves Parliament's ability to scrutinise and, if necessary, disallow.

Moreover, proposed section 8A will enable effect to be given to long standing Commonwealth policy that 'disability' allowances such as shift penalty payments

MINISTER ASSISTING THE PRIME MINISTER
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should not be payable during long service leave, as no disability is experienced by employees on such leave. It had originally been thought that, this was the effect of the Act, as no regulations have been made under section 8 of the Act to specify such allowances as salary for long service leave purposes (only skill and qualification allowances have been so specified). However, that view is now open to some doubt.

I am forwarding a copy of this letter to the Secretary of the Committee

Yours fraternally

Peter Cook