SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FOURTEENTH REPORT

OF

2000

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MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

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 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 2000

The Committee presents its Fourteenth Report of 2000 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 1(a)(v) of Standing Order 24:

Fuel Quality Standards Bill 2000

States Grants (Primary and Secondary Education Assistance) Bill 2000

Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No. 2) 2000

Telecommunications (Universal Service Levy) Amendment Bill 2000

Fuel Quality Standards Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 13 of 2000*, in which it made various comments. The Minister for Environment and Heritage has responded to those comments in a letter dated 9 October 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 13 of 2000

This bill was introduced into the Senate on 7 September 2000 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

The bill establishes a framework to set, implement and enforce national quality standards for fuels. It aims to regulate fuel quality to reduce pollutants and emissions arising from the use of fuel that may cause environmental, greenhouse and health problems; to facilitate the adoption of better engine and emission control technologies; and to allow for the more effective operation of engines. In particular, the bill:

- creates offences relating to the supply of fuel that does not comply with a fuel standard; to the alteration of fuel which is subject to a fuel standard; and to the supply or importation of a fuel additive that is entered in the Register of Prohibited Fuel Additives;
- sets out an enforcement regime for the purposes of compliance monitoring and prosecuting offences under its provisions; and
- sets out record-keeping and reporting obligations which apply to persons supplying or importing fuels which are subject to a fuel standard.

Commencement on Proclamation
Clause 2

Clause 2 permits this bill to commence on Proclamation, with no further time specified within which its provisions must necessarily come into force. The Committee is wary of such provisions which, effectively, provide the Executive with an unfettered discretion in deciding whether, and when, to bring a particular measure into force. The Committee takes the view that Parliament, as the elected holder of Federal legislative power, is responsible for determining when the laws it makes are to come into force.

In taking this view, the Committee is conscious of *Drafting Instruction No 2 of 1989* issued by the Office of Parliamentary Counsel. This provides that, as a general rule, "a restriction should be placed on the time within which an Act should be proclaimed," and that "clauses providing for commencement by Proclamation … should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation)".

In the case of this bill, the Explanatory Memorandum states that "it is intended that the offence provisions will commence on the same date that the first determinations setting out petrol and diesel standards take effect. This date is not specified in the Bill because consultations on the standards will not be finalised until after the Bill is introduced".

However, subclause 23(2) provides that the Minister is not required to consult the Fuel Standards Consultative Committee in relation to any such determinations made within 6 months after commencement. This is because of "an extensive consultation process involving State and Territory agencies, industry and community stakeholders. These consultations will have concluded before the Fuel Quality Standards Bill is enacted". Given this provision, and this explanation, there would seem to be little real justification for providing the unfettered discretion to the Executive in clause 2. The Committee, therefore, **seeks the Minister's advice** as to why the open-ended discretion as to the commencement of the bill contained in clause 2 should not be limited in some way.

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

Relevant extract from the response from the Minister

As the Committee is aware, the Explanatory Memorandum states that the intended effect of Clause 2 of the Bill is to ensure that the date on which the offence provisions take effect is synchronised with the date that the first standards take effect. This is to avoid uncertainty which might arise if the offence provisions, which refer to the existence of standards, come into effect on an earlier date.

Clause 2 was drafted to allow the Act to commence on a day fixed by proclamation because the date on which the standards will take effect is unknown. The Commonwealth position which officials have developed for the purpose of consultations would have the first standards for petrol and automotive diesel taking effect from 1 January 2002. The choice of date is, however, one of the critical points for stakeholders, in particular the fuel producing and importing industry, and vehicle manufacturers.

As you note, the Explanatory Memorandum also indicates, in reference to Clause 23 of the Bill, that consultations with stakeholders will be completed before the Bill is enacted. Following consultations there will, however, be a further process within the Commonwealth, of determining the whole of government position on the content of the standards. This position will be considered by the Minister for the Environment and Heritage when he makes relevant decisions under the new legislation.

It would be inappropriate to pre-empt this process by determining, in advance, a date by which standards must take effect. This, together with the concerns about the timing of commencement of those provisions which rely upon the existence of standards, supports the discretion as to the commencement not being limited.

The Committee thanks the Minister for this response which indicates that the bill is expressed to commence on a day fixed by proclamation because the date on which the proposed fuel standards will take effect – a date which is critical for stakeholders – is unknown.

The Committee remains concerned that legislation which is expressed to commence on proclamation may, in fact, never commence. In the case of this bill, it would be preferable if it fixed a date – no matter how long after assent – by which standards must be determined and the bill must either commence or be repealed.

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

Reversal of the onus of proof
Subclause 12(2)

Subclause 12(1) creates an offence of supplying fuel that does not comply with an applicable fuel standard. Subclause 12(2) states that a person is not guilty of this offence if he or she believes on reasonable grounds that the fuel supplied will be further processed for the purpose of bringing it into compliance with the applicable standard. An accompanying note states that a defendant bears an evidential burden in relation to the matter in this subclause.

The Committee is wary of provisions which require a person charged with an offence to prove or disprove some matter to establish his or her innocence, even where the defendant only bears the burden "of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist" (*Criminal Code* s 13.3(6)).

In the case of this bill, the Explanatory Memorandum states that subclause 12(2) "is intended to ensure that supplies occurring in the course of production may not give rise to an offence. It is intended that a person may not rely on this clause unless they believe, on reasonable grounds, that further processing will occur to bring the fuel into compliance with a standard or a standard as varied. A reasonable ground for such belief may arise where fuel was supplied for this purpose to a person who had the capacity to bring the fuel into compliance with a standard or a standard as varied".

While the Explanatory Memorandum sets out the intention underlying this provision, it does not explain why the accused should bear an evidential burden of proof in these circumstances. The Committee, therefore, **seeks the Minister's advice** as to why the defendant should bear an evidential burden in relation to matter in subclause 12(2).

Pending the Minister's advice, the Committee draws Senators' attention to these 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.

Relevant extract from the response from the Minister

> The proposed offence in clause 12 reflects the underlying policy that only persons who supply non-compliant fuel reckless as to whether the fuel will be used in its non-compliant state should be convicted of an offence.

In general, an offence provision should be framed so that the prosecution must prove each aspect of the offence beyond a reasonable doubt. Commonwealth criminal law policy does, however, permit an evidential burden to be placed on a defendant where the matter:

- will be peculiarly within the knowledge of the defendant; and

- will be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

Where an evidential burden is placed on a defendant, the defendant must adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist. In relation to proposed subclause 12(2), a defendant's belief on reasonable grounds that the fuel supplied was going to be further processed into compliant fuel is a matter peculiarly within the knowledge of the defendant. For example, an employee of the company purchasing the fuel from the defendant may have given certain assurances that further processing was to occur. Alternatively, the defendant may have a belief on reasonable grounds based on previous dealings with a particular company, such as where all the non-compliant fuel that the defendant had previously supplied to that company had been further processed into compliant fuel. It may be reasonable for the defendant to assume that the same kind of processing would occur again.

In disproving this matter the prosecution would be required to identify an employee of the relevant purchaser of the non-compliant fuel who may have given the defendant certain assurances. The purchasing company may have large numbers of employees making it very difficult for the prosecution to identify a relevant employee. It would also be very difficult for the prosecution to ascertain a complete history of previous dealings between the defendant and the purchaser. In these circumstances, it will be significantly more difficult and costly for the prosecution to disprove a defendant's belief on reasonable grounds.

Therefore, both limbs of the evidential burden exception are satisfied. It is appropriate to require a defendant to point to evidence of assurances or of previous dealings. Once the defendant has adduced such evidence the onus of proof shifts back to the prosecution to disprove the matter. Of course, the prosecution must also prove the matters in (a) – (f) of subclause 12(1). In this light, clause 12 is consistent with Commonwealth criminal law policy and does not unfairly compromise the rights of defendants to a fair criminal trial.

The Committee thanks the Minister for this response, which states that subclause 12(2) is within the scope of Commonwealth criminal law policy. However, the Committee reiterates the view, expressed in *Alert Digest No 13 of 2000*, that it is "wary of provisions which require a person charged with an offence to prove or disprove some matter to establish his or her innocence" and, therefore, continues to draw Senators' attention to this 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.

Strict liability offence
Subclause 67(6)

Clause 67 requires producers and importers of fuel to provide an annual statement in a form approved by the Secretary, and containing any information required by the Secretary. Subclause 67(5) makes non-compliance an offence, and subclause 67(6) makes the offence one of strict liability. An offence is one of strict liability where it provides for someone to be punished for doing something, or failing to do something, whether or not they had a guilty intent.

The Explanatory Memorandum simply notes that this provision "will enable the Commonwealth to collect information relating to fuel produced in and imported to Australia on an annual basis". Not only does the Explanatory Memorandum fail to explain why this offence should be one of strict liability, it fails to alert readers even to the fact that strict liability has been imposed. The Committee, therefore, **seeks the Minister's advice** as to why a failure to provide information in these circumstances should be an offence of strict liability.

Pending the Minister's advice, the Committee draws Senators' attention to these 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.

Relevant extract from the response from the Minister

> The Explanatory Memorandum (in the context of Clause 66) notes the importance of record keeping to adequate monitoring and enforcement of the Act's provisions. The same importance attaches to annual reporting.
>
> Annual reporting will provide the Commonwealth, as the party responsible for monitoring and enforcement of the legislation, with the opportunity to regularly assess the overall performance of fuel producers and importers. These parties have the greatest level of control over the quality of fuel supplied in Australia, and are the principal group targeted by the legislation.
>
> The Commonwealth believes that fuel producers and importers are generally committed to the introduction of fuel standards. At the same time, there is a perceived need to promote a culture of public accountability for fuel suppliers. It is therefore as important to be able to pursue careless non-compliance, as intentional and reckless breaches.
>
> The fault element of the offences contained in Part 4 also recognises the difficulty of establishing a mental element in relation to this type of offence. As the offence relies on an 'act of omission', most probably by a corporation, a requirement to establish intention or recklessness would likely render the provision unenforceable. This may

have the undesirable effect of encouraging non-compliance with the record keeping and reporting requirements.

The imposition of strict liability in enforcing this type of record-keeping/reporting obligation is increasingly common. The requirement to lodge annual reports is not unreasonably burdensome and a defendant has the benefit of statutory defences of mistake of fact, intervening conduct or event, duress, sudden or extraordinary emergency and self defence under the *Criminal Code Act 1995*. I believe that the proposed imposition of strict liability is justified under the circumstances and does not unduly trespass on personal rights and liberties.

The Committee thanks the Minister for this response, which indicates that requiring the establishment of intent or recklessness, in all likelihood by a corporate defendant, "would likely render the provision unenforceable".

Transitional provisions
General comment

As noted above, this bill establishes a framework for setting mandatory national fuel quality standards. In his Second Reading Speech, the Minister states that "if Australia is to reap the environmental benefits of evolving emission control and fuel efficiency technologies, fuel standards need to keep pace with vehicle standards". It is possible, in these circumstances, that some engines (for example, those used to power vintage or veteran cars) may no longer be able to use fuel that complies with quality standards set by reference to more recent vehicle standards, and that such engines cannot be modified to accommodate new or changing standards.

Further, not all motors are used to power motor vehicles (for example, they may be used in pumps or in mining or farm equipment). It is possible that these motors will no longer be able to operate using fuel that must comply with a modified vehicle standard. The Committee is concerned that individuals may be disadvantaged in these circumstances and **seeks the Minister's advice** as to what transitional arrangements are proposed to ensure that individuals will not be disadvantaged by the imposition of mandatory quality standards.

Pending the Minister's advice, the Committee draws Senators' attention to these 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.

Relevant extract from the response from the Minister

The Government does not propose any transitional arrangements targeted at individuals. The policy underpinning the legislation will, in a number of ways, ensure that the impacts on individuals are minimised.

1. Standards specifically designed to maintain efficient operation of petrol and diesel engines will be included in the national fuel quality standards for petrol and automotive diesel. While the initial focus in the development of standards has been on the environmental impacts of fuel quality, the consultation process has brought the need for operability standards to the Government's attention.

   The fuel characteristics which are most likely to affect the operation of diesel engines relate to lubricity of the fuel and the formation of wax in the fuel as a result of cold winter temperatures. Commonwealth agencies have already commenced work with the Federal Chamber of Automotive Industries (FCAI) and the Australian Institute of Petroleum (AIP), in consultation with other key stakeholders, to develop operability standards.

2. Standards for petrol will accommodate owners of those older petrol vehicles which cannot operate on regular unleaded petrol (many older models with low compression engines and hardened valve seats can already use unleaded fuel). Vehicles with high compression engines and soft exhaust valve seats will need to use an alternative fuel known as "Lead Replacement Petrol" (LRP). LRP is premium unleaded petrol with an anti-valve seat recession (AVSR) additive blended at the refinery. The higher octane rating of the fuel and added AVSR allow LRP to be used as a substitute in these vehicles. A number of companies are already supplying a LRP.

   Vehicles with soft valve seats can also have their engines rebuilt using hardened valves and valve seat inserts, allowing them to use regular or premium unleaded petrol instead of LRP. Although no pre-1986 vehicle owner will need to pursue such mechanical modification, some owners may choose this option to allow the use of cheaper regular unleaded petrol. This option is likely to be cost effective only for those vehicles, such as historical cars, that are kept for a long period of time when LRP will no longer be available. Once LRP ceases to be available, the remaining option for these vehicles will be to use unleaded petrol with an anti-valve seat recession additive purchased at the service station.

3. Diesel standards will not be mandatory for off-road diesel users until 2006. The commitments set out in the *Measures for a Better Environment* package indicated that requirements for low sulphur diesel would be targeted at road vehicles, until 50ppm sulphur is mandated for all automotive diesel in 2006. If there is a significant demand from off-road users for diesel with a sulfur content higher than prescribed in the standards, the legislation will not impede its supply.

4. The approvals process set out in Division 3 of Part 2 was included to cover circumstances where the application of the standards would be inappropriate or excessively burdensome, and it is possible to exempt or vary the standards without compromising the objectives of the legislation. A mining company, for example, could apply for an approval for supply of fuel formulated specifically to meet the requirements of its equipment.

I thank the Committee for its examination of the Bill.

The Committee thanks the Minister for this response, which addresses some of its concerns.

However, the Committee refers to the Minister's statement that "diesel standards will not be mandatory for off-road diesel users until 2006". This implies that such standards will be mandatory after that date. The Committee notes the Minister's subsequent observation that "if there is a significant demand from off-road users for diesel with a sulfur content higher than prescribed in the standards, the legislation will not impede its supply". The Committee would appreciate the Minister's further advice clarifying how a mandatory standard will not impede the supply of fuel which does not meet that standard.

Pending the Minister's further advice, the Committee continues to draw attention to these 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.

States Grants (Primary and Secondary Education Assistance) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 11 of 2000*, in which it made various comments. The Minister for Education, Training and Youth Affairs has responded to those comments in a letter dated 4 September 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 11 of 2000

This bill was introduced into the House of Representatives on 29 June 2000 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

The bill proposes to the provide funding to the States and Territories for primary and secondary education in Australia for the 2001-2004 quadrennium and to provide for:

- the introduction of new socio-economic-status (SES)-based funding arrangements for non-government schools;
- additional funding and consequential changes to funding arrangements for the School Transitional Emergency Assistance program, formerly known as the Short Term Emergency Assistance program;
- the introduction of a revised structure for Commonwealth programs for targeted assistance for schools; and
- improved accountability arrangements for Commonwealth schools programs.

The Committee previously dealt with this bill in *Alert Digest No 10 of 2000*, in which it made no comment. The Committee has since received some correspondence on the bill from Mr Vincent Thackeray (copy appended to this *Digest*), and now makes the following comments.

Non reviewable decisions
Proposed sections 18, 20 and 38

This bill introduces a new method for determining funding for non-government schools. In so doing it provides a statutory formula for determining a year 2000 funding level (under clause 8), and provides that guidelines approved by the Minister for determining a school's SES score are disallowable instruments (under subclause 7(2)). Each of these measures introduces a level of accountability that was not present in previous funding methods.

However, while the bill has improved the accountability framework in these areas, it does not seem to have addressed the related issue of administrative discretions.

Under proposed subsection 18(5), the Minister may refuse to authorise, or may delay, a payment for a non-government body if the relevant authority of that body is not a body corporate and the Minister considers that the liabilities of that authority are substantially greater than its assets, or that the authority is unable (and unlikely to be able) to pay its debts as they fall due. While such a solvency requirement is necessary, it requires the exercise of a Ministerial discretion. No provision is made for the independent review of this discretion.

The Minister exercises a similar discretion under proposed section 20, where he or she may include in a section 18 agreement "any other provisions that the Minister thinks appropriate".

More significantly, under proposed subsections 38(3) or (4), if the Minister is satisfied that a school's SES score has not been determined correctly, or is no longer accurate because of a significant change in the school's circumstances, the Minister must change the school's funding level. Again, no provision is made for the independent review of this discretion.

Funding decisions may have significant consequences for those affected by them. The Committee, therefore, **seeks the Minister's advice** as to the reasons why no provision has been made to enable the exercise of these discretions to be independently reviewed.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they may be considered to make rights, liberties and obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Digest refers to non-reviewable decisions under clauses 18, 20 and 38 of the Bill. During the drafting of the legislation, the Department of Education, Training and Youth Affairs examined this issue in relation to the Administrative Review Council's publication *"What decisions should be subject to merits review, July 1999"*. This publication provides a number of exclusions for decisions where it would be inappropriate for merits review to be applied to legislation. These include:

- decisions allocating a finite resource between competing applicants;
- policy decisions of a high political content; and
- financial decisions with a significant public interest element.

Paragraphs 4.18 and 4.19 of this publication are particularly pertinent as they state:

"4.18. The Council also holds the view that decisions by government to allocate funding to programs as a whole are not suitable for review, as they are budgetary decisions of a policy nature, rather than decisions immediately affecting any particular person's interests. Those decisions are subject to parliamentary scrutiny, and the Minister who makes them will be held politically accountable for any consequences.

4.19. Even though the Council does not believe that such decisions should be reviewed, the Council does not consider that administrative accountability in relation to such allocative decisions should be given greater emphasis, including ensuring that:

the processes of allocating funds are fair;
the criteria for funding are made clear; and
decisions are made objectively."

This legislation provides for budgetary decisions of a policy nature which do not immediately affect the individual. This legislation is also subject to Parliamentary scrutiny and the Minister is both publicly and politically accountable. Comprehensive administrative guidelines similar to the "Commonwealth Programmes for Schools Quadrennial Administrative Guidelines 1997 to 2000" will be issued which will provide clear criteria to allow for objective decision making.

It should also be noted that only one submission on non-reviewable decisions appears to have been received by the Committee even though this legislation applies to over 10,000 schools across Australia, of which some 2,500 are non-government schools, and has a high degree of political sensitivity. The powers in clauses 18(5) and 20 have also been a part of the States Grants legislation for a number of quadrennium.

For these reasons I do not consider it necessary or appropriate to include merit review provisions in States Grants legislation.

The Committee thanks the Minister for this response.

Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No. 2) 2000

Introduction

The Committee dealt with this bill ("the No 2 bill") in *Alert Digest No. 10 of 2000*, in which it made various comments. These comments followed Committee consideration (in its *Tenth Report of 2000*) of the *Telecommunications (Consumer Protection and Service Standards) Amendment Act (No 1) 2000* ("the No 1 Act") – which dealt with similar matters.

The Minister for Communications, Information Technology and the Arts has responded to the Committee's comments in relation to both the No 1 Act and the No 2 bill in a letter dated 5 October 2000. A copy of the letter is attached to this report. An extract from *Alert Digest No. 10* (in relation to the No 2 bill), and relevant parts of the Minister's response are discussed below.

Extract from Alert Digest No. 10 of 2000

This bill was introduced into the House of Representatives on 29 June 2000 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

Introduced with the Telecommunications (Universal Service Levy) Amendment Bill 2000, the bill proposes the repeal and substitution of the universal service regime in Part 2 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

Part 2 of the Act currently imposes universal service obligations (USO) on telecommunications carriers to ensure that standard telephone services, payphones and prescribed carriage services to all people in Australia are provided on an equitable basis.

The bill:

- gives the Minister a clarification power to determine what is necessary to ensure that services provided under the Universal Service Obligation and Digital Data Service Obligation (DDSO) are 'reasonably accessible';

- makes provision for primary universal service providers (PUSPs) and competing universal service providers (CUSPs);
- makes minor changes which align the provisions relating to the DDSO with the new USO arrangements;
- provides that price control determinations are to take effect on the day specified rather than at the start of a financial year;
- enables the Minister to determine USPs' subsidy entitlements for up to three years in advance;
- passes responsibility for defining eligible revenue to the Australian Communications Authority;
- provides that claims for USO subsidies are to be calculated for a 'claim period';
- aligns provisions relating to the Universal Service Account with the standard forms for Special Accounts under the *Financial Management and Accountability Act 1997*;
- authorises the Minister, by subordinate instrument, to modify the information disclosure provisions in the Act to make the disclosure test less restrictive; and
- requires the Australian Communications Authority to maintain a register of key subordinate instruments.

Non-disallowable declarations
Proposed new subsections 8D(4), 9A(5) and 20C(3)

Among other things, this bill proposes to insert new subsections 8D(4), 9A(5) and 20C(3) in the *Telecommunications (Consumer Protection and Service Standards) Amendment Act 1999*. Each of these provisions will permit the Minister to make a declaration the effect of which may be to modify the way in which specific legislative provisions are to apply to various persons. As such, the determinations appear to be legislative in character.

In each case, the Minister's determination must be published in the *Gazette*, but the determination does not appear to be a disallowable instrument. The Committee, therefore, **seeks the Minister's advice** as to why the Act does not provide for parliamentary scrutiny of these apparently legislative instruments.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Relevant extract from the response from the Minister

Further to my letter of 1 August 2000, I understand that the Committee has continuing concerns about certain provisions of the *Telecommunications (Consumer Protection and Service Standards) Amendment Act (No. 1) 2000* (the first amending Act), raised in the Committee's Tenth Report of 2000.

I understand that the Committee also has several concerns about provisions of the Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No. 2) 2000 (the second Bill) and the Telecommunications (Universal Service Levy) Amendment Bill 2000, raised in the Committee's Alert Digest No. 10 of 2000.

In relation to the first amending Act, the Committee has again raised the issue of the basis on which the Minister may determine a person to be a universal service provider, and in particular, whether the Minister uses an existing selection system as a basis for that decision.

As you are aware, the provision of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the primary Act) relating to the Minister's scope in determining a person to be a universal service provider was amended in the Senate during consideration of the first amending Act. The Minister is now constrained to considering only matters that relate to achieving the objects of the primary Act.

The provisions relating to selection systems have never been used, and there is no intention of using them in the foreseeable future. The second Bill, which is currently before the Parliament, takes a different approach to decisions relating to the selection of a universal service provider. It repeals all references to selection systems, and introduces the new concepts of primary and competing universal service providers.

The Senate amendment to the first amending Act constraining the Minister to considering only matters that relate to achieving the objects of the primary Act, will be reintroduced in the second Bill.

Effectively, following the passage of the second Bill, there will be a single selection system for the selection of a primary USP, that is the Minister must consider only the objects of the Act. Furthermore, the determination of a primary universal service provider (other than a deemed determination under proposed new section 12E of the second Bill) will be a disallowable instrument.

In relation to the second Bill, the Committee has raised three instances where Ministerial determinations are non-disallowable. In all three cases, amendments to the second Bill have been prepared that will make the determinations disallowable instruments. These amendments were circulated in the House of Representatives on 7 September 2000 (Amendments (3), (4) and (24) - see attached).

I trust that this satisfies the Committee's concerns with the Bills.

The Committee thanks the Minister for this response, and for the amendments to be moved to the bill.

Telecommunications (Universal Service Levy) Amendment Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 10 of 2000* in which it noted a minor drafting matter. While the Committee did not seek a formal response, the Minister for Communications, Information Technology and the Arts has responded to this comment. An extract from the *Alert Digest* and relevant parts of the Minister's response are noted below for the information of Senators.

Extract from Alert Digest No. 10 of 2000

This bill was introduced into the House of Representatives on 29 June 2000 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes amendments to the *Telecommunications (Universal Service Levy) Act 1997* which are consequential on the amendments proposed in the Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No. 2) 2000. The amendments arise from the extension of universal service obligation (USO) and digital data service obligation (DDSO) funding to include both carriers and carriage service providers; and reflect new arrangements in relation to claim periods.

Drafting note
Schedule 1, item 3

Item 3 of Schedule 1 to this bill proposes to insert a new section 6 in the *Telecommunications (Universal Service Levy) Act 1997*. This proposed new section refers to a levy debit for a claim period "because of section #[L12]" of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. The Explanatory Memorandum indicates that the reference is intended to be to section 20S of that Act.

Given this, the Committee makes no further comment on this provision.

Relevant extract from the response from the Minister

In relation to the incorrect reference in Item 3 of the Schedule 1 of the Telecommunications (Universal Service Levy) Amendment Bill 2000, this error was corrected before the Bill was tabled in the House of Representatives, but after the Bill was delivered to the Committee. I apologise for the inconvenience this may have caused.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

Senator the Hon Robert Hill
Leader of the Government in the Senate
Minister for the Environment and Heritage

- 9 OCT 2000

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10 OCT 2000
Senate Standing C'ttee
for the Scrutiny of Bills

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

Dear Senator Cooney

I refer to comments contained in the Scrutiny of Bills Alert Digest No. 13 of 2000 (4 October 2000), in which the Senate Standing Committee for the Scrutiny of Bills sought my advice as the Minister responsible for the Fuel Quality Standards Bill 2000. My response to the points raised in the Digest is as follows.

Commencement on Proclamation (Clause 2)

As the Committee is aware, the Explanatory Memorandum states that the intended effect of Clause 2 of the Bill is to ensure that the date on which the offence provisions take effect is synchronised with the date that the first standards take effect. This is to avoid uncertainty which might arise if the offence provisions, which refer to the existence of standards, come into effect on an earlier date.

Clause 2 was drafted to allow the Act to commence on a day fixed by proclamation because the date on which the standards will take effect is unknown. The Commonwealth position which officials have developed for the purpose of consultations would have the first standards for petrol and automotive diesel taking effect from 1 January 2002. The choice of date is, however, one of the critical points for stakeholders, in particular the fuel producing and importing industry, and vehicle manufacturers.

As you note, the Explanatory Memorandum also indicates, in reference to Clause 23 of the Bill, that consultations with stakeholders will be completed before the Bill is enacted. Following consultations there will, however, be a further process within the Commonwealth, of determining the whole of government position on the content of the standards. This position will be considered by the Minister for the Environment and Heritage when he makes relevant decisions under the new legislation.

It would be inappropriate to pre-empt this process by determining, in advance, a date by which standards must take effect. This, together with the concerns about the timing of commencement of those provisions which rely upon the existence of standards, supports the discretion as to the commencement not being limited.

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Reversal of the onus of proof (Subclause 12(2))

The proposed offence in clause 12 reflects the underlying policy that only persons who supply non-compliant fuel reckless as to whether the fuel will be used in its non-compliant state should be convicted of an offence.

In general, an offence provision should be framed so that the prosecution must prove each aspect of the offence beyond a reasonable doubt. Commonwealth criminal law policy does, however, permit an evidential burden to be placed on a defendant where the matter:

- will be peculiarly within the knowledge of the defendant; and
- will be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

Where an evidential burden is placed on a defendant, the defendant must adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist. In relation to proposed subclause 12(2), a defendant's belief on reasonable grounds that the fuel supplied was going to be further processed into compliant fuel is a matter peculiarly within the knowledge of the defendant. For example, an employee of the company purchasing the fuel from the defendant may have given certain assurances that further processing was to occur. Alternatively, the defendant may have a belief on reasonable grounds based on previous dealings with a particular company, such as where all the non-compliant fuel that the defendant had previously supplied to that company had been further processed into compliant fuel. It may be reasonable for the defendant to assume that the same kind of processing would occur again.

In disproving this matter the prosecution would be required to identify an employee of the relevant purchaser of the non-compliant fuel who may have given the defendant certain assurances. The purchasing company may have large numbers of employees making it very difficult for the prosecution to identify a relevant employee. It would also be very difficult for the prosecution to ascertain a complete history of previous dealings between the defendant and the purchaser. In these circumstances, it will be significantly more difficult and costly for the prosecution to disprove a defendant's belief on reasonable grounds.

Therefore, both limbs of the evidential burden exception are satisfied. It is appropriate to require a defendant to point to evidence of assurances or of previous dealings. Once the defendant has adduced such evidence the onus of proof shifts back to the prosecution to disprove the matter. Of course, the prosecution must also prove the matters in (a) – (f) of subclause 12(1). In this light, clause 12 is consistent with Commonwealth criminal law policy and does not unfairly compromise the rights of defendants to a fair criminal trial.

Strict liability offence (Subclause 67(6))

The Explanatory Memorandum (in the context of Clause 66) notes the importance of record keeping to adequate monitoring and enforcement of the Act's provisions. The same importance attaches to annual reporting.

Annual reporting will provide the Commonwealth, as the party responsible for monitoring and enforcement of the legislation, with the opportunity to regularly assess the overall performance of fuel producers and importers. These parties have the greatest level of control over the quality of fuel supplied in Australia, and are the principal group targeted by the legislation.

The Commonwealth believes that fuel producers and importers are generally committed to the introduction of fuel standards. At the same time, there is a perceived need to promote a culture of public accountability for fuel suppliers. It is therefore as important to be able to pursue careless non-compliance, as intentional and reckless breaches.

The fault element of the offences contained in Part 4 also recognises the difficulty of establishing a mental element in relation to this type of offence. As the offence relies on an 'act of omission', most probably by a corporation, a requirement to establish intention or recklessness would likely render the provision unenforceable. This may have the undesirable effect of encouraging non-compliance with the record keeping and reporting requirements.

The imposition of strict liability in enforcing this type of record-keeping/reporting obligation is increasingly common. The requirement to lodge annual reports is not unreasonably burdensome and a defendant has the benefit of statutory defences of mistake of fact, intervening conduct or event, duress, sudden or extraordinary emergency and self defence under the *Criminal Code Act 1995*. I believe that the proposed imposition of strict liability is justified under the circumstances and does not unduly trespass on personal rights and liberties.

Transitional provisions (General comment)

The Government does not propose any transitional arrangements targeted at individuals. The policy underpinning the legislation will, in a number of ways, ensure that the impacts on individuals are minimised.

1. Standards specifically designed to maintain efficient operation of petrol and diesel engines will be included in the national fuel quality standards for petrol and automotive diesel. While the initial focus in the development of standards has been on the environmental impacts of fuel quality, the consultation process has brought the need for operability standards to the Government's attention.

   The fuel characteristics which are most likely to affect the operation of diesel engines relate to lubricity of the fuel and the formation of wax in the fuel as a result of cold winter temperatures. Commonwealth agencies have already commenced work with the Federal Chamber of Automotive Industries (FCAI)

and the Australian Institute of Petroleum (AIP), in consultation with other key stakeholders, to develop operability standards.

2. Standards for petrol will accommodate owners of those older petrol vehicles which cannot operate on regular unleaded petrol (many older models with low compression engines and hardened valve seats can already use unleaded fuel). Vehicles with high compression engines and soft exhaust valve seats will need to use an alternative fuel known as "Lead Replacement Petrol" (LRP). LRP is premium unleaded petrol with an anti-valve seat recession (AVSR) additive blended at the refinery. The higher octane rating of the fuel and added AVSR allow LRP to be used as a substitute in these vehicles. A number of companies are already supplying a LRP.

   Vehicles with soft valve seats can also have their engines rebuilt using hardened valves and valve seat inserts, allowing them to use regular or premium unleaded petrol instead of LRP. Although no pre-1986 vehicle owner will need to pursue such mechanical modification, some owners may choose this option to allow the use of cheaper regular unleaded petrol. This option is likely to be cost effective only for those vehicles, such as historical cars, that are kept for a long period of time when LRP will no longer be available. Once LRP ceases to be available, the remaining option for these vehicles will be to use unleaded petrol with an anti-valve seat recession additive purchased at the service station.

3. Diesel standards will not be mandatory for off-road diesel users until 2006. The commitments set out in the *Measures for a Better Environment* package indicated that requirements for low sulphur diesel would be targeted at road vehicles, until 50ppm sulphur is mandated for all automotive diesel in 2006. If there is a significant demand from off-road users for diesel with a sulfur content higher than prescribed in the standards, the legislation will not impede its supply.

4. The approvals process set out in Division 3 of Part 2 was included to cover circumstances where the application of the standards would be inappropriate or excessively burdensome, and it is possible to exempt or vary the standards without compromising the objectives of the legislation. A mining company, for example, could apply for an approval for supply of fuel formulated specifically to meet the requirements of its equipment.

The contact officer in my department in relation to these proposals is Ms Chris Schweizer, telephone 6274 1581.

I thank the Committee for its examination of the Bill.

Yours sincerely

Robert Hill

The Hon. Dr David Kemp MP
Minister for Education, Training and Youth Affairs

RECEIVED
4 SEP 2000
Senate Standing C'ttee
for the Scrutiny of Bills

Mr James Warmenhoven
Secretary
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

- 4 SEP 2000

Dear Mr Warmenhoven

I refer to your letter of 31 August 2000 concerning comments contained in the Scrutiny of Bills Alert Digest No. 11 of 2000 about the *States Grants (Primary and Secondary Education Assistance) Bill 2000.*

The Digest refers to non-reviewable decisions under clauses 18, 20 and 38 of the Bill. During the drafting of the legislation, the Department of Education, Training and Youth Affairs examined this issue in relation to the Administrative Review Council's publication *"What decisions should be subject to merits review, July 1999"*. This publication provides a number of exclusions for decisions where it would be inappropriate for merits review to be applied to legislation. These include:

- decisions allocating a finite resource between competing applicants;
- policy decisions of a high political content; and
- financial decisions with a significant public interest element.

Paragraphs 4.18 and 4.19 of this publication are particularly pertinent as they state:

"4.18. The Council also holds the view that decisions by government to allocate funding to programs as a whole are not suitable for review, as they are budgetary decisions of a policy nature, rather than decisions immediately affecting any particular person's interests. Those decisions are subject to parliamentary scrutiny, and the Minister who makes them will be held politically accountable for any consequences.

4.19. Even though the Council does not believe that such decisions should be reviewed, the Council does not consider that administrative accountability in relation to such allocative decisions should be given greater emphasis, including ensuring that:

the processes of allocating funds are fair;
the criteria for funding are made clear; and
decisions are made objectively."

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This legislation provides for budgetary decisions of a policy nature which do not immediately affect the individual. This legislation is also subject to Parliamentary scrutiny and the Minister is both publicly and politically accountable. Comprehensive administrative guidelines similar to the "Commonwealth Programmes for Schools Quadrennial Administrative Guidelines 1997 to 2000" will be issued which will provide clear criteria to allow for objective decision making.

It should also be noted that only one submission on non-reviewable decisions appears to have been received by the Committee even though this legislation applies to over 10,000 schools across Australia, of which some 2,500 are non-government schools, and has a high degree of political sensitivity. The powers in clauses 18(5) and 20 have also been a part of the States Grants legislation for a number of quadrennium.

For these reasons I do not consider it necessary or appropriate to include merit review provisions in the States Grants legislation.

Yours sincerely

David Kemp

SENATOR THE HON RICHARD ALSTON
Minister for Communications, Information Technology and the Arts
Deputy Leader of the Government in the Senate

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

05 OCT 2000

Dear Senator Cooney, Barney -

Further to my letter of 1 August 2000, I understand that the Committee has continuing concerns about certain provisions of the *Telecommunications (Consumer Protection and Service Standards) Amendment Act (No. 1) 2000* (the first amending Act), raised in the Committee's Tenth Report of 2000.

I understand that the Committee also has several concerns about provisions of the Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No. 2) 2000 (the second Bill) and the Telecommunications (Universal Service Levy) Amendment Bill 2000, raised in the Committee's Alert Digest No. 10 of 2000.

In relation to the first amending Act, the Committee has again raised the issue of the basis on which the Minister may determine a person to be a universal service provider, and in particular, whether the Minister uses an existing selection system as a basis for that decision.

As you are aware, the provision of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the primary Act) relating to the Minister's scope in determining a person to be a universal service provider was amended in the Senate during consideration of the first amending Act. The Minister is now constrained to considering only matters that relate to achieving the objects of the primary Act.

The provisions relating to selection systems have never been used, and there is no intention of using them in the foreseeable future. The second Bill, which is currently before the Parliament, takes a different approach to decisions relating to the selection of a universal service provider. It repeals all references to selection systems, and introduces the new concepts of primary and competing universal service providers.

The Senate amendment to the first amending Act constraining the Minister to considering only matters that relate to achieving the objects of the primary Act, will be reintroduced in the second Bill.

Effectively, following the passage of the second Bill, there will be a single selection system for the selection of a primary USP, that is the Minister must consider only the objects of the Act. Furthermore, the determination of a primary universal service

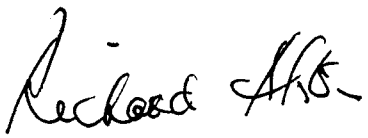
provider (other than a deemed determination under proposed new section 12E of the second Bill) will be a disallowable instrument.

In relation to the second Bill, the Committee has raised three instances where Ministerial determinations are non-disallowable. In all three cases, amendments to the second Bill have been prepared that will make the determinations disallowable instruments. These amendments were circulated in the House of Representatives on 7 September 2000 (Amendments (3), (4) and (24) – see attached).

In relation to the incorrect reference in Item 3 of the Schedule 1 of the Telecommunications (Universal Service Levy) Amendment Bill 2000, this error was corrected before the Bill was tabled in the House of Representatives, but after the Bill was delivered to the Committee. I apologise for the inconvenience this may have caused.

I trust that this satisfies the Committee's concerns with the Bills.

Yours sincerely



RICHARD ALSTON
Minister for Communications,
Information Technology and the Arts

1998-1999-2000

The Parliament of the

Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No. 2) 2000

(Government)

(1) Clause 2, page 1 (lines 11 and 12), omit subclause (2), substitute:

(2) Schedules 1 to 3 (other than items 10, 11 and 13 of Schedule 3) commence, or are taken to have commenced, on 1 July 2000.

(3) Items 10, 11 and 13 of Schedule 3 commence on the first 1 January, 1 April, 1 July or 1 October following the day on which this Act receives the Royal Assent.

[commencement]

(2) Schedule 1, page 3 (lines 2 to 4), omit the heading, substitute:

Schedule 1 New Part 2 of the Telecommunications (Consumer Protection and Service Standards) Act 1999

[Schedule 1]

(3) Schedule 1, item 1, page 7 (lines 7 and 8), omit subsection (5), substitute:

(5) A determination under paragraph (1)(b) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

[section 8Dclaim period determinations]

(4) Schedule 1, item 1, page 9 (lines 22 and 23), omit subsection (5), substitute:

(5) A determination under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

[section 9Areasonable accessibility determinations]

(5) Schedule 1, item 1, page 10 (line 4), omit subsection (4), substitute:

(4) A determination under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

[section 9Bservice obligation determinations]

(4) Subsection (1) does not, by implication, limit the Ministers powers under section 486 of the *Telecommunications Act 1997* (which deals with public inquiries).

[section 16AACAs advice]

(20) Schedule 1, item 1, page 69 (after line 22), at the end of subsection (3), add:

Note: It is an offence to make a false or misleading statement in connection with the operation of this Act (see section 578 of the *Telecommunications Act 1997*).

[section 20lodgment of eligible revenue return]

(21) Schedule 1, item 1, page 69 (line 24), omit Part, substitute Act.

[technical correction]

(22) Schedule 1, item 1, page 70 (line 31), after section, insert , other than a determination taken to have been made because of subsection (3),.

[section 20Bdetermination of eligible revenue]

(23) Schedule 1, item 1, page 71 (line 2), omit Part, substitute Act.

[technical correction]

(24) Schedule 1, item 1, page 71 (lines 10 and 11), omit subsection (3), substitute:

(3) A determination under paragraph (1)(b) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

[section 20Celigible revenue period determinations]

(25) Schedule 1, item 1, page 71 (lines 23 and 24), omit subsection (2), substitute:

(2) However, the Minister may, by making a written determination, modify the requirements in subsection (1), including by omitting, adding or substituting requirements.

(3) This section does not apply to a person if the ACA gives written notice to the person to that effect.

(4) A copy of a determination under subsection (2) must be published in the *Gazette*.

[section 20Daudit report]

(26) Schedule 1, item 1, page 72 (lines 18 and 19), omit subsection (4), substitute:

(4) A determination made for the purposes of subsection (2) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

[section 20Fthreshold amount determinations]

(27) Schedule 1, item 1, page 74 (after line 19), at the end of subsection (5), add:

Note: It is an offence to make a false or misleading statement in connection with the operation of this Act (see section 578 of the *Telecommunications Act 1997*).

[section 20Jclaims for levy credit]

(28) Schedule 1, item 1, page 83 (after line 4), at the end of section 21A, add:

; and (d) amounts equal to amounts of penalty paid from time to time under section 23D.