SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIRST REPORT

OF

1994

2 FEBRUARY 1994

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MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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

FIRST REPORT OF 1994

The Committee presents its First Report of 1994 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:

Interstate Gas Pipelines Bill 1993

National Health Amendment Bill (No. 3) 1993

INTERSTATE GAS PIPELINES BILL 1993

This Bill was introduced into the Senate on 28 October 1993 by the Manager of Government Business in the Senate for the Minister representing the Minister for Primary Industries and Energy.

The Bill proposes to:

. implement statutory requirements for interstate gas pipeline operations to facilitate the efficient and competitive development of the natural gas industry.

The Committee dealt with the Bill in Alert Digest No. 9 of 1993, in which it made various comments. The Minister for Resources has responded to those comments in a letter dated 22 December 1993. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Privilege against self-incrimination
Subclause 61(2)

In Alert Digest No. 9 of 1993, the Committee noted that this proposed subclause, if enacted, would expressly preserve the privilege against self-incrimination for a witness required to answer questions in accordance with paragraph 61(1)(b) in a hearing before the Trade Practices Commission.

Two matters arising from this were of concern to the Committee.

The Committee indicated that, first, the privilege is expressly preserved only in relation to answering questions. The Bill is silent on whether the privilege extends to the production of documents. The principle of statutory interpretation, *expressio unius est exclusio alterius: an express reference to one matter indicates that other matters are excluded,* must always be applied with caution. A Court could rely on the principle to construe the provision as excluding the privilege in relation to a witness being required to produce documents. However, a Court will always try to ascertain whether it was the legislative intention to exclude the privilege in relation to the production of documents. The Committee sought the advice of the Minister on whether or not the privilege against self-incrimination was intended to apply to the production of documents and asked whether the legislative intent could be made clear by suitable drafting.

Secondly, the Committee sought the Minister's advice on whether practical steps could be taken to ensure that a witness is made aware that he/she is entitled to the privilege, whether it be in relation only to answering questions or also to producing documents.

The Committee drew Senators' attention to paragraph 61(1)(b), 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 privilege against self-incrimination is intended to apply to the production of documents and I agree that this should be made clear in the Bill. I have therefore instructed my Department to arrange for the Office of Parliamentary Council to draft an amendment to address the point raised by the Committee.
>
> The Committee indicated that it would appreciate my advice on whether practical steps can be taken to ensure that witnesses are made aware of their entitlement to the privilege under subclause 61(2), whether it be in relation only to answering questions or also to producing documents.
>
> The Trade Practices Commission (TPC) has confirmed that it would take appropriate steps to ensure that witnesses at TPC arbitration hearings are informed of the rights and privileges available to them under the provisions of the legislation, including those afforded by subclause 61(2).
>
> Subsequent discussions between officers from my Department and officers from the Commission have confirmed that the TPC is considering a number of options, including:
>
> . a general guidelines booklet for interested parties that would outline the TPC's role and the rights of witnesses, including the privilege against self-incrimination;
>
> . preparation of a pamphlet outlining rights that would be given to witnesses called before the TPC;
>
> . TPC writing to advise witnesses of their rights before they are called to arbitration hearings.
>
> I trust that this response clarifies the Government's intention regarding subclause 61(2) and the practical steps that the TPC

will take to ensure that witnesses are made aware of their rights.

The Committee thanks the Minister for his response.

NATIONAL HEALTH AMENDMENT BILL (NO. 3) 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Health.

This Bill should be read in conjunction with the Nursing Home Charge (Imposition) Bill 1993.

The Bill proposes to amend the *National Health Act 1953* to:

. complement amendments made last year to the nursing home benefit payments scheme by the *National Health Amendment Act 1992*;

. make fee-reducing benefit received for a period up to 30 June 1993 recoverable as nursing home charge;

. allow fee-reducing benefit received for the period from 1 July 1993 to continue to be recovered as an overpayment in accordance with the 1992 amendments;

. provide that where the Commonwealth holds monies in trust for the benefit of the vendor pending completion of an investigation of the nursing home accounts, and on completion it is found that money is repayable to the vendor, the Commonwealth is liable to pay interest at commercial rates on the amount repayable; and

. complement measures in the *National Health Amendment Act 1992* to provide that amounts of unspent benefit paid prior to the recent prospective amendments, are recoverable from the vendor as debts on sale.

The Committee dealt with the Bill in Alert Digest No. 6 of 1993, in which it made various comments. The Minister for Housing, Local Government and Community Services responded to those comments in a letter dated 3 November 1993 and the Committee dealt with the response in its Sixth Report of 1993. The Committee sought further advice from the Minister who has responded in a letter dated 31 January 1994. A copy of this response is attached to this report and relevant parts of the response are also discussed below.

Retrospective application
Proposed new section 65GA

In Alert Digest No. 6, the Committee noted that proposed new subsection 65GA(1) provides:

> **Notice of fee-reducing benefit**
>
> **65GA.(1)** If:
>
> (a) an investigation under paragraph 65C(1)(c) or 65F(1)(c) or subsection 65G(3) in respect of an approved nursing home is completed after the commencement of this section; and
>
> (b) the investigation establishes that the vendor or an earlier proprietor of the nursing home has received a fee-reducing benefit in respect of the investigation period;
>
> the Secretary must work out whether some or all of that fee-reducing benefit was received in respect of the period beginning on the day determined by the Secretary under paragraph 65C(1)(c) or 65F(1)(c) or subsection 65G(3) (as the case may be) and ending on 30 June 1993 (**'charge period'**).

The Committee noted that proposed new section 65GC makes it clear that the amount of nursing home charge payable by the vendor of the approved nursing home equals the amount of the fee-reducing benefit stated in the notice under section 65GA. The combined effect of the provisions is retrospectively to take into account in determining the amount of the charge matters that occurred before 30 June 1993.

While noting in the second reading speech that the amendments are designed to address inequities in the recovery of unspent Commonwealth nursing home benefit when a nursing home is sold, the Committee was concerned that some inequity may remain if the vendor is retrospectively made liable for the 'debt'. This is especially so when the second reading speech alludes to the industry's practice of making appropriate provisions in contracts of sale. If, in a completed purchase, the vendor has allowed for the purchaser to be liable for the repayment, it would be inequitable for the vendor to be retrospectively made liable by this Bill. The Committee sought advice from the Minister on any way in which this issue has been or may be addressed.

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.

On 3 November 1993 the Minister responded to the Committee's comments:

> The concern outlined in the Secretary's letter is that an inequity

may arise if, as a result of the amendments, the vendor of a nursing home on sale is made retrospectively liable for a debt. This perception appears to be based on a misreading of the arrangements and I would like to take the opportunity to clarify the effect of the proposed amendments for the Committee.

The amendments proposed by the Bill must be read in conjunction with, and in the context of, the arrangements introduced this year by the National Health Amendment Act 1992. These arrangements came into effect on 1 July 1993 and are, effectively, extended by the proposed amendments.

Currently the National Health Act 1953 ("the Act") provides that certain investigations must be carried out when the Minister receives notice of a sale of a nursing home. In the course of such investigations, any unspent benefit identified that was advanced after 1 July 1993 is recoverable as a debt from the vendor at the point of sale. Any unspent benefit identified that was advanced prior to 1 July 1993 is only recoverable as an offset or fee loading from the purchaser.

The proposed amendments rely on (and expand on) this process in the following way. Any such unspent benefit, advanced prior to 1 July 1993, will reflect the amount of "charge" payable by the vendor under the new arrangements. For technical reasons, recoverable amounts relating to this period will be characterised as a "charge" rather than an overpayment. The vendor is already liable to repay the unspent benefit and would, in the normal course of events, repay it by a negative loading in the fee (which in fact reduces the Commonwealth benefit paid). Currently, however, where a home is sold, such a liability is transferred to the purchaser as a negative fee loading. The amendments will ensure that this liability will not, as a result of the vendor's actions, be passed onto the purchaser when a nursing home is sold.

There was also a concern expressed that any potential inequity may be compounded by a conflict between arrangement made in the contract of sale and recovery action effected under the proposed arrangements. current provisions in the Act, upon which the proposed amendments will rely, are designed to avoid any such conflict.

It is a requirement under the Act that the Minister be given 90 days notice of completion of a sale. Failure to give this notice is

> an offence attracting a maximum penalty of $20 000.
>
> Once notice has been received, the investigations establish the likely amount of any unspent benefit and this is advised to both the vendor and purchaser prior to completion of the sale, so that both parties are aware of the vendor's liability. This advice will, as a result of the amendments, include the amount of any nursing home charge payable by the vendor.

In its Sixth Report of 17 November 1993, the Committee thanked the Minister for the advice (in the last paragraph quoted) that the likely amount of any unspent benefit is advised to both vendor and purchaser prior to the completion of the sale, so that both parties are aware of the vendor's liability. Where this occurs, the Committee's concern is allayed.

The Committee noted, however, the legislation contemplated that there may be occasions where no notice was given and a sale could be completed without the benefit of advice as to the vendor's liability.

In such a case, the Committee sought the Minister's assurance that, if a vendor and a purchaser completed a contract of sale on the assumption that the purchaser would be liable, the Secretary would not give a notice under the proposed subsection 65GA(2) making the vendor liable. It may be that the Minister could include this matter in the principles to be complied with by the Secretary in accordance with subsections 65F(6) and 65G(7).

On 31 January 1994, the Minister responded as follows:

> As I understand the Committee's concerns, they relate to the question of whether the Bill contemplates revisiting a sale which has taken place prior to its commencement, and retrospectively determining that the vendor in such a sale is liable for a debt to the Commonwealth.
>
> I can assure the Committee that the Bill would not enable this to occur, nor is it intended that it should. The Bill's provisions would only affect the vendor of a sale which occurs after the commencement of the legislation. Whilst it would enable recovery action in relation to debts incurred in prior financial years, the action will be confined to future sales of nursing homes.
>
> I hope that this assurance allays the Committee's remaining concerns.

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

Mal Colston
(Chairman)

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SECOND REPORT OF 1994

The Committee presents its Second Report of 1994 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:

Offshore Minerals Bill 1994

Social Security Legislation Amendment Bill 1994 (Social Security Legislation Amendment Bill (No. 3) 1993)

Transport and Communications Legislation Amendment Act (No. 2) 1993

OFFSHORE MINERALS BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Resources.

This Bill, and associated Bills, replace the existing *Minerals (Submerged Lands) Act 1981* and its associated Acts. The Bill is a consequence of a Commonwealth-State Government agreement (the Offshore Constitutional Settlement) which provides that Commonwealth legislation alone applies to the mineral resources of that area of Australia's continental shelf beyond the three nautical miles limit from the territorial sea baselines.

The Committee dealt with the Bill in Alert Digest No. 1 of 1994, in which it made various comments. The Minister for Resources responded to those comments in a letter dated 9 February 1994.

Although this Bill has been passed by the Senate, a copy of that letter is attached to this report and relevant parts of the response are discussed below for the information of Senators.

Strict liability - Reversal of onus of proof
Subclauses 404(4) and (5)

In Alert Digest No. 1 of 1994, the Committee noted that Division 5 of Part 4.2 contains provisions in accordance with the 1958 *Convention on the Continental Shelf* to establish and regulate a safety zone around a structure or equipment in an offshore area. Subclauses 404(3) - (5) provide:

> **(3)** The owner of a vessel and the person in command or in charge of a vessel are each guilty of an offence against this section if the vessel enters or remains in a safety zone in contravention of subsection (1) or (2).
> Maximum penalty: Imprisonment for 5 years.
>
> **(4)** It is a defence to a prosecution of a person for an offence against subsection (3) if the person satisfies the court that:
> (a) an unforeseen emergency made it necessary for the vessel to enter or remain in the safety zone to attempt to secure the safety of:
> (i) a human life; or

(ii) the vessel; or
(iii) another vessel; or
(iv) a well, pipeline, structure or equipment; or

(b) the vessel entered or remained in the safety zone in circumstances beyond the control of the person who was in command or in charge of the vessel (for example, adverse weather).

(5) It is a defence to a prosecution of the owner of a vessel for an offence against subsection (3) if the owner satisfies the court that the owner:

(a) did not aid, abet, counsel or procure the vessel's entering or remaining in the safety zone; and

(b) was not in any way, directly or indirectly, knowingly concerned in, or party to, the vessel's entering or remaining in the safety zone.

The Committee observed that these subclauses, if enacted, would impose an offence of strict liability and reverse the onus of proof by providing specific defences.

The Committee pointed out that offences are categorised as of strict liability where it is immaterial whether the person had the 'guilty knowledge' which at common law is an integral part of any statutory offence, unless the statute itself or its subject matter rebuts that presumption. At common law offences of strict liability are subject to the defence of honest and reasonable mistake of fact. In such cases the accused must raise the defence, though the prosecution has the ultimate onus of proving the elements which constitute the offence. In a statute, a strict liability offence may also be made subject to a specific defence or defences.

The Committee acknowledged that where public policy dictates that strict liability offences should be created, both specific and general defences assist the personal rights and liberties of the accused. The primary issue, therefore, is whether a strict liability ought to be imposed.

It seemed to the Committee that the Explanatory Memorandum did not offer any reason for establishing the offence as one of strict liability. Nor did the Explanatory Memorandum indicate why the owner of a vessel which has entered a safety zone should automatically be guilty of an offence. Subclause 404(5) offers the owner a defence which involves proving a series of negatives to show that the owner was not 'conspiring' to have the ship enter the safety zone. The Committee was of the view that it should be a matter for the prosecution to prove a 'conspiracy'. Accordingly the Committee sought the Minister's advice on the reasons for the imposition of strict liability and the need for the owner to be included in the regime, and especially for the owner to be required to disprove that he or she was even indirectly a party to the vessel's entering or remaining in the safety zone.

While awaiting the Minister's advice, 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 Minister responded as follows:

> Subclauses 404(4) and (5) continue the existing policy expressed in the Minerals (Submerged Lands) Act 1981. Subsection 76(3) of the Act provides that both the owner and the person in command of a vessel are guilty of an offence if the vessel enters or remains in a safety zone. The imposition of strict liability has been carried over into the Offshore Minerals Bill in order to highlight the importance that the Commonwealth and the States place on maritime safety.
>
> The collision of a vessel with an offshore minerals structure could have very serious consequences in term of danger to life, financial damage and damage to the environment. The creation of safety zones is intended to minimise the chances of such damage occurring. In addition to concern for safety, there is concern about the high cost in terms of finance and resources in mounting rescue operations as well as clean up and repair of any environmental damage.
>
> In order to impress the seriousness of the situation it is considered that the offence created should be one of strict liability. The owner is included to make sure that all precautions are taken to ensure that the locations of safety zones are known and that proper instructions are in place to avoid them.

The Committee does not accept that continuing the existing policy expressed in a current Act is conclusive of itself: especially when the Act was passed early in 1981 before the Committee existed.

The Committee notes that subsection 76(3) of the *Minerals (Submerged Lands) Act 1983,* which this legislation is replacing, did not provide any statutory defence. The terms of such a defence are therefore open to further consideration.

The Committee thanks the Minister for the explanation on the seriousness of the consequences of a collision. This is directly relevant to the issue posed by the Committee, namely whether the seriousness of the consequences warrants, in public policy terms, the imposition of strict liability.

The nature of the statutory defence offered to the owner continues to cause concern. If it is accepted that strict liability is warranted, the Committee is not troubled by requiring the captain or person in charge to establish that weather conditions or the safety of human life or a vessel compelled intrusion into the safety zone.

The Committee is of the view, however, that, if strict liability is to be imposed, it ought to be sufficient for the owner to satisfy the court that he or she had taken reasonable steps to ensure the vessel's safety. This would afford the opportunity to show that notification of safety zones and orders for observing safety zones had been kept up to date.

Delegation of power
Subclause 419(1)

The Committee also noted that subclause 419(1), if enacted, would enable a Designated Authority to delegate all or any of the powers or functions of the Designated Authority to a person. The Committee noted that there is no limitation as to the persons or classes of persons to whom the Designated Authority can delegate these various powers and functions. Neither the Bill nor the Explanatory Memorandum indicated the need for a power of such width.

Since its establishment the Committee has consistently drawn attention to provisions which allow for the delegation of significant and wide-ranging powers to 'a person'. Generally, the Committee has taken the view that it would prefer to see a limit on either the type of powers that can be delegated in this way or the persons to whom the powers can be delegated. If the latter course is adopted, the Committee prefers that the limit should be to the holders of a nominated office, to members of the Senior Executive Service or by reference to the qualifications of the person to be delegated the powers.

Accordingly, the Committee sought the Minister's advice whether some limitation could be imposed or, if not, the reasons for such an unlimited power.

The Committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

The Minister responded as follows:

> The Offshore Minerals legislation will be administered by the various State and Northern Territory (NT) minerals administrations for and on behalf of the Commonwealth. As each of the State/NT departments operate under differing

administrative arrangements and structures, the delegation of powers of the Designated Authority has been expressed in broad terms in subclause 419(1) so as to accommodate these differences.

For example, it is not considered practicable to nominate specific positions because:

- State/NT departments undergo frequent reorganisations, either following the election of a new government or through the need to increase efficiency gains;

- the description of nominated positions carrying out similar duties or functions vary from State to State (for example, the duties carried out by the Registrar of Mines in Tasmania are carried out by the Director of the Mining Registration Division in Western Australia and the Manager of the Mineral Resources Administration Branch in New South Wales).

Similarly, it is not considered practicable to specify a particular class of officers because the level or seniority of positions carrying out similar functions vary from State to State, eg, what may be the responsibility of the Senior Executive Service in one State may be carried out by an officer of the more junior Administrative Service in another State.

The Committee accepts the Minister's explanation and thanks him for his response.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1994
(Social Security Legislation Amendment Bill (No. 3) 1993)

This Bill was introduced into the House of Representatives on 25 November 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes to amend the *Social Security Act 1991* and *National Health Act 1953* to:

. extend qualification conditions for mobility allowance;

. reverse several AAT decisions and so permit the AAT to order a stay of a decision under review where the Social Security Appeals Tribunal has affirmed the departmental decision;

. include a new category of recoverable debt;

. allow payment of widow B pension in certain circumstances without the need to make a proper claim;

. extend provisions relating to confidentiality of client information;

. allow the apportionment rule to apply to primary producers where a liability exists in relation to an asset that is any part exempt for the purposes of the assets test;

. provide that the value of certain life interests will not be disregarded in calculating the value of a person's assets;

. ensure the assessable period of a non-client partner will be taken into account when a 'saved' non-superannuation investment is realised;

. abolish the administrative charge relating to certain debts to be replaced by a penalty interest charge applicable under certain circumstances;

. clarify the existing definition of retirement village;

. effect a new international social security Agreement between Australia and Italy;

. prevent a dependent of a mobility allowee from attracting concessional pharmaceutical benefits; and

. correct minor and technical amendments.

The Committee dealt with the Bill in Alert Digest No. 11 of 1993, in which it made various comments. The Minister for Social Security has responded to those comments in a letter dated 1 February 1994. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Retrospectivity and limitation of rights
Subclause 3(1)

In Alert Digest No. 11 of 1993, the Committee noted that subclause 3(1), if enacted, would give retrospective operation to the amendments effected by Part 4 of this Bill. Part 4, if enacted, would substantially affect the rights of social security clients within the appeal system of administrative review.

Recoverable debts

The Committee further noted that Part 4 would insert a new section in the *Social Security Act 1991*, section 1223AB. By this proposed section, money paid to a social security client, as a result of a stay order under section 41 of the *Administrative Appeals Tribunal Act 1975* (the AAT Act), will become a recoverable debt if the client loses the appeal to the Administrative Appeals Tribunal (the AAT).

At present the amount is not recoverable. If a sole parent pensioner, for example, loses an appeal to the Social Security Appeals Tribunal against the cancellation of pension, there is a right of further appeal to the AAT. If the appeal is made, the appellant has a further right to ask the AAT to stop the effect of the appealed decision by exercising its discretion to stay the effect of that cancellation. Payment will continue until the AAT has determined the appeal or revokes the 'stay' order.

It seemed to the Committee that the effect of the proposed amendment would be to convert the amount paid as a result of the 'stay' order into a recoverable debt, if the AAT agrees that the decision to cancel was correct.

The Committee was concerned on two counts:

. the right to appeal is made less attractive by, in effect, inflicting a heavy penalty if a stay order is obtained and the appeal is lost;

. the operation of the amendment is made retrospective which means that appellants who obtained stay orders in the past,

where the amount was not recoverable, will be now required to repay the amount they received.

The Committee considered that the amendment may unduly trespass on personal rights and liberties on both counts. The amendment undoubtedly takes away the present right to obtain a stay order where amounts paid are not recoverable.

Pressure not to appeal

The Committee suggested that the proposed amendment did not sit well with the Commonwealth's role as a model litigant. The Commonwealth properly avoids the appearance of using the 'power of the purse' to prolong litigation in order to exhaust an opponent. This amendment appears to be the obverse of that coin: to instil reluctance to risk further cost by obtaining a stay order. In effect, it imposes financial pressure on an appellant not to apply for a stay order and is an effective disincentive to exercise the right of appeal to the AAT.

The AAT Act provides for the stay order to be given under certain conditions. The Committee was of the opinion that it is inappropriate to have other legislation in effect penalising a person where the Tribunal has properly exercised a discretion to allow a payment to continue. Where there are proper reasons to grant continuation of the payment, the 'validity' of the AAT's decision ought not to depend on the outcome of a separate issue. This seems to impugn the correctness of the AAT's decision to grant the stay order.

The Committee invited consideration of the relevant provisions of section 41 of the AAT Act:

> (2) The Tribunal or a presidential member may, on request being made, as prescribed, by a party to a proceeding before the Tribunal (in this section referred to as the **"relevant proceeding"**), if the Tribunal or presidential member is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review, make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or a part of that decision as the Tribunal or presidential member considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review.
>
> (3) Where an order is in force under subsection (2) (including an order that has previously been varied on one or more occasions under this subsection), the Tribunal or a presidential member may, on request being made, as

prescribed, by a party to the relevant proceeding, make an order varying or revoking the first-mentioned order.

(4) Subject to subsection (5), the Tribunal or a presidential member shall not:

(a) make an order, under subsection (2) unless the person who made the decision to which the relevant proceeding relates has been given a reasonable opportunity to make a submission to the Tribunal or presidential member, as the case may be, in relation to the matter; or

(b) make an order varying or revoking an order in force under subsection 92) (including an order that has previously been varied on one or more occasions under subsection (3)) unless:

(i) the person who made the decision to which the relevant proceeding relates;

(ii) the person who requested the making of the order under subsection (2); and

(iii) if the order under subsection (2) has previously been varied by an order or orders under subsection (3)-the person or persons who requested the making of the last-mentioned order or orders;

have been given a reasonable opportunity to make submissions to the Tribunal or presidential member, as the case may be, in relation to the matter.

The Committee noted that the Department has the right to argue against the stay order being made - subsection (4) - and to request that it be revoked - subsection (3). The Committee further noted that the decision to grant the stay order depends on the AAT or a presidential member being of the opinion **that it is desirable to do so after taking into account the interests of any persons who may be affected by the review** and that the stay order is **for the purpose of securing the effectiveness of the hearing and determination of the appeal** - subsection (2).

In the light of these considerations, the Committee was concerned that the effectiveness of the general scheme of administrative review was being undermined and that a right presently enjoyed was being taken away.

Retrospective application

The Committee also noted that subclause 3(1), if enacted, would provide that all past 'stay' orders of the AAT would be affected. The Committee noted, from the Explanatory

Memorandum, that both under Part 5.2 of the present Act and at common law, before the enactment of that Part, the amounts paid were valid payments and are not recoverable.

The Committee expressed its concern that the Senate should be asked to pass legislation which would retrospectively turn into a debt amounts that were validly and properly paid pursuant to the law existing at the time of the payment.

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 Minister, having dealt with a matter on which the Committee had no further comment, responded as follows to the substantive issue:

> ... the amendment that creates a recoverable debt of an amount paid under an AAT stay order if the AAT ultimately finds against the client, as provided by part 4 of the Bill. This amendment concerns certain clients who object to a departmental decision and appeal to the SSAT but lose that appeal. If the client then takes the matter to the AAT, the AAT may, on the client's application, issue a stay order. This suspends the decision to stop or reduce the client's payment until the matter is decided by the AAT. If the decision eventually goes against the client, then this amendment ensures that any amount paid as a result of the stay order becomes a debt which can be assessed for recovery from the client.
>
> The Committee is concerned that this amendment may trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. The Committee is concerned on two counts:
>
> . that the right to appeal is made less attractive by, in effect, inflicting a heavy penalty if a stay order is obtained and the appeal lost; and
>
> . that the amendment would operate retrospectively, creating a debt whether a stay order was made before or after the commencement of the new provision.
>
> On the first count, I disagree that the amendment would act as a disincentive to appeal. A client chooses to apply for a stay order as a completely separate issue from deciding to appeal - the two actions are not inextricably linked.

It might be said that the amendment makes the option of applying for a stay order less attractive. However, this is an option that should be carefully considered by the client in the knowledge that proper enforcement of the departmental decision, as reinforced by the SSAT, would normally require the immediate cessation or reduction of the payment anyway. The stay order option should not be an avenue for a client to simply continue receiving payments as long as possible regardless of the strength of his or her case. The notion of creating a debt of an amount that it was known all along was probably not payable, subject to the outcome of the AAT appeal, is conceptually proper.

It should be noted that a related amendment in Part 3 of the Bill actually extends the range of decisions for which the AAT may issue a stay order. This is a beneficial move for clients who choose to apply for a stay order. Of course, if the AAT ultimately finds for the client, there is no question of a debt arising from the operation of the stay order.

Further more, I am assured that the Department has no intention of enforcing recovery from those clients not in a position to repay the debt. In these cases, the debt would be written off.

It is also important to note that protection of Government revenue is an important factor in the AAT's decision on whether or not to grant a stay order. I understand that it has been indicated to the Department that the AAT would be more likely to grant a stay order if payments may later be recovered if the appeal fails. Without this assurance, it is more likely that the AAT would refuse a stay order and that the client's payment would therefore cease or reduce outright.

On the second issue of concern to the Committee, I have reconsidered the need to make the amendment retrospective. Since there are no exceptional circumstances that warrant retrospectivity and because I am assured that the Department does not intend to raise old stay debts, I am seeking the Prime Minister's approval to move a Government amendment to the relevant clause in the Bill (clause 3(12)).

The Committee notes the Minister's intention to remove the retrospectivity, but is not persuaded by his comments in relation to stay orders. Further, it is surprised that he

has indicated that 'protection of government revenue is an important factor in the AAT's decision on whether or not to grant a stay order'. The Committee will write to the AAT to ask it to explain its procedures in this area as outlined in the Minister's comments.

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT ACT (NO. 2) 1993

The Bill for this Act was introduced into the Senate on 21 October 1993 by the Manager of Government Business in the Senate for the Minister for Transport and Communications.

The Bill proposed amendments to the following Acts within the portfolio:

. *Air Navigation Act 1920* to provide for Australian ratification of a Protocol to the Convention on International Civil Aviation;

. *Australian Land Transport Development Act 1988* to enable payments through the ALTD Trust fund to the National Rail Corporation Ltd for One Nation projects to be recognised as Commonwealth capital contributions;

. *Australian National Railways Commission Act 1983* to increase the maximum penalty that may be prescribed for offences against the by-laws or regulations from $500 to $1,500 and extend the powers of inquiry into rail safety incidents;

. *Civil Aviation Act 1988* to give effect to Article 83 *bis* of the Chicago Convention when it enters into force internationally, clarify the Authority's ability to regulate foreign registered aircraft employed domestically and empower the Authority to provide regulatory services to other countries and agencies under contract;

. *Navigation Act 1912* to provide for the making of regulations relating to competency standards and licensing where use of marine pilots is required in the Australian Coastal sea;

. *Seafarers Rehabilitation and Compensation Act 1992* to distinguish company trainees from industry trainees for the purposes of claiming compensation, allow employers to insure their liabilities with State insurance offices, rationalise provisions relating to compensation for travelling expenses incurred in seeking medical treatment and ensure that injured seafarers are not required to be examined by a medical panel;

. *Seafarers Rehabilitation and Compensation Levy Act 1992* to

require the Minister to consult in relation to financial matters affecting the operation of the Authority before recommending a particular rate of levy to the Governor General in Council; and

. *Telecommunications Act 1991* to amend numbering provisions and to amend section 88 relating to the protection of the content of communications.

The Committee dealt with the Bill in Alert Digest No. 8 of 1993, in which it made various comments. The Minister for Transport and Communications responded to those comments in a letter dated 16 November 1993, which the Committee dealt with in its 7th Report of 1993. The Committee sought further advice from the Minister and has received a response dated 4 February 1994.

Although this Bill has now passed the Senate and received Royal Assent, a copy of that letter is attached to this report and relevant parts of the response are also discussed below for the information of Senators.

Commencement on proclamation
Subclause 2(3)

In Alert Digest No. 8 of 1993, the Committee noted that by subclause 2(3) various provisions of the Bill would come into effect on a day to be proclaimed, 'being a day not before the day on which the Protocol inserting [Article] 83 bis into the Convention on International Civil Aviation comes into force in relation to Australia.'

The Committee also noted that the Explanatory Memorandum points out that the reason for this is that the provisions in question cannot be given legal effect until the Protocol comes into force in relation to Australia.

The Committee pointed out that it has consistently opposed the inclusion of open-ended proclamation provisions because it may be considered an inappropriate delegation of legislative power for the Parliament to enact legislation but have no control over when it will commence.

The Committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this

period, or this date, as the case may be, the "fixed time"). This is to be accompanied by either:

(a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or

(b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the "repeal" option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The Committee was of the view that the circumstances of this Bill would make paragraph 6 applicable in that the commencement depends on an event whose timing is uncertain. The Committee suggested, however, that an addition to the proclamation subclause could produce a result more in harmony with the thrust of the Drafting Instruction and with the principle of appropriate delegation of legislative power. The Committee sought the Minister's advice whether the subclause could also provide that the amendments would commence within (say) 6 months of the Protocol coming into force in relation to Australia.

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

On 16 November 1993 the Minister responded as follows:

The Committee has expressed concern in relation to subclause 2(3) of the Transport and Communications Legislation

Amendment Bill (No. 2) 1993. That particular subclause provides that the Bill's provisions which will give effect to Article 83 bis of the Convention on International Civil Aviation are to commence on a day to be fixed by Proclamation; the sole restriction being that it be on a day not before the day on which the Protocol inserting Article 83 bis into the convention comes into force in relation to Australia.

The Committee has acknowledged that the method of commencement adopted by subclause 2(3), complies with paragraph 6 of the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1991 but has suggested that the amendments "commence within (say) six months of the Protocol coming into force in relation to Australia". I understand the suggestion to mean that the provisions would be repealed automatically if not commenced within six months of coming into force in relation to Australia.

I am concerned that the suggested sunset clause will, however, introduce a significant element of uncertainty into the legislation.

The Protocol comes into effect internationally (and hence in relation to Australia) when it receives its ninety-eighth ratification. Establishing when this occurred may be a difficult task, particularly for a member of the general public, with the result that the operation of sub-clause 2(3) would be uncertain and some confusion may arise as to whether the repeal provision has been triggered.

There is no cause for concern that proclamation might be delayed once the Protocol comes into force. It is in Australia's interest that the amendments which will give effect to Article 83 bis commence as soon as is possible.

Amongst other benefits (including overall air safety gains), the advantages bestowed by Article 83 bis are clearly consistent with the securing of more flexible and efficient non-economic regulatory arrangements broadly of the type envisaged with the formation of a single aviation market between Australia and New Zealand (which, incidentally, has already ratified the Protocol). Furthermore, major Australian airline carriers strongly support the early introduction of Article 83 bis arrangements by Australia.

In its 7th Report of 1993, the Committee made further comments as follows:

> The Minister's interpretation of the Committee's suggestion discloses some misunderstanding. Paragraph 3 of the Drafting Instruction, which is set out above, envisages alternative methods of restricting the time within which an Act should be proclaimed:
>
> 1. The Act to commence automatically on a fixed date after Royal Assent or at the end of a period.
>
> 2. The Act to be repealed automatically if it has not been proclaimed by a fixed date or by the end of a period.
>
> The Committee intended to suggest the first method. The Minister has understood that the Committee was suggesting the second.
>
> The Committee was suggesting that
>
> - EITHER the amendment be proclaimed within, say, six months of the ninety-eighth country ratifying the Protocol
>
> - OR the amendments would commence automatically at the end of that six month period.
>
> The suggested six months comes from paragraph 4 of the Drafting Instruction. The Committee, however, would be satisfied to receive advice from the Minister that 9 or 12 months might be needed for the relevant international authority to verify that 98 countries have ratified the Protocol and to notify the Australian authorities accordingly.
>
> The Minister points out that it is in Australia's interest that Article 83 bis commence as soon as possible, and that the major Australian airline carriers strongly support the early introduction of Article 83 bis arrangements. On this basis, the Committee believes that an automatic commencement at the end of a set period after the ninety-eighth ratification ought not to present a problem.

The Committee sought the Minister's further consideration of the matter.

On 4 February 1994 the Minister responded to the Committee's further comments in its 7th report:

Whilst I appreciate the Committee's concerns, I see genuine difficulties in having a date of commencement that is triggered by reference to an event whose occurrence can only be established, with any degree of certainty, by writing to an international organisation. The suggested means of commencement, particularly where there is no proclamation, would place an especially difficult burden on a member of the general public who wishes to know whether the Article 83 bis amendments have commenced. In order to do so, she or he would need to establish the exact date of the ninety-eighth country's ratification of the Protocol. This would not be the case in the legislation as presently drafted. A member of the public would simply need to establish whether the amendments have been proclaimed.

Accordingly, I am of the view that the committee's suggested means of commencement would introduce a significant element of uncertainty into the legislation.

As the Minister for Transport and Communication noted in his letter, there is no cause for concern that proclamation of the Article 83 amendments might be delayed. No special administrative scheme or regulatory framework needs to be established before the amendments can commence. It is my intention that the Article 83 bis amendments be proclaimed to commence as soon as is possible after the Protocol comes into force internationally.

I trust that my response satisfactorily addresses the Committee's concerns.

The Committee thanks the Minister for this response which meets its concerns.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

THIRD REPORT

OF

1994

2 MARCH 1994

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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

THIRD REPORT OF 1994

The Committee presents its Third Report of 1994 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:

Agricultural and Veterinary Chemicals Bill 1993

Agricultural and Veterinary Chemicals Code Bill 1993

Agricultural and Veterinary Chemical Products (Collection of Levy) Bill 1993

AGRICULTURAL AND VETERINARY CHEMICALS BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to enable the new Agricultural and Veterinary Chemicals Code (the Agvet Code) to have effect in the Australian Capital Territory. The Code is then to be adopted by the State and Northern Territory legislatures as a law of those jurisdictions. This Bill also proposes to repeal the *Agricultural and Veterinary Chemicals Act 1988*.

The Committee dealt with the Bill in Alert Digest No. 1 of 1994, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 24 February 1994.

Although this Bill has been passed by the Senate, a copy of the Minister's letter is attached to this report and relevant parts of the response are discussed below for the information of Senators.

Commencement by proclamation
Clause 2

In Alert Digest No. 1 of 1994, the Committee noted that clause 2 of the Bill provides:

> Commencement
>
> **2.(1)** Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.
>
> **(2)** If this Act does not commence under subsection (1) within the period of 12 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

The Committee noted that, by virtue of clause 2, this Bill could commence outside a period of six months from the date of Royal Assent. This would be contrary to the preference expressed in paragraph 4 of the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. That paragraph provides:

> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen,

> [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

Although no reason for choosing a longer period is set out in the Explanatory Memorandum, the Committee noted that the scheme requires complementary adoptive legislation by all States and the Northern Territory. The Committee, therefore, sought the Minister's advice on whether the longer period is needed for that legislation to be passed.

In the meantime, the Committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister responded as follows:

> In respect of the Agricultural and Veterinary Chemicals Bill, clause 2 commencement by proclamation, the Committee is concerned about the 12 months proclamation period.
>
> I wish to draw the Committee's attention to the Second Reading Speech which states that "This Bill also provides that the whole legislative package will commence on a date agreed to with the States and Northern Territory to enact complementary State law, provision has [therefore] been made for the Act to commence 12 months after Royal Assent or earlier by proclamation". In particular, I am concerned that State or Northern Territory elections could delay their enacting complementary legislation.

The Committee thanks the Minister for this response. The Committee, however, notes that the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 states that a delay in proclamation should be explained in the Explanatory Memorandum.

AGRICULTURAL AND VETERINARY CHEMICALS CODE BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to enable the National Registration Authority for Agricultural and Veterinary Chemicals (NRA) to evaluate and, if satisfied on certain grounds, to approve the active constituents to agvet chemicals products, to register the products enabling their lawful possession and sale, and to approve the label which must be affixed to the container holding the chemical products. The Bill also enables the NRA to licence manufacturers of those chemicals.

The Committee dealt with the Bill in Alert Digest No. 1 of 1994, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 24 February 1994.

Although this Bill has been passed by the Senate, a copy of the Minister's letter is attached to this report and relevant parts of the response are discussed below for the information of Senators.

Inappropriate delegation of legislative power
Clause 6(3)(a)

In Alert Digest No. 1 of 1994, the Committee noted that clause 6 provides for matters relating to making regulations under the proposed Act. The Committee noted that paragraph 6(3)(a) allows regulations to adopt rules and codes of other bodies and institutions, as changed from time to time. The effect would be to enable such a body or institution to amend regulations made by the Executive without reference to, or oversight by, either House of Parliament. The Committee considered that this may be regarded as an inappropriate delegation of legislative power.

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

The Minister responded as follows:

> Concerning the Agricultural and Veterinary Chemicals Code Bill (Code Bill), paragraph 6(3)(a), the Committee is concerned that this provision would allow standards, rules and codes of other bodies and institutions, as changed from time to time, to

be incorporated into the regulations without reference to Parliament.

Examples of the standards to be adopted for the purpose of assisting with the evaluation of chemical products include the British Pharmacopoeia, the United States Pharmacopoeia, and the Food and Agricultural Organisation standards. While recognising the point raised by the Committee, it is simply not practical or efficient to amend the regulations each and every time there is a change to these types of standards.

Similar provisions occur in regulation-making powers contained in the legislation, as for instance, subsection 270(3A) of the *Customs Act 1901*, subsection 89(6) of the *Veterans' Entitlements Act 1986*, and subsection 56(3) of the *Interstate Road Transport Act 1985.* Other examples can also be given.

The Committee thanks the Minister for this explanation and recognises the difficulties which the Minister outlines. The matter was raised by the Committee, however, because of the width of the terms of the enabling clause. The Committee's role is to draw to the attention of Senators instances where the legislative power of the Parliament may be inappropriately delegated. The Committee, of course, accepts that international institutions of great integrity are not likely to be manipulated by sectional interests from Australia but the enabling clause allows regulations to adopt the rules of any association, not only as they are at the time of adoption, but also as subsequently changed. While the Minister outlines the best scenario, the Committee points out that the width of the clause would not necessarily exclude a form of industry self-regulation.

Strict liability - reversal of onus of proof
Regulation of the supply of active constituents for chemical products and the supply of chemical products
Clauses 74-89

In Alert Digest No. 1 of 1994, the Committee noted that Part 4 contains a regime of control of chemical products by means of imposing offences of strict liability. It also provides in some clauses specific defences, in others the general defence of reasonable excuse.

Offences are categorised as of strict liability where it is immaterial whether the person had the 'guilty knowledge' which at common law is an integral part of any statutory offence, unless the statute itself or its subject matter rebuts that presumption. At common law offences of strict liability are subject to the defence of honest and reasonable mistake of fact. The defence arises where the accused entertains an honest

belief in the existence of facts which, if true, would make the act charged innocent. In such cases the accused must raise the defence, though the prosecution has the ultimate onus of proving the elements which constitute the offence. In a statute, a strict liability offence may also be made subject to a specific defence or defences.

The Committee pointed out that, where public policy dictates that strict liability offences should be created, the Committee acknowledges that both specific and general defences assist the personal rights and liberties of the accused. The primary issue, therefore, is whether a strict liability ought to be imposed.

The Committee noted that in the context of justifying reversing the onus of proof, the Explanatory Memorandum suggests a reason which is relevant to the issue of strict liability:

. the very serious implications which the misuse of these materials could have on public health, occupational health and safety, the environment, and trade and commerce.

The Committee accepted that some contraventions of these provisions could have very serious implications and so warrant offences of strict liability. An examination of individual provisions, however, showed that in some circumstances suppliers are able to sell off remaining stocks of chemicals or active constituents of chemical products which are no longer to be approved or registered; that A may continue to supply an unregistered chemical product under permit but B may not. In such cases dire consequences to the environment or public health were not so apparent to the Committee and so the justification for strict liability may be lacking.

As the code itself recognises a range of circumstances which justify continuing to supply otherwise unapproved or unregistered materials, the Committee sought the Minister's advice on whether the code should reflect that range of circumstances by a system of offences only some of which are of strict liability. For example, strict liability would attach only to offences in respect of active constituents or chemical products where under no circumstances would it be justified to continue to supply under exemption or permit or to sell off current stocks. This would better relate the serious consequences with the creation of strict liability.

While awaiting the Minister's advice, 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 Minister responded as follows:

> In addition, clauses 74-89 of the Code Bill concerned the Committee because of the reversal of onus of proof in some

provisions. The circumstances raised by the Committee can be explained by the situation whereby the annual renewal of registration of chemical products will be subject to the payment of a fee. If the fee is not paid the registration expires. In practice, if a business has not paid the renewal of registration fee it is probably because the chemical product is no longer commercially viable. In this case, there being no adverse health grounds, the National Registration Authority for Agricultural and Veterinary Chemicals (NRA) would allow existing retail stock to be sold out. It is extremely unlikely that a business which has decided that a product's registration should expire because the product is not commercially viable would want to continue to manufacture the product. In this scenario, it is extremely unlikely that an offence would be committed and consequently, the offence provisions, in reality, would not be applicable. However, in the case where the NRA cancels or suspends the registration of a chemical product on public health grounds, the NRA would require the product held by retailers to be recalled so as to eliminate any further danger to the public. If the manufacturer or retailer continued to supply the product after the recall notice had been issued, then there could be very serious health implications which warrant the offence provisions being enforced.

I also point out that it is essential to ensure proper enforcement of the Code to require the accused person to prove matters of defence that are peculiarly within his or her knowledge because it would not be possible for the prosecution to disprove those matters. All the offence provisions make specific provision to give the accused person the opportunity of proving matters of this nature.

The Committee thanks the Minister for this response. It seems to the Committee that the Minister agrees with the Committee's point of view, namely that in the circumstances raised by the Committee there are no adverse health grounds and existing retail stock is allowed to be sold out. The Minister does not appear to have addressed the conclusion from this which the Committee was attempting to draw. If very serious health implications warrant the imposition of strict liability, why does strict liability also attach where no such serious consequences exist?

The Committee continues to invite the Minister's consideration of whether strict liability should attach only to offences which involve the very serious implications which misuse of the materials could have on public health and safety. As the code outlines the circumstances which justify continuing to sell otherwise unapproved or unregistered materials, so the code could attach a different form of liability in those

circumstances.

The Committee continues to draw the attention of Senators to the provisions.

Commencement by regulation
Subclause 120(3)

In Alert Digest No. 1 of 1994, the Committee pointed out that subclause 120(3) of the Bill provides:

> **(3)** Section 121 does not come into force until a date to be prescribed by regulations that is not later than 12 months after the date of commencement of this Code.

The Committee noted that, by virtue of subclause 120(3), clause 121 of this Bill could commence outside a period of six months from the date of Royal Assent. Indeed, this Bill commences on the same day as the proposed Agricultural and Veterinary Chemicals Act 1993 which is subject to commencement by proclamation for up to twelve months after it receives Royal Assent. Section 121, therefore, may not commence for up to two years. This would be contrary to the preference expressed in paragraph 4 of the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. That paragraph provides:

> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

As the Explanatory Memorandum did not indicate the reason for delaying commencement, the Committee sought the Minister's advice on this matter.

In the meantime, the Committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister responded as follows:

> The Committee also raised concern about subclause 120(3) of the Code Bill. In particular that offences relating to the manufacture of chemical products and licensing of premises do

> not come into force until a date prescribed by the regulations, but not later than 12 months after the date of commencement of the Code Bill.
>
> I would again refer the Committee to the Second Reading Speech which states "To ensure chemical products available to the public comply with the specifications determined by the NRA, this Bill provides for the licensing of manufacturers of registered chemical products. The introduction of manufacturing principles is to be phased in over a period of time so as to allow the manufacturing industry time to adjust". During the 12 month period between commencement of the proposed Act and commencement of clause 121, chemical manufacturers will need to apply for a manufacturer's licence. Each manufacturer will need to make a detailed application addressing a number of matters including manufacturing practices and methods for each chemical product they manufacture.

The Committee thanks the Minister for this explanation for the delay in the commencement of this provision. The Committee, however, notes that the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 states that a delay in proclamation should be explained in the Explanatory Memorandum.

AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS (COLLECTION OF LEVY) BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to allow for the assessment and collection of levies with regard to agricultural and veterinary products registered for use in Australia. It further provides certain powers of entry, inspection and seizure to determine the amount of levy, if any, that is payable and contains provisions for an appeal and review process where a person is dissatisfied with an assessment.

The Committee dealt with the Bill in Alert Digest No. 1 of 1994, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 24 February 1994.

Although this Bill is been passed by the Senate, a copy of the Minister's letter is attached to this report and relevant parts of the response are discussed below for the information of Senators.

Imposition of charges by regulation
Paragraphs 10(2)(b), 11(2)(b), 12(2)(b) and 14(1)(b) - Rate of levy

In Alert Digest No. 1 of 1994, the Committee pointed out that Part 2 of this Bill includes a basic formula for the various levies that it imposes. The rate of levy is left to be prescribed by regulation, subject to an annual limit. Such a method would generally be acceptable to the Committee. Part 2, however, extends the method of arriving at a maximum amount, by providing an unfettered power to determine a higher maximum amount by regulation.

Each of the paragraphs noted provides in respect of the maximum amount set out in the legislation:

> (b) if another amount is prescribed by the regulations for the purposes of this paragraph in respect of that year - that other amount.

This allows the maximum amount of the various levies to be set by regulation and the maximum amount is not necessarily limited to the amount specified in the primary legislation. The Explanatory Memorandum indicates that ultimately the National Registration Authority will be fully funded by the levies and other charges to be

imposed under this regime.

The Committee has consistently drawn attention to provisions which allow for the rate of a levy to be set by regulation, largely on the basis that a rate of levy could be set which amounted to a tax (and which, therefore, should be set by primary rather than secondary legislation). Further, the Committee has generally taken the view that, if there is a need for flexibility in the setting of a levy, the primary legislation should prescribe either a maximum rate of levy or a method of calculating the maximum rate. In the present Bill, there is, in effect, no maximum levy (nor method of calculation thereof).

The Committee was concerned that the legislation purports to set a maximum amount but in effect gives an unfettered discretion for the regulations to increase the levy without limit.

While the Committee accepted that the regulations would be disallowable by either House of Parliament, it should be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the amount of the levy.

The Committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Minister responded as follows:

> The Committee is also concerned about the imposition of charges by regulation, in particular paragraphs 10(2)(b), 12(2)(b) and 14(1)(b) of the Agricultural and Veterinary Chemical Products (Collection of Levy) Bill 1993. I would like to put these concerns into context.
>
> The maximum amount which the various levies can be set by regulation is limited because the percentage that may be prescribed by the regulations for the purpose of clauses 10, 11 or 12 must not exceed 2%. Also the reasons for increases in the levy would of course be explained with the tabling of the regulations.
>
> As you have indicated, the regulations could be disallowed by either House of Parliament but not amended. I emphasise that in the event of disallowance, the levy payable would revert to the previous levy, thereby avoiding a vacuum in the cost recovery arrangements. This of course would also apply in-principle to clause 14.

The Committee thanks the Minister for this explanation.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTH REPORT

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TERMS OF REFERENCE

Extract from **Standing Order 24**

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTH REPORT OF 1994

The Committee presents its Fourth Report of 1994 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:

Social Security (Home Child Care and Partner Allowances) Legislation Amendment Bill 1993

SOCIAL SECURITY (HOME CHILD CARE AND PARTNER ALLOWANCES) LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 15 December 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes to introduce the home child care allowance and partner allowance, effective from September 1994. Consequential amendments to the *Data-matching Program (Assistance and Tax) Act 1990* relating to these allowances are also included.

The Committee dealt with the Bill in Alert Digest No. 1 of 1994, in which it made various comments. The Minister for Social Security responded to those comments in a letter dated 9 March 1994. A copy of the Minister's letter is attached to this report and relevant parts of the response are discussed below for the information of Senators.

Further use of tax file numbers
Clauses 3 and 5 - Insertion of Parts 2.18 and 2.15A

In Alert Digest No. 1 of 1994, the Committee noted that these new Parts provide for the home child care allowance and the partner allowance respectively. They include proposed sections 913, 914, 771HD and 771HE. The effect of these proposed new sections is to preclude the payment of the respective allowances where recipients have not responded to a request to provide their own and their partner's tax file numbers to the Department.

The Committee has continued to maintain that, although tax file numbers may be considered necessary to prevent persons defrauding the system, they may also be considered to be unduly intrusive into a person's private life.

The Committee sought the Minister's advice on why the provision of tax file numbers is necessary, as it appears that the tax file number is being used as a method of identification.

Accordingly the Committee drew Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

The Minister responded in part as follows:

Your Committee ... sought advice on why the provision of TFNs is necessary for the purpose of home child care allowance and partner allowance.

The rate at which home child care and partner allowances are payable is determined by the income received by a person.

Under a data-matching program introduced by the *Data-matching Program (Assistance and Tax) Act 1990*, income disclosed by people to the Department of Social Security (and other paying agencies) is automatically checked against income disclosed to the Australian Taxation Office (ATO) and other paying agencies. TFNs can be required to check the income information disclosed to other agencies.

In relation to the proposed home child care and partner allowances, most people likely to receive these allowances are receiving some form of a social security payment and will already have provided the required TFNs. In such cases, the Department will be seeking authorisation to use previously collected TFNs for the purposes of home child care and partner allowances.

In addition, some clients would be exempted (temporarily or indefinitely) from the requirement to provide a TFN (eg. a person with no income, in a natural disaster zone, in a remote area or when the partner is uncontactable or violent).

Those clients who do not have a TFN could be assisted by the Department as the TFN provisions would enable the Department to accept TFN applications on behalf of ATO and conduct necessary proof of identity checks. This would provide an opportunity for the Department to assist those clients who may have problems with obtaining TFN because of proof of identity requirements. As the Department conducts its own proof of identity checks, this would not constitute any increased intrusiveness from the client's point of view. The Department's involvement in the TFN application process should be beneficial to disabled people, persons with language difficulties or new entrants to the workforce.

The requirements to provide TFNs as a condition of payment of home child care and partner allowances are consistent with the requirements that apply to existing payments administered by the Department of Social Security.

The Committee thanks the Minister for this response.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTH REPORT

OF

1994

4 MAY 1994

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTH REPORT

OF

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Senator J Troeth

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTH REPORT OF 1994

The Committee presents its Fifth Report of 1994 to the Senate.

The Committee draws the attention of the Senate to clauses of the ***Corporate Law Reform Act 1994*** which contain provisions that the Committee considers may fall within principles 1(a)(i) to (v) of Standing Order 24.

CORPORATE LAW REFORM ACT 1994

The bill for this Act was introduced into the House of Representatives on 15 December 1993 by the Attorney-General.

The bill replaced the Corporate Law Reform Bill (No. 2) 1992 introduced into the Senate on 26 November 1992. It proposed to:

- enable the enhanced disclosure scheme to apply to listed and unlisted 'disclosing' entities;
- streamline prospectus requirements;
- relax present restrictions on companies which wish to insure or indemnify their officers and auditors; and
- enable ASC's database to be admissible in court proceedings as prima facie evidence, without document certification.

The Committee dealt with the Corporate Law Reform Bill (No. 2) 1992 in Alert Digest No. 18 of 1992, in which it made several comments on the bill. Those comments were reproduced in Alert Digest No. 1 of 1993 after it had been restored to the Notice Paper by a resolution of the Senate on 5 May 1993. The Attorney-General responded to those comments in a letter dated 6 October 1993 and a copy of that letter was attached to the Committee's Alert Digest No. 1 of 1994 in which the Committee made further comments.

The Minister responded to the Committee's comments in Alert Digest No. 1 of 1994 in a letter dated 14 April 1994. Although this bill has been passed by both Houses and received Royal Assent on 4 March 1994, a copy of the Minister's letter is attached to this report and relevant parts of the response are discussed below, for the information of Senators.

Inappropriate delegation of legislative power
Schedule 1 Item 26 - proposed new section 111AJ of the Corporations Law

In Alert Digest No. 1 of 1994 the Committee noted that Item 26 proposed to insert 'Part 1.2A - Disclosing Entities' into the Corporations Law. The proposed new Part would deal, inter alia, with 'enhanced disclosure securities' which are referred to in the bill as 'ED securities'. The concept of 'ED securities' would be defined in the proposed new Part.

Proposed new section 111AJ provides:

> **Regulations may declare securities not to be ED securities**
>
> 111AJ.(1) The regulations may declare specified securities of bodies not to be ED securities.
>
> (2) Regulations in force for the purposes of subsection (1) have effect accordingly, despite anything else in this Division.

If enacted, this provision would allow the making of regulations to exclude certain types of securities from the definition of 'ED securities'. As such, it would permit, in effect, the amendment of the definition, by the exclusion of certain securities which would otherwise be covered. Given the importance of this definition to the operation of the proposed new Part, the Committee was of the opinion that it may have been considered to be a matter which would be more appropriately dealt with in primary rather than subordinate legislation.

Inappropriate delegation of legislative power
Schedule 1 item 26 - proposed new sections 111AS and 111AT of the Corporations Law

In Alert Digest 1 of 1994 the Committee noted that Item 26 of the bill proposed to insert a new Part 1.2A into the Corporations Law. The proposed new Part would deal, inter alia, with 'continuous disclosure', which is a system of enhanced statutory disclosure that is to be applied to corporations covered by the Corporations Law.

Proposed new section 111AS provides:

> **Exemptions by regulations**
>
> 111AS.(1) The regulations may exempt specified persons from all or specified enhanced disclosing entity provisions:
>
> (a) either generally or as otherwise specified; and
>
> (b) either unconditionally or subject to specified conditions.
>
> (2) Without limiting subsection (1), an exemption may relate to specified securities.

If enacted, this provision would allow the Governor-General (acting on the advice of the Federal Executive Council) to make regulations to exclude 'specified persons' from any or all of the requirements of the disclosing entity provisions. The Committee thought that this could be considered to be an inappropriate delegation of legislative power, as it would allow the Executive to alter (and, perhaps, overturn) the effect of

the primary legislation.

Similarly, proposed new section 111AT provides:

> **Exemptions by the Commission**
>
> 111AT.(1) The Commission may, by writing, exempt specified persons from all or specified disclosing entity provisions:
>
> (a) either generally or as otherwise specified; and
>
> (b) either unconditionally or subject to specified conditions.
>
> (2) Without limiting subsection (1), an exemption may relate to specified securities.
>
> (3) The Commission must cause a copy of an exemption to be published in the *Gazette*.

If enacted, this clause would, similarly, give the Australian Securities Commission the power to exempt 'specified' persons from any or all of the requirements of the disclosing entity provisions. This could also be considered to be an inappropriate delegation of legislative power.

Proposed sections 111AJ, 111AS, and 111AT substantively repeat proposed sections 22H, 1084J and 1084K respectively of the Corporate Law Reform Bill (No. 2) 1992.

The Committee at that time drew Senators' attention to these sections for the reasons given above. The Attorney-General responded on 6 October 1993 noting:

> The comments which the Committee has made will, of course, be taken into account in the re-drafting of the Bill.
>
> In this regard, I should point out that the Corporations Law already contains a number of provisions similar to those referred to by the Committee, mostly based on predecessors under the co-operative companies and securities legislation. For example, section 1084 of the Law enables the ASC to exempt a particular person or class of persons from the provisions relating to fund raising. In addition, section 633 of the Law provides that the usual restrictions on the acquisition of shares do not apply to acquisitions made in a manner or in circumstances prescribed by the Regulations or with the ASC's written approval.
>
> The effective operation of the Corporations Law depends on

provisions like these. Because new investment vehicles are constantly being developed, and business practices differ and are subject to change, such provisions are necessary to enable the alteration of the Law in a timely manner where a strict application may otherwise cause hardship or may be inappropriate. Such provisions provide a safeguard against any unintended consequences of new wide-ranging rules. The effectiveness of the regulatory regime would be seriously compromised if it were necessary to seek Parliamentary approval for every minor modification of the Corporations Law.

It did not appear to the Committee that our earlier comments had had any effect on the re-drafting of the bill. Accordingly, the Committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Inappropriate delegation of legislative power
Schedule 1Item 26 - Proposed new section 111AV
Item 92 - Proposed new section 1001A

Proposed new section 111AV provides:

> Modifications by regulations
>
> 111AV.(1) The regulations may make modifications of all or specified disclosing entity provisions.
>
> (2) Without limiting subsection (1), a modification may relate to specified securities.

In Alert Digest 1 of 1994 the Committee noted that this section, if enacted, would permit the provisions referred to in proposed new section 111AR to be amended by regulation rather than by primary legislation. This could be regarded as an inappropriate delegation of legislative power.

The Committee's view was that proposed new section 1001A, if enacted, would impose criminal liability for failing (intentionally or recklessly) to comply with the listing rules of the Australian Stock Exchange. The effect of this proposed new section would have been to enable the rules of a private organisation to create criminal liability in respect of which citizens can be charged and penalties applied. It also followed that the protection of the general public who may want to become shareholders would be left to this same private organisation. The rules of the Australian Stock Exchange are not legislation of the Parliament, either primary or delegated. Hence the proposed new section could be regarded as a further

inappropriate delegation of legislative power.

The Committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

The Attorney-General has responded to the Committee's comments by means of a short letter and a paper which are attached to this Report.

Although the Bill has now become law, the Committee, conscious of its role of drawing to the Senate's attention matters which may infringe its terms of reference, would like to make some general comments.

The Committee thanks the Attorney-General with his detailed assistance with these matters. The Committee, however, is more concerned with the general principles that these issues raise.

There is always a healthy tension between attractive solutions to identified problems and general principles of sound experience that are compromised by the attractive solution. The paper attached to the Attorney's letter asserts that the 'effectiveness of the regulatory regime would be seriously compromised if it were necessary to seek Parliamentary approval for every minor modification of the Corporations Law'.

The Committee would say that minor matters can be dealt with by regulations under the Law subject to Parliamentary disallowance. Such an option would better preserve the legislative function of Parliament. But the Committee questions whether giving power the make regulations to change the Principal Act is a minor matter. If the matter to be modified is a minor matter, perhaps it should be in the regulations rather than the Act. If it is so important that in ought to be in the Act, it should not be amended without Parliamentary approval.

Further the Committee questions the wisdom of giving bodies which are neither legislative, judicial nor executive, the power to exempt people from the law. One of the desired outcomes of lawmaking is certainty. It seems to the Committee that introducing a 'regulatory regime' that allows exemptions to the law and modifications of the primary legislation by regulation will inevitably lead in the not too distant future to complaints about uncertainty and calls for reform.

Finally, the attention of Senators is drawn to the consequences of section 1001A. The function of Parliament to determine what constitutes a crime has in effect been passed to a private body. Even a private body which plays a 'vital role' 'in regulating the market' and in 'ensuring an informed market' ought not have the power to make law, no matter how convenient it might seem to be.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTH REPORT

OF

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11 MAY 1994

SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SIXTH REPORT OF 1994

The committee presents its Sixth Report of 1994 to the Senate.

The committee draws the attention of the Senate to clauses of the **Social Security Legislation Amendment Bill 1994** which contains provisions that the committee considers may fall within principle 1(a)(i) of Standing Order 24.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1994

This bill was introduced into the House of Representatives on 25 November 1993 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the *Social Security Act 1991* and *National Health Act 1953* to, *inter alia*:

. reverse several AAT decisions and so permit the AAT to order a stay of a decision under review where the Social Security Appeals Tribunal has affirmed the departmental decision.

The committee dealt with this bill in its Second Report of 1994. The Report referred to the committee's earlier comments in Alert Digest No. 11 of 1993 with respect to the proposed amendment of the *Social Security Act 1991* which will change to being recoverable an amount that under the current law is not recoverable. The amount in question is the sum of the social security payments made to an appellant where the AAT has granted a stay order to suspend a Departmental decision to cancel a payment.

The Minister's response on this issue stated:

> ... I am assured that the Department has no intention of enforcing recovery from those clients not in a position to repay the debt. In these cases, the debt would be written off.
>
> It is also important to note that protection of Government revenue is an important factor in the AAT's decision on whether or not to grant a stay order. I understand that it has been indicated to the Department that the AAT would be more likely to grant a stay order if payments may later be recovered if the appeal fails. Without this assurance, it is more likely that the AAT would refuse a stay order and that the client's payment would therefore cease or reduce outright.
>
> On the second issue of concern to the Committee, I have reconsidered the need to make the amendment retrospective. Since there are no exceptional circumstances that warrant retrospectivity and because I am assured that the Department does not intend to raise old stay debts, I am seeking the Prime Minister's approval to move a Government amendment to the relevant clause in the Bill (clause 3(12)).

The committee noted the Minister's intention to remove the retrospectivity, but was not persuaded by his comments in relation to stay orders. Further, it was surprised that he had indicated that 'protection of government revenue is an important factor in the AAT's decision on whether or not to grant a stay order'. The committee would write to the AAT to ask it to explain its procedures in this area as outlined in the Minister's comments.

For the information of Senators the ensuing correspondence is attached to this report.

It seems to the committee that the Acting President's letter of 7 April 1994, particularly the second last paragraph, reinforces the reasoning that the committee was presenting. The Acting President indicates that a stay order will very likely be granted 'where the potential hardship which an applicant will suffer if the stay order is refused will outweigh the detriment the Government will suffer from not being able to recover the moneys paid during the period of the stay order'. On the assumption that the hardship is scarcely likely to diminish during the appeal period and noting the Minister's own words that the Department has no intention of enforcing recovery from those clients not in position to repay the debt, the committee questions the utility of the amendment and remains of the view that the amendment may unduly trespass on a present right of a social security client.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTH REPORT

OF

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SENATE STANDING COMMITTEE

FOR

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

SEVENTH REPORT OF 1994

The committee presents its Seventh Report of 1994 to the Senate.

The committee draws the attention of the Senate to clauses of the **Agricultural and Veterinary Chemical Products (Collection of Interim Levy) Bill 1994** which may contain provisions that the committee considers may fall within principle 1(a)(iv) of Standing Order 24.

AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS (COLLECTION OF INTERIM LEVY) BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Veterans' Affairs.

The bill is one of six to give effect to interim cost recovery arrangements for the operation of the National Registration Scheme for Agricultural and Veterinary Chemicals. It allows for the assessment and collection of interim levies in regard to agricultural and veterinary products. Further, it allows for certain powers of entry, inspection and seizure to determine the amount of levy payable, and an appeal and review process where a person is dissatisfied with an assessment made.

The committee dealt with the bill in Alert Digest No. 7 of 1994, in which it made various comments. The Minister for Primary Industries and Energy responded to those comments in a letter dated 25 May 1994. A copy of that letter is attached to this report. Relevant parts of the response are also discussed below.

Inappropriate delegation of legislative power: Imposition of amount of penalty by regulation Paragraph 11(1)(b)

In Alert Digest No. 7 of 1994 the Committee noted that proposed subsection 11 provides:

> Late payment penalty
>
> 11.(1) If any levy payable by a person is not wholly paid on or before the prescribed date for payment of the levy, the person immediately becomes liable to pay a late payment penalty of:
>
> (a) subject to paragraph (b), $200; or
>
> (b) if another amount is prescribed by the regulations for the purposes of this section and is applicable in respect of that prescribed date for payment, that other amount.

The effect of subsection 11(1), if enacted, would be to provide an unfettered power to determine any amount as the late payment penalty.

The committee has consistently drawn attention to provisions which allow for the rate of a levy or other imposition to be set by regulation, largely on the basis that a rate or an amount could be set which amounted to a tax (and which, therefore, should be set by primary rather than secondary legislation). Further, the committee has generally taken the view that, if there is a need for flexibility in the setting of a levy or other imposition, the primary legislation should prescribe either a maximum rate or a method of calculating the maximum rate.

The committee noted that, in the present bill, no maximum amount for the late payment penalty is prescribed.

In Alert Digest No. 1 of 1994, the committee had drawn the attention of Senators to a similar provision (clause 14) in the then Agricultural and Veterinary Chemical Products (Collection of Levy) Bill 1993 which has since passed into law.

In that bill the committee was considering several provisions setting rates of levies by regulation together with the late payment penalty provision. The committee pointed out that, although the committee accepted that the regulations would be disallowable by either House of Parliament, it should be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the amount of the levy (or the penalty).

In response to the committee's comments in Alert Digest No. 1 of 1994, the Minister stated in a letter dated 24 February 1994:

> As you have indicated, the regulations could be disallowed by either House of Parliament but not amended. I emphasise that in the event of disallowance, the levy payable would revert to the previous levy, thereby avoiding a vacuum in the cost recovery arrangements. This of course would also apply in-principle to clause 14.

The committee pointed out that disallowance, however, is effective only from the date it occurs. Non payment by the due date would have automatically attracted the penalty set out in the regulation from the date the regulation was made. Disallowance would not have the retrospective effect of cancelling an obligation already incurred during the period the regulation was in force.

The committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Minister responded as follows:

> The Committee's concern relates to paragraph 11(1)(b) of the bill, which provides for the imposition of an amount of penalty by regulation. As the Committee has noted this same provision exists in the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* passed by Parliament on 1 March 1994. The Committee also notes that an increased late penalty payment would apply during the intervening period between the date the amending regulations were made and disallowance by either House of Parliament.
>
> Given that the proposed late penalty payment of $200 is adequate for 1994/95 and the Bill, if enacted, would only apply for 1994/95, I am prepared to give the Committee an assurance that I will not recommend the making of regulations for the purpose of increasing the late penalty payment.

The committee thanks the Minister for this response and for his assurance which meets the committee's concerns in respect of this bill.

It leaves unresolved, however, the position of a late payment penalty under the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994.* On reflection, the committee is concerned that a regulation making power is thought necessary for a late payment penalty. There does not appear to be any need for that flexibility which justifies the use of regulations. A late payment penalty can be adequately expressed as either a fixed amount or a fixed percentage of the debt due. **The committee seeks the Minister's advice** whether the late payment penalty ought to be set only by the primary legislation.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTH REPORT

OF

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SENATE STANDING COMMITTEE

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

REPORT OF 1994

The Committee presents its Eighth Report of 1994 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:

Petroleum (Submerged Lands) Fees Bill 1994

Social Security Legislation Amendment Bill (No. 2) 1994

PETROLEUM (SUBMERGED LANDS) FEES BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Resources.

The bill proposes to consolidate provisions contained in the Acts repealed by the Petroleum (Submerged Lands) Legislation Amendment Bill 1994.

The committee dealt with the bill in Alert Digest No. 7 of 1994, in which it made various comments. The Minister for Resources responded to those comments in a letter dated 30 May 1994. Although this bill has been passed by the Senate, a copy of that letter is attached to this report and relevant parts of the response are discussed below for the information of Senators.

Inappropriate delegation of legislative power: Imposition of amount of fee by regulation Paragraph 4(2)(b)

In Alert Digest No. 7 of 1994, the committee noted that proposed paragraph 4(2)(b), if enacted, would provide that the fee to be charged under this bill is to be calculated in accordance with the regulations, with no maximum amount set by the primary legislation. Its effect is to give an unfettered power to determine any amount as the fee.

The committee has consistently drawn attention to provisions which allow for the rate of a levy or other imposition to be set by regulation, largely on the basis that a rate or an amount could be set which amounted to a tax (and which, therefore, should be set by primary rather than secondary legislation). Further, the committee has generally taken the view that, if there is a need for flexibility in the setting of a levy or other imposition, the primary legislation should prescribe either a maximum rate or a method of calculating the maximum rate.

The committee pointed out that in the present bill, no maximum amount for the fee, nor method of calculating it, is prescribed. It seemed to the committee that flexibility in setting the fee is not an issue. From 1967 to 1990 the fees in connection with offshore petroleum exploration and production were specified in the relevant Acts. Regulations have been used since 1990 to set fees in some but not all of the Acts to be repealed upon the commencement of this bill. But once set by regulation, the fees do not appear to have been altered.

The committee indicated that although the committee accepts that the regulations would be disallowable by either House of Parliament, it should be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for

either House to make a positive input (ie by making an amendment) on the regulations and on the amount of the fee. Disallowance, however, is effective only from the date it occurs. Any fee becoming payable under subsection 4(3) would attract the rate set out in the regulation from the date the regulation was made. Disallowance would not have the retrospective effect of cancelling an obligation already incurred during the period the regulation was in force.

The committee sought the Minister's advice on whether an appropriate maximum fee or a method of calculating it can be specified in the bill.

Pending the Minister's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Minister responded as follows:

> The intent of the Bill is to simply reduce the quantity of legislation administering the offshore petroleum industry. The provisions contained in the Bill replicate the provisions of the four Acts it will replace.
>
> The level of the administrative fees under this legislation is determined in consultation with the States and the Northern Territory. As part of the Offshore Constitutional Settlement any fees received in relation to the areas adjacent to the States/Northern Territory are retained by those States/Northern Territory to cover costs of administration of the offshore petroleum legislation on behalf of the Commonwealth. The level of fees received is set to only cover those costs. Apart from fees received from Commonwealth Territories such as the Ashmore/Cartier Islands Adjacent Area, the Commonwealth gains no benefit from an increase in these fees.
>
> The intention of the 1989 amendments to the four fees Acts which this Bill consolidates was to enable timely adjustment of these fees so that they more closely reflect actual administrative costs. While the level of fees has not been changed since the 1989 amendments took effect, they are currently under review in conjunction with the States and the Northern Territory Government and a satisfactory outcome is anticipated.
>
> While I remain unconvinced of the need to include a maximum fee level in the Petroleum (Submerged Lands) Fees Bill, I would not object to an amendment to include such a provision in the Bill if that were a condition of passage of the Bill by the Senate.

The committee thanks the Minister for this response which gives details of the background of the bill. It seems to the committee that the information given by the Minister confirms the committee's concern about flexibility.

The committee acknowledges that it is appropriate to delegate the legislative power of the Parliament where minor adjustments to the law need to be made frequently. It is in that context that the committee fosters the practice that where flexibility is paramount, a maximum fee or a method of calculating it be specified in the primary legislation.

It seems to the committee, however, that the need for flexibility in this case is not demonstrated. Historically, as we pointed out in Alert Digest No. 7, there have been infrequent changes. Currently, while the fees may need to be adjusted to reflect the administrative costs of the program for the relevant State and Territory Departments, the committee is not persuaded that an amendment in a Departmental omnibus bill would not adequately meet that need.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL (NO.2) 1994

This bill was introduced into the House of Representatives on 24 March 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following:

- *Social Security Act 1991* to:
  - introduce the disability wage supplement, from 1 July 1994;
  - increase the maximum rate of additional family payment payable in respect of children who have not turned 16 by $1 a week per child, from 1 January 1995;
  - impose a rate of return for shares and managed investments for ordinary income assessment purposes;
  - allow the Minister for Social Security to take account of migration law changes by way of disallowable instrument;
  - increase the pension age for women from 60 to 65, to be phased in from 1 July 1995 over a 20-year period;
  - prevent payments to persons refusing to obtain and provide a tax file number to the Department;
  - modify the definition of 'compensation'; and
  - make minor amendments consequent upon the new home child care and partner allowances;
- *Data-matching Program (Assistance and Tax) Act 1990* to make minor amendments consequent upon the introduction of the disability wage supplement; and the
- *Veterans' Entitlements Act 1986* and *Farm Household Support Act 1992* to make minor amendments consequent upon the introduction of the partner allowance.

The committee dealt with this bill in Alert Digest No. 6 of 1994, in which it made various comments. The Parliamentary Secretary to the Minister for Social Security responded to those comments in a letter dated 30 May 1994. A copy of the letter is attached to this report and relevant parts of the response are discussed below for the information of Senators.

Tax file numbers
Clause 5 - Insertion of Part 2.9
Clauses 34-37: Response to AAT decision

In Alert Digest No. 6 of 1994 the committee noted that clause 5, if enacted, would insert Part 2.9 to provide for a new payment: the disability wage supplement. It includes proposed sections 416 and 417. The effect of these proposed new sections

would be to preclude the payment of the supplement where recipients have not responded to a request to provide their own and their partner's tax file numbers to the Department.

The committee also noted that clauses 34-37 are proposed because of the decision of the Administrative Appeals Tribunal in *Re Malloch and Secretary, Department of Social Security*. The Explanatory Memorandum states that the AAT held 'that the Principal Act does not prevent payment to a person who does not provide a tax file number to the Department because he or she has no tax file number and has no intention of getting one'.

The committee continues to maintain that, although tax file numbers may be considered necessary to prevent persons defrauding the system, they may also be considered to be unduly intrusive into a person's private life.

The committee sought the Minister's advice on why the provision of tax file numbers are necessary, as it appears that the tax file number is being used as method of identification.

Pending the Minister's advice, 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 Minister responded as follows:

> Your Committee expressed its concern that while tax file numbers (TFNs) may be considered necessary to prevent persons from defrauding the social security system, they may also be considered to be unduly intrusive into a person's private life. Your Committee also sought advice on why the provision of TFNs are necessary as is appears that TFNs are being used as a method of identification.
>
> With respect to disability wage supplement, the rate at which disability wage supplement will be payable to a person is determined by the income received by a person. Your Committee noted that the Bill provides for tax file numbers as a prerequisite to the payment of disability wage supplement and expressed concern.
>
> Under a data-matching program introduced by the *Data-matching Program (Assistance and Tax) Act 1990,* income disclosed by people to the Department of Social Security (and other paying agencies) is automatically checked against income disclosed to the Australian Taxation Office (ATO) and other paying agencies. TFNs are needed to ensure that the ATO income data is attributed to the correct social security or other beneficiary.

In relation to the proposed disability wage supplement, most people likely to receive this payment will already be receiving disability support pension or sickness allowance and will therefore already have provided the required TFNs. In such cases, the Department will be seeking authorisation to use previously collected TFNs for the purposes of disability wage supplement.

In addition, some clients would be exempted (temporarily or indefinitely) from being requested to provide a TFN (eg. a person with no income, in a natural disaster zone, in a remote area or when the partner is uncontactable or violent).

Those clients who do not have a TFN could be assisted by the Department as the TFN provisions would enable the Department to accept TFN applications on behalf of ATO and conduct necessary proof of identity checks. This provides an opportunity for the Department to assist those clients who may have problems with obtaining TFN because of proof of identity requirements. As the Department conducts its own proof of identity checks, this would not constitute any increased intrusiveness from the client's point of view. The Department's involvement in the TFN application process should be beneficial to disabled people, persons with language difficulties or new entrants to the workforce.

The requests to provide TFNs as a condition of payment of disability wage supplement is consistent with the requirements that apply to existing payments administered by the Department of Social Security.

The committee thanks the Minister for this response.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

NINTH REPORT

OF

1994

22 JUNE 1994

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator B Cooney
Senator M Forshaw
Senator J Troeth

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

NINTH REPORT OF 1994

The Committee presents its Ninth Report of 1994 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:

Banking (State Bank of South Australia and Other Matters) Act 1994

Student Assistance Amendment Bill 1994

The bill for this Act was introduced into the Senate on 24 March 1994 by the Minister for Veterans' Affairs.

The Act facilitates South Australia's compliance with some of the principal conditions attached to special assistance being provided by the Commonwealth to South Australia over a three year period. The conditions relate to: the sale of the State Bank of South Australia (SBSA); subjecting the bank to Commonwealth taxation; and transfer by legislation of prudential supervision powers over the bank to the Reserve Bank of Australia. The Act also makes a number of other minor amendments to streamline the transfer of assets from the SBSA to the corporatised bank. Amendments have also been made to the *Banking Act 1959* and *Reserve Bank Act 1959*.

The committee dealt with the bill in Alert Digest No. 6 of 1994, in which it made various comments. The Treasurer responded to those comments in a letter dated 9 June 1994. A copy of that letter is attached to this report. Although this bill has been passed by both houses (and received Royal Assent on 9 June 1994), the Treasurer's response may, nevertheless, be of interest to Senators. Relevant parts of the response are, therefore, discussed below.

Commencement on proclamation
Clause 2

In Alert Digest No. 6 of 1994, the committee noted that clause 2 of the bill provides:

> 2.(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
>
> (2) Part 2.1 (other than subsections 5(2) and 6(2)) commences on a day to be fixed by Proclamation. The day must not be earlier than the day on which the *State Bank (Corporatisation) Act 1994* of South Australia commences.
>
> (3) If the provisions referred to in subsection (2) do not commence within the period of 6 months beginning on the day on which the *State Bank (Corporatisation) Act 1994* of South Australia commences, they commence on the first day after the end of that period.
>
> (4) Subsections 5(2) and 6(2) commence on a day to be fixed by Proclamation.

By subclause 2(4), proposed subsections 5(2) and 6(2) will come into effect on a day

to be fixed by Proclamation, with no provision for automatic commencement or repeal being specified.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The committee pointed out that paragraph 3 of the Drafting Instruction suggests that the time for proclamation should not be open-ended, but that the commencement clause should provide for either automatic commencement or repeal at a fixed time.

The committee noted that, although the Explanatory Memorandum suggests that the

Reserve Bank must fulfil certain requirements before these provisions can be proclaimed, it is not explained why automatic commencement or repeal would not be appropriate. It may be that the circumstances of this bill would make paragraph 6 applicable in that the commencement depends on an event whose timing is uncertain. The committee sought the Minister's advice whether this was the reason.

Pending the Minister's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Treasurer has responded as follows:

> The Committee has expressed concern as to whether subclauses 5(2) and 6(2) of the Bill are in accordance with the Office of Parliamentary Counsel (OPC) drafting instructions concerning restrictions on the time for proclamation. I note the Committee's findings that although the Explanatory Memorandum of the Bill suggests that the Reserve Bank must fulfil certain requirements before these provisions can be proclaimed, it does not explain why automatic commencement or repeal would not be appropriate. The Committee sought clarification as to whether the commencement depends on an event whose timing is uncertain, in which case the subclauses would meet the requirements of the OPC drafting instructions.
>
> I am able to advise that subclauses 5(2) and 6(2) are so drafted because these clauses cannot be proclaimed until the Reserve Bank has completed the necessary processes to allow it to issue a banking authority to the Bank of South Australia Limited. These processes will involve the RBA undertaking an extensive examination of the bank, the time taken for which is uncertain. Accordingly, I consider that these subclauses fall into the category, outlined in paragraph 6 of the Office of Parliamentary Counsel Drafting Instructions No. 2 of 1989, as a circumstance where commencement depends on an event whose timing is uncertain.

The committee thanks the Treasurer for this response.

STUDENT ASSISTANCE AMENDMENT BILL 1994

This bill was introduced into the House of Representatives on 24 March 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend:

- the *Student Assistance Act 1973* to:
  - establish a legislative basis for the ABSTUDY and Assistance for Isolated Children schemes;
  - extend the debt management regime to include certain schemes;
  - index the dependent spouse allowance under AUSTUDY to the CPI;
  - recover certain overpayments;
  - change the requirement for persons receiving student assistance to advise the Department of any changed circumstances that may affect their entitlement from within seven days to within 14 days;
  - give the Minister power to issue guidelines for repayment of supplement loans obtained by fraud;
  - introduce an offence where persons receive student assistance when not entitled to do so;
  - vary the taxable income thresholds for the compulsory repayment of financial supplement debts;
  - reduce the financial supplement payable to students in certain circumstances; and
  - minor amendments;
- the *Student Assistance Amendment Act 1992* to make minor amendments.

The committee dealt with the bill in Alert Digest No. 6 of 1994, in which it made various comments. The Minister for Schools, Vocational Education and Training responded to those comments in a letter received 8 June 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Inappropriate delegation of legislative power
Regulations to govern Schemes
Schedule, items 13 and 14

In Alert Digest No. 6 of 1994, the committee noted that proposed new sections 9 and 10A of the *Student Assistance Act 1973*, if enacted, would give a legislative backing to the Assistance for Isolated Children Scheme and the ABSTUDY scheme. The proposed sections, however, provide only the barest minimum in respect of the schemes,

leaving virtually everything to be prescribed by regulation. For example, section 9, of itself, does not require a person to be isolated to be granted a benefit.

The committee was of the view that a proper balance of the functions of primary and secondary legislation would require more content to be included in the Act. Accordingly, the committee sought the Minister's advice on how an appropriate balance could be achieved.

The committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Minister has responded on this matter as follows:

> It is acknowledged that proposed new sections 9 and 10A, which would give a legislative backing to the Assistance for Isolated Children Scheme (AIC Scheme) and the ABSTUDY scheme, leave most of the rules of the schemes to be prescribed by regulation. The matters which would be prescribed by regulation include:
>
> . the kinds of benefits that may be paid and their value;
> . conditions for getting benefits;
> . when benefits will be payable;
> . how benefits will be paid;
> . means tests relating to students, parents and spouses;
> . workload and progress requirements; and
> . how applications should be made for benefits.
>
> However, in addition to the authority for the grant of benefits under proposed new sections 9 and 10A, provision would be made for the review of decisions under the *Student Assistance Act 1973.* The following important aspects of these schemes would continue to be covered by the Act:
>
> . recovery of overpayments;
> . provision of tax file numbers;
> . offences; and
> . power to obtain information.
>
> At present, these programs are running on a non-statutory basis. This approach will achieve the Government's goal of giving the programs a statutory basis. It is expected that the rules will be subject to frequent amendments to implement policy changes. These changes could be effected more

> efficiently and speedily by amendments to regulations than by amendments to the Act. The same approach was adopted for AUSTUDY (see section 7 of the Act) and has worked well. For this reason, the Government considers the proposed balance of primary and secondary legislation in relation to the AIC and ABSTUDY schemes to be appropriate.

The committee remains unconvinced, however, that the proposed balance between primary and secondary legislation is appropriate. One of the criteria for deciding whether matters should be in primary or secondary legislation is the importance of the matter. On this test of importance, it could be seen that the Government regards its power to recover overpayments and to obtain information as so important that they should be put in the Act but that the provisions which spell out the students' entitlements are of lesser importance and can be dealt with by regulation.

Further, it is open to question whether the same approach, adopted for AUSTUDY, has worked well. The Minister cites in favour of the proposal the efficiency and speed with which the expected frequency of policy changes will be translated into law by regulation. The committee views this as the greatest weakness of the scheme.

Frequent amendments of regulations and amendments of amendments of regulations have created the legislative maze which even the legal expert finds hard to follow and in which the student is irretrievably lost.

Further, policy changes effected by regulation are not exposed to the same public scrutiny as changes to laws made in the Parliament. Entitlements of social security clients are fully spelled out in primary legislation and adequately changed by amendments of an Act. If such a complex system is encompassed in primary legislation, there can be no argument that student assistance entitlements have to be in regulations.

Offence of strict liability/reversal of onus of proof
Schedule, Items 50 and 53

In Alert Digest No. 6 of 1994 the committee noted that items 50 and 53 together with items 48 and 49 would have introduced a significant change in the system of criminal and civil sanctions which relate to the payment of student assistance. The committee was concerned that the new arrangement was a retrograde step, imposing a more onerous level of obligation on recipients under the threat of what, in the circumstances appeared to be an inappropriate penalty - one year's imprisonment.

The committee put various arguments in support of this view and concluded that the defences put too onerous a burden of proof on the recipient and that the proposal to make the bare receipt of an overpayment a criminal offence, and one of strict liability, was both unprecedented and unwarranted. Accordingly the committee sought the

Minister's reconsideration of the scheme.

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 Minister, on this issue, has responded as follows:

> The Committee expressed concerns about items 50 and 53 of the Schedule to the Bill. The Government's concern in proposing these items was to facilitate its program of eliminating overpayments under the student assistance schemes.
>
> As Senator Schacht noted in the Senate debate on the Bill, these amendments were directed at overpayments amounting to about $43m a year. Senator Schacht indicated that there is a need to balance protections for individuals with effective efforts to ensure that taxpayer's money is properly spent and is recouped if paid out incorrectly.
>
> The Government recognised that the proposed amendments involved strict liability offences but initially considered them warranted in view of the wider considerations. As you will be aware, however, the Government agreed to an amendment seeking to delete these two matters from the Bill in view of the detailed concerns raised by the Committee.

The committee has noted the amendments that were made and thanks the Minister for his response.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TENTH REPORT

OF

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SENATE STANDING COMMITTEE

FOR

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator B Cooney
Senator M Forshaw
Senator J Troeth

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 1994

The Committee presents its Tenth Report of 1994 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:

Bounty (Fuel Ethanol) Act 1994

Corporations Legislation Amendment Bill 1994

Superannuation Laws Amendment Bill 1994

BOUNTY (FUEL ETHANOL) ACT 1994

The bill for this Act was introduced into the Senate on 23 March 1994 by the Parliamentary Secretary to the Minister for Primary Industries and Energy.

The Act introduces the payments of bounty on the production of certain fuel ethanol in Australia from 1 July 1994 to 30 June 1997.

The committee dealt with the bill in Alert Digest No. 6 of 1994, in which it made various comments. The Minister for Small Business, Customs and Construction responded to those comments in a letter dated 27 June 1994. A copy of that letter is attached to this report. Although this bill has been passed by both houses (and received Royal Assent on 23 June 1994), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are, therefore, discussed below.

Unreviewable decisions
Subclauses 13(1), 15(4), 17(1), 19(4) and 21(1)

In Alert Digest No. 6 of 1994 the committee noted that the relevant subclauses give the Minister the discretion to decide whether a person may be registered for the bounty scheme established by this bill and to decide the production allocation for the person so registered. Although each clause requires the Minister, if the person is refused registration or production allocation, to give the person reasons for the refusal, the bill does not provide for review of such a decision. The committee noted, however, that under proposed paragraph 61(1)(a)the Minister's decision to cancel a person's registration is subject to review by the Administrative Appeals Tribunal. Accordingly the committee sought the Minister's advice on the matter.

The committee drew Senators' attention to the provisions, as they may be considered to make 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:

> The clauses at issue outline the allocation process that is to operate in respect of the fuel ethanol bounty. The allocation process is intended to create certainty for the entire bounty period for producers who are successful applicants in the first and second years whilst ensuring there is opportunity for new producers to enter the scheme in years 2 and 3 of the bounty.
>
> Where a finite resource is to be allocated to a finite number of recipients it is considered inappropriate for the Administrative

> Appeals Tribunal (AAT) to have jurisdiction to review decisions on who receives the allocations. This is because a successful application for review by the AAT would, of necessity, alter all allocations under the scheme and therefore defeat any attempt at certainty. It is for this reason that the decision of the Minister to refuse registration (and therefore allocation) under the fuel ethanol bounty scheme is not the subject of merits review by the AAT.

In view of the scheme in other Bounty Acts, which allow for similar decisions to be reviewed by the Administrative Appeals Tribunal (AAT), the committee remains unconvinced by the reasons put forward.

Section 12, for example, of the *Bounty (Books) Act 1986* envisages that only a finite amount is available for payment of bounty on books and makes provision to cope with this. Section 33 provides for review by the AAT of a range of decisions including the refusal to register a person for the purposes of the Act.

The committee continues to draw Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

CORPORATIONS LEGISLATION AMENDMENT BILL 1994

This bill was introduced into the House of Representatives on 24 March 1994 by the Attorney-General.

The bill proposes to:

- confer on lower courts in each State and Territory civil jurisdiction in respect of corporate law claims relating to debt recovery or monetary compensation;
- enable the Australian Stock Exchange to introduce a new Clearing House Electronic Subregister System (CHESS) through the establishment of an approved Securities Clearing House and support of business rules;
- allow the implementation of rationalisation between the national companies and securities scheme laws;
- regulate certain activities of the Corporations and Securities Panel;
- exclude certain decisions made under the Corporations Law and the ASC Law from the requirements of subsection 27A(1) of the *Administrative Appeals Tribunal Act 1975*. This section requires a person who makes reviewable decisions to take all reasonable steps to give any person whose interests are affected by that decision notice of the making of the decision and of the right to have the decision reviewed;
- introduce penalty units rather than dollar value units;
- transfer the unclaimed property functions and powers of the Minister to the ASC;
- provide for the establishment of stock markets in unquoted prescribed interests on which the interests may be traded by means of an electronic trading facility;
- recognise that in a futures transaction involving a chain of intermediaries, monies can be identified as client monies and continue to be treated as such; and
- amend the definitions of 'securities' and 'futures contract'.

The committee dealt with the bill in Alert Digest No. 6 of 1994, in which it made various comments. The Attorney-General responded to those comments in a letter dated 27 June 1994. A copy of that letter is attached to this report. Although this bill has been passed by both houses, the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are, therefore, discussed below.

Procedural fairness/inappropriate delegation of legislative power
Schedule 4, items 19 and 20

In Alert Digest No. 6 of 1994, the committee noted that schedule 4, if enacted, would amend the *Australian Securities Commission Act 1989* and the Corporations Law to introduce a new structure to enable the Australian Securities Commission (ASC) to examine takeover conduct. The present structure, according to the Explanatory Memorandum, was 'found to be ineffective'. The proposed structure would change the adversarial hearing into an inquisitorial inquiry. Items 19 and 20, in particular, would remove the right of legal representation and the right to have the rules of natural justice apply. Item 19 would substitute a right to have another person present to assist a person before an inquiry without the assistant being able to address the Panel. Item 20 would substitute a regulation making power to prescribe what will constitute 'procedural fairness'.

At paragraph 320, the Explanatory Memorandum states the dilemma:

> The crux of the problem which the Panel has encountered with the conduct of its hearings is how it is to provide procedural fairness to parties while at the same time coming to a timely decision concerning the acceptability fo commercial takeover conduct.

The committee was concerned that the proposal may be an overreaction to the difficulties experienced in the first application. The Explanatory Memorandum itself stresses the flexibility of the principles of procedural fairness. The Explanatory Memorandum also notes in paragraph 325 that delay in coming to a quick decision is less likely to be a problem with the interim order powers available to the Panel through sections 773A and 733B. The committee was also concerned that an argument should be put forward that quick decisions are necessary because the peer group members who will conduct the inquiry will want to be off attending to their own business interests and may not be able to devote the time necessary to come to a proper decision.

The committee was of the view that

> the changes proposed may be considered to trespass unduly on personal rights and liberties in taking away the right to a public hearing of an adversarial nature with legal representation which would enable the exercise of the wide powers of the Panel to be challenged and tested; and
>
> the proposal to alter the principles of procedural fairness by regulation in the interests of getting quick decisions may constitute an inappropriate delegation of the legislative power of Parliament in that the committee would prefer to see any alteration in primary legislation.

Accordingly, the committee sought the Attorney-General's advice on these matters.

Pending the Attorney-General's advice, 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) and to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

On the issue of excluding the rules of natural justice, the Attorney-General responded as follows:

> Government Amendment
>
> Firstly, I direct the Committee's attention to the amendment of item 20 of Schedule 4 of the Bill, moved on behalf of the Government and agreed to by the House of Representatives in the course of the second reading debate in the House. That amendment omitted proposed subsection 195(3) of the *Australian Securities Commission Act 1993* ("the ASC Act") and substituted the following subsection:
>
> > " (3) It is intended that this Division and the regulations will set out procedural requirements that equate to the rules of natural justice."
>
> The amendment thus omits the express exclusion of the rules of natural justice that had formerly been proposed by subsection 195(3) and substitutes a statement of the Government's intention that the requirements of the rules of natural justice will be met where the procedural requirements set out in Division 3 of Part 10 of the ASC Act and in the regulations are followed in the course of an inquiry by the Panel.
>
> I anticipate that this amendment will make it clear that natural justice is not to be excluded from the operations of the Panel. Rather, the amended provision makes it clears that the content of the rules of natural justice to be met by the Panel are those that have been specifically provided in the legislation and the proposed regulations.

The Committee approves the new direction which the Attorney-General has given to bill in omitting the express exclusion of the rules of natural justice.

On the question of the right of legal representation at an oral hearing. The committee appreciates the way in which the proposed regulations have been framed. On this matter the Attorney-General has pointed out:

Furthermore, the Bill does not exclude the possibility of an oral hearing, and the proposed regulations will specifically give the Panel a discretion to convene a conference to hear oral evidence if it considers it necessary or desirable to do so. Conferences will provide a further means for testing material provided to the Panel.

In addition, natural justice does not necessarily require the decision maker to hear argument from a person's legal representative. It requires that a person have an adequate opportunity to present his of her case. While the Bill removes the right of a person's legal adviser to address the Panel, it enables such an adviser to be present and to assist the person. This provision has been modelled on the system of pre-decision conferences under subsection 90A(7) of the *Trade Practices Act 1974*. I understand that the system works well in that arena and I have confidence that it will work equally well here. It is particularly appropriate that it be the parties themselves, rather than their legal advisers, address the Panel, given that the matters that are the subject of the Panel's consideration will generally be matters of market behaviour and market standards and not technical legal matters.

Specific provision has also be made in the proposed regulations for the Panel, at its discretion, to invite an adviser to address the conference where it considers that would assist the Panel's consideration of a particular matter.

The legislation and the proposed regulations also require the Panel to notify parties of any decision it makes and the reasons for such decisions.

The second limb of the rules of natural justice requires that the decision be made by an unbiased adjudicator. This is addressed by section 185 of the ASC ACT, as amended by the Bill, which requires a member of the Panel who is involved in an inquiry to disclose any conflict of interest and, unless such a conflict is immaterial or indirect, the member is not permitted to continue to take part in the inquiry.

Thus, when a comparison is made of what is required by the rules of natural justice and the procedures that are in fact provided for in the Bill and the proposed regulations, the Government considers that the removal of the right to a public hearing of an adversarial nature and for legal representatives to address the Panel would not unduly trespass on the rights and liberties of the parties. The procedures outlined in the legislation and proposed regulations in fact offer the

> additional advantage of certainty for both the parties and the Panel as to what their rights and obligations are. As noted above, the rules of natural justice vary with circumstances. Thus, until tested in the Courts, their precise content, beyond the broad principles outlined above, cannot be known in any particular circumstance.
>
> Turning now to the issue of whether the proposal to alter the principles of procedural fairness by regulation constitutes an inappropriate delegation of the legislative power of Parliament, the enclosed draft regulations will clearly evidence the extent of the detail the Government considers should appropriately be covered by regulation. In the Government's view, it is inappropriate that detailed administrative provisions of this nature be incorporated in primary legislation.

As it has been made clear that the regulations will equate with natural justice the committee has no objection to the detailed administrative provisions being in regulations. The committee's concern was that any departure from the rules of natural justice should be contained in primary legislations. The committee thanks the Attorney-General for his assistance in this matter.

Inappropriate delegation of legislative power
Schedule 8, items 4 - 8

The committee received a submission from Michael G Hains expressing concern at 'the delegation of substantial powers to modify the Corporation Law as it applies to derivative financial products'.

The submission argued that the definition of what constitutes a futures contract or a security should be in primary legislation and not left to delegated legislation.

The committee sought the Attorney-General's advice on the matters raised by Mr Hains submission.

Pending the Attorney-General's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

On this issue the Attorney-General has responded as follows:

> The Committee has sought my advice on the matters raised by the submission from Mr Michael G Hains which is attached to the Digest.
>
> I wish to advise the Committee that the Government has decided not

to proceed with the amendments proposed by item nos 4 to 8 and item 21 of Schedule 8. The amendments in question are to the definitions of "securities" and "futures contract", to facilitate the trading of equity based instruments having the characteristics of both equity and futures products.

The amendments were included in the Bill, as an urgent measure, following the public exposure of the draft Bill and before its introduction. I acted quickly to incorporate the amendments in the Bill at that stage, following representations by the Australian Stock Exchange ("ASX") stressing their importance and urgency. The ASX stated that they wished to be able to trade an important new product from 1 July this year. However, I have now been informed by the ASX that they will not be in a position to trade this product until later in the year.

In light of that, I decided to withdraw the amendments so that further consultation can be undertaken with industry representatives. An amendment to this effect was moved on behalf of the Government and agreed to by the House of Representatives during the course of the second reading debate in the House.

The committee notes with approval the decision to withdraw the amendments for further consultation and thanks the Attorney-General for his assistance with the details of this bill.

SUPERANNUATION LAWS AMENDMENT BILL 1994

This bill was introduced into the House of Representatives on 1 June 1994 by the Minister for Finance.

The bill proposes primarily to amend the *Parliamentary Contributory Superannuation Act 1948*, and make consequential amendments to the *Parliamentary Contributory Superannuation Amendment Act 1981* and the *Parliamentary Contributory Superannuation Amendment Act 1983* and deals with superannuation for Commonwealth parliamentarians. The amendments allow the superannuation scheme established under the Act to comply with the *Superannuation Industry (Supervision) Act 1993* and associated Acts and Regulations in relation to vesting and preservation of members' benefits, and disclosure of information to members of the scheme. The amendments also propose to correct inequities in the scheme which relate to former members who hold offices of profit, invalidity retirement, transfers between the Commonwealth Parliament and State and Territory Parliaments, and to make a minor amendment to spouse benefits.

The committee dealt with the bill in Alert Digest No. 9 of 1994, in which it made various comments. The Minister for Finance responded to those comments in a letter dated 20 June 1994. A copy of that letter is attached to this report. Although this bill has been passed by both houses, the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are, therefore, discussed below.

Inappropriate delegation of legislative power
Clause 11 - Proposed new subsection 26B(3)

In Alert Digest No. 9 of 1994, the committee noted that proposed new subsections 26B(1) and (3) provide:

> **Preservation of benefits and disclosure of information to members**
>
> *Regulations to which section applies*
>
> "26B.(1) This section applies to the Superannuation Industry (Supervision) Regulations in so far as they deal with:
> (a) the preservation of benefits; or
> (b) the disclosure of information to members of regulated superannuation funds.
>
> ...
>
> *Regulations to prevail over inconsistent provisions of this Act*

"(3) If those regulations are inconsistent with a provision of this Act, the regulations prevail and that provision, to the extent of the inconsistency, is of no effect."

The committee also noted that subsection 26B(3), if enacted, would permit regulations made under the *Superannuation Industry (Supervision) Act 1993* in so far as they deal with the preservation of benefits or disclosure of information to members of regulated superannuation funds to override inconsistent provisions in the *Parliamentary Contribution Superannuation Act 1948.*

The committee pointed out that an express provision authorising the amendment of either the empowering legislation or any other Act by means of delegated legislation is what is termed a 'Henry VIII' clause and is considered to be an inappropriate delegation of legislative power. The proposed subsection has a similar effect and the committee is concerned about regulatory powers of this nature.

In addition, the committee noted that the General Outline in the Explanatory Memorandum states that there are currently no provisions in the Act requiring disclosure of information to members and that there are no provisions in the Scheme which require benefits to be preserved. In the light of these statements, the committee sought the Minister's advice on whether the provision is otiose but, if it is necessary, what reasons justify an apparently inappropriate delegation of legislative power.

Pending the Minister's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Minister has responded as follows:

> As you are aware, it is the Government's intention that all Commonwealth superannuation schemes that are completely unfunded, including the parliamentary scheme, will comply, on a continuing basis, with the main operative provisions of the *Superannuation Industry (Supervision) Act 1993* and the associated Acts and Regulations (the SIS legislation) in relation to vesting, preservation and disclosure of information to scheme members.
>
> While the Act is silent on preservation arrangements, it is necessary to override the Act because, in the absence of specific preservation arrangements, the Act requires immediate payment of all lump sum benefits at the time of leaving the Parliament. In addition, no provision is made in the Act for the disclosure of information to scheme members.

I have not sought to make specific amendments to the Act to mirror the SIS Regulations. Those Regulations are likely to change as the regulatory framework is fine-tuned and updated, with the effect that any mirrored provisions in the Act would also need to be regularly amended. As you will appreciate the lead time for amending legislation can be considerable. If the Act itself contained the relevant provisions there could be lengthy periods where the SIS Regulations and the Act were at odds.

The SIS Regulations have also been developed principally as part of the regulatory framework governing private sector superannuation schemes. The parliamentary superannuation scheme has features that do not occur in the private sector which require the SIS Regulations to be modified to make allowances for those features. For example, unlike typical private sector schemes, the parliamentary scheme is unfunded and consequently there is no superannuation fund. Therefore aspects of the SIS Regulations that deal with the provision of reports to fund members about investment, audit and accounting matters require modification in the context of the parliamentary superannuation scheme. The proposed subsection 26B(2) of the Act provides for such modification of the SIS Regulations (clause 11 of the Bill); for example, the provisions covering fund investment matters, etc would be ignored for the purpose of parliamentary scheme reporting to members.

Accordingly, in these circumstances, it seems to me that the most efficient use of scarce parliamentary resources would be served by adopting any future changes in the SIS Regulations (modified as necessary in the context of the parliamentary scheme) automatically under the Act. In this way, the Act would always keep up to date with changing requirements. Similar arrangements to comply with the forerunner to the SIS Regulations (the Occupational Superannuation Standards Regulations and now under SIS) have been adopted, with the agreement of your Committee, under the *Superannuation Act 1976* and the *Superannuation Act 1990* for the same reasons.

As you will appreciate, any changes to the SIS Regulations are subject to the usual parliamentary tabling and disallowance arrangements associated with scrutiny of Statutory Rules and disallowable instruments.

The committee thanks the Minister for this response.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ELEVENTH REPORT

OF

1994

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator B Cooney
Senator M Forshaw
Senator J Troeth

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 1994

The Committee presents its Eleventh Report of 1994 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:

Agricultural and Veterinary Chemical Products (Collection of Interim Levy) Act 1994 and Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994

Australian Capital Territory Government Service (Consequential Provisions) Act 1994

Migration Legislation Amendment Bill (No. 2) 1994

National Environment Protection Council Bill 1994

Witness Protection Bill 1994

AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS (COLLECTION OF INTERIM LEVY) ACT 1994 and AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS (COLLECTION OF LEVY) ACT 1994

The bills for both these Acts were introduced into the Parliament earlier this year and have been passed by both Houses and received Royal Assent.

The purpose of the Acts was to give effect to (interim) cost recovery arrangements for the operation of the National Registration Scheme for Agricultural and Veterinary Chemicals.

The committee dealt with these bills in its Alert Digests Nos 1 and 7 and in its Third and Seventh Reports of 1994. The Minister has since responded to the committee's latest comments in a letter dated 28 July 1994. As the Minister's response may be of interest to Senators, relevant parts of the response are discussed below. A copy of that letter is attached to this report.

Inappropriate delegation of legislative power: Imposition of amount of penalty by regulation

The committee and the Minister resolved satisfactorily the issues with respect to the setting of the levy and interim levy by regulation. Attention then focused on the issue of the power to set by regulation the rate of the penalty for a late payment.

With respect to the collection of the interim levy the Minister was prepared to give the committee an assurance that he would not recommend the making of regulations for the purpose of increasing the late penalty payment.

In its Seventh Report, the committee thanked the Minister for his assurance which met the committee's concerns in respect of this bill.

It left unresolved, however, the position of a late payment penalty under the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994.* On reflection, the committee was concerned that a regulation making power was thought necessary for a late payment penalty. There did not appear to be any need for that flexibility which justified the use of regulations. A late payment penalty can be adequately expressed as either a fixed amount or a fixed percentage of the debt due. The committee sought the Minister's advice whether the late payment penalty ought to be set only by the primary legislation.

The Minister has responded:

> ...the Committee has raised a concern about section 14(1)(b) of the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* which provides for the imposition of an amount of penalty by regulation. This Act was passed by Parliament on 1 March 1994. In particular the Committee is concerned, on reflection, that a regulation making power is thought necessary for a late payment penalty as the penalty could be adequately expressed as either a fixed amount or a fixed percentage of the debt due.
>
> I accept the Committee's in-principle concerns and will consult with the Office of Parliamentary Counsel with a view to amending section 14 of the Act at the earliest possible opportunity.
>
> I trust that my response satisfactorily addresses the Committee's concerns.

The committee thanks the Minister for this response.

AUSTRALIAN CAPITAL TERRITORY GOVERNMENT SERVICE (CONSEQUENTIAL PROVISIONS) ACT 1994

The bill for this Act was introduced into the House of Representatives on 12 May 1994 by the Special Minister of State.

The Act introduces changes to Commonwealth legislation required as a result of arrangements being put in place for the establishment of a separate public service for the Australian Capital Territory, to be called the Australian Capital Territory Government Service (ACTGS).

Included among the arrangements are provision for:

- certain classes of officers and employees to cease to be officers and employees of the Australian Public Service (APS);

- a 'reciprocal mobility' arrangement between the ACTGS and APS;

- delivery of personnel records between the two agencies when a person moves from one to the other;

- re-entry to the ACTGS when staff have been employed in other areas of the Commonwealth public sector;

- regulation making power to enable modification of legislation relating to matters arising from or consequential on the establishment of the ACTGS;

and amends the *A.C.T. Self-Government (Consequential Provisions) Act 1988*, *Public Service Act 1922* and *Privacy Act 1988* and various other Commonwealth legislation to enable the establishment of the ACTGS.

The committee dealt with the bill in Alert Digest No. 8 of 1994, in which it made various comments. The Assistant Minister for Industrial Relations responded to those comments in a letter dated 27 June 1994. A copy of that letter is attached to this report. Although this bill has been passed by both Houses (and received Royal Assent on 29 June 1994), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are, therefore, discussed below.

Commencement on proclamation

Clause 2

In Alert Digest No. 8 of 1994 the committee noted that clause 2 of the bill provides that this legislation will come into effect on a day to be fixed by Proclamation, with no provision for automatic commencement or repeal being specified.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the "fixed time"). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the "repeal" option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

Paragraph 3 of the Drafting Instruction suggests that the time for proclamation should not be open-ended, but that the commencement clause should provide for either automatic commencement or repeal at a fixed time.

The committee also noted that in its third paragraph, the explanatory memorandum

indicates that the 'entire scheme of the Commonwealth legislation is dependent on the enactment of complementary legislation by the ACT and, for this reason, it is necessary to have the bill take effect on proclamation'.

The committee accepted that in the circumstances the legislation should commence on proclamation but questions whether the delegation of the power to bring the legislation into effect should be open-ended. The legislative power of the Parliament includes the control of the commencement of the legislation passed pursuant to that power. The reasons for a clause delegating an open-ended power to bring legislation into effect must be carefully examined. The explanatory memorandum did not appear to address this matter.

Paragraph 6 of the Drafting Instruction suggests that an open-ended period for proclamation might be appropriate where commencement depends on an event whose timing is uncertain.

The committee noted, however, that:

the Territory Public Sector Management Bill 1994 provides that the substantive provisions of the legislation will automatically commence six months from the day on which that bill becomes law, if the Minister has not brought them into effect sooner; and

the A.C.T Self-Government legislation requires an election before the end of February 1995 with, consequentially, the lapse of any bill not passed before the Assembly dissolves.

Accordingly, the committee sought the Minister's consideration of whether clause 2 ought also provide for automatic repeal, say, 12 months after Royal Assent.

Pending the Minister's response, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

On this issue the Minister has responded as follows:

> Clause 2
>
> Clause 2 of the Bill provides for the Bill to commence on proclamation. The Committee has sought my consideration of whether the clause ought also provide for automatic repeal, say, 12 months after Royal Assent.
>
> The Committee has accepted that in the circumstances the legislation should commence on proclamation but questions whether the

delegation of the power to bring the legislation into effect should be open-ended.

The Committee notes that the Territory Public Sector Management Bill 1994 provides for that legislation to automatically commence six months after the Bill becomes law and that in accordance with the A.C.T. Self-Government legislation that Bill will lapse if not passed before the Assembly is dissolved which must be before February 1995 - the latest possible date for the next Territory election.

The drafting of clause 2 in its present form takes account of the following considerations:

. The Government strongly supports the establishment of a separate public service for the A.C.T., but this cannot be achieved solely through Commonwealth legislation. Complementary Territory legislation is also required.

. Although it is hoped that the Commonwealth and Territory legislation will be passed more or less contemporaneously it is by no means certain that this will occur.

. The Commonwealth legislation cannot be proclaimed until the Territory legislation is in place. This means that some of the necessary conditions for commencement of the legislation are substantially outside the Commonwealth's control which lends support to the inclusion of an open ended period for proclamation. The 6 month period included in the Territory legislation will commence on passage of that legislation. It is possible that the ACT legislation may be passed a good deal later than the Commonwealth legislation resulting in any period for commencement included in Commonwealth legislation starting to run ahead of that provided for in the Territory legislation.

. The possible lapsing of the Territory Bill in February 1995 makes the situation even more difficult. The Commonwealth Government is keen to proceed with the establishment of a separate Service and, on the basis that a new Territory Government would also wish to proceed with the separate Service, the Commonwealth legislation needs to have the flexibility to delay commencement for an extended period to take account

of the possible lapsing of the Territory legislation.

. Automatic repeal would be undesirable having regard to the pressures on the Government's legislation program and the time available in the Parliament for the consideration of legislation.

I note that there are precedents for the omission of a time limit for proclamation. For example that certain provisions of the *Health and Community Services Legislation Amendment Act (No. 2) 1993* commenced on a day to be fixed by Proclamation and that no time limit was included for such Proclamation. This was because the Act needed to accommodate proposed complementary State and Territory legislation yet to be enacted to implement a uniform national system of controls for therapeutic goods.

The Explanatory Memorandum accompanying the Bill included the following:

> *This clause* [clause 30], *together with all other clauses dealing with the complementary State laws, will commence on a date to be fixed by Proclamation. A specific date has not been set, as the commencement date must coincide with the enactment of a complementary State law. The Commonwealth must be prepared for the coming of that complementary State law, but cannot predict when it will come into operation.*

I suggest therefore that similar considerations apply to this Bill which cannot be proclaimed until complementary Territory legislation has been enacted.

Notwithstanding this, having regard to the Committee's concerns, I have arranged for the clause to be amended to include a time limit of 18 months for proclamation.

Inappropriate delegation of legislative power
Subclause 23(1)

In Alert Digest No. 8 of 1994, the committee was of the view that this subclause would permit regulations to be made which would modify other primary legislation, as it applies to matters relating to the ACT Government Service.

The committee received a letter from the Minister on this issue which is attached to this Report. The letter gives reasons for such a delegation of the legislative function of Parliament and also gives assurances on limiting the use of the power.

The committee pointed out that an express provision authorising the amendment of either the empowering legislation or any other Act by means of delegated legislation is what is regarded as a 'Henry VIII' clause. Subclause 23(1) is a classic example.

The committee had concerns about regulatory powers of this nature but in the light of the Minister's letter and on the assumption the Senate Standing Committee on Regulations and Ordinances will scrutinise any regulations made under this subclause, the committee made no further comment on this aspect of subclause 23(1).

Retrospectivity of regulations under subclause 23(1)

The committee noted that the whole bill including the regulation making power in subclause 23(1) will commence on a day to be proclaimed. The Minister's letter indicates that a regulation making power to modify Commonwealth Acts is needed to avoid the necessity of retrospective legislation to make amendments which should have been in place from the commencement of the new public service. Subsection 48(2) of the *Acts Interpretation Act 1901*, however, precludes retrospectivity in a regulation where the rights of a person would be affected so as to disadvantage that person. It would seem therefore that not all amendments to legislation may be able to be achieved by use of the regulation making power.

On these issues, the Minister has responded as follows:

> ### Subclause 23(1)
>
> I have noted the Committee's comments on the delegation of a legislative function and on the retrospectivity issue.

Loss of rights - Conditions of service

There were several issues about general conditions of service which did not appear to be covered under the proposed bill. The bill offered certain mobility rights between the Australian Public Service (APS) and the ACT Government Service (ACTGS). The bill, however, appeared to be silent on whether sick leave and other accrued or accruing rights are transferable.

The committee sought the Minister's advice on the position of a former APS officer with, say, twenty years service who transfers from the ACTGS to the APS under the new mobility provisions after the separate service is established. If that officer has accrued sick leave, would the officer retain those sick leave entitlements? The bill makes it clear that unused recreation leave would be paid out by the ACT

Government, but there seems to be no provision for sick leave. A further example would be, where, after transferring to the APS, the officer becomes redundant: would the twenty years service be taken into account for redundancy payments?

Further, short term employees of the APS whose employment is extended beyond one year are deemed under section 82AD of the *Public Service Act 1922* to be continuing employees. The committee was unable to determine what the position will be for current short term employees in the ACT Branch of the APS who would have become continuing employees under section 82AD but for the commencement of this bill. There may have been other issues but the committee sought the Minister's clarification of these, as they may be considered to trespass unduly on personal rights and liberties.

Pending the Minister's advice, the committee drew Senators' attention to these issues, as the bill's failure to address them 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.

On these issues, the Minister has responded as follows:

> Conditions of Service
>
> The Committee has sought my advice and clarification in relation to issues about general conditions of service which do not appear to be covered by the proposed Bill.
>
> In particular, the Committee seeks advice as to the position in relation to accrued sick leave and service that is to count for redundancy purposes. The Committee also seeks clarification about the position for current short term employees in the ACT Branch of the APS who would have become continuing employees under section 82AD but for the commencement of the Bill.
>
> The conditions of service that are to continue to apply in the separate services have been the subject of consultation with the unions and some have been the subject of conciliation proceedings before the Australian Industrial Relations Commission.
>
> Where a former APS officer transfers from the ACTGS to the APS after the separation of the Services, the officer's prior service with both the ACTGS and APS will be recognised (under existing provisions) for sick leave purposes under the prior service provisions. In assessing the amount of leave arising from prior service, credits are granted as if that service had been with the APS. Any sick leave previously taken will then be deducted from the credit. While the accrual rates between the Services remain

identical this is equivalent to the transfer of credits.

I would also like to clarify that transitional arrangements in the Bill provide that officers moving from the APS to the ACTGS on transfer day will not be entitled to payment in lieu of recreation leave.

In relation to service that is to count for redundancy purposes, the Commonwealth and unions have been negotiating on the arrangements for this as one of the matters before the Australian Industrial Relations Commission. It is expected that the final arrangements will be implemented administratively.

In relation to the specific example that you have raised where an APS officer transfers to the ACTGS on transfer day, the Commonwealth will recognise all continuous service with the Commonwealth and the ACTGS should he or she return to the APS employment in the future.

Short Term Temporary Employees

The Committee has sought clarification regarding the position of short term employees in the ACT Branch of the APS who would have become continuing employees under section 82AD of the Public Service Act 1922 but for the commencement of this bill.

In her Presentation Speech to the introduction of the Public Sector Management (Consequential and Transitional Provisions) Bill 1994 the Chief Minister said:

> The Bill puts in place transitional arrangements that provide a mechanism for the transfer of existing Australian Public Service and Territory staff to the new Government Service. A number of these clauses give effect to the Government's commitment that the terms and conditions of existing staff will not be reduced. In line with this commitment government officers will be appointed to offices in the new Service corresponding with their former offices and existing employment contracts will be carried over into the new Service.

More specifically I understand that clause 6(4) of the Territory Public Sector Management (Consequential and Transitional Amendments) Act 1994 will transfer transitional staff who were employees in the APS (other than continuing employees, who will become officers under section 6(5) into the ACT Government Service

as employees. Deemed continuing employee status under section 82AD arises where a temporary employee's period of employment is extended, and the anniversary of their employment occurs. The ACT Government advises that where a decision had been taken under section 82AD to extend a person's temporary employment, and the decision was such that in the ordinary course of events the persons would still have been employed on the anniversary of their employment, then the person will be made permanent. This will apply even if that anniversary would occur after Commonwealth legislation ceases to apply on the commencement of the new Service.

Having regard to the advice of the ACT Government, I am satisfied that the arrangements for the transfer of employees to the new Service do not trespass unduly on personal rights and liberties.

Please let me know if you require any further explanation.

The committee thanks the Minister for his detailed assistance with this bill.

MIGRATION LEGISLATION AMENDMENT BILL (NO. 2) 1994

This bill was introduced into the Senate on 8 June 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the *Migration Act 1958* to clarify certain provisions following recent High Court challenges to the legislation. The bill proposes, from 1 November 1989 to:

- ensure the Act authorises custody for a finite time period of a person who arrives in Australian unlawfully on board a vessel that subsequently is unable to depart Australia for various reasons;

- ensure that an officer may, to prevent a person from entering Australia unlawfully, require a vessel to enter a port and require persons who are on board the vessel to remain on board until the vessel arrives at the port; and

- to insert a "reading down" provision similar to, and consistent with, provisions contained in certain other Commonwealth legislation.

The committee dealt with the bill in Alert Digest No. 10 of 1994, in which it made various comments. The Minister for Immigration and Ethnic Affairs responded to those comments in a letter dated 4 August 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity
Subclause 2(2)

In Alert Digest No. 10 of 1994, the committee noted that subclause 2(2) of this bill, if enacted, would give retrospective effect from 1 November 1989 to clauses 5, 6 and 7 of the bill. The explanatory memorandum and clause 4, which states the object of the amendments, show that the purpose of the retrospectivity is to limit the effect of recent Court decisions.

The committee indicated that in its approach to considering whether the retrospectivity in this bill unduly trespasses on personal rights and liberties the committee needed to separate the effect of the amendments made by the bill from the effect of making those amendments apply retrospectively.

The committee had no doubt that it is proper for the Commonwealth to have the power to detain appropriately a person who applies for an entry permit irrespective of the date of departure (or otherwise) of the vessel on which the person arrives in Australia. The committee questioned whether the *Migration Act 1958*, as presently

constituted, did not adequately provide this.

In the committee's opinion the issue was whether making the amendments retrospective unduly trespassed on personal rights and liberties. To assist the Senate to decide this, the committee needed to examine the rationale put forward to justify the retrospectivity.

The background

The committee pointed out by way of background that the Constitution by section 51(xix) confers on Parliament legislative power with respect to 'Naturalization and aliens'. A statute, therefore, can authorise the executive to detain an alien in custody for the purposes of expulsion or deportation and can include detention while an application for an entry permit is being considered.

Under the common law an alien who is within this country, whether lawfully or unlawfully, is not an outlaw (except enemy aliens in time of war). 'Neither public official nor private citizen can lawfully detain him or her... except under and in accordance with some positive authority conferred by the law' (*Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1, at p. 19 per Justices Brennan, Deane and Dawson). Their Honours go on to point out that, if the unlawful detention is by a person who is an officer of the Commonwealth, the status of that person as such an officer will not, of itself, confer immunity from proceedings against him or her personally in the ordinary courts of the land.

In the *Chu Kheng Lim* case, six of the seven judges of the High Court discussed the meaning of section 36 of the *Immigration Act 1958*, the section into which clause 7 of the present bill will insert significant subsections. The section as it stood on 1 November 1989 authorised the detention of the particular person in custody only until the departure of the vessel from Australia or 'until such earlier time as an authorised officer directs'. All six judges had no difficulty with the plain meaning of the section. It was not considered ambiguous or doubtful or open to other interpretations. Justices Brennan, Deane and Dawson in their joint judgment concluded that the view apparently taken by the Minister's Department was a mistaken approach to the construction of that section: the view that, in a case where a vessel can never leave because it has been destroyed, temporary custody can continue indefinitely was mistaken. They also concluded that 'the continued detention of each plaintiff in custody after the destruction of the boat on which he or she arrived in Australia was unlawful'(at p. 22).

On p.19 their Honours had pointed out that, in the absence of a legislative provision to the contrary an alien does not lack the standing or the capacity to invoke the intervention of a domestic court of competent jurisdiction if he or she is unlawfully detained. Under the common law a person who has been unlawfully detained has the

right to sue for damages for that unjust imprisonment.

Section 54RA of the *Immigration Act 1958*, as the explanatory memorandum points out at paragraph 5, was inserted in December 1992 to extinguish the common law right of action to sue for damages for unlawful imprisonment for persons found to have been unlawfully detained under section 36 and to substitute a statutory right of action limiting the damages payable to $1 per day.

Recent High Court decisions raise doubts whether section 54RA is constitutionally valid in that the taking away of the general right to damages and substituting compensation of $1 a day may be the acquisition of a person's property on unjust terms. In the event of such a finding, substantial damages for unlawful imprisonment may be awarded. Hence the proposal to amend the law retrospectively to validate the unlawful imprisonment.

Rationale justifying retrospectivity

It seemed to the committee that the explanatory memorandum contained three elements justifying retrospectivity:

- the amendments need to be retrospective to prevent a possible windfall through substantial awards of damages;

- because the Minister and the Department thought that the law gave them the power to detain these people in custody, it ought to be changed retrospectively so that it will be taken to have meant from 1 November 1989 what the Minister and the Department understood it to mean; and

- none of those who were unlawfully imprisoned had sought to challenge lawfulness of their custody before the High Court said that it was unlawful.

The committee suggested that the first element was founded on the notion that an award of damages is a windfall. Inherent to the notion of a windfall is that the person who picks up by chance what the wind of fortune has cause to fall at his or her feet has no right to that property. Unlawful imprisonment, however, carries the right to just compensation. The concept of windfall has no application here. That certain classes of people should not have a right to compensation challenges the concept of equality before the law. The High Court has more than once pointed out that neither citizen nor alien can be deprived of liberty by mere administrative decision or action; that any officer of the Commonwealth who, without judicial warrant, purports to authorise or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. Both citizens and aliens have equal rights not to be deprived of liberty unlawfully, both should have equal rights to compensation.

The committee was of the view that the second element clearly trespassed on the basic right that those subject to the law are entitled to know what the law says and to be treated according to what the law says, ultimately according to what the courts declare the law to mean.

As far back as 1765, in his *Commentaries, Sir William Blackstone* said:

> ... a base resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it.

In the committee's opinion the third element did not overcome the hurdle that the right of a person to challenge the unlawful excess of authority does not take away the obligation on the person exercising authority to ensure that the use of that authority is within power.

The rationale given for retrospectivity did not appear to the committee to justify validating unlawful imprisonment.

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:

> Your Committee expressed concern about subclause 2(2) of the bill , which would give retrospective effect to clauses 5, 6 and 7 of the Bill, and noted the purpose of the retrospectivity was to limit the effect of recent Court decisions. I note the comments about the justification for the retrospectivity - which goes to the fundamental issue of the proposed effect of the Bill. I also note the findings that the Bill does not appear to justify validating unlawful imprisonment and may be considered to trespass unduly on personal rights and liberties.
>
> Notwithstanding your Committee's comments, the Government continues to consider that the proposals in the Bill are warranted. The Government's primary objective in proposing the Bill is to avoid the possibility of the Australian taxpayer underwriting compensation payments, which would be in the nature of windfalls, to certain unauthorised boat arrivals in Australia.
>
> As set out in the Explanatory Memorandum to the Bill, recent Court decisions have cast doubt on the way the Commonwealth

> administered section 36 of the *Migration Act 1958* (renumbered section 88 by section 35 of the *Migration Legislation Amendment Act 1989* on 19 December 1989). Consequently, the understanding of the law held at the relevant time by the Minister and the Department and the persons detained has been proven to be incorrect.
>
> Other Court decisions have now cast doubt on the effectiveness of section 54RA of the *Migration Act 1958* - the specific legislation enacted by Parliament in December 1992 to limit the possible compensation payable by the Commonwealth in this situation. That legislation dealt with exactly the same fact situation as does the current Bill. It is worth noting that section 54RA was also retrospective in nature, in that it altered rights that existed before its commencement.
>
> In commenting upon the Government's justifications for retrospectivity, I do not consider your Committee placed sufficient weight on the fact that the uncertainty about the operation of section 36 (section 88) turned not on the issue of unauthorised arrival, but on the haphazard fate of the boats on which the persons concerned arrived. As such, the unlawfulness of the custody arose as a result of a technical misunderstanding of the operation and effect of the section.
>
> Furthermore, I do not consider your Committee gave sufficient weight to the fact that, until the Court decisions were handed down, the lawfulness of the custody under section 36 (section 88) of those concerned was never challenged.
>
> In practical terms, the Government is, therefore, proposing in this Bill to do no more than restore the status quo as agreed by the Parliament in December 1992.

The committee thanks the Minister for responding but continues to find unconvincing the rationale for retrospectivity which the Minister has repeated. The Minister has again asserted that the award of damages would be a windfall without addressing the reasons the committee put forward to show that windfall cannot be applied to the enforcement of a legal right. The Minister has not addressed the concept of responsibility and accountability of a person exercising authority to ensure that the use of authority is within power. Finally, no Scrutiny of Bills committee could be expected to agree that the law ought to be not what Parliament has passed but what the Minister thought had been passed.

NATIONAL ENVIRONMENT PROTECTION COUNCIL BILL 1994

This bill was introduced into the Senate on 6 June 1994 by the Minister for Small Business, Customs and Construction.

The bill proposes to implement Schedule 4 of the Intergovernmental Agreement on the Environment endorsed by the Council of Australian Governments in May 1992. The legislation gives effect to the:

- # establishment of the National Environment Protection Council (NEPC) for the purpose of making national environment protection measures;

- # establishment of the NEPC Service Corporation and appointment of an NEPC Executive Officer;

- # establishment of the NEPC Standing Committee of Officials and other committees as NEPC requires; and

- # annual Parliamentary reporting process on the implementation and effectiveness of measures to be followed by the parties and NEPC.

The committee dealt with the bill in Alert Digest No. 10 of 1994, in which it made various comments. The Acting Minister for Environment, Sport and Territories responded to those comments in a letter dated 22 August 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Commencement on proclamation
Clause 2

In Alert Digest No. 10 of 1994, the committee noted that clause 2 of this bill provided that the legislation will come into effect on a day to be fixed by Proclamation, with no provision for automatic commencement or repeal being specified.

The committee placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:

(a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or

(b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

Paragraph 3 of the Drafting Instruction suggests that the time for proclamation should not be open-ended, but that the commencement clause should provide for either automatic commencement or repeal at a fixed time.

Paragraph 6 of the Drafting Instruction, however, suggests that an open ended power of proclamation may be warranted in unusual circumstances, where the commencement depends on an event whose timing is uncertain, such as the enactment of complementary State and Territory legislation.

The committee noted that Preamble to the bill states that an intergovernmental agreement provides that:

> the Commonwealth, the States, the Australian Capital Territory and the Northern Territory will make joint legislative provision for the establishment of a body to determine national environment protection measures.

Although it appeared that paragraph 6 of the Drafting Instruction is applicable, the committee considered that the commencement of this legislation should not in effect be open-ended and that it might be preferable for the legislation to be automatically

repealed if it has not been proclaimed within, say, 12 months of Royal Assent.

Accordingly, the committee sought the Minister's advice on whether this would be appropriate. Pending the Minister's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Minister has responded as follows:

> The Alert Digest No. 10 of 22 June 1994 noted that Clause 2 of this Bill has no provision for automatic commencement or repeal, and suggested that the legislation specify automatic repeal if it has not been proclaimed within 12 months of Royal Assent.
>
> I accept this suggestion. Drafting instructions for revision of the Bill will be issued accordingly.

The committee thanks the Minister for this response.

WITNESS PROTECTION BILL 1994

This bill was introduced into the Senate on 23 March 1994 by the Parliamentary Secretary to the Minister for Primary Industries and Energy.

The bill proposes to establish a National Witness Protection Program to be operated by the Australian Federal Police. Consequential amendments are made to the *Administrative Decisions (Judicial Review) Act 1977*, the *Australian Federal Police Act 1979* and the *Marriage Act 1961*.

The committee dealt with the bill in Alert Digest No. 6 of 1994, in which it made various comments. The Minister for Finance responded to those comments in a letter dated 29 June 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Non reviewable decisions
Schedule

In Alert Digest No. 6 of 1994, the committee noted that the first item in the Schedule, if enacted, would amend the *Administrative Decisions (Judicial Review) Act 1977* (ADJR) to preclude the application of that Act to decisions under this bill and decisions under proposed subsection 60A(2B) of the *Australian Federal Police Act 1979*.

The committee was concerned that these arrangements would allow the Commissioner unfettered discretions without those discretions being reviewable for legality under ADJR.

The Commissioner would have an unfettered discretion as to who may be included in the witness protection program and to authorise the divulging of information relating to the program.

It would not be expected that the decision to include someone in the program would be challenged as the person must agree to be included and the Commissioner must terminate protection if requested to do so. The preclusion of ADJR, however, not only prevents judicial review but also denies access to reasons for decisions under that Act. So a person refused inclusion could not challenge the decision or obtain reasons for it.

The committee noted that the Explanatory Memorandum suggests that the Commissioner would be able to authorise information relating to the program to be given to the Ombudsman where the Ombudsman is investigating a complaint against the police. But the Commissioner has to be of the opinion that it is in the interests of the due administration of justice to disclose the information. It appeared to the committee that the Ombudsman would not be able to challenge the Commissioner's

decision nor seek reasons for the formation of that opinion. Accordingly, the committee sought the Attorney-General's advice on the necessity for granting such unfettered discretions.

Pending the Attorney-General's advice, the committee drew Senators' attention to the provision, as it may be considered to make 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 for Justice, as the Minister responsible for the legislation, has responded as follows:

> It may be useful, before responding to the particular concerns of the Committee, if I provide some background to the Bill.
>
> The Bill will underpin the current AFP witness protection program. The current program and the proposed National Witness Protection Program (NWPP) to be established by the Bill are intended to be available to a small number of witnesses and their families in cases where there is an assessed risk or probability that a person may suffer death, injury or significant property damage. Thus, a person whose risk was assessed as not immediately requiring relocation and a new identity would not satisfy the risk criteria for placement on the program. Usually, a person on the program will be a witness in a major prosecution, together with his/her family members. However, the definition of 'witness' in section 3 of the Bill covers a range of persons who may need protection of a very high order. Placement on the program is voluntary and, where a person requests to be removed, the Commissioner must accede to this request (cl 18(1)(a)).
>
> The policy behind the Bill is to enable protected witnesses to be given a high order of protection, including during those periods when it is most required, such as during court appearances. For example, in cases where a witness is required to give evidence, it is intended that, pending giving evidence, the person be assimilated into a new community and, wherever possible, achieve a normal lifestyle. The Bill does not contemplate a regime of 24 hour protection except during those periods of high risk. In the usual case, persons are removed from the program once they have completed their undertakings and have been assimilated into their new community. Where removal from the program occurs in these circumstances, the person retains his/her new identity. These persons need to be able to seek the support or assistance of the AFP's Witness Protection Branch, and the Bill allows them to do so should the need arise.

The integrity of the current program and the NWPP is of paramount importance. This integrity is not only for the protection of the witness but also for the AFP officers who provide the protection. The integrity must not only be for the initial period of protection but for the life time of the witness and his/her family. This could, of course, involve a number of generations of people. It should be remembered that some offenders are now serving very lengthy sentences and non-parole periods, so that a threat could arise again, many years after the initial threat. For example, there are a number of federal narcotic drug offenders who have non-parole periods in excess of 16 years (not reduced by remissions). These offenders will thus not be eligible for parole until well into the next century.

Turning to the Committee's comments on the Bill, I wish to assure you that the decision to exclude the operation of the AD(JR) Act was not taken lightly. It was done only after careful consideration of the issues and by ensuring that there were internal review mechanisms, that key decisions could not be delegated below Deputy Commissioner level and that there was a special clause to ensure that the Ombudsman had a right of access to the Register required to be maintained under clause 12.

The Bill's measures relating to assessment for placement or removal from the program, the secrecy provisions and provisions on access to documents belonging to the program, as well as the exemption from the AD(JR) Act, are all designed to protect the integrity of the NWPP. The importance of ensuring the safety of the witnesses, their relatives and the AFP officers means that information must be subject to strict safeguards. The wider the information net extends, the greater the likelihood that the integrity of the scheme will be breached. Once a matter is in the arena of court-based review, the information net is significantly expanded, because of the procedures required for such review. It is for these reasons that the usual administrative arrangements have been modified. A balance has to be struck between the protection of the integrity of the scheme and the requirements of administrative law.

In recognition of the significance of the powers and functions set out in the bill, subclause 25(3) precludes delegation of key powers or functions below Deputy Commissioner level. These powers and functions are entering into arrangements with other authorities for the provision of witness protection (cl 6), placement on the NWPP (cl 8), access to the Register (cl 12(2)&(3), permission not to disclose former identity (cl 16), cessation of protection and assistance (cl 18),

provision of information to law enforcement authorities, where a witness is under investigation, arrested or charged with an offence that carries a penalty of 12 months' imprisonment or more (cl 20).

The letter from your Committee's secretary states that the Commissioner has an unfettered discretion as to who may be placed on the program. It also states that -

. the Explanatory Memorandum suggests that the Commissioner would be able to authorise information relating to the program to be given to the Ombudsman where the Ombudsman is investigating a complaint against the police;

. but the Commissioner has to be of the opinion that it is in the interest of the due administration of justice to disclose information; and

. it appears that the Ombudsman would not be able to challenge the Commissioner's decision nor seek reasons for the formulation of that opinion.

These comments appear to relate to the amendment to s60A of the *Australian Federal Police Act 1979* in the Schedule to the Bill. Section 60A is the AFP secrecy provision and relates to the divulging of information by officers. This section is being amended to ensure that officers, if authorised to do so by the Commissioner, may disclose to a person specified in the authorisation information obtained during the performance of their duties under the NWPP. This clause is necessary to enable, for example, a State police officer to interview an AFP officer, say, if a witness was murdered. In relation to the provision of information by officers to the Ombudsman, I draw your attention to subsection 27(5) of the *Complaints (Australian Federal Police) Act 1981* (the Complaints Act). Subsection 27(5), which is expressed to operate '[n]otwithstanding the provisions of any enactment', confers a power on the Ombudsman to require the production of information or the answering of questions when required to do so under relevant provisions of the Complaints Act. It is not true to say that the Ombudsman's access to information relating to the NWPP is dependent on the Commissioner's discretion since the access will be supported by the powers conferred on the Ombudsman by section 27 of the Complaints Act.

The committee thanks the Minister for clarifying this issue. It is unfortunate that,

when the Ombudsman already had the power to interview police without the Commissioner's authorisation, the explanatory memorandum suggested on page 12, by way of example, that the secrecy provision needed to be amended to enable the Commissioner to authorise the Ombudsman to interview the police.

The Minister continued:

> An additional feature of the Bill designed to compensate for the exclusion of the Bill designed to compensate for the exclusion of the AD(JR) Act appears in clause 12. Clause 12 deals with access to the Register of participants. Subclause 12(2) provides that the Commissioner must give the Commonwealth Ombudsman access to the Register or part of a Register for the purposes of an investigation under Part III or IV of the Complaints Act. As mentioned above, the decision whether to place or remove a person from the Program cannot be delegated below Deputy Commissioner (cl 18(1)(b)). A witness may appeal to the Commissioner against the decision the decision of the Deputy Commissioner. The Commissioner may confirm, vary or reverse the decision (cl 18(2)-(4).
>
> In 1988, the Parliamentary Joint Committee on the National Crime Authority tabled its report entitled *Witness Protection.* Paragraph 5.53 of that Report states -
>
> > "The Committee also recommends that an appropriate complaints mechanism should be established so that there is an avenue for review for witnesses who believe they have been denied protection although the threat to their safety warrants it and for witnesses aggrieved by decisions made by the agency protecting them including decisions to terminate any assistance being provided to them. At the federal level the appropriate person to exercise this complaints jurisdiction would be the Ombudsman."
>
> All decisions made by officers in relation to the operation of the program are subject to investigation by the Ombudsman. This review process is hence in accordance with the observations in the *Witness Protection* report. The provisions of the Bill relating to access, together with the operation of the Complaints Act, ensure that all decisions made under the Bill are subject to review by the Ombudsman.

The committee thanks the Minister for this clarification which meets the concerns of the committee.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

TWELFTH REPORT

OF

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MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator B Cooney
Senator M Forshaw
Senator J Troeth

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 1994

The Committee presents its Twelfth Report of 1994 to the Senate.

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

Bounty (Fuel Ethanol) Act 1994

BOUNTY (FUEL ETHANOL) ACT 1994

The bill for this Act was introduced into the Senate on 23 March 1994 by the Parliamentary Secretary to the Minister for Primary Industries and Energy.

The Act introduces the payments of bounty on the production of certain fuel ethanol in Australia from 1 July 1994 to 30 June 1997.

The committee dealt with the bill in Alert Digest No. 6 of 1994 and in its Tenth Report of 1994. The Minister for Small Business, Customs and Construction has since responded to the committee's latest comments in a letter dated 25 August 1994. A copy of that letter is attached to this report. Although this bill has been passed by both houses (and received Royal Assent on 23 June 1994), the Minister's response may, nevertheless, be of interest to Senators. Relevant parts of the response are, therefore, discussed below.

Unreviewable decisions
Subclauses 13(1), 15(4), 17(1), 19(4) and 21(1)

In Alert Digest No. 6 of 1994 the committee noted that the relevant subclauses give the Minister the discretion to decide whether a person may be registered for the bounty scheme established by this bill and to decide the production allocation for the person so registered. Although each clause requires the Minister, if the person is refused registration or production allocation, to give the person reasons for the refusal, the bill does not provide for review of such a decision. The committee noted, however, that under proposed paragraph 61(1)(a)the Minister's decision to cancel a person's registration is subject to review by the Administrative Appeals Tribunal. Accordingly the committee sought the Minister's advice on the matter.

The committee drew Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

On 27 June 1994, the Minister responded as follows:

> The clauses at issue outline the allocation process that is to operate in respect of the fuel ethanol bounty. The allocation process is intended to create certainty for the entire bounty period for producers who are successful applicants in the first and second years whilst ensuring there is opportunity for new producers to enter the scheme in years 2 and 3 of the bounty.
>
> Where a finite resource is to be allocated to a finite number of

> recipients it is considered inappropriate for the Administrative Appeals Tribunal (AAT) to have jurisdiction to review decisions on who receives the allocations. This is because a successful application for review by the AAT would, of necessity, alter all allocations under the scheme and therefore defeat any attempt at certainty. It is for this reason that the decision of the Minister to refuse registration (and therefore allocation) under the fuel ethanol bounty scheme is not the subject of merits review by the AAT.

In its Tenth Report the committee, however, remained unconvinced by the reasons put forward in view of the scheme in other Bounty Acts, which allow for similar decisions to be reviewed by the Administrative Appeals Tribunal (AAT).

The committee noted, by way of example, that section 12 of the *Bounty (Books) Act 1986* envisages that only a finite amount is available for payment of bounty on books and makes provision to cope with this. Section 33 provides for review by the AAT of a range of decisions including the refusal to register a person for the purposes of the Act.

The committee continued to draw Senators' attention to the provisions, as they may be considered to make 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 further responded as follows:

> ...I note that my reply to your Committee's concerns was included in the Senate Standing Committee's Tenth Report of 1994, but that the Committee remained unconvinced that merits review of such decisions was inappropriate.
>
> I would like to take this opportunity to emphasise that the scheme put in place by the Act is slightly different to other bounty schemes administered by the Australian Customs Service (ACS). The starting point is that section 28 of the Act provides for a specified maximum amount of money to be available for the three years of the bounty. This provision is unique in relation to bounty Acts administered by the ACS. It indicates a clear intention by the Parliament that in any of the three years of the scheme only the amounts specified in section 28 will be available for bounty.
>
> Subsections 13(1), 15(4), 17(1), 19(4) and 21(1) all relate to registration under the scheme and the production allocation that is to be provided in respect of successful registrants. It is important to

note that all successful registrants under the bounty scheme are granted a production allocation which, under section 25 of the Act, is the maximum production for which that applicant will be entitled to claim bounty. Given that the rate of bounty payable is 18 cents per litre (section 27 refers), then each production allocation granted can therefore be translated to a maximum amount of money that can be granted to each producer for each year of the bounty.

The allocation process was decided upon in order to create certainty for the entire bounty period for producers who are successful applicants in the first and second years of the bounty whilst ensuring there is opportunity for new producers to enter the scheme in years 2 and 3 of the bounty.

It can therefore be seen from the above that AAT review of the decisions made in the process of allocation, is considered to be inappropriate. For example, consider a situation where, in the first year of the bounty, 6 out of 10 applicants were successful in being registered and they were allocated $1m worth of bounty (section 28 providing that $6m is the maximum available in the first year). If the AAT had jurisdiction to review that decision and one or more of the unsuccessful applicants requested such review, or even if one or more of the successful applicants requested review of the quantum of their allocation, the AAT in reviewing one request would need to revisit all the allocations for each successful applicant. This result comes about because of the $6m limit for year 1 of the bounty period. This would lead to a situation where even if only one person requests AAT review, this review would necessarily involve all the successful applicants defending their entitlements already granted because the AAT could not alter just one allocation without having to adjust the rest of the allocations because of the limits imposed by section 28 of the Act.

It is for this reason that the Government considers the AAT review in such circumstances is inappropriate.

The committee thanks the Minister for clarifying this issue.

Mal Colston
(Chairman)

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THE SCRUTINY OF BILLS

THIRTEENTH REPORT

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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

THIRTEENTH REPORT OF 1994

The Committee presents its Thirteenth Report of 1994 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:

Classification (Publications, Films and Computer Games) Bill 1994

Crimes and Other Legislation Amendment Bill 1994

Primary Industries Legislation Amendment Bill 1994

Classification (Publications, Films and Computer Games) Bill 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Attorney-General.

The bill proposes to provide for the classification of publications, films and computer games for the Australian Capital Territory. When enacted the Act will form part of a national scheme for classification and the enforcement of those classifications. The bill establishes the Classification Board and the classification Review Board. Classification decisions are to be made in accordance with the National Classification Code and Guidelines to help apply the Code.

The committee dealt with the bill in Alert Digest No. 12 of 1994, in which it made various comments. The Attorney-General responded to those comments in a letter dated 8 September 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Inappropriate delegation of legislative power/Insufficient parliamentary scrutiny
Amendment of the National Classification Code

In Alert Digest No. 12 of 1994, the committee noted that clause 9 of the bill provides that material is to be classified in accordance with the Code and the classification guidelines. The Code is contained in the schedule to the bill. Clause 6, however, provides for the code to be amended simply by the agreement of the Minister and his or her State counterparts without reference to Parliament. To enable the legislation of the Parliament to be amended in this way may be regarded as an inappropriate delegation of the legislative power of the Commonwealth. Further, as there is no requirement for the amendments to be tabled or opportunity for them to be disallowed the process may also be considered as insufficiently subjecting the exercise of legislative power to parliamentary scrutiny.

The committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference. It may also be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

The Attorney-General has responded as follows:

The question of amendment of the Code raises difficult issues. If it were a matter entirely for the Commonwealth, in the exercise of its legislative power, the relevant provisions would have been structured quite differently. However, it is not a matter entirely for the Commonwealth and to put the matter in perspective it might be helpful to the Committee if I were to outline the background to the provision.

The Bill is based on the Australian Law Reform Commission's (ALRC) Report on Censorship Procedure. The ALRC was required to report on how Australia's censorship laws could be made more simple, uniform and efficient while preserving the co-operative nature of the current scheme. Censorship is an area where the Commonwealth does not have comprehensive Constitutional power.

The Bill reflects the ALRC's preferred option for reform. It is a Federal Act for the ACT which establishes the Classification Boards and sets out the procedures for the making of classification decisions. It is proposed that the States and Territories will pick up the decisions made under the Commonwealth Act for the purposes of enforcement in their respective jurisdictions.

To give effect to this scheme it is necessary for the States and Territories to voluntarily give up some of their current legislative powers, in particular their power over the procedures under which classification decisions are made.

An integral part of the ALRC's recommended approach is a classification code agreed to by the Commonwealth, States and Territories which contains the classification categories and criteria. In commenting on this the ALRC notes (in para 2.12 and 2.13, respectively of the Report) that:

> "The classification categories and criteria, however, would not be legislated by any State or Territory, nor by the Commonwealth. Instead, they would be, as they are at present, agreed to by the States, the Northern Territory and the Commonwealth. They would form a 'code'. An agreement between governments would include provision for amendment for the code from time to time. The classifying body would be instructed by the federal Act to make decisions in accordance with the terms of the agreed code as in force for the time being. The text of the code as it stood when the federal law was enacted would be published for information as a schedule to the

federal Act. The schedule would not, however, be part of the Act."

"This alternative [i.e. the preferred option] accurately reflects, and maintains, the balance of responsibilities that has been arrived at between these jurisdictions. It recognises that, in relation to the classification criteria and categories, the Commonwealth, the States and the Northern Territory [and following a decision of Ministers, the ACT] are equal partners, and that policy on these matters is derived from agreement between all the jurisdictions. There will be a single procedure, avoiding the overlaps and duplications that presently exist, and the classifiers will derive their powers from a single source, removing the difficulty that they sometimes face now of conflicting legislation from different jurisdictions. Provision will need to be made for amendments to the code to be published."

The code referred to is the National Classification Code set out in the Schedule to the Bill which has been agreed to by all jurisdictions.

The ALRC also recommended that an exposure draft of any proposed amendment to the Code should be open for public comment before it is agreed to by the Commonwealth, States and Territories. A process of public consultation has already been adopted in relation to the recently introduced computed game classification scheme and it is proposed that a similar process be adopted in relation to any future amendments of the Code. This requirement will, as recommended by the ALRC, need to be set out in a formal inter-governmental agreement after the Bill is enacted.

Securing State and Territory agreement to a new scheme of this kind is never an easy task. There are clear benefits to industry and the Australian community by the much simplified and more uniform scheme reflected in the Bill.

The Commonwealth conducted its negotiations with the States and Territories on the ALRC's recommended legislative approach in good faith. I think it is fair to say that in the course of these negotiations very real concern was expressed amongst some of the States and Territories that, having agreed to forgo legislative power in certain areas, particularly in relation to the classification categories and criteria, subsequent agreements reached on these matters could be undone by the Federal Parliament.

> In the spirit of these negotiations the Commonwealth has brought forward this Bill in the form agreed to by all jurisdictions. It is, of course, ultimately a matter for the Federal Parliament on what happens to provisions of this kind but if we are serious about co-operation between governments in the Australian Federation (of which we hear a great deal) I think we must realise and accept that some compromises are usually needed to achieve this end.
>
> I hope the above comments have been of assistance to the Committee in explaining the reasons for the approach adopted in the Bill to amendment of the Code.

The committee thanks the Attorney-General for this response.

Crimes and Other Legislation Amendment Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to amend the following portfolio Acts:

- *Australian Security Intelligence Organization Act 1979* to:
  - include certain offences in the *Crimes (Ships and Fixed Platforms) Act 1992* in the category of acts of politically motivated violence;
  - allow the Director-General of Security to authorise an ASIO officer to approve persons authorised to exercise the authority of warrants issued by the Attorney-General; and
  - allow ASIO officers to apply for vacant positions in the Australian Public Service;
- *Crimes Act 1914* to:
  - enable courts to consider cultural background when sentencing federal offenders;
  - make minor drafting amendments to provisions concerning action in the event of breach of certain court orders;
  - exclude ACT prisoners from the Commonwealth provisions on escape from lawful custody, ensure that the sentence of federal prisoners convicted of escape under State provisions ceases to run for the length of the escape, and replace outdated references to detention at the Governor-General's pleasure;
  - remove scanning devices from the category of prohibited interception devices; and
  - reflect the name change of the Cash Transaction Reports Agency to the Australian Transaction Reports and Analysis Centre;
- *Transfer of Prisoners Act 1983* to:
  - include the ACT in the national transfer of prisoners scheme; and

- correct minor drafting errors.

Minor amendments are also made to 14 Acts falling within this portfolio.

The committee dealt with the bill in Alert Digest No. 12 of 1994, in which it made various comments. The Minister for Justice has responded to those comments in a letter dated 14 September 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Commencement by Ministerial Declaration Subclause 2(7)

In Alert Digest No. 12 of 1994, the committee noted that subclause 2(7) provides:

> (7) The amendments made by sections 25 and 28 to the *Transfer of Prisoners Act 1983* do not take effect (except for the purposes of the making of a declaration under section 5 of that Act in relation to the Australian Capital Territory) until such a declaration is made.

The committee noted that this subclause would allow the amendments to come into effect only when the Minister makes a declaration under section 5 of the *Transfer of Prisoners Act 1983* without there being any time limit within which the declaration must be made.

The committee also noted the absence from the explanatory memorandum and the second reading speech of any reason for the Minister to be given such an unfettered discretion.

In the absence of such a reason and in the interests of greater certainty as to whether these clauses are, or are not, in force the committee sought the Minister's consideration of adding a further clause which would deem clauses 25 and 28 to be repealed if the Minister has not made the declaration within 6 months of Royal Assent. Pending the Minister's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Minister has responded on this issue as follows:

> These amendments will enable the ACT to participate independently in the national scheme for the interstate transfer of prisoners. The

ACT has enacted its *Prisoners (Interstate Transfer) Act 1994* ("the ACT Act"). However, before the ACT Act can come into operation, the Commonwealth Transfer of Prisoners Act as well as the State and Northern Territory legislation has to be amended.

It is desirable that the ACT assumes responsibility for its own offenders at the earliest opportunity. A device was therefore needed to ensure that, as the Commonwealth Transfer of Prisoners Act and the relevant State and Northern Territory Acts were amended, the ACT Act could come into force.

The alternative was to have a commencement clause that could not come into effect until all jurisdictions amended their legislation. However, it could take some time for the amendments to be passed in each jurisdiction. The method of commencement which I have adopted in this Bill will ensure that the introduction of the ACT into the interstate transfer of prisoners scheme is not held up by legislative delays in one State.

Because the timing on the passage of the necessary State legislation is uncertain I am unwilling to accept the Committee's recommendation that these amendments be repealed if ministerial declarations are not made within 6 months. However, I can assure the Committee that I will make the delegation as soon as possible after a State amendment is passed. The Government wishes that the ACT become an independent participant in the scheme as soon as it can.

Background to the Amendment

Some years ago the Standing Committee of Attorneys-General ("SCAG") agreed that there be a national scheme for the interstate transfer of prisoners for trial and welfare purposes. The Commonwealth, States and the Northern Territory enacted legislation to underpin the scheme.

At present ACT offenders are covered by the Commonwealth Transfer of Prisoners Act. Following Australian Capital Territory self government, SCAG approved that the ACT should enact its own legislation.

The staggered introduction of the ACT into the interstate transfer of prisoners scheme provided for in clause 29 means that, in effect, the Commonwealth will retain responsibility for the transfer of ACT prisoners between the ACT and States that have not amended their interstate transfer laws. However, as each State amends its law and

> that State and the ACT recognise each other's interstate prisoner transfer laws, the ACT will assume responsibility for transfers to and from that State. There will be a transitional period during which the Commonwealth will have responsibility for some ACT transfers and the ACT for others. Furthermore, under clause 29 of the Bill, the Commonwealth will continue to be responsible for ACT transfers that are commenced under the Transfer Act but not completed when the current amendments commence.

The committee thanks the Minister for this response.

Delegation of power
Clause 6 - Exercise of authority under warrants

In Alert Digest No. 12 of 1994, the committee noted that clause 6 of the bill, if enacted, would repeal the present section 24 of the *Australian Security Intelligence Organization Act 1979* (the Act) and substitute a new section. The effect of the change to the section is to allow the Director-General to appoint an officer of the organization to perform a function which the Director-General must perform personally at present: to appoint those persons who will exercise the authority contained in warrants issued by the Attorney-General under certain sections of the Act. Those sections enable warrants with respect to search warrants, listening devices, mail interception and collection of foreign intelligence in Australia.

Proposed subsection 24(1) provides:

> 24.(1) The Director-General, or an officer of the Organization appointed by the Director-General in writing to be an authorising officer for the purposes of this subsection, may, by signed writing, approve officers and employees of the organization, and other people, as people authorised to exercise, on behalf of the Organization, the authority conferred by relevant warrants.

The committee noted that there is no limitation as to the persons or classes of persons to whom the Director-General or his appointee can approve to exercise the authority granted by the warrants. The committee also notes that the present section 24 contains a similar wide choice of the recipients of these powers. Under the present section the Director-General can approve any person. Neither the bill nor the explanatory memorandum indicates the need for a power of such width.

Since its establishment the committee has consistently drawn attention to provisions which allow for the delegation of significant and wide-ranging powers to 'a person'. Generally, the committee has taken the view that it would prefer to see a limit on

either the sorts of powers that can be delegated in this way or the persons to whom the powers can be delegated. If the latter course is adopted, the committee prefers that the limit should be to the holders of a nominated office, to members of the Senior Executive Service or by reference to the qualifications of the person to be delegated the powers.

Although the proposed section merely repeats the earlier section on this point, the committee pointed out that the present section was enacted in 1979 before this committee existed. Accordingly, the committee sought the Minister's advice on the reasons for having no limitation on the class of persons who can be approved. Pending the Minister's advice the committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

On this issue, the Minister has responded as follows:

> The Government acknowledges that the proposed amendment of section 24 is deficient in not specifying the class of potential delegates of the power to appoint authorising officers. The Government will introduce an amendment of clause 6 of the Bill to limit the class of potential recipients of this power to members of the Senior Executive Service or their Organization equivalents and to Managers (Senior Officer Grade A).

The committee thanks the Minister for this response and notes the Government's intention to introduce an amendment to meet the concerns raised by the committee.

Primary Industries Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 28 June 1994 by the Parliamentary Secretary to the Treasurer.

The bill proposes to amend the following portfolio Acts:

- *Australian Meat and Live-stock (Quotas) Act 1990* to:
  - clarify the types of restrictions imposed by importing countries which enable the AMLC to establish export quota mechanisms; and
  - insert a delegations clause to enable AMLC's staff to sign the documents imposing a quota scheme; and
- *Beef Production Levy Act 1990* to:
  - introduce a conversion factor allowing the beef production levy to be calculated where only a cold carcase weight is available;
- *Primary Industries Levies and Charges Collection Act 1991* to:
  - clarify the intention that an agent, if involved in the sale of cattle, is responsible for collecting and forwarding the levy to the Commonwealth;
  - impose penalties for offences relating to the amendment made to the *Beef Production Levy Act 1990* regarding carcase weights; and
  - correct an omission relating to abattoir proprietors' ability to refuse to slaughter certain livestock.

The committee dealt with the bill in Alert Digest No. 12 of 1994, in which it made various comments. The Minister for Primary Industries and Energy has responded to those comments in a letter dated 16 September 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Delegation of power
Proposed section 8A of the *Australian Meat and Live-stock (Quotas) Act 1990*

In Alert Digest No. 12 of 1994, the committee noted that clause 5 of the bill, if enacted, would provide that under new section 8A the Australian Meat and Livestock Corporation would be able to delegate all or any of its powers under the Act to 'a person'.

The committee noted that there is no limitation as to the persons or classes of persons to whom the Corporation can delegate these various powers and functions. The committee also noted that, although the explanatory memorandum mentions that the staff of the Corporation will be able to exercise delegated authority, neither the bill nor the explanatory memorandum indicates the need for a power of such width.

Since its establishment the committee has consistently drawn attention to provisions which allow for the delegation of significant and wide-ranging powers to 'a person'. Generally, the committee has taken the view that it would prefer to see a limit on either the sorts of powers that can be delegated in this way or the persons to whom the powers can be delegated. If the latter course is adopted, the committee prefers that the limit should be to the holders of a nominated office, to members of the Senior Executive Service or by reference to the qualifications of the person to be delegated the powers.

The committee realised that this amendment, as the explanatory memorandum correctly observes, would bring the delegation power in the Quotas Act into conformity with the delegation power in section 48 of the *Australian Meat and Live-stock Corporation Act 1977*. The committee preferred, however, that the proposed clause should be modified to limit the delegation perhaps to certain staff of the Corporation and invited the Minister to consider whether the earlier legislation should also be amended - section 48 being enacted before this committee existed.

Pending the Minister's advice the committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

The Minister has responded as follows:

> Amendments to the *Australian Meat and Live-stock (Quotas) Act 1990* have been withdrawn from the Bill. In this regard, your comment is noted and any subsequent amendment of the Act to include a power of delegation will limit delegation of the Australian Meat and Live-stock Corporation's powers to certain persons or classes of persons.
>
> The decision to include a wide power of delegation in the proposed amendments, in addition to conformity with the delegation power in

section 48 of the *Australian Meat and Live-stock Corporation Act 1977* as noted by the Committee, also took into account a similar power of delegation contained in section 70 of the *Australian Wool Research and Promotion Organisation Act 1993.*

Amendment of the *Australian Meat and Live-stock Corporation Act 1977* to reflect the Committee's comment on a general limitation on delegation of the Corporation's powers will again be considered in the context of amendment of meat and livestock industry legislation, which is expected to result from the outcome of consultations with industry on the Report on the Industry Commission Inquiry into Meat Processing.

The committee thanks the Minister for this response noting his assurance that any subsequent amendments will be in accordance with committee's comments.

Mal Colston
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

1994

12 OCTOBER 1994

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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 1994

The committee presents its Fourteenth Report of 1994 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:

Family Law Reform Bill 1994

Family Law Reform Bill 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Attorney-General.

The bill proposes to amend the *Family Law Act 1975* to:

- facilitate the greater use of mediation, counselling and arbitration in the resolution of family law disputes, prior to seeking a court impose action;
- replace the concepts of custody and access with emphasis on the concept of parental responsibility;
- provide an objects clause in the Act to provide that children should receive adequate and proper parenting to help them achieve their full potential and to ensure parents fulfil their duties and responsibilities;
- update numerous provisions relating to children so they are consistent with the new concepts of parental responsibility.

The committee dealt with the bill in Alert Digest No. 12 of 1994, in which it made various comments. The Attorney-General responded to those comments in a letter dated 30 September 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Commencement on proclamation
Clause 2

In Alert Digest No. 12 of 1994, the committee noted that clause 2 of the Bill provides:

> **2.** This Act commences on a day or days to be fixed by proclamation.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case

may be, the 'fixed time'). This is to be accompanied by either:

(a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or

(b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The committee pointed out that paragraph 3 of the Drafting Instruction suggests that the time for proclamation should not be open-ended but that the commencement clause should provide for either automatic commencement or repeal at a fixed time.

The committee indicated that the explanatory memorandum comments on the commencement provision at page 5:

> ...that the Act commences on a day or days to be fixed by Proclamation. The purpose of commencing the Act by Proclamation is to enable changes to be made to regulations and Rules of Court and also all consequential amendments to other Commonwealth legislation such as the *Child Support (Registration and Collection Act 1988,* the *Child Support (Assessment) Act 1989* and the *Social Security Act 1991.* It is recognised that where other legislation relies on the former concepts of "custody" and "access", there will need to be sufficient time to ensure that these are brought into line with the new concepts established under this Bill. In addition, there will also need to be sufficient time to educate both the community and the legal profession about the changes.

The committee noted from this that paragraph 6 of the Drafting Instruction may be applicable in that the commencement may be seen as dependent on events whose timing is uncertain. The committee was of the opinion, however, that commencement could be indefinitely protracted without some limitation as to time.

Accordingly, the committee sought the Attorney-General's advice whether a period of twelve months after Royal Assent might not be sufficient time for the implementation of the consequential changes which the explanatory memorandum mentions.

Pending the Attorney-General's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

The Attorney-General has responded as follows:

> As indicated in the explanatory memorandum, the reforms to be enacted by the Family Law Reform Bill are extensive and there is much associated work such as changes to Regulations, Rules of Court and educative work, to be undertaken after passage of the Bill. I advise that the 12 month period indicated by the Committee would be a sufficient time.

The committee thanks the Attorney-General for this response, but would like to **seek clarification from the Attorney-General** that the commencement provision of the bill will be amended to ensure automatic commencement 12 months after Royal Assent if the legislation has not been proclaimed beforehand.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

FIFTEENTH REPORT

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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

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT OF 1994

The Committee presents its Fifteenth Report of 1994 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:

Legislative Instruments Bill 1994

Legislative Instruments Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to establish a regime governing drafting standards and procedures for the making, publication and scrutiny of delegated legislation. The bill establishes the Federal Register of Legislative Instruments to be maintained by the Principal Legislative Counsel. The *Statutory Rules Publication Act 1903* is repealed by this bill and amendments are made to the *Acts Interpretation Act 1901*, *Administrative Decisions (Judicial Review) Act 1977*, *Family Law Act 1975*, *Federal Court of Australia Act 1976*, *High Court of Australia Act 1979* and *Industrial Relations Act 1988*.

The committee dealt with the bill in Alert Digest No. 12 of 1994, in which it made various comments. The Attorney-General responded to those comments in a letter dated 4 October 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

General comment
Clause 7

In Alert Digest No. 12 of 1994, the committee noted that the term 'legislative instrument' has the meaning given in clause 4 of this bill.

Clause 7, if enacted, would provide a mechanism for removing a doubt whether an instrument or a particular kind of instrument is, or is not, a legislative instrument. Under clause 7, where uncertainty exists, an application may be made for the Attorney-General to determine whether or not an instrument, or an instrument of a particular kind, is, or will be, a legislative instrument. The Attorney-General is required to issue a certificate containing the decision which is subsequently recorded in Part C of the proposed Federal Register of Legislative Instruments (cf clause 39).

Subclause 7(5) provides:

> **(5)** A certificate given by the Attorney-General under this section is, for all purposes, conclusive of the question whether the instrument to which the certificate relates is, or is not, or whether the kind of instrument to which the certificate relates will be, or will not be, a legislative instrument.

The committee acknowledged the reasoning behind this provision, noting the desire

expressed in paragraph 11 of the explanatory memorandum to reduce the likelihood of litigation on whether an instrument falls within the ambit of the legislation. There is always a healthy tension between the attractiveness of a convenient solution to a problem and the experience that resulted in the establishment of this committee: experience that attractive solutions sometimes have a downside of making rights, liberties or obligations unduly dependent on non-reviewable decisions or of making the exercise of legislative power insufficiently subject to parliamentary scrutiny.

It seemed to the committee that the power given to the Attorney-General by clause 7 may be characterised as either judicial, administrative or legislative.

Judicial in character?

Without clause 7, the question of whether an instrument is a legislative instrument within the meaning of clause 4 would be settled by a court. If clause 7 gives the Attorney-General the exclusive right to interpret what clause 4 means, this may be seen as trespassing on the judicial function contrary to Chapter III of the Constitution.

Whether or not a constitutional challenge would be successful, the proposed mechanism raises a further issue of whether it is appropriate for the Attorney-General to have the function of conclusively interpreting legislation. Whether the clause is constitutionally valid or not in a narrow sense, the clause may be considered to trespass on personal rights and liberties in that it is basic to our system of democracy that citizens have the right to have the law interpreted by an impartial court and not by a minister of the government of the day.

The committee acknowledged, of course, that, in the Westminster system, the responsibility of the Attorney-General as the First Law Officer places him or her in a special role vis-a-vis other government ministers in that it is the function of the Attorney-General to provide legal advice to the other ministers.

Clause 7 provides that the certificate given by the Attorney-General 'is, for all purposes, conclusive' of the question whether the instrument comes within the meaning of legislative instrument in clause 4. Were it not for clause 7, the Attorney-General or another relevant Minister, advised and represented by the Attorney-General, would be a party to litigation to decide whether an instrument was a legislative instrument within the meaning of clause 4. It is unacceptable that the power conclusively to decide an issue should be given to a person who would otherwise be one of the parties to litigation to decide that very issue.

Accordingly, the committee sought the Attorney-General's advice on this interpretation of the power in clause 7.

Pending the Attorney-General's response, 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.

Administrative or legislative in character?

If clause 7 gives an administrative decision making power, it is the function of this committee to draw to the attention of Senators that, as the decision is not reviewable, personal rights, liberties or obligations may become unduly dependent upon non-reviewable decisions.

If clause 7 gives the Attorney-General a legislative power - the Attorney-General is delegated by Parliament to make a subordinate law that an instrument or a particular kind of instrument is not to be subject to this legislation - the committee would question whether this is an appropriate delegation of legislative power contrary to the fourth of our terms of reference. Further, if the determination itself is a legislative instrument -the committee would suggest that it ought to be registered (perhaps separately) within Part A rather than in Part C and thus be subject to Parliamentary scrutiny under proposed Part V of the bill by way of tabling and disallowance procedures.

Accordingly, the committee sought the Attorney-General's advice (Not a certificate!) on these issues.

Pending the Attorney-General's advice, the committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference. In the alternative the committee drew Senators' attention to the provision, as it may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

On this issue the Attorney-General has responded as follows:

> Clause 7
>
> The Committee has sought my advice whether the power in clause 7 of the Bill, to certify whether an instrument, or an instrument of a particular kind, is or will be a legislative instrument, may be judicial in nature or, if it is administrative or legislative, whether its exercise is sufficiently reviewable.
> I do not consider that the power conferred by clause 7 is judicial in nature. At the heart of the judicial function is the power of the sovereign to decide controversies between its subjects, or between

itself and its subjects. In the case of certificates under clause 7, however, there are no competing parties involved. Rather, an officer of the executive, the rule-maker, seeks from another officer of the executive, the Attorney-General, a decision regarding the status of an instrument. The terms of the Act will then operate of their own force.

The determination does not affect the rights or obligations of anyone other than the rule maker. The making of a determination is not the result of any controversy regarding the operation of an instrument. In relation to an instrument made before the commencing day of the Act the clause confers power to make a determination only before the last day on which registration would be required if the instrument is a legislative instrument. In relation to instruments proposed to be made after commencing day, there is power to make a determination only before an instrument is made. There can therefore be no question of a certificate being issued which would validate an instrument which would otherwise be unenforceable because of a failure to register it. Nor is the certificate a mechanism which may be used to exempt instruments from the operation of the Act.

Rather, the certificate is a mechanism to provide certainty, to both the executive and those potentially affected by an instrument, as to whether it is covered by the terms of the Act, in those instances where this is not entirely clear. It is unlikely that there will be a large number of applications for certificates under the clause. In the case of most instruments made before commencing day, or proposed to be made after commencing day, no application will be made, because the person having authority to make the instrument will not be uncertain about the nature of the instrument.

The Committee has raised a concern that there may not be sufficient provision for review of the exercise of power under this clause. Exclusion from review under the *Administrative Decisions (Judicial Review) Act 1977* is something which I do not advocate lightly. However, in this case I feel it is vital that the making or operation of administrative instruments not be unduly hampered or delayed by challenges to the issue of a certificate. The issue of a certificate that an instrument is not a legislative instrument would, of course imply that it is administrative, and the usual channels for administrative review would then be available in relation to the instrument itself. Although the certificate is stated to be "conclusive", this would of course not prevent review of the exercise of this power by the High Court, in its original jurisdiction under s75(v) of the Constitution in

all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

The committee thanks the Attorney-General for this explanation. The committee notes the comments on clause 7 of the Senate Standing Committee on Regulations and Ordinances in its 99th Report, "Legislative Instruments Bill 1994". Along with that committee, this committee also has considerable reservations about this power.

This committee, however, endorses the recommendation of the Standing Committee on Regulations and Ordinances that clause 7 be amended to make certificates under subclause 7(2) subject to disallowance by Parliament.

Non-reviewable decision-making powers
Clauses 17 and 19

The committee noted that these sections give responsible Ministers, the Attorney-General and 'rule-makers' decision making powers that are excluded from review under the *Administrative Decisions (Judicial Review) Act 1977*. These powers are to decide not to engage in the consultation process which would otherwise be required or to decide who must be consulted as the persons likely to be affected by the instrument.

The committee recognised the need to avoid consultation or the uselessness of engaging in it (for example, where comparable consultation has already taken place) in the circumstances outlined in paragraph 19(1)(a) of the bill. The committee also noted that paragraph 17(b) requires the recording of the decision in writing and subclause 19(2) requires in writing both the recording of the decision and the reasons for it.

The committee sought the Attorney-General's advice whether those decisions (and reasons) will be published or whether access to them would be available under Freedom of Information legislation. It may be that the appropriate forum to review those decisions is the Parliament itself, particularly with the expert assistance of the Senate Standing Committee on Regulations and Ordinances, when the legislative instruments themselves are tabled and subject to disallowance.

Pending the Attorney-General's advice, the committee drew Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

On this issue the Attorney-General has responded as follows:

The Committee has asked whether these decisions and reasons will be published, and has suggested that the appropriate forum to review those decisions may be the Parliament, when the legislative instruments are tabled and subject to disallowance. The short answer is that there will be indirect publication of the decisions and that review will occur through surveillance by the Senate Standing Committee on Regulations and Ordinances.

Clause 32 of the Bill requires a rule-maker to lodge with the Principal Legislative Counsel, at the time of lodging a legislative instrument for registration or soon thereafter, an explanatory statement explaining the operation of the instrument. If consultation was required under Part 3, subclause 32(2) requires the explanatory statement to include, inter alia, a statement of the decision made under clause 17 (subparagraph 32(2)(a)(ii)), and of any decision made under paragraph 19(1)(a) or certificate issued under paragraph 19(1)(b)(subparagraphs 32(2)(vi) and (vii)). Paragraph 32(2)(b) requires the explanatory statement to be accompanied by a copy of the relevant record of decision or certificate.

Subclause 46(1) requires a copy of the explanatory statement and of any accompanying documents, to be delivered by the Principal Legislative Counsel to the Parliament to be laid before each House with the relevant legislative instrument. Subclause 46(2) requires that, where a rule-maker has failed to lodge an explanatory statement with the Principal Legislative Counsel before he or she has delivered the relevant instrument to the Parliament for tabling, the rule-maker must deliver the explanatory statement to the Parliament, together with a written explanation of the delay in it being lodged for tabling.

The Parliament will therefore have before it an explanatory statement to which is attached a copy of the decision under clause 17, and any decision or certificate under clause 19 when legislative instruments are tabled and subject to disallowance, and these decisions will be able to be reviewed by the Parliament at that time.

The committee thanks the Attorney-General for this explanation.

Inappropriate delegation of legislative power
Clause 21, subclause 58(2) and Schedule 4

Clause 21 - Amending Schedule 2, legislative instruments directly

affecting business

In Alert Digest 12 of 1994, the committee noted that clause 21 concludes Part 3 of the bill which regulates the consultation required before the making of legislative instruments which directly affect business. Part 3 provides that consultation will be required where legislative instruments are to be made under enabling legislation listed in Schedule 2.

Clause 21 enables legislation to be added to the list or removed where

- the enabling legislation has been repealed, revoked or amended so as no longer to authorise the making of legislative instruments; or

- the legislative instruments authorised by the enabling legislation no longer directly affect business.

Subclause 58(3) further provides that regulations removing legislation from Schedule 2 require the consent of the Attorney-General.

Schedule 4 - Amendment of various Acts with respects to Rules of Court

The committee noted that Schedule 4 regulates, inter alia, the interaction between the substantive provisions of the proposed bill and the Rules of Court of the Family Court, the Federal Court, the High Court and the Industrial Relations Court. Clause 6 of the bill provides generally that the rules of those courts are not legislative instruments for the purposes of the legislation.

Schedule 4, however, would provide that the proposed bill with some exceptions, would apply to those rules as if they were legislative instruments with such further modifications and adaptations as are made by regulations made under the Acts regulating those Courts.

The only limit on the power of those regulations to modify the primary legislation is that the Rules of Court of the Federal Court, Industrial Relations Court and the High Court must provide some procedure for consultation before a rule directly affecting business is made.

The committee was of the view that it would be possible to exclude the rules of court from having to be registered and to exclude them from Parliamentary scrutiny. The committee viewed these consequences seriously and sought the Attorney-General's advice on whether some further limitation on the width of this power could be

included in the bill.

Pending the Attorney-General's advice, the committee drew Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference. The committee drew Senators' attention to the provisions, as they may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.

With respect to Schedule 4 the Attorney-General has responded as follows:

> Schedule 4 - Amendment of various Acts with respect to Rules of Court
>
> The provisions of the Bill, with some exceptions, are applied to the rules of court of the four federal Courts as if those rules were legislative instruments. The application of these provisions is subject to modification or adaption by regulations made under each Court's enabling legislation. Each Court's enabling legislation requires that regulations must provide for a procedure for consultation before a rule directly affecting business is made, to ensure that there is consultation with organisations or bodies representing the interests of those likely to be affected by the proposed rule.
>
> The Committee comments that it would be possible to exclude the rules of court from having to be registered and to exclude them from parliamentary scrutiny, and has sought my advice as to whether some further limitation on the width of this regulation making power could be included in the Bill.
>
> As the Committee is aware, rules of court are made by the Judges of each Court and deal primarily with practice and procedure in the Courts. As such, considerations of the independence of the judiciary arise in relation to the prescription of processes to be followed by the Judges.
>
> In order to be able to react quickly to any unforeseen difficulties which might arise in the application of the provisions of the Bill to these rules, a power has been provided to modify this application by regulation. Any such regulations would be registered, tabled in Parliament, and subject to disallowance. No diminution of the power of Parliament to disallow rules of court is provided envisaged. In the unlikely event that such a change were proposed to be effected by regulation, Parliament would have full power to disallow such a regulation.

The committee thanks the Attorney-General for this explanation but notes and endorses the recommendation of the Standing Committee on Regulations and Ordinances that the bill be amended to provide that the regulations may not modify Part 5 of the bill - Parliamentary Scrutiny of Legislative Instruments, in its application to rules of court.

General comment
Clause 48

The committee viewed with concern the proposed limitation on the Senate's powers contained in proposed clause 48.

Clause 48, if enacted, would take away the Senate's present power to disallow an individual provision in a set of rules. The bill provides that the Senate could only disallow the whole legislative instrument. This means that all the rules contained in the instrument have to be disallowed in order to ensure that a single objectionable one ceases to have effect.

The committee considered that a less attractive alternative is provided by subclause 48(4). By resolution, consideration of a motion to disallow could be deferred for a specified period to enable a rule to be remade to achieve an objective specified in the resolution. At the end of the period, if the amendment specified had not been satisfactorily achieved, the Senate would either have to disallow the whole instrument or allow it to continue in force.

At present, by disallowance, an individual objectionable clause ceases to have effect and needs to be remade in an acceptable form. Under the proposed legislation, the objectionable clause will continue in force until the new clause is made. In the worst scenario, the proposed legislation will enable the rule-maker, by not remaking the rule in the deferral period, to force the Senate to disallow all the rules in a particular instrument or let the objectionable one continue in force.

The committee drew Senators' attention to these consequences of clause 48 as it may be considered effectively to lessen the Senate's powers with respect to scrutinising the exercise of legislative power.

The Attorney-General has responded as follows:

> The other significant change is the preservation, in Part 5 - Parliamentary Scrutiny of Legislative Instruments, of the power to disallow a discrete regulation or single provision of an instrument. I attach a copy of the amendments the Government proposes to

introduce together with the Supplementary Explanatory Memorandum. I believe these amendments address the Committee's comments regarding clause 48.

I observe that the provisions dealing with the Parliamentary scrutiny and disallowance are an advance on the present law. The power conferred in subclause 48(4) to defer consideration of a motion of disallowance for a specified period to enable a rule, or a provision of a rule, to be remade to achieve an objective specified in the resolution is additional to the existing power of disallowance. Under the Present law the method of dealing with issues of concern is the acceptance by the Parliament of an undertaking by the relevant Minister that a further instrument will be made in the future to address the concern. I further observe that there have been occasions when delays in implementing the undertaking have been drawn to attention. Subclause 48(4) will provide a mechanism to ensure that an offending provision is remade, where its immediate disallowance would cause practical difficulties or leave an unacceptable gap in a legislative scheme.

The committee thanks the Attorney-General for this explanation and for his detailed assistance with the bill. The committee welcomes the proposed change to the bill to enable the disallowance of a discrete regulation or single provision of an instrument.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SIXTEENTH REPORT

OF

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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 1994

The Committee presents its Sixteenth Report of 1994 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:

Aboriginal Councils and Associations Amendment Bill 1994

Superannuation Industry (Supervision) Legislation Amendment Bill 1994

Aboriginal Councils and Associations Legislation Amendment Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to amend the *Aboriginal Councils and Associations Act 1976* to:

- create a new authority, the Australian Indigenous Corporations Commission (AICC), to replace the Registrar of Aboriginal Corporations;

- improve standards of accountability of bodies incorporated under the Act including enabling action to be taken when these bodies do not fulfil their statutory obligations; and

and amend the *Aboriginal and Torres Strait Islander Commission Act 1989* to give the Office of Evaluation and Audit responsibility for preparing the AICC annual report.

The committee dealt with this bill in Alert Digest No. 12 of 1994, in which it made various comments. The Minister for Aboriginal and Torres Strait Islander Affairs responded to those comments in a letter dated 20 October 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Offence of strict liability/reversal of onus of proof
Subclause 31(d)

In Alert Digest No. 12 of 1994, the committee noted that subclause 31(d), if enacted, would involve creating an offence of strict liability and reversing the onus of proof. The bill proposes to omit subsection 59A(2) and to replace it with a series of new subsections which would impose a more onerous regime than exists under the present subsection with respect to preparing and filing statements concerning the financial affairs of an Aboriginal Association. At present, a penalty of $200 will attach to an Incorporated Aboriginal Association which fails to comply with the requirements imposed under the subsection with respect to accounts, records and financial statements. The proposed subsections would make all members of the Governing Committee of an Association automatically guilty (with a similar penalty) where the Committee fails without reasonable excuse to prepare and file such statements as are required. Proposed subsection 59A(4), however, would provide that in a prosecution for such an offence:

...it is a defence if the person proves that the person:

(a) did not aid, abet, counsel or procure the contravention; and

(b) was not in any way, by act or omission, directly or indirectly,

(c) knowingly concerned in, or a party to, the contravention.

Offences are categorised as of strict liability where it is immaterial whether the person had the 'guilty knowledge' which at common law is an integral part of any statutory offence, unless the statute itself or its subject matter rebuts that presumption. At common law offences of strict liability are subject to the defence of honest and reasonable mistake of fact. In such cases the accused must raise the defence, though the prosecution has the ultimate onus of proving the elements which constitute the offence. In a statute, a strict liability offence may also be made subject to a specific defence or defences.

Where public policy dictates that strict liability offences should be created, the committee acknowledged that both specific and general defences assist the personal rights and liberties of the accused. The primary issue, therefore, is whether grounds exist which would justify the imposition of strict liability.

The committee indicated that it could understand a desire to ensure that financial reporting provisions are complied with so that the executives of the associations are more accountable for the manner in which they carry out their duties. The committee also acknowledged that a similar section (section 59) has previously been amended to impose strict liability and reverse the onus of proof in respect of the reporting requirements of that section. There are several reasons, however that indicate that strict liability should not be imposed in either section.

First, the committee was concerned that this proposal imposes strict liability on the executives of Aboriginal Associations but the Corporations Law does not impose strict liability on the directors of companies with respect to similar duties of keeping accounts and preparing financial statements - see, for example, subsection 318(1) of the Corporations Law.

Secondly, the committee was concerned at the burden of proving a negative which is imposed on the defence. The only form that the contravention can take is one of failure to prepare and file statements. The defence, in effect, is required to prove that the accused had nothing to do with the doing of nothing.

Thirdly, the committee questioned the legitimacy of the administrative convenience of prosecuting all members of a Committee. The Crown ought to have the responsibility of checking that the person charged was not out of the country or ill in hospital at the

time of the alleged offence.

It seemed to the committee that the purpose of obtaining the required reports could be achieved if new subsection 59A(3) imposed liability only on those members of a Governing Committee who were knowingly concerned in, or a party to, the contravention. The committee sought the Minister's consideration of such a regime.

Pending the Ministers advice, 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.

Abrogation of the privilege against self-incrimination
Proposed new subsection 70G(4) and new section 79AA

In Alert Digest No. 12 of 1994, the committee noted that these proposed provisions, if enacted, would abrogate the privilege against self-incrimination for a person required:

- to answer questions or produce documents under section 39, 60 or 68; or,

- under subsection 70G, as well as answering questions or producing documents, to make statements or provide other assistance.

The committee noted that both provisions preclude the act of self-incrimination from being admissible in evidence 'in any criminal proceedings or proceeding for the imposition of a penalty'. The committee was concerned, however, that the form of the preclusion is less protective than the form which the committee has previously been prepared to accept, as it does not contain a limit on the indirect use to which any information can be put. The committee noted in particular that sections 39, 60 and 68 in their present form all contain a prohibition on the **indirect** as well as the direct use of self-incriminating acts. Subclauses 10(f), 32(f) and 38(b) of the bill would repeal the relevant subsections that provide for the prohibition on **indirect** use. Accordingly, the committee sought the Minister's advice on this matter.

Pending the Minister's advice, 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 Minister has responded as follows:

> I have informed the Prime Minister of the decision made on 22 September 1994 by the Commissioners of the Aboriginal and Torres Strait Islander Commission that debate on the Bill should be

> postponed indefinitely to enable a complete review of the Aboriginal Corporations Law to take place. Consequently debate on the Bill will not take place during the present sittings.
>
> Thank you for bringing to my attention the matters raised in the Alert Digest. The comments raised in the letter from the Secretary of your Committee will be taken into account during the course of this review.

The committee thanks the Minister for this response, noting his assurance that the committee's concerns will be taken into account in the review.

Superannuation Industry (Supervision) Legislation Amendment Bill 1994

This bill was introduced into the Senate on 5 May 1994 by the Minister for the Environment, Sport and Territories.

The bill proposes to amend:

- the *Superannuation Industry (Supervision) Act 1993* to:
  - allow certain non-bank financial institutions to offer guarantees required under the Act;
  - allow 'in-house' investments in certain non-bank financial institutions;
  - ensure the trustee cannot accept a person as a member of a public offer entity unless that person has applied in the appropriate manner and has received the relevant information regarding the entity before doing so;
  - ensure an excluded superannuation fund can only acquire business real property from a member if the property is business real property in the member's principal business;
  - allow public offer funds the option of either having an independent trustee or having equal numbers of employer and member representatives involved in the trusteeship of the fund;
  - ensure that the trustee retiring from an entity is not required to hold a meeting of beneficiaries before the management company takes over the role of trustee;
  - allow the Minister to approve disclosure of protected information (if in the public interest) to the public at large, rather than to particular members of the public;
  - ensure consistency between provisions of the Act dealing with the purposes for which an approved deposit fund may be maintained and payments to beneficiaries;

- ensure custodians are subject to similar 'eligibility' requirements to those applying to trustees and investment managers;

- prevent another party from trying to exert undue influence on a trustee by threatening to remove the trustee unless the trustee complies with that party's requests; and

- the *Superannuation (Resolution of Complaints) Act 1993* to amend the definition of "excluded subject matter".

The committee dealt with this bill in Alert Digest No. 7 of 1994, in which it made various comments. The Treasurer responded to those comments in a letter dated 27 October 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Non reviewable decision
Clause 11

In Alert Digest No. 7 of 1994, the committee noted that clause 11 amends the definition of "approved purposes" in section 10 of the *Superannuation Industry (Supervision) Act 1993*. Paragraph 11(d), if enacted, would allow the Insurance and Superannuation Commissioner to extend the purposes for which an approved deposit fund may be maintained by approving in writing any other purpose.

Although section 10 of the Act includes in its definition of "reviewable decision" every, or almost every, other discretion of the Commissioner under the Act, this amending bill does not include the discretion to be granted under proposed paragraph 11(d) in the list of reviewable decisions. Hence this discretion to give (or withhold) an approval to extend the purposes for which an approved deposit fund may be maintained will not be subject to review by the AAT. The committee sought the Treasurer's advice on whether this discretion should be included in the list of reviewable decisions.

Pending the Treasurer's advice, the committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

In respect of clause 11 the Treasurer has responded as follows:

> In respect of the concerns raised on Clause 11, an approved deposit fund is required to be maintained solely for 'approved purposes' stated in the *Superannuation Industry (Supervision) Act 1993* (the

Principal Act), other purposes may need to be included during the application of this legislation in respect of approved deposit funds.

Clause 11 amends the definition of 'approved purposes' in section 10 of the Principal Act. The amendment is required so that in addition to the existing 'approved purposes', the Commissioner has the ability to include other purposes that he approves in writing. The superannuation industry is a diverse and changing industry and for this reason it is essential that the Commissioner has the ability to administer the legislation in a manner which is receptive to industry needs and promotes a move towards generic superannuation rules for all superannuation products.

There is a similar requirement contained in the Principal Act in relation to superannuation funds. The requirement is known as the 'sole purpose test' and under that requirement the Commissioner has power to approve additional 'purposes'. Section 62 of the Principal Act provides that the trustee of a regulated superannuation fund must ensure that the fund is maintained for prescribed core purposes and for one or more ancillary purposes. Subparagraph 62 (1)(b)(v) of the Principal Act provides for the 'provision of such other benefits as the Commissioner approves in writing'. This provision in respect of superannuation funds is not a reviewable decision in the Principal Act.

As the amendment contained in clause 11 would extend the general application of approved deposit funds to be used for additional purposes, it should not be seen as infringing on people's rights, liberties or obligations unduly. It is merely an administrative measure that will enable the Commissioner to be receptive to a diverse and changing industry.

I advise the Committee that the discretion provided by Clause 11 of the Amendment Bill to give the Commissioner the ability to extend the purposes for which an approved deposit fund may be maintained, should not be included in the list of 'reviewable decisions'. Any decision to extend, or not extend, the purposes for which an approved deposit fund may be maintained can, however, be reviewed under the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) if a person feels they have been aggrieved by a decision made by the Commissioner. A decision under Section 10 (as amended by Clause 11) would be one which applies generally to the community, rather than a decision directed towards the circumstances of particular persons. Accordingly, I note that the guidelines of the Administrative Review Council indicate the decision

would be an inappropriate one for review by the AAT (see ARC Annual Report 1992-1993 Chapter 7, paragraph 7.9).

The committee thanks the Treasurer for this explanation.

General Comment

In Alert Digest No. 7 of 1994, the committee noted that by its express words clause 16 would give retrospective application to all decisions made under amendments in the 18 other Divisions in Part 2 of this bill not just those under Division 6. It was suggested that the Treasurer might care to consider whether clause 16 also may be inconsistent with the application clause (clause 46) in Division 19.

In respect of clause 16 the Treasurer has responded as follows:

> In respect of the Committee's concerns relating to clause 16 which relates to correction of drafting errors to enable the definition of 'reviewable decisions' to apply to the intended decisions, from the commencement of the Principal Act. It is vital that they be retrospective.
>
> While the Committee does not express concerns regarding the retrospectivity, concerns are raised about whether clause 16 may be inconsistent with the application clause (clause 46) in Division 19. On closer examination of these clauses, it would appear that an inconsistency exists due to an inadvertent reference to 'this Part' in clause 16 rather than 'this Division'.
>
> I advise that an amendment will be introduced to the SIS Amendment Bill to correct this error. The explanatory memorandum correctly referred to 'this Division'.

The committee thanks the Treasurer for his response and his assistance with this bill.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

SEVENTEENTH REPORT

OF

1994

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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 1994

The Committee presents its Seventeenth Report of 1994 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:

Employment Services Bill 1994

Migration Legislation Amendment Bill (No. 3) 1994

Migration Legislation Amendment Act (No. 4) 1994

Employment Services Bill 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Minister for Employment, Education and Training.

The bill proposes to establish:

- the Commonwealth Employment Service within the Department of Employment, Education and Training (DEET);
- Employment Services Regulatory Authority as an independent statutory authority responsible for regulating the case management system;
- Employment Assistance Australia as a separate organisation, within DEET, to provide case management services.

The committee dealt with this bill in Alert Digest No. 12 of 1994, in which it made various comments. The Minister for Employment, Education and Training has responded to those comments in a letter dated 7 November 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Double penalty and retrospective application
Clause 45

In Alert Digest No. 12, the committee noted that clause 45, if enacted, would restrict the Employment Services Regulatory Authority (ESRA) from accrediting persons who have been found guilty of various offences relating to fraud and dishonesty. In particular, paragraph 45(6)(b) prohibits accreditation for a period of five years after the person has paid the penalty imposed by reason of his or her conviction.

The committee was concerned that the provision, if enacted, may be considered to trespass unduly on personal rights by imposing a double penalty on a person in that even after a convicted person has paid his or her debt to society, the fact of the conviction will operate for a further five years to discriminate against the person.

The committee considered that it is inappropriate for the proposed section to have retrospective application in that the offence and the conviction could have occurred before the commencement of the section. Hence, the committee was concerned that the retrospective application may be considered to trespass unduly on personal rights in that a statutory penalty is being imposed retrospectively on a convicted person in addition to the penalty imposed by the court. It may be that, in future cases, courts

may take into account the statutory penalties imposed by this bill in considering an appropriate sentence. Such an adjustment of sentence is not possible for those already sentenced on whom these statutory penalties are retrospectively imposed.

The committee found no explanation in the explanatory memorandum for the apparent lack of correspondence between the purpose of the accreditation scheme and the definition of a person disqualified from being accredited. The committee sought the Minister's advice on why it is thought that a person who up to ten years previously committed an act of fraud or dishonesty is now an inappropriate person to be accredited for the purpose of assisting the unemployed to obtain employment.

Pending the Minister's advice on these matters, 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 Committee has commented upon clause 45 of the Employment Services Bill which would disqualify certain persons (individuals or bodies corporate) convicted of offences under the proposed Act or involving fraud or dishonesty from being accredited as a case manager. The Committee commented upon what it sees as an apparent lack of correspondence between the definition of a person disqualified from being accredited and the purpose of the accreditation scheme.
>
> The accreditation scheme to be established by the legislation is a foundation of the case management system and an essential part of the Employment Services Regulatory Authority's (ESRA's) regulatory powers. The case management system will involve the expenditure of Government moneys in the provision of important services to one of the most vulnerable sections in our community, the unemployed. It is therefore essential that only suitable persons are accredited to provide such services.
>
> Clause 45 has been based upon section 11YA of the *Export Market Development Grants Act 1974*. This provision, which was added in 1993, implemented Government policy in relation to persons eligible to claim grants under that Act. As the case management system proposed under the Employment Services Bill would involve significant Government funding of businesses in the provision of services, it is appropriate that similar qualification provisions should be adopted. Specifically, the clause would prevent ESRA from accrediting:
>
> ! individuals who, and corporations which have been convicted of offences involving fraud or dishonesty; and

- other entities with whom such individuals or corporations are closely associated.

The clause would also require ESRA to cancel an accreditation where such a conviction occurs after the accreditation.

The clause would provide that an individual or corporation is disqualified if they have been convicted of the following.

- an offence under clause 48 which deals with false or misleading statements in connection with claims for payments to contracted case managers;

- an offence involving fraud or dishonesty, punishable by imprisonment for life or for a period or a maximum period of at least two years imprisonment;

- an indictable offence committed in connection with the promotion, formation or management of a body corporate; or

- certain specified offences under the Corporations Law relating to breaches of duty and dishonest dealings (individual provisions are described in the notes to the clause).

A person would be disqualified for a period of 5 years following the conviction or, where a custodial sentence has been imposed, for a period of 5 years following release. This would mean that relatively recent offenders remain disqualified for an appropriate period of time. In establishing a competitive environment for the provision of case management services, the Government is concerned that there are adequate standards maintained in the provision of services and there is proper protection of both vulnerable clients and the public revenue.

The legislation would set other major standards for accreditation, eg

- a case manager may not charge participants fees for the provision of case management services (clause 41);
- a case manager must provide copies of Case Management Activity Agreements entered into with participants and must provide reports on compliance with those agreements (clause 42); and
- security deposits may be required to ensure compliance

with financial obligations (clause 43).

ESRA, by way of a disallowable instrument, will stipulate other requirements of the accreditation scheme. There is also to be provision for the formulation of rules of conduct, again by way of disallowable instrument.

Provisions similar to clause 45 are often used in the establishment of occupational licensing schemes such as the accreditation scheme under this Bill. For example, under the *Income Tax Assessment Act 1936* the Tax Agents Board is required to cancel or suspend the registration of a Tax Agent convicted of certain offences. The period of any suspension may be for such time as the Board thinks fit (section 251K). The *Broadcasting Services Act 1992* provides that the Australian Broadcasting Authority must take into account the suitability of a person to hold a broadcasting licence (section 41). Matters to be taken into account include whether a person has been convicted of an offence against the Act or regulations or whether there is a risk of such offence being committed. Such provisions are particularly appropriate where Government funded services are to be offered to sections of the general public.

The Committee has made the comment that it considers it inappropriate for the proposed section to have retrospective application in that the offence and conviction could have occurred before the commencement of the section. The Committee has also made the comment that clause 45 amounts to imposition of a statutory penalty in addition to a penalty imposed by a court. With respect, I believe these comments to be based on an incorrect analysis of the provision.

As I have stated above, the accreditation scheme is a form of occupational licensing. Disqualification is a failure to satisfy a requirement of suitability rather than the imposition of a penalty. Perhaps the clearest authority that such measures are not regarded as resulting in a double penalty appears in the judgement of the High Court in the case of *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186; a case dealing with the disbarment of a barrister. The five member bench of the High Court stated (at pp201-202):

> "Although it is sometimes referred to as the "penalty of disbarment", it must be emphasized that a disbarring order is in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection....."

The purpose of clause 45 is to protect the public, especially vulnerable

> unemployed clients, and the public revenue in that only suitably qualified persons may be accredited as case managers within the case management system established by this Bill. It does not provide an additional penalty for past offences and accordingly it would be unnecessary for a court, in imposing a penalty on a convicted person, to take into account the possibility of disqualification from accreditation under the Employment Services legislation.
>
> I also draw the Committee's attention to the report on the Employment Services Bill by the House of Representatives Standing Committee on Legal and Constitutional Affairs. The Committee did not see fit to make comment on clause 45.

The committee thanks the Minister for this response but remains unconvinced by the reasons put forward. The committee does not have a problem with cancelling accreditation for an offence under clause 48 in relation to false claims under the scheme nor, as a matter of principle, with an appropriate disqualification, whether it is rightly called a double penalty or not. The committee, however, continues to disagree with the retrospective application to crimes committed before the commencement of the legislation.

The main concern of the committee, however, is with the lack of logical correspondence between the occupation and the reason for disqualification for that occupational licence.

The protection of the unemployed is a worthy cause but if that were the purpose the committee would have expected that subclause 45(2) would have included as disqualified not only the directors, company secretary and board of management of a body corporate accredited to provide case management services but also any employee who provides those services. It would perhaps also have been logical to protect the vulnerable unemployed by disqualifying ex-burglars who might pass on break-and-enter techniques or ex-purse snatchers who might inspire a spot of mugging to complement government benefits. Basically, the question remains unanswered: why should someone who cannot expect to be re-employed in the finance industry not have the right to assist unemployed people to find a job ? The answer may be that such a person may be able to assist as an employee but not as a principal. If that is the case, the underlying reason for the provisions is not that such a person is unfit to assist the unemployed but is not fit to be employed directly or financed by the Government.

This leaves the reason of protecting public revenue, which the committee also finds unconvincing. It seems to be based on a lack of confidence in the administration of the scheme. There appears to be some apprehension that the administrators will be unable successfully to supervise the operation of a contract for the provision of services where the provider has previously committed a serious fraud.

The committee draws 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.

Migration Legislation Amendment Bill (No. 3) 1994

This bill was introduced into the House of Representatives on 21 September 1994 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to amend the *Migration Act 1958* to clarify certain provisions of the Act in relation to the custody of certain unauthorised boat arrivals. Consequentially, certain sections of the Act are repealed.

The committee dealt with this bill in Alert Digest No. 15 of 1994, in which it made various comments. The Minister for Immigration and Ethnic Affairs responded to those comments in a letter dated 10 November 1994. A copy of that letter is attached to this report. Although this bill was negatived at the 2nd reading stage in the Senate on 9 November 1994 the Minister's response may, nevertheless, be of interest to Senators and relevant parts of the response are, therefore, discussed below.

Retrospectivity

In Alert Digest No. 15 of 1994, the committee noted that this bill contains the same provisions as those in the Migration Legislation Amendment Bill No. 2 1994 to which the committee drew Senators' attention in Alert Digest No 10. of 1994 and reported to the Senate in the committee's Eleventh Report of 1994 with discussion of the Minister's response to the committee's Alert Digest comments.

The bill retains the retrospective provisions. The explanatory memorandum continues to put forward the same rationale for retrospectivity which did not appear to the committee to justify validating the unlawfulness of the detention in custody.

Accordingly, the committee continued to draw 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.

For the information of Senators extracts from the committee's Eleventh Report concerning the earlier bill follow:

> The committee dealt with the bill in Alert Digest No. 10 of 1994, in which it made various comments. The Minister for Immigration and Ethnic Affairs responded to those comments in a letter dated 4 August 1994.
>
> **Retrospectivity**

Subclause 2(2)

In Alert Digest No. 10 of 1994, the committee noted that subclause 2(2) of this bill, if enacted, would give retrospective effect from 1 November 1989 to clauses 5, 6 and 7 of the bill. The explanatory memorandum and clause 4, which states the object of the amendments, show that the purpose of the retrospectivity is to limit the effect of recent Court decisions.

The committee indicated that in its approach to considering whether the retrospectivity in this bill unduly trespasses on personal rights and liberties the committee needed to separate the effect of the amendments made by the bill from the effect of making those amendments apply retrospectively.

The committee had no doubt that it is proper for the Commonwealth to have the power to detain appropriately a person who applies for an entry permit irrespective of the date of departure (or otherwise) of the vessel on which the person arrives in Australia. The committee questioned whether the *Migration Act 1958*, as presently constituted, did not adequately provide this.

In the committee's opinion the issue was whether making the amendments retrospective unduly trespassed on personal rights and liberties. To assist the Senate to decide this, the committee needed to examine the rationale put forward to justify the retrospectivity.

The background

The committee pointed out by way of background that the Constitution by section 51(xix) confers on Parliament legislative power with respect to 'Naturalization and aliens'. A statute, therefore, can authorise the executive to detain an alien in custody for the purposes of expulsion or deportation and can include detention while an application for an entry permit is being considered.

Under the common law an alien who is within this country, whether lawfully or unlawfully, is not an outlaw (except enemy aliens in time of war). 'Neither public official nor private citizen can lawfully detain him or her... except under and in accordance with some positive authority conferred by the law' (*Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1, at p. 19 per Justices Brennan, Deane and Dawson). Their Honours go on to point out that, if the unlawful detention is by a person who is an officer of the Commonwealth, the status of that person as such

an officer will not, of itself, confer immunity from proceedings against him or her personally in the ordinary courts of the land.

In the *Chu Kheng Lim* case, six of the seven judges of the High Court discussed the meaning of section 36 of the *Immigration Act 1958*, the section into which clause 7 of the present bill will insert significant subsections. The section as it stood on 1 November 1989 authorised the detention of the particular person in custody only until the departure of the vessel from Australia or 'until such earlier time as an authorised officer directs'. All six judges had no difficulty with the plain meaning of the section. It was not considered ambiguous or doubtful or open to other interpretations. Justices Brennan, Deane and Dawson in their joint judgment concluded that the view apparently taken by the Minister's Department was a mistaken approach to the construction of that section: the view that, in a case where a vessel can never leave because it has been destroyed, temporary custody can continue indefinitely was mistaken. They also concluded that 'the continued detention of each plaintiff in custody after the destruction of the boat on which he or she arrived in Australia was unlawful'(at p. 22).

On p.19 their Honours had pointed out that, in the absence of a legislative provision to the contrary an alien does not lack the standing or the capacity to invoke the intervention of a domestic court of competent jurisdiction if he or she is unlawfully detained. Under the common law a person who has been unlawfully detained has the right to sue for damages for that unjust imprisonment.

Section 54RA of the *Immigration Act 1958*, as the explanatory memorandum points out at paragraph 5, was inserted in December 1992 to extinguish the common law right of action to sue for damages for unlawful imprisonment for persons found to have been unlawfully detained under section 36 and to substitute a statutory right of action limiting the damages payable to $1 per day.

Recent High Court decisions raise doubts whether section 54RA is constitutionally valid in that the taking away of the general right to damages and substituting compensation of $1 a day may be the acquisition of a person's property on unjust terms. In the event of such a finding, substantial damages for unlawful imprisonment may be awarded. Hence the proposal to amend the law retrospectively to validate the unlawful imprisonment.

Rationale justifying retrospectivity

It seemed to the committee that the explanatory memorandum contained

three elements justifying retrospectivity:

the amendments need to be retrospective to prevent a possible windfall through substantial awards of damages;

because the Minister and the Department thought that the law gave them the power to detain these people in custody, it ought to be changed retrospectively so that it will be taken to have meant from 1 November 1989 what the Minister and the Department understood it to mean; and

none of those who were unlawfully imprisoned had sought to challenge lawfulness of their custody before the High Court said that it was unlawful.

The committee suggested that the first element was founded on the notion that an award of damages is a windfall. Inherent to the notion of a windfall is that the person who picks up by chance what the wind of fortune has cause to fall at his or her feet has no right to that property. Unlawful imprisonment, however, carries the right to just compensation. The concept of windfall has no application here. That certain classes of people should not have a right to compensation challenges the concept of equality before the law. The High Court has more than once pointed out that neither citizen nor alien can be deprived of liberty by mere administrative decision or action; that any officer of the Commonwealth who, without judicial warrant, purports to authorise or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. Both citizens and aliens have equal rights not to be deprived of liberty unlawfully, both should have equal rights to compensation.

The committee was of the view that the second element clearly trespassed on the basic right that those subject to the law are entitled to know what the law says and to be treated according to what the law says, ultimately according to what the courts declare the law to mean.

As far back as 1765, in his *Commentaries, Sir William Blackstone* said:

... a base resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it.

In the committee's opinion the third element did not overcome the hurdle that the right of a person to challenge the unlawful excess of authority does not take away the obligation on the person exercising authority to ensure that the use of that authority is within power.

> The rationale given for retrospectivity did not appear to the committee to justify validating unlawful imprisonment.
>
> 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.

On 4 August 1994 the Minister responded to the committee's comments in Alert Digest No. 10 of 1994. That response is attached to this report. Later, in its Eleventh Report of 1994 the committee said:

> The committee thanks the Minister for responding but continues to find unconvincing the rationale for retrospectivity which the Minister has repeated. The Minister has again asserted that the award of damages would be a windfall without addressing the reasons the committee put forward to show that windfall cannot be applied to the enforcement of a legal right. The Minister has not addressed the concept of responsibility and accountability of a person exercising authority to ensure that the use of authority is within power. Finally, no Scrutiny of Bills committee could be expected to agree that the law ought to be not what Parliament has passed but what the Minister thought had been passed.

On 10 November 1994 the Minister responded to the committee's comments on the present bill in Alert Digest No. 15 of 1994, as follows:

> The Committee commented that this Bill contains the same provisions as those in the *Migration Legislation Amendment Bill (No. 2) 1994* to which the Committee drew attention in Alert Digest No. 10 of 1994 and reported to the Senate in the Committee's Eleventh Report of 1994.
>
> I thank the Committee for its comments regarding my letter of 4 August 1994 relating to the No. 2 Bill and noted the Committee's comments in relation to the No. 3 Bill. However, I again draw the Committee's attention to the rationale for the No. 3 Bill which is set out in detail in the Explanatory Memorandum and the Second Reading Speech to that Bill.
>
> I also draw the Committee's attention to my press release of 30 August 1994 which also makes it clear that the purpose of the Bill is simply to return the law to what the Parliament, the Department and all other parties thought it to be, and to avoid the possibility of the Australian taxpayer underwriting compensation payments, which would be in the nature of windfalls, to certain unauthorised boat arrivals in Australia.
>
> It is the Government's attention to proceed with the *Migration Legislation*

Amendment Bill (No. 3) 1994 in its current form.

The committee thanks the Minister but, for the reasons given above, continues to draw 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.

Migration Legislation Amendment Act (No. 4) 1994

The bill for this Act was introduced into the Senate on 21 September 1994 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The Act amends the *Migration Act 1958* to ensure that non-citizens covered by the Comprehensive Plan of Action for Indo-Chinese refugees or in relation to whom there is a safe third country, should not be able to apply for a protection visa and, in some cases, any other visa. Transitional arrangements are provided for non-citizens applying for protection visas on or after 1 September 1994 and before commencement.

The committee dealt with this bill in Alert Digest No. 15 of 1994, in which it made various comments. The Minister for Immigration and Ethnic Affairs has responded to those comments in a letter dated 10 November 1994. A copy of that letter is attached to this report. Although this Bill has now been passed by both houses (and received Royal Assent on 15 November 1994), the Minister's response may, nevertheless, be of interest to Senators. Relevant part of the response are, therefore, discussed below.

Non reviewable decision
Proposed section 91F

In Alert Digest No. 15 of 1994, the committee noted that proposed section 91F of the *Migration Act 1958*, if enacted, would give to the Minister, if the Minister thinks it is in the public interest, a discretion to determine that the new scheme for asylum seekers is not to apply to a particular person. The decision not to exercise this discretion is apparently not reviewable in any way, as proposed new subsection 91F(6) provides that the Minister does not have a duty to consider whether to exercise the power to exempt a particular person from the scheme.

The committee sought the Minister's advice on this matter, as it appears inappropriate that, where it may be in the public interest to exercise a power, the bill should provide that the Minister does not have a duty even to consider exercising that power.

The committee noted that proposed subsection 96F(3) requires the Minister to lay before Parliament a favourable determination and the reasons for making it but the committee is of the opinion that scrutiny ought to be directed at the reasons for not considering to make a determination or, having considered, the reasons for refusing the determination. Accordingly, the committee sought the Minister's advice on an appropriate method of review.

Pending the Minister's advice, the committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

On this issue the Minister has responded as follows:

> Your Committee expressed concerns about section 91F of the Bill. This section would give me, if I think it is in the public interest, a discretion to determine that the new scheme for asylum seekers is not to apply to a particular person. The Committee noted that subsection 91F(6) would provide that I don not have a duty consider whether to exercise this power.
>
> The Committee queried, since the power may be exercised in the public interest, whether it was appropriate that I am not subject to a duty to consider the exercise of the power.
>
> There are currently five sections of the *Migration Act 1958* (the Act) which provide the Minister with a non-compellable discretion to act in a certain manner where it is in the public interest to do so. These provisions are:

(i) Subsections 345(1) and 345(7) - following review by the Migration Internal Review Office (MIRO).

(ii) Subsections 351(1) and 351(7) - following review by the Immigration Review Tribunal (IRT).

(iii) Subsections 391(1) and 391(7) - following review by the Administrative Appeals Tribunal (AAT) of an IRT - reviewable decision.

(iv) Subsections 417(1) and 417(7) - following review by the Refugee Review Tribunal (RRT).

(v) Subsections 454(1) and 454(7) - following review by the AAT of an RRT - reviewable decision.

These non-compellable discretions provide me with the power to act where the circumstances of a particular case are such as to merit my intervention in the "public interest". Thus, the powers involved provide for a "safety-net".

The various discretions are non-compellable to ensure that persons whose circumstances are such that they do not require my intervention cannot require

that I exercise these powers. This will ensure that the powers are used sparingly and the integrity of the statutory scheme is maintained.

The Committee also noted that proposed subsection 91F(3) requires that the Minister lay before Parliament a favourable determination and the reasons for the making of the determination. However, the Committee formed the opinion that scrutiny ought to be directed at the reasons for not considering to make a determination, or at the reasons for refusing the determination and requested advice on an appropriate method of review of such matters.

Notwithstanding the Committee's comments, the Government does not consider it is appropriate to provide for the review of a non-compellable discretion that may only be exercised personally by the Minister when it is the "public interest" to do so.

The committee thanks the Minister for this response but continues to draw Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Retrospectivity - legislation by press release
Schedule item 3

In Alert Digest No. 15 of 1994, the committee noted that schedule item 3, if enacted, would have the effect of bringing the new scheme into effect on 1 September 1994. It provides that applications from asylum seekers made, but not granted, during the transitional period (from 1 September 1994 until Royal Assent) would cease to be valid on the commencement of the bill and would be treated as having been made after commencement.

The committee has consistently taken the view that, in principle, legislating in this way is unsatisfactory. It shares the unfairness that attaches to any form of retrospective legislation. But it also suffers the drawback of uncertainty. Legislation by press release assumes that Parliament will not only pass the bill but also pass it in the same terms as the press release. This detracts from Parliament's ability, capacity and inclination to amend legislation.

In this instance the introduction of the bill shortly after the Minister's announcement lessens the uncertainty about the details of the proposed legislation but does not lessen the uncertainty on whether the bill will be passed unamended. The committee notes that, for practical reasons, the Senate has been prepared to accept a degree of retrospectivity in relation to taxation legislation which has been announced by press release, as is evident from the resolution of 8 November 1988 (see *Journals* of the

Senate, No. 109, 8 November 1988, pp 1104-5).

On the other hand, the retrospectivity of the proposed bill takes away the present rights of asylum seekers under the current law of Australia.

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.

On this issue, the Minister has responded as follows:

> The Committee also commented on the retrospective nature of schedule item 3 which, if enacted, would have the effect of bringing the new scheme into effect on 1 September 1994. The Committee noted that this would have the effect of providing that applications from asylum seekers covered by the proposed Bill that were made after 1 September 1994 and before Royal Assent would cease to be valid on commencement and would be treated as having been made after commencement. The 1 September 1994 commencement date was foreshadowed by me in a press release on 29 August 1994.
>
> The Committee commented that "legislation by press release" detracts from Parliament's ability, capacity and inclination to amend legislation and concluded that the retrospective commencement of the proposed bill would take way present rights of asylum seekers under the current law.
>
> While noting the Committee's concerns, the Government does not consider that the proposed legislation detracts in any way from Parliament's ability, capacity and inclination to amend legislation. The Government considers it is always open for the Parliament to enact legislation it considers appropriate in the circumstances, including the commencement date of any such legislation. Further, the Government notes it is the Parliament which has legislative power under the Constitution and that the Parliament is neither obliged nor required to directly translate the intentions of the Cabinet and the Executive into law.
>
> In this instance, the Government considers the retrospective nature of schedule 3 is more than a matter of convenience. The Government's view is that the proposed amendments are necessary to maintain the integrity of Australia's borders and the efficiency of its refugee determination system.
>
> Prompt action was required on the part of the Government because of the recent arrival of 3 boats containing some 58 unauthorised arrivals, each of whom had been found not to be refugees under processes set up under the Comprehensive Plan of Action (CPA).

The CPA was the response of the international community to the outflow of Vietnamese and Lao asylum seekers during the 1970s and 1980s. It was adopted in Geneva on 14 June 1989 by governments of:

. countries from where asylum seekers originated (Vietnam and Laos);

. countries or a territory which offered first asylum to boat people (Indonesia, Malaysia, the Philippines, Thailand and Hong Kong);

. countries offering resettlement of refugees (including Australia); and

. the United Nations High Commissioner for Refugees.

The committee thanks the Minister for his assistance with this bill but 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.

Judith Troeth
(Chairman)

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

EIGHTEENTH REPORT

OF

1994

30 NOVEMBER 1994

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator J Troeth (Chairman)
Senator M Forshaw (Deputy Chairman)
Senator R Bell
Senator M Colston
Senator B Cooney
Senator C Ellison

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 1994

The Committee presents its Eighteenth Report of 1994 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:

> Social Security (Parenting Allowance and Other Measures) Legislation Amendment Bill 1994

Social Security (Parenting Allowance and Other Measures) Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following Acts:
Social Security Act 1991 to:

- provide for the introduction of a parenting allowance to incorporate and retain the major elements of the home child care allowance;

- modify certain social security benefit income tests;

- modify the partner allowance from 1 July 1995; and

- provide for the introduction of a widow allowance, payable from 1 January 1995 and rename the widowed person allowance;

- phase out wife pension as a discrete payment under the Act;

- provide for the introduction of an education entry payment for recipients of wife pension, partner allowance, parenting allowance, widow allowance and mature age partner allowance; and

Social Security Legislation Amendment Act (No. 4) 1994 to remove the sunset clauses included in this Act to provide the continuation of the advance pharmaceutical allowance; and
Data-matching Program (Assistance and Tax) Act 1990, *Income Tax Assessment Act 1936*, *Veterans' Entitlements Act 1986*, *Health Insurance Act 1973* and *National Health Act 1953* to make consequential amendments.

The committee dealt with this bill in Alert Digest No. 16 of 1994, in which it made various comments. The Minister for Social Security responded to those comments in a letter dated 18 November 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Further use of tax file numbers
Schedule 1 - item 1: Insertion of proposed sections 912 and 913
Schedule 4 - item 1: Insertion of proposed section 408CD

In Alert Digest No. 16 of 1994, the committee noted that the effect of these proposed new sections is that an allowance would not be payable unless the person and his or her partner has provided his or her tax file number to the Secretary.

The committee continued to maintain that, although tax file numbers may be considered necessary to prevent persons defrauding the system, they may also be considered to be unduly intrusive into a person's private life.

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 Minister has responded as follows:

> The Bill includes provisions for parenting allowance and widow allowance that enable the Secretary to request a person to provide their TFN and the TFN of their partner (if applicable). If a request is made and the person does not satisfy the request then the allowance is not payable. Your Committee expressed its concern that while TFNs may be considered necessary to prevent persons from defrauding the social security system, they may also be considered to be unduly intrusive in to a person's private life.
>
> The rate at which parenting and widow allowances are payable is determined by the income received by a person.
>
> Under a data-matching program introduced by the *Data-matching Program (Assistance and Tax) Act 1990*, income disclosed by people to the Department of Social Security (and other paying agencies) is automatically checked against income disclosed to the Australian Taxation Office (ATO) and other paying agencies. TFNs can be required to check the income information disclosed to other agencies.
>
> In relation to the proposed parenting and widow allowances, most people likely to receive these allowances are receiving some form of a social security payment and will already have provided the required TFNs. In such cases, the Department will be seeking authorisation to use previously collected TFNs for the purposes of

parenting and widow allowances.

In addition, some clients would be exempted (temporarily or indefinitely) from the requirement to provide a TFN (eg. a person with no income, in a natural disaster zone, in a remote area or when the partner is uncontactable or violent).

The requirements to provide TFNs as a condition of payment of parenting and widow allowances are consistent with the requirements that apply to existing payments administered by the Department of Social Security.

The committee thanks the Minister for this response.

Judith Troeth
(Chairman)