SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

SEVENTEENTH 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

SEVENTEENTH REPORT OF 2000

The Committee presents its Seventeenth 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:

Auditor of Parliamentary Allowances and Entitlements Bill 2000

Charter of Political Honesty Bill 2000

Education Services for Overseas Students (Assurance Fund Contributions) Bill 2000

Education Services for Overseas Students Bill 2000

Education Services for Overseas Students (Registration Charges) Amendment Bill 2000

Electoral Amendment (Political Honesty) Bill 2000

Horticulture Marketing and Research and Development Services Bill 2000

Privacy Amendment (Private Sector) Bill 2000

Auditor of Parliamentary Allowances and Entitlements Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 16 of 2000*, in which it made various comments. Senator Faulkner has responded to those comments in a letter dated 23 November 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Senator's response are discussed below.

Extract from Alert Digest No. 16 of 2000

This bill was introduced into the Senate on 1 November 2000 by Senator Faulkner as a Private Senator's bill.

The bill proposes to establish the office of Auditor of Parliamentary Allowances and Entitlements as an independent office of the Parliament to investigate and report to the Parliament on matters associated with the use of parliamentary allowances. The Auditor will have a wide range of powers modelled on those of the Auditor-General and the Ombudsman, including the powers to enter premises, access and copy documents and report on any member of the parliament who refuses to cooperate with an inquiry or on any other matter.

Consequential amendments are also made to the *Auditor-General Act 1997* and the *Public Accounts and Audit Committee Act 1951*.

Search and entry provision
Clause 21

Subdivision A of Division 2 of this bill applies to Members of Parliament and their staff. Subdivision B of Division 2 applies "to any person who is not covered by Subdivision A". Subdivision B includes clause 21, which will permit the Auditor established by the bill (or a duly authorised member of his or her staff), at all reasonable times to enter any premises for the purposes of inquiring into a person's receipt or use of parliamentary entitlements or allowances. No provision is made for obtaining a warrant from a judicial officer.

In its *Fourth Report of 2000*, the Committee examined the issue of search and entry provisions in Commonwealth legislation and, among other things, set out a number of principles which should govern the authorisation of an entry. In general terms, the Committee considered that legislation should authorise entry on to, and search of, premises only with the occupier's genuine and informed consent, or under warrant or equivalent statutory instrument, or by providing for a penalty determined by a court for a failure to comply.

Clause 21 permits entry to any premises to inquire into any person's receipt or use of parliamentary entitlements or allowances. The Committee **seeks the advice of the Senator sponsoring the bill** as to why clause 21 does not require that the Auditor obtain a warrant if he or she cannot enter with consent.

Pending the sponsoring Senator's advice, the Committee draws 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.

Relevant extract from the response from the Senator

I note the committee's general concern with the issue of search and entry powers.

As the committee would be aware, many of the powers in the bill are modelled on those of the Auditor-General and the Ombudsman. Clause 21 of the bill is based on section 33 of the *Auditor-General Act 1997*, although it differs from section 33 in not being confined to Commonwealth property. While the clause does confer a very wide power on the Auditor of Parliamentary Allowances and Entitlements to investigate allegations of the misuse of parliamentary entitlements, the bill also provides for the operations of the Auditor to be closely overseen by, and accountable to, the Parliament, more so in fact than any other Commonwealth statutory officer. This will act as a safeguard against any misuse of the Auditor's powers, while at the same time ensuring that the Auditor has all the necessary powers to strengthen public confidence in the integrity of the system of parliamentary allowances and entitlements.

I trust this addresses the committee's concerns.

The Committee thanks the Senator for this response which indicates that the search and entry powers in clause 21 of this bill are based on those made available to the Auditor-General under section 33 of the *Auditor-General Act 1997*. However, as noted in the response, section 33 of that Act is restricted to Commonwealth property. This represents a substantial limitation which has not been included in clause 21 of this bill, which authorises entry to any premises without the need to obtain a warrant.

For this reason, and notwithstanding the other accountability mechanisms in the bill, the Committee 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.

Charter of Political Honesty Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2000*, in which it made various comments. Senator Murray has responded to those comments in a letter dated 24 November 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Senator's response are discussed below.

Extract from Alert Digest No. 15 of 2000

This bill was introduced into the Senate on 10 October 2000 by Senator Murray as a Private Senator's bill.

Introduced with the Electoral Amendment (Political Honesty) Bill 2000, the bill proposes to:

- establish guidelines, based on recommendations of the Auditor-General and the Joint Committee of Public Accounts and Audit, to ensure the political honesty of taxpayer-funded government advertising campaigns;
- make these guidelines enforceable through an independent committee comprising the Auditor-General, the Ombudsman and an advertising expert;
- establish a parliamentary joint committee to develop a code of conduct for ministers and other members of parliament which clarifies what is required of politicians in the exercise of their duties and set minimum standards of behaviour;
- establish an Office of Commissioner for Ministerial and Parliamentary ethics to enforce the proposed code, and undertake impartial investigations of any allegations of breaches of the code by parliamentarians; and
- establish a merit-based code of practice to ensure open and accountable ministerial appointments to public bodies.

Non-reviewable discretion
Subclauses 9(1) and (3)

Subclause 9(1) of this bill would confer on a committee comprising the Auditor-General, the Ombudsman and one other person "with knowledge and experience in advertising" appointed by the Auditor-General, the power to determine whether a government advertising campaign complies with certain guidelines which are appended to the bill.

Subclause 9(3) would confer on the same committee the power to determine whether the objective of a government advertising campaign is legitimate, and whether the campaign is likely to achieve its stated objective.

These provisions thus confer a wide discretion on the committee constituted under the bill, and the exercise of that discretion is not subject to any form of review, whether administrative, legislative or judicial.

In his Second Reading Speech, the proposer of the bill has made clear that he regards the judicial consideration of such questions to be inappropriate ("questions such as how much money needs to be spent on a publicity campaign and what information should be conveyed is not an area in which a court is likely to substitute its judgment for that of the elected government of the day"). Further, the nature of the matters to be decided is seen as inappropriate for parliamentary review.

While it is likely that the courts could not expeditiously review the matters to be decided by the committee, and may be unwilling to review them at all, it is clear that the powers made available to the committee under clauses 9 and 10 may have serious consequences. The Committee, therefore, **seeks the advice of the Senator proposing the bill** as to why no provision has been made for the involvement of a judicial officer in either the determination or review of the matters covered by clause 9.

Pending the Senator's advice, the Committee draws Senators' attention to this provision, as it may be considered to make rights, liberties or 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 Senator

> The Alert Digest claims that the powers conferred by these provisions on the committee constituted under the Bill are 'not subject to any form of review, whether

administrative, legislative or judicial.' I am advised that no attempt has been made to exclude judicial review of decisions made under the Bill.

I am advised that if the Committee were to abuse its powers by, for example, acting in pursuit of an improper purpose, basing its decision on irrelevant considerations, acting under dictation or subdelegating its authority, those decisions could be successfully challenged in the courts. If their decisions were in any way ultra vires or constituted a denial of natural justice they would be subject to review.

The merits of decisions made (as distinct from their legality) are the domain of the expert committee constituted under the Bill. However, it must be understood that the Committee is itself a mechanism for reviewing decisions made by ministers or their delegates. At this stage, I take the view that providing for a further avenue of review on the merits is unnecessary. However, if a Senate Committee examining this Bill were to recommend that there be a further avenue of merits review I would certainly reconsider my position.

The Scrutiny of Bills Committee has drawn to my attention the fact that these provisions 'may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions.' In my view, that is a more accurate description of the status quo than the situation that would exist under the proposed legislation. Decisions currently made by ministers or their delegates in relation to government advertising are not subject to any effective review process. Far from allowing the exercise of arbitrary non-reviewable power, this Bill provides for a much-needed avenue of review to soften the arbitrary nature of existing powers.

The Committee thanks the Senator for this response which indicates that judicial review would remain available, and that the committee constituted under the bill was itself a mechanism for reviewing decisions made by the Executive. The Committee notes that the bill is to be referred to the Finance and Public Administration Legislation Committee for more detailed consideration.

Education Services for Overseas Students (Assurance Fund Contributions) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 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 24 November 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. 12 of 2000

This bill was introduced into the House of Representatives on 30 August 2000 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

Introduced as one of a package of five bills to reform the provision of education services to overseas students, the bill proposes to impose a requirement on registered providers of educational services to pay annual contributions and special levies to the ESOS Assurance Fund. It is proposed that the Fund will provide greater security for overseas students' pre-paid course fees than exists under the current scheme.

Unlimited amount of levy
Clause 6

Subclause 6(1) of this bill states that the amount of annual Fund contribution payable by a provider "is as determined by the Fund Manager for that provider under Division 4 of Part 5" of the *Education Services for Overseas Students Act 2000*.

Subclause 6(2) states that the amount of special levy payable "is as determined by the Fund Manager for that provider under section #73 [sic] of that Act".

In each case, the Fund Manager (a statutory office holder) is empowered to determine an amount of levy with no upper limit on this amount, or formula for determining this amount, specified in the legislation itself.

The amount of annual Fund contribution is referred to in clauses 59 and 60 of the *Education Services for Overseas Students Act 2000.* Clause 59 requires the Fund Manager (in conjunction with the Contributions Review Panel) to determine criteria for contributions. Clause 60 states that these criteria "must be determined having regard solely to the purpose of the Fund" and "must enable the amount of contribution for each provider to reflect, at least to some extent, the risk of calls being made on the Fund in respect of that provider".

The amount of special levy is referred to in clause 73 of the *Education Services for Overseas Students Act 2000*. Clause 73 states that this amount "must correspond, so far as practicable, to the provider's proportion of the total of the annual Fund contributions required of registered providers for the year".

While clause 62 requires that the Fund Manager must make contributions criteria, or changed contributions criteria, publicly available, there is no indication of how they are to be made available, and no requirement that they be tabled in the Parliament, or be disallowable.

While flexibility and consultation may be needed in determining the amount of contribution and special levy payable by providers of educational services to overseas students, the Committee consistently draws attention to legislation which provides for the rate of a levy to be set by regulation or in a purely administrative manner without reference to the Parliament. This creates the risk that the levy may, in fact, become a tax. It is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The Committee, therefore, **seeks the Minister's advice** as to why the bill does not specify an upper limit for annual contributions or levies, or set out criteria by which such contributions or levies might be determined. The Committee also **seeks the Minister's advice** as to why the contributions criteria to be developed by the Fund Manager are not to be tabled in the Parliament or disallowable by the Parliament.

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

> The upper limit for annual contributions is not specified in the Bill as the contributions and the limits of such will be set commercially, in line with their insurance nature. The Fund is essentially a form of insurance, and contributions should be set on the basis of actuarial assessment. The Fund will be industry-based, with contributions determined according to the commercial risk presented to it. It will be managed by a professional Fund Manager, with expertise in commercial risk assessment.
>
> As the Committee has noted, the criteria are set out in the principal Act.
>
> The possibility of disallowance of the contribution criteria calculated on the basis of actuarial advice, could undermine the financial viability of the Fund and create greater instability for the education export industry and consequent risks for the overseas students.

The Committee thanks the Minister for this response which indicates that the Assurance Fund is intended to operate essentially as a form of industry-based insurance.

Where levy or contribution amounts cannot be specified in a principal Act, that Act will often contain a clause which explicitly states that the amount of any levy or contribution cannot be such as to amount to taxation (see, for example, *A New Tax System (Family Assistance) (Administration) Act 1999*, s 235(2); *Aged Care Act 1997* s 8-2(3)(b); *Dairy Produce Act 1986* Schedule 2: Dairy industry adjustment program, s 27(2)). Arguably, it would be appropriate if this bill contained a similar safeguard.

Alternatively, the Senate may consider the inclusion in a disallowable instrument of levy or contribution amounts as sufficient to ensure Parliamentary scrutiny in this case.

Education Services for Overseas Students Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 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 24 November 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. 12 of 2000

This bill was introduced into the House of Representatives on 30 August 2000 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

Introduced as part of a package of five bills to reform the provision of education services to overseas students, the bill establishes a new national regime for the registration of education and training providers, which have been approved by State and Territory authorities. In general terms, the bill:

- provides overseas students with stronger protection for pre-paid fees and continuing education if their provider collapses, through an industry based assurance fund;
- establishes a legally enforceable national code providing nationally consistent standards for the registration and conduct of providers, and more reliable quality assurance across all States and Territories;
- creates new obligations for providers to report on student breaches of visa conditions;
- makes it an offence to fail to provide genuine courses to students and, in doing so, to intentionally or recklessly facilitate visa breaches;
- provides for the Department to investigate possible breaches of the Act and Code; and
- allows greater powers to impose suspension and cancellation action and other conditions on providers that breach the provisions of the Act or the national code.

Strict liability offences
Subclauses 104(2) and 105(2)

Subclause 104(1) states that a registered provider who fails to provide the information about accepted overseas students required under subsection 19(1) is guilty of a separate offence for each event for which required information is not given. Subclause 104(2) states that strict liability applies to this offence.

Similarly, subclause 105(1) states that a registered provider who breaches the record-keeping requirements under section 21 is guilty of a separate offence for each student for whom the required records are not kept or retained. Subclause 105(2) states that strict liability applies to this offence.

In dealing with these subclauses, the Explanatory Memorandum gives no indication as to why it was thought necessary to impose strict criminal liability for these offences – particularly as strict liability is not imposed for other related offences such as failing to provide particulars of a breach by a student of their visa conditions under subclause 19(2), or failing to notify a student of a breach of a student visa condition relating to attendance or satisfactory academic performance under clause 20. The Committee, therefore, **seeks the Minister's advice** as to the reason for applying strict liability for offences under subclauses 104(1) and 105(1).

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to trespass unduly upon 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

> Record-keeping (s105) and Notification requirements (s104) are critical requirements for the effective operation of the electronic confirmation of enrolment system that is designed to enhance the integrity of enrolment of overseas students and to reduce visa fraud.
>
> The imposition of strict liability in enforcing these types of record-keeping obligations is now quite common (see s.50 of the *Excise Act 1901*; s. 11C of the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No 1) 2000*; s.15 of the *Aircraft Noise Levy Collection Act 1995*).
>
> Notifying the Secretary of records and any changes to them is vital for the Department to monitor compliance by the provider with its obligations under the legislation and for the Department of Immigration and Multicultural Affairs to monitor any visa abuse.

It was essential to make the failure to comply with these obligations an offence in order to indicate the serious nature of the obligation, and to deter those inclined to offend against it. It was recognised however, that prosecution of every offence would be time and resource consuming for both the Commonwealth and the defendants. It was therefore decided to provide for the imposition of penalties by way of infringement notices (s.106) as an alternative to prosecution.

The Criminal Law Division of the Attorney-General's Department advised that it is Commonwealth criminal law policy that offences underpinned by an infringement notice must be strict liability offences. Only strict liability offences, with clear-cut physical elements, are suitable for infringement notice schemes.

The obligations/prohibitions in subsection 19(1) and section 21, underpinned by subsections 104(1) and 105(1) respectively, are of a kind that can legitimately be made strict i.e. they have clear-cut physical elements. Matters in subsection 19(2) and section 20, however, require an assessment of whether a particular student has breached his or her visa conditions. This is not a clear-cut inquiry. Because of this strict liability and infringement notices were considered inappropriate for these latter provisions.

The Committee thanks the Minister for this response which indicates that strict liability has been imposed as part of an infringement notice scheme.

Education Services for Overseas Students (Registration Charges) Amendment Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 12 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 24 November 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. 12 of 2000

This bill was introduced into the House of Representatives on 30 August 2000 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

Introduced as one of a package of five bills to reform the provision of education services to overseas students, the bill proposes the introduction of changes to the Annual Registration Charge (ARC) for education and training providers registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). This bill will provide the resources for the new Commonwealth role as provided for in the main bill.

Unlimited amount of levy
Proposed new section 5A

Item 7 of Schedule 1 to this bill proposes to insert a new section 5A in the *Education Services for Overseas Students (Registration Charges) Act 1997*. This new section authorises the Governor-General to vary the amount of annual registration charge by issuing a written instrument.

Such an instrument must be tabled in each House of the Parliament and does not take effect until each House has passed a resolution approving it (proposed subsection 5A(5)). These requirements are more onerous than those that usually apply to disallowable legislative instruments. However, it is unclear whether the Parliament may debate the propriety of any change in amount, or propose amendments to it.

The Committee, therefore, **seeks the Minister's advice** as to why this bill departs from the usual procedure for disallowable legislative instruments, and whether, under the procedures set out in the bill, variations in the amount of registration charge (other than indexation for changes in the CPI, as provided for in section 7 of the Principal Act) may be debated and possibly amended by the Parliament.

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

Relevant extract from the response from the Minister

> This provision was structured in this manner to provide the flexibility to vary registration charges promptly in response to developments in the industry, without the time lags involved in the legislative amendment process. Such flexibility may prove necessary to achieve the objects of the legislation.
>
> The decision to choose a mechanism requiring a positive resolution of both Houses of Parliament before an instrument under section 5A would come into effect was considered to provide greater scrutiny over the power to vary registration charges than the usual disallowance powers of the Parliament in relation to Regulations and other disallowable instruments.
>
> While it is still considered that proposed section 5A of the bill as drafted provides greater accountability to Parliament than Regulations or other disallowable instruments, if the Committee considers that this power could more appropriately be exercised through Regulations the Government would be prepared to consider an amendment to the Bill to effect this.
>
> As with all disallowable instruments, proposed section 5A does not provide a power for the Parliament to vary the instrument. Parliament only has the power to approve or not approve such an instrument.

The Committee thanks the Minister for this response which indicates that this provision was drafted in a form to enable flexibility in varying registration charges.

While there is much to recommend an approach which requires that both Houses must affirmatively resolve to approve any such variation before it can take effect, this Committee is mindful that such an instrument would not be scrutinised in detail by the Regulations and Ordinances Committee. Given the invaluable work of that Committee, the Committee sees merit in treating proposed variations in registration charges as conventional disallowable instruments.

Electoral Amendment (Political Honesty) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 15 of 2000*, in which it made various comments. Senator Murray has responded to those comments in a letter dated 24 November 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Senator's response are discussed below.

Extract from Alert Digest No. 15 of 2000

This bill was introduced into the Senate on 10 October 2000 by Senator Murray as a Private Senator's bill.

Introduced with the Charter of Political Honesty Bill 2000, the bill proposes to amend the *Commonwealth Electoral Act 1918* to impose a requirement that political advertising meet similar standards of probity and honesty as commercial advertising must meet under the Trade Practices Act. The bill prohibits political advertising that is misleading to a material extent.

Reversal of the onus of proof
Proposed new subsection 329(5)

Section 329 of the *Commonwealth Electoral Act 1918* deals with publications or other matter likely to mislead or deceive an elector in relation to the casting of a vote. Under existing subsection 329(5), it is a defence to a prosecution if the defendant proves that he or she did not know, and could not reasonably be expected to have known, that the matter or thing in question was likely to mislead.

This bill proposes to amend section 329 to include an additional prohibition on printing, publishing or distributing electoral advertisements containing a statement of fact that is inaccurate or misleading to a material extent.

Item 5 of Schedule 1 to the bill proposes to substitute a new subsection 329(5). This new subsection will provide a defence if the defendant proves that he or she took no part in determining the content of the matter, thing or advertisement, and could not reasonably be expected to have known that the matter, thing or advertisement was inaccurate or misleading. Clearly, this proposed new subsection will impose on a person charged with an offence the onus of proving these matters by way of a defence.

In his second reading speech, the proposer of the bill does not provide any reasons for imposing this onus on a defendant, however it seems that the new provision has adopted the approach contained in the existing provision, and extended it to the additional offence of misleading electoral advertising.

The Committee **seeks the advice of the Senator sponsoring the bill** as to appropriateness of requiring a person charged with publishing misleading matter, or misleading electoral advertising, to bear the onus of proving the matters set out in proposed new subsection 329(5).

Pending the Senator's advice, the Committee draws 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.

Relevant extract from the response from the Senator

> I thank the Committee for drawing my attention to the reversal of the onus of proof in proposed new subsection 329 (5) of the *Commonwealth Electoral Act 1918*. The section in the existing legislation prohibits misleading and deceptive conduct in limited circumstances. The existing s 329 (5) sets out relevant defences and contains a reversal of the onus of proof. The proposed Bill has widened the ambit of the offences under the Act without addressing the onus of proof reversal. I intend to have the Bill amended to ensure that the Crown bears the onus of proof.
>
> I thank the Committee for its comments of these bills.

The Committee thanks the Senator for this response and for the amendment foreshadowed.

Horticulture Marketing and Research and Development Services Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 14 of 2000*, in which it made various comments. The Parliamentary Secretary to the Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 31 October 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Parliamentary Secretary's response are discussed below.

Extract from Alert Digest No. 14 of 2000

This bill was introduced into the House of Representatives on 5 October 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill, together with the Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Bill 2000 proposes to create a 'not for personal profit' company to provide marketing and research and development services to the horticulture industry.

The new company, which will replace the Australian Horticultural Corporation, the Australian Dried Fruits Board, and the Horticultural Research and Development Board, will have industry representative bodies and voluntary funding contributors as its members, with voting rights allocated according to the amount of funds provided.

The bill provides that the Minister may declare a single company, or separate companies, to be the industry services body (which uses Commonwealth funds to provide marketing and research and development programs to the industry) and the export control body (which administers export control powers on behalf of the industry, issuing licences and charging fees for the purpose). Both bodies will be required to act in accordance with a Deed of Agreement which contains details about the body's accountability to the Commonwealth.

Parliamentary scrutiny of Ministerial decisions
Clauses 9 and 10

As noted above, clause 9 of this bill authorises the Minister to declare that an appropriately constituted company limited by guarantee, incorporated under the Corporations Law, which has entered into a deed of agreement with the Commonwealth, is the relevant industry services body and/or export control body.

Similarly, clause 10 authorises the Minister to declare that either company ceases to be the relevant industry services or export control body.

Under subclauses 9(6) and 10(5), copies of each such declaration are to be published in the *Gazette*, but no provision is made to ensure that only appropriate bodies may be so declared, or that such declarations are subject to Parliamentary oversight. The Committee, therefore, **seeks the Minister's advice** as to why such declarations are not subject to Parliamentary scrutiny. The Committee also **seeks the Minister's advice** as to how the new corporate framework to be established for the horticultural services industry compares with the corporate structures established elsewhere in the agricultural sector.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they may insufficiently subject the exercise of delegated 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 Parliamentary Secretary

Why the Declarations under Clauses 9 and 10 are not directly scrutinised by Parliament?

The declaration or cessation of declaration of the industry services body and the export control body are administrative decisions to be taken by the Minister under clauses 9 and 10. The decisions must be made by the Minister on the criteria set out in clauses 9(1) and (2), and 10(2). A decision by the Minister under these provisions will be subject to judicial review.

Provision is made for public notification of these decisions in the Gazette within 14 days so that the industry, the Parliament and the public generally are kept fully informed of the Minister's decisions. The Parliament is in a position to question the Minister about these administrative decisions through the normal Parliamentary processes, should this be considered necessary.

How does the new corporate framework for the horticulture services industry compare with corporate structures established elsewhere in the agricultural sector?

The new corporate framework is similar to that used for the establishment of Meat and Livestock Australia, which delivers marketing and R&D services to the meat industry. As in Meat and Livestock Australia the company is controlled by a Board elected by the members. In the case of horticulture the members are the horticulture industry sectors, in the case of meat it is the levy payers. Because of this difference, a key part of the policy position negotiated between the government and industry for the horticulture company is the direct involvement of levy payers' in company planning through Industry Advisory Committees within the company structure established under its constitution.

Unlike MLA, the new horticulture company will also be responsible for the administration of statutory export control powers. Because of these differences from MLA and other models, it has been considered appropriate to provide additional statutory provisions and safeguards in relation to the use of transferred industry funds and assets, and in relation to the administration of export control powers, by the new horticulture company, to ensure appropriate accountability. In part, this accountability comes through a deed of agreement to be entered into by the company with the Minister for the purposes of the Bills, and which is specifically referenced throughout the Bills. The Bill provides that the Deed is to be a public document, to provide for transparency to industry, Government and the Parliament.

The Committee thanks the Parliamentary Secretary for this response which indicates that "administrative decisions" such as the declaration or removal of a company as the industry services body will be subject to "the normal Parliamentary processes".

Under the proposed arrangements, some Parliamentary oversight of such decisions might be possible (for example, through the authority of Senate Legislation Committees to inquire into annual reports and the performance of departments and agencies). However, it is clear that this oversight will be more limited than that which presently exists. For example, it is unlikely that any declared industry services corporation will remain subject to the Senate Estimates process.

Given this more limited oversight, the Committee continues to draw Senators' attention to these provisions as they may insufficiently subject the exercise of delegated legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Non-disallowable Ministerial directions
Clause 29

Subparagraph 29(1)(a)(i) of this bill authorises the Minister to give a written direction to the industry services body or the export control body if the Minister is satisfied that such a direction is in the national interest "because of exceptional and urgent circumstances". Under subclause 29(2), the body must comply with such a direction.

Under subclause 29(3) the Minister must table a copy of such a direction within 15 sitting days "unless the Minister makes a written determination that doing so would be likely to prejudice the national interest of Australia or the body's commercial activities".

Neither "the national interest" nor "exceptional and urgent circumstances" are defined in the bill or referred to in the Explanatory Memorandum. In addition, clause 29 makes no provision for Parliamentary scrutiny of a Ministerial direction to either body. Further, were the Minister to make a written determination not to table such a direction (on national interest or commercial prejudice grounds), it is not clear whether, and how, Parliament would be informed of the fact that such a determination had been made.

Clause 29 seems to adopt an approach similar to that taken in section 32 of the current *Australian Horticultural Corporation Act 1987*. However existing section 32 contains a number of safeguards that do not appear in new clause 29. Specifically, section 32 requires:

- that a Ministerial direction also be published in the *Gazette* (s 32(3)(a)(i));
- that particulars of the direction and its impact on the operations of the relevant body be reported on (s 32(3)(b)); and
- where the Minister declines to table a determination for reasons of likely prejudice to commercial activities, that this occurs only on the recommendation of the body concerned (s 32(4)(a)).

The Committee, therefore, **seeks the Minister's advice** as to:

- the circumstances contemplated by the terms "the national interest" and "exceptional and urgent circumstances";
- the reason why the bill makes no provision for Parliamentary scrutiny of directions under clause 29, or how the Parliament is to be made aware of, and able to scrutinise, determinations not to table such directions;

- the reason why the bill does not include the additional safeguards contained in section 32 of the existing *Australian Horticultural Corporation Act 1987*; and
- the appropriateness of retaining key powers, such as the ability to issue binding Ministerial directions, while establishing a new company which is to be "accountable to shareholders for the effective use of funds provided".

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may insufficiently subject the exercise of delegated 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 Parliamentary Secretary

What are the circumstances contemplated by the terms "the national interest" and "exceptional and urgent circumstances" in Clause 29

This clause is provided to provide a reserve power to the Minister in circumstances where the direction is needed in the national interest because of exceptional and urgent circumstances. Such circumstances may arise for example where the industry services body is required to immediately suspend an R&D program or marketing program because to continue the spending would place the national interest at risk (eg ongoing joint research expenditure with a country which Australia has suspended all diplomatic and commercial relations). Similarly in the case of the export control powers, a case may arise where the powers need to be suspended urgently for similar national interest reasons.

It is also possible circumstances may arise where a horticulture disease outbreak could occur, requiring urgent national response, including urgent research and development and/or marketing initiatives to be taken in the national interest. This provision of the Bill would allow the Minister to immediately engage the company and, if necessary, direct the company to allocate resources to the necessary R&D and marketing programs required, should the company not be sure of the position.

While not envisaged, it is possible in extreme circumstances for the company to decline to be the industry services body or the export control body if it could not accept the Ministerial direction.

The reason the Bill makes no provision for Parliamentary scrutiny of directions under clause 29, or how the Parliament is to be made aware of and able to scrutinise determinations not to table such directions.

Clause 29 of the Bill is consistent with section 32 of the present *Australian Horticultural Corporation Act 1987*, in that it provides for a direction made by the Minister under clause 29 to be tabled in the Parliament within 15 sitting days.

Neither the present *Australian Horticultural Corporation Act 1987* nor the Bill go to the further step of providing for such directions to be disallowable instruments, and this would be inappropriate given the exceptional and urgent national interest grounds on which a direction can be given by the Minister.

The only circumstances where tabling would not occur is if the Minister makes a written direction that tabling would be likely to prejudice the national interest of Australia or the bodies commercial interests. The latter circumstances are designed to protect the nation and the company in circumstances where to table the direction could be harmful to those interests. It is seen as necessary to provide such safeguards in the legislation, although it is acknowledged that Parliament would not be informed immediately of the determination. The Minister can be questioned about any directions through the normal Parliamentary processes, once Parliament is informed of these through the regular reporting requirements imposed on the company.

The reason why the Bill does not include the additional safeguards contained in section 32 of the existing *Australian Horticultural Corporation Act 1987*

The additional safeguards provided for in the *Australian Horticultural Corporation 1987 Act* were not carried across to the new legislation because of the change in arrangements from the Statutory Authority to a limited liability company operating under Corporations Law. Under this change, rather than requiring under legislation that the Statutory Corporation publish the particulars of the direction and an assessment of the impact of the direction on the Corporation in its annual report as a statutory requirement, the requirement to do this will be handled in the Deed of Agreement with the company made under clause 12 of the Bill.

The deed will specify that the company publish in its annual report the impact on it of any Ministerial direction, subject to any commercial confidentiality and public interest restrictions. This is considered to cover the safeguards presently in sections 32(3)(a)(i) and 32(3)(b) of the present Act.

The safeguard expressed in section 32(4)(a) of the present Act is covered by the requirement in clause 29(1)(a)(iii), that adequate opportunity be given to the directors to discuss with the Minister the impact of compliance with section 29(3) on the body's commercial activities.

The appropriateness of retaining key powers, such as the ability to issue binding Ministerial Directions, while establishing a new company which is to be " accountable to shareholders for effective use of funds provided".

In moving to a company arrangement for the delivery of services, the legislation, Deed of Agreement and Constitution all provide public accountability constraints on how the company operates, since levy payer and Government matching funds for R&D are involved. These requirements are necessary to ensure public accountability for use of these funds is met, while at the same time providing scope for the company to focus on the commercial delivery of the services in an efficient and effective manner to its members, the horticulture industries. The company is also being given responsibility for administering export control powers.

The Ministerial Direction provision is retained to ensure that in circumstances of the national interest because of exceptional and urgent circumstances, the Government is in a position to issue a direction to the company and have it followed, backed by the legislation, under the constraints contained in clause 29.

I have also noted that the Committee has provided comments on aspects of the *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Bill 2000.* These do not require further comment.

Thank you for your consideration of these legislative matters.

The Committee thanks the Parliamentary Secretary for this comprehensive response which indicates that certain constraints on how the company operates have been imposed to ensure public accountability given that "levy payer and Government matching funds for R&D are involved".

However, while the bill authorises the Minister to issue directions to enforce a measure of accountability, it does not enable the Parliament to adequately scrutinise these directions.

For example, Ministerial directions expressed to be made 'in the national interest because of exceptional and urgent circumstances' may not even come to the attention of the Parliament until it is informed "through the regular reporting requirements imposed on the company" by the Deed of Agreement. Further, while the Deed will specify that the company report on the impact of any Ministerial direction, this will be "subject to any commercial confidentiality and public interest restrictions". Given this apparent lack of Parliamentary scrutiny, the Committee continues to draw Senators' attention to this provision, as it may insufficiently subject the exercise of delegated legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Privacy Amendment (Private Sector) Bill 2000

Introduction

The Committee dealt with this bill in *Alert Digest No. 6 of 2000*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 3 October 2000. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 6 of 2000

This bill was introduced into the House of Representatives on 12 April 2000 by the Attorney-General. [Portfolio responsibility: Attorney-General]

After more than 12 months of intensive consultation with Australian business, consumers and privacy advocates, this bill proposes to amend the *Privacy Act 1988* to establish a national scheme for the appropriate collection, holding, use, correction, disclosure and transfer of personal information by private sector organisations. The scheme is to operate through codes of practice adopted by private sector organisations and the National Privacy Principles.

The bill also proposes consequential amendments to the *Administrative Decisions (Judicial Review) Act 1977, Customs Act 1901, Telecommunications Act* 1997 and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and amends the *Australian Security Intelligence Organisation Act 1979* and *Privacy Act 1988* in relation to disclosures to intelligence bodies.

Commencement
Subclause 2(1)

Subclause 2(1) of this bill provides that it is to commence at least 12 months after it receives Royal Assent. *Drafting Instruction No. 2 of 1989*, issued by the Office of Parliamentary Counsel, states that the Explanatory Memorandum should provide reasons if an Act is to commence more than 6 months after Royal Assent.

While it is likely that the delayed commencement provision is intended to enable businesses to adjust their practices in order to comply with scheme established by the bill, this is not made clear in the otherwise comprehensive Explanatory Memorandum.

The Committee therefore, **seeks the advice of the Attorney-General** on the reasons for departing from the approach to commencement recommended by the Office of Parliamentary Counsel in the case of this bill.

Pending the Attorney's response, the Committee draws Senators' attention to these provisions, as they may be considered to inappropriately delegate legislative powers, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Attorney-General

Subclause 2(1) of the Bill provides that the legislation is to commence on the later of the following days:

(a) the first day after the end of the period of 12 months beginning on the day on which the Act receives the Royal Assent;

(b) 1 July 2001.

As it is now after 1 July 2000, commencement will be determined under subclause 2(1)(a).

The Committee has correctly identified the basis for the delayed commencement which is to enable businesses to adjust their practices in order to comply with the scheme established by the Bill. In addition, as the scheme encourages private sector organisations and industries that handle personal information to develop privacy codes of practice, the delayed commencement is also intended to allow time for the private sector to develop privacy codes or revise existing codes to submit to the Privacy Commissioner for approval once the legislation has commenced.

The Committee may also be interested to know that while the legislation itself will commence in accordance with subclause 2(1), the Bill contains further provisions (in item 54 of Schedule 1) concerning the application of the National Privacy Principles (NPPs) set out in Schedule 3 of the Bill. In particular, proposed new section 16D delays the application of the NPPs to small business for a further 12 months from when the legislation commences. The reason for this extra period, which was specified in the Explanatory Memorandum, is to allow small businesses extra time to ensure compliance with the legislation. The Government acknowledges that small businesses need to focus on implementing the new tax system and other Government initiatives. Therefore, the extra time for compliance with privacy standards is considered appropriate.

The Committee thanks the Attorney-General for this response.

Inappropriate delegation of legislative power
Proposed new subsections 6A(2) and 6B(2)

Proposed new subsection 6A(2) provides that an act or practice does not breach a National Privacy Principle if the act or practice is undertaken by a contracted service provider for a Commonwealth contract for the purposes of that contract, and is authorised by a provision of the contract that is inconsistent with the Principle.

Proposed new subsection 6B(2) deems that an act or practice does not breach an approved privacy code in similar circumstances.

The Explanatory Memorandum states that the effect of these provisions is that a privacy clause in a Commonwealth contract that is inconsistent with a National Privacy Principle or an approved privacy code will prevail over that Principle or code.

This would seem to permit the provisions of the Act to be circumvented by contract. However, proposed new section 95B, to be inserted by item 131 of Schedule 1 to the bill, requires such contracts to contain terms which oblige service providers not to do an act or engage in conduct which contravenes the privacy principles.

In general terms, the approach taken seems to exempt service providers under Commonwealth contracts from having to observe the privacy principles, but to require the relevant contracts to incorporate them. It is not clear why such an approach has been adopted. It is also not clear how this approach will work in practice. The Committee, therefore, **seeks the Attorney-General's advice** as to why this approach has been taken in relation to service providers under Commonwealth contracts, and would appreciate some examples in plain English of how this approach will work in practice.

Pending the Attorney's response, the Committee draws Senators' attention to these provisions, as they may be considered to inappropriately delegate legislative powers, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Relevant extract from the response from the Attorney-General

> The Committee has sought clarification of the approach reflected in proposed new subsections 6A(2) and 6B(2) and has asked for an example of how the approach would work in practice.
>
> Subsections 6A(2) and 6B(2) are two of many provisions in the Bill that address issues arising from the outsourcing of Commonwealth Government functions and the

need to ensure that appropriate privacy protection is in place when such outsourcing occurs.

When the Bill comes into effect different privacy standards will apply to private sector organisations to those that currently apply to Commonwealth public sector agencies under the existing Act. Commonwealth agencies are required to comply with the Information Privacy Principles (IPPs) set out in section 14 of the Act. When the Bill comes into effect, private sector organisations will be required to comply with the National Privacy Principles (NPPs) set out in proposed Schedule 3.

While both sets of principles have common features, there are some differences. The most notable of the differences concern how personal information can be used or disclosed. There are separate IPPs for use and disclosure of personal information by Commonwealth agencies and the exceptions that allow either use or disclosure in each IPP are slightly different. In relation to the private sector, both use and disclosure of personal information is covered by the same NPP. Among other things, this NPP allows a degree of use or disclosure of personal information by private sector organisations for the secondary purpose of direct marketing. The legislative scheme also contemplates sharing of information by related bodies corporate. In simple terms the IPPs impose more stringent requirements on Commonwealth agencies than the proposed NPPs will on the private sector. As a result of this difference the Government was concerned to ensure that the Bill provides for adequate protection when a Commonwealth agency outsources functions to the private sector.

The Government considers that when a Commonwealth agency contracts a private sector organisation to provide services for or on behalf of the Commonwealth, and the contract requires the private sector organisation to collect or hold personal information on behalf of the Commonwealth, the appropriate privacy standards that ought to apply to that information are those that apply to the outsourcing agency, that is, the IPPs. The Government considers that the outsourcing agency should be able to specify what the personal information can be used for and to whom, and in what circumstances, it can be disclosed.

Proposed new section 95B, to be inserted by item 131 of the Bill, is intended to ensure that Commonwealth agencies include privacy clauses in Commonwealth contracts with private sector contractors, and that those clauses and subsequent clauses in any subcontracts are consistent with the agency's own obligations under the IPPs.

The approach in the Bill does not exempt contracted service providers from having to observe the NPPs. The Bill acknowledges that there may be apparent inconsistency between what a private sector organisation can do under the NPPs and what it can do under the Commonwealth contract, and that where there is inconsistency the contract prevails. Proposed new subsections 6A(2) and 6B(2) are to ensure that the standards imposed under the Commonwealth contract (which, by virtue of proposed new section 95B, are to be the more stringent IPPs) will be paramount when it comes to an act or practice undertaken by a contracted service provider pursuant to a Commonwealth contract.

The Committee has asked for an example of how the proposed approach would operate in practice. Under NPP 2 an organisation may use or disclose personal information it holds for purposes other than the purposes for which the information was collected in the situations set out in the NPP. A Commonwealth agency contracting with that organisation may want to limit the use and disclosure of the

personal information held by the organisation for the purposes of the contract in a manner that is consistent with obligations that apply to Government held information, but which may be inconsistent with what the organisation could otherwise have done under NPP 2. The Bill ensures that the Commonwealth agency can do so.

While I note the Committee's view that the provisions may be considered to inappropriately delegate legislative powers, I do not agree that this is the case. What they are intended to do is ensure that personal information collected by Commonwealth Government agencies remains appropriately protected in the outsourcing context. The provisions ensure that, where appropriate, the more stringent legislative privacy standards (the IPPs) can be applied to private sector organisations contracting with the Government than the NPPs that would otherwise apply to those organisations.

I hope that the above satisfactorily clarifies these matters for the Committee.

The Committee thanks the Attorney-General for this comprehensive response.

Winston Crane
Deputy Chairman

Senator John Faulkner

Leader of the Opposition in the Senate
Shadow Minister for Public Administration and Government Services
Shadow Minister for Olympic Coordination and the Centenary of Federation

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

Dear Barney,

I refer to comments made by the Scrutiny of Bills Committee in Alert Digest No. 16/2000 about clause 21 of the Auditor of Parliamentary Allowances and Entitlements Bill 2000, and I note the committee's general concern with the issue of search and entry powers.

As the committee would be aware, many of the powers in the bill are modelled on those of the Auditor-General and the Ombudsman. Clause 21 of the bill is based on section 33 of the *Auditor-General Act 1997*, although it differs from section 33 in not being confined to Commonwealth property. While the clause does confer a very wide power on the Auditor of Parliamentary Allowances and Entitlements to investigate allegations of the misuse of parliamentary entitlements, the bill also provides for the operations of the Auditor to be closely overseen by, and accountable to, the Parliament, more so in fact than any other Commonwealth statutory officer. This will act as a safeguard against any misuse of the Auditor's powers, while at the same time ensuring that the Auditor has all the necessary powers to strengthen public confidence in the integrity of the system of parliamentary allowances and entitlements.

I trust this addresses the committee's concerns.

Yours sincerely,

JOHN FAULKNER

23 November 2000

Parliament House, Canberra ACT 2600. Telephone (02) 6277 3233. Facsimile (02) 6277 3415

PARLIAMENT OF AUSTRALIA • THE SENATE

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27 NOV 2000
Senate Standing C'ttee for the Scrutiny of Bills

24 November 2000

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

Dear Senator Cooney

Scrutiny of Bills Alert Digest

I am writing in response to comments contained in the Scrutiny of Bills Alert Digest No. 15 of 2000 concerning the *Charter of Political Honesty Bill 2000* and the *Electoral Amendment (Political Honesty) Bill 2000*. Both bills were introduced by me as Private Senator's Bills.

Charter of Political Honesty Bill 2000 – Subclauses 9 (1) and (3)

The Alert Digest claims that the powers conferred by these provisions on the committee constituted under the Bill are 'not subject to any form of review, whether administrative, legislative or judicial.' I am advised that no attempt has been made to exclude judicial review of decisions made under the Bill.

I am advised that if the Committee were to abuse its powers by, for example, acting in pursuit of an improper purpose, basing its decision on irrelevant considerations, acting under dictation or subdelegating its authority, those decisions could be successfully challenged in the courts. If their decisions were in any way ultra vires or constituted a denial of natural justice they would be subject to review.

The merits of decisions made (as distinct from their legality) are the domain of the expert committee constituted under the Bill. However, it must be understood that the Committee is itself a mechanism for reviewing decisions made by ministers or their delegates. At this stage, I take the view that providing for a further avenue of review on the merits is unnecessary. However, if a Senate Committee examining this Bill were to recommend that there be a further avenue of merits review I would certainly reconsider my position.

The Scrutiny of Bills Committee has drawn to my attention the fact that these provisions 'may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions.' In my view, that is a more accurate

description of the status quo than the situation that would exist under the proposed legislation. Decisions currently made by ministers or their delegates in relation to government advertising are not subject to any effective review process. Far from allowing the exercise of arbitrary non-reviewable power, this Bill provides for a much-needed avenue of review to soften the arbitrary nature of existing powers.

Electoral Amendment (Political Honesty) Bill 2000

I thank the Committee for drawing my attention to the reversal of the onus of proof in proposed new subsection 329 (5) of the *Commonwealth Electoral Act 1918*. The section in the existing legislation prohibits misleading and deceptive conduct in limited circumstances. The existing s 329 (5) sets out relevant defences and contains a reversal of the onus of proof. The proposed Bill has widened the ambit of the offences under the Act without addressing the onus of proof reversal. I intend to have the Bill amended to ensure that the Crown bears the onus of proof.

I thank the Committee for its comments on these bills.

Yours Sincerely

Senator Andrew Murray
Australian Democrats Senator for Western Australia

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

24 NOV 2000

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

Dear Senator Cooney

I refer to the Senate Standing Committee for the Scrutiny of Bills Alert Digest No. 12 of 2000 (6 September 2000) concerning the Committee's comment on the following legislation:

Education Services for Overseas Students (Assurance Fund Contributions) Bill 2000;
Education Services for Overseas Students Bill 2000; and
Education Services for Overseas Students (Registration Charges) Amendment Bill 2000.

As the Minister with portfolio responsibility for these Bills, I provide the attached response to the Committee's comments.

A copy of my response, and this letter, will be forwarded by email, as requested to Ms Margaret Lindeman at Margaret.lindeman@aph.gov.au. Should you also require a disc copy please contact Ms Susan Bennett, Director, ESOS Reform Group on (02) 6240 7506.

The contact officer in my Department with responsibility for this matter is Ms Sara Cowan, Assistant Secretary, International Policy Branch. Should you have any queries, please contact her on (02) 6240 7388 or email on sara.cowan@detya.gov.au.

Yours sincerely

David Kemp

DAVID KEMP

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Senate Standing Committee for the Scrutiny of Bills

Submission by Department of Education, Employment, Training and Youth Affairs.

Education Services for Overseas Students (Assurance Fund Contributions) Bill 2000 (Clause 6)

> Possible breach of principle 1(a)(iv) (inappropriate delegation of legislative powers) and principle 1(a)(v) (insufficient subjection of the exercise of legislative power to parliamentary scrutiny) of the Committee's terms of reference.

The Committee seeks advice as to why the Bill does not specify an upper limit for annual contributions or levies, or set out criteria by which such contributions or levies might be determined. The Committee also seeks advice as to why the contributions criteria to be developed by the Fund Manger are not to be tabled in the Parliament or disallowable by the Parliament.

Response

The upper limit for annual contributions is not specified in the Bill as the contributions and the limits of such will be set commercially, in line with their insurance nature. The Fund is essentially a form of insurance, and contributions should be set on the basis of actuarial assessment. The Fund will be industry-based, with contributions determined according to the commercial risk presented to it. It will be managed by a professional Fund Manager, with expertise in commercial risk assessment.
As the Committee has noted, the criteria are set out in the principal Act.

The possibility of disallowance of the contribution criteria calculated on the basis of actuarial advice, could undermine the financial viability of the Fund and create greater instability for the education export industry and consequent risks for the overseas students.

Education Services for Overseas Students Bill 2000 (Subclauses 104(2) and 105(2))

Subclause 104(1) states that a registered provider who fails to provide the information about accepted overseas students required under subsection 19(1) is guilty of a separate offence for each event for which required information is not given. Subclause 104(2) states that strict liability applies to this offence. Similarly, subclause 105(1) states that a registered provider who breaches the record-keeping requirements under section 21 is guilty of a separate offence for each student for whom the required records are not kept or retained. Subclause 105(2) states that strict liability applies to this offence.

The Committee seeks advice as to the reason for applying strict liability for offences under subclauses 104(1) and 105(1).

Response

Record-keeping (s105) and Notification requirements (s104) are critical requirements for the effective operation of the electronic confirmation of enrolment system that is designed to enhance the integrity of enrolment of overseas students and to reduce visa fraud.

The imposition of strict liability in enforcing these types of record-keeping obligations is now quite common (see s.50 of the *Excise Act 1901;* s. 11C of the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No 1) 2000;* s.15 of the *Aircraft Noise Levy Collection Act 1995*).

Notifying the Secretary of records and any changes to them is vital for the Department to monitor compliance by the provider with its obligations under the legislation and for the Department of Immigration and Multicultural Affairs to monitor any visa abuse.

It was essential to make the failure to comply with these obligations an offence in order to indicate the serious nature of the obligation, and to deter those inclined to offend against it. It was recognised however, that prosecution of every offence would be time and resource consuming for both the Commonwealth and the defendants. It was therefore decided to provide for the imposition of penalties by way of infringement notices (s.106) as an alternative to prosecution.

The Criminal Law Division of the Attorney-General's Department advised that it is Commonwealth criminal law policy that offences underpinned by an infringement notice must be strict liability offences. Only strict liability offences, with clear-cut physical elements, are suitable for infringement notice schemes.

The obligations/prohibitions in subsection 19(1) and section 21, underpinned by subsections 104(1) and 105(1) respectively, are of a kind that can legitimately be made strict i.e. they have clear-cut physical elements. Matters in subsection 19(2) and section 20, however, require an assessment of whether a particular student has breached his or her visa conditions. This is not a clear-cut inquiry. Because of this strict liability and infringement notices were considered inappropriate for these latter provisions.

Education Services for Overseas Students (Registration Charges) Amendment Bill 2000 (Proposed new section 5A)

> Possible breach of principle 1(a)(iv) of the Committee's terms of reference (inappropriately delegate legislative powers).

Proposed section 5A will authorise the Governor-General to vary the amount of annual registration charge by issuing a written instrument. Such an instrument must be tabled in each House of the Parliament and would not take effect until each House had passed a resolution approving it.

The Committee suggests these requirements are more onerous than those that usually apply to disallowable legislative instruments. The Committee seeks advice as to why this bill departs from the usual procedures for disallowable legislative instruments and whether, under the procedures set out in the bill, variations in the amount of registration charge (other than indexation for changes in the CPI, as provided for in section 7 of the Principal Act) may be debated and possibly amended by the Parliament.

Response

This provision was structured in this manner to provide the flexibility to vary registration charges promptly in response to developments in the industry, without the time lags involved in the legislative amendment process. Such flexibility may prove necessary to achieve the objects of the legislation.

The decision to choose a mechanism requiring a positive resolution of both Houses of Parliament before an instrument under section 5A would come into effect was considered to provide greater scrutiny over the power to vary registration charges than the usual disallowance powers of the Parliament in relation to Regulations and other disallowable instruments.

While it is still considered that proposed section 5A of the bill as drafted provides greater accountability to Parliament than Regulations or other disallowable instruments, if the Committee

considers that this power could more appropriately be exercised through Regulations the Government would be prepared to consider an amendment to the Bill to effect this.

As with all disallowable instruments, proposed section 5A does not provide a power for the Parliament to vary the instrument. Parliament only has the power to approve or not approve such an instrument.

Senator the Hon Judith Troeth
Senator for Victoria

PARLIAMENTARY SECRETARY TO THE MINISTER
FOR AGRICULTURE, FISHERIES AND FORESTRY

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

31 OCT 2000

RECEIVED
1 NOV 2000
Senate Standing C'ttee
for the Scrutiny of Bills

Dear Senator ~~Cooney~~ Barney

I refer to matters raised in the Alert Digest 14/00, relating to the *Horticulture Marketing and Research and Development Services Bill 2000* and the *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Bill 2000.*

Why the Declarations under Clauses 9 and 10 are not directly scrutinised by Parliament?

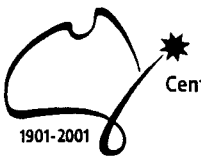
The declaration or cessation of declaration of the industry services body and the export control body are administrative decisions to be taken by the Minister under clauses 9 and 10. The decisions must be made by the Minister on the criteria set out in clauses 9(1) and (2), and 10(2). A decision by the Minister under these provisions will be subject to judicial review.

Provision is made for public notification of these decisions in the Gazette within 14 days so that the industry, the Parliament and the public generally are kept fully informed of the Minister's decisions. The Parliament is in a position to question the Minister about these administrative decisions through the normal Parliamentary processes, should this be considered necessary.

How does the new corporate framework for the horticulture services industry compare with corporate structures established elsewhere in the agricultural sector?

The new corporate framework is similar to that used for the establishment of Meat and Livestock Australia, which delivers marketing and R&D services to the meat industry. As in Meat and Livestock Australia the company is controlled by a Board elected by the members. In the case of horticulture the members are the horticulture industry sectors, in the case of meat it is the levy payers. Because of this difference, a key part of the policy position negotiated between the government and industry for the horticulture company is the direct involvement of levy payers' in company planning through Industry Advisory Committees within the company structure established under its constitution.

Unlike MLA, the new horticulture company will also be responsible for the administration of statutory export control powers. Because of these differences from MLA and other models, it has been considered appropriate to provide additional statutory provisions and safeguards in relation to the use of transferred industry funds and assets, and in relation to the administration of export control powers, by the new horticulture company, to ensure appropriate accountability. In part, this accountability comes through a deed of agreement to be entered into by the company with the Minister for the purposes of the Bills, and which is specifically referenced throughout the Bills. The Bill provides that the Deed is to be a public document, to provide for transparency to industry, Government and the Parliament.



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What are the circumstances contemplated by the terms "the national interest" and "exceptional and urgent circumstances" in Clause 29

This clause is provided to provide a reserve power to the Minister in circumstances where the direction is needed in the national interest because of exceptional and urgent circumstances. Such circumstances may arise for example where the industry services body is required to immediately suspend an R&D program or marketing program because to continue the spending would place the national interest at risk (eg ongoing joint research expenditure with a country which Australia has suspended all diplomatic and commercial relations). Similarly in the case of the export control powers, a case may arise where the powers need to be suspended urgently for similar national interest reasons.

It is also possible circumstances may arise where a horticulture disease outbreak could occur, requiring urgent national response, including urgent research and development and/or marketing initiatives to be taken in the national interest. This provision of the Bill would allow the Minister to immediately engage the company and, if necessary, direct the company to allocate resources to the necessary R&D and marketing programs required, should the company not be sure of the position.

While not envisaged, it is possible in extreme circumstances for the company to decline to be the industry services body or the export control body if it could not accept the Ministerial direction.

The reason the Bill makes no provision for Parliamentary scrutiny of directions under clause 29, or how the Parliament is to be made aware of and able to scrutinise determinations not to table such directions.

Clause 29 of the Bill is consistent with section 32 of the present *Australian Horticultural Corporation Act 1987*, in that it provides for a direction made by the Minister under clause 29 to be tabled in the Parliament within 15 sitting days. Neither the present *Australian Horticultural Corporation Act 1987* nor the Bill go to the further step of providing for such directions to be disallowable instruments, and this would be inappropriate given the exceptional and urgent national interest grounds on which a direction can be given by the Minister.

The only circumstances where tabling would not occur is if the Minister makes a written direction that tabling would be likely to prejudice the national interest of Australia or the bodies commercial interests. The latter circumstances are designed to protect the nation and the company in circumstances where to table the direction could be harmful to those interests. It is seen as necessary to provide such safeguards in the legislation, although it is acknowledged that Parliament would not be informed immediately of the determination. The Minister can be questioned about any directions through the normal Parliamentary processes, once Parliament is informed of these through the regular reporting requirements imposed on the company.

The reason why the Bill does not include the additional safeguards contained in section 32 of the existing *Australian Horticultural Corporation Act 1987*

The additional safeguards provided for in the *Australian Horticultural Corporation 1987 Act* were not carried across to the new legislation because of the change in arrangements from the Statutory Authority to a limited liability company operating under Corporations Law. Under this change, rather than requiring under legislation that the Statutory Corporation publish the particulars of the direction and an assessment of the impact of the direction on the Corporation in its annual report as a statutory requirement, the requirement to do this will be handled in the Deed of Agreement with the company made under clause 12 of the Bill. The deed will specify that the company publish in its annual report the impact on it of any Ministerial direction, subject to any commercial confidentiality and public interest restrictions. This is considered to cover the safeguards presently in sections 32(3)(a)(i) and 32(3)(b) of the present Act.

The safeguard expressed in section 32(4)(a) of the present Act is covered by the requirement in clause 29(1)(a)(iii), that adequate opportunity be given to the directors to discuss with the Minister the impact of compliance with section 29(3) on the body's commercial activities.

The appropriateness of retaining key powers, such as the ability to issue binding Ministerial Directions, while establishing a new company which is to be " accountable to shareholders for effective use of funds provided".

In moving to a company arrangement for the delivery of services, the legislation, Deed of Agreement and Constitution all provide public accountability constraints on how the company operates, since levy payer and Government matching funds for R&D are involved. These requirements are necessary to ensure public accountability for use of these funds is met, while at the same time providing scope for the company to focus on the commercial delivery of the services in an efficient and effective manner to its members, the horticulture industries. The company is also being given responsibility for administering export control powers.

The Ministerial Direction provision is retained to ensure that in circumstances of the national interest because of exceptional and urgent circumstances, the Government is in a position to issue a direction to the company and have it followed, backed by the legislation, under the constraints contained in clause 29.

I have also noted that the Committee has provided comments on aspects of the *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Bill 2000.* These do not require further comment.

Thank you for your consideration of these legislative matters.

Yours sincerely

Judith Troeth

JUDITH TROETH

The Hon Daryl Williams AM QC MP

Attorney-General

00/4026ISL RG
Min. No.: 201079

03 OCT 2000

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

Dear Senator Cooney

I refer to the letter of 11 May 2000 from the Secretary of the Standing Committee for the Scrutiny of Bills inviting a response to the comments contained in Scrutiny of Bills Alert Digest No. 6 of 2000 (10 May 2000) in relation to the Privacy Amendment (Private Sector) Bill 2000 ('the Bill'). I thank the Committee for its interest in the Bill and provide the following responses to the matters raised in the Alert Digest.

Commencement - Subclause 2(1)

Subclause 2(1) of the Bill provides that the legislation is to commence on the later of the following days:

(a) the first day after the end of the period of 12 months beginning on the day on which the Act receives the Royal Assent;

(b) 1 July 2001.

As it is now after 1 July 2000, commencement will be determined under subclause 2(1)(a).

The Committee has correctly identified the basis for the delayed commencement which is to enable businesses to adjust their practices in order to comply with the scheme established by the Bill. In addition, as the scheme encourages private sector organisations and industries that handle personal information to develop privacy codes of practice, the delayed commencement is also intended to allow time for the private sector to develop privacy codes or revise existing codes to submit to the Privacy Commissioner for approval once the legislation has commenced.

The Committee may also be interested to know that while the legislation itself will commence in accordance with subclause 2(1), the Bill contains further provisions (in item 54 of Schedule 1) concerning the application of the National Privacy Principles (NPPs) set out in Schedule 3 of the Bill. In particular, proposed new section 16D delays the application of the NPPs to small business for a further 12 months from when the legislation commences. The reason for this extra period, which was specified

in the Explanatory Memorandum, is to allow small businesses extra time to ensure compliance with the legislation. The Government acknowledges that small businesses need to focus on implementing the new tax system and other Government initiatives. Therefore, the extra time for compliance with privacy standards is considered appropriate.

Inappropriate delegation of legislative power - Proposed new subsections 6A(2) and 6B(2)

The Committee has sought clarification of the approach reflected in proposed new subsections 6A(2) and 6B(2) and has asked for an example of how the approach would work in practice.

Subsections 6A(2) and 6B(2) are two of many provisions in the Bill that address issues arising from the outsourcing of Commonwealth Government functions and the need to ensure that appropriate privacy protection is in place when such outsourcing occurs.

When the Bill comes into effect different privacy standards will apply to private sector organisations to those that currently apply to Commonwealth public sector agencies under the existing Act. Commonwealth agencies are required to comply with the Information Privacy Principles (IPPs) set out in section 14 of the Act. When the Bill comes into effect, private sector organisations will be required to comply with the National Privacy Principles (NPPs) set out in proposed Schedule 3.

While both sets of principles have common features, there are some differences. The most notable of the differences concern how personal information can be used or disclosed. There are separate IPPs for use and disclosure of personal information by Commonwealth agencies and the exceptions that allow either use or disclosure in each IPP are slightly different. In relation to the private sector, both use and disclosure of personal information is covered by the same NPP. Among other things, this NPP allows a degree of use or disclosure of personal information by private sector organisations for the secondary purpose of direct marketing. The legislative scheme also contemplates sharing of information by related bodies corporate. In simple terms the IPPs impose more stringent requirements on Commonwealth agencies than the proposed NPPs will on the private sector. As a result of this difference the Government was concerned to ensure that the Bill provides for adequate protection when a Commonwealth agency outsources functions to the private sector.

The Government considers that when a Commonwealth agency contracts a private sector organisation to provide services for or on behalf of the Commonwealth, and the contract requires the private sector organisation to collect or hold personal information on behalf of the Commonwealth, the appropriate privacy standards that ought to apply to that information are those that apply to the outsourcing agency, that is, the IPPs. The Government considers that the outsourcing agency should be able to specify what the personal information can be used for and to whom, and in what circumstances, it can be disclosed.

Proposed new section 95B, to be inserted by item 131 of the Bill, is intended to ensure that Commonwealth agencies include privacy clauses in Commonwealth contracts with private sector contractors, and that those clauses and subsequent clauses in any subcontracts are consistent with the agency's own obligations under the IPPs.

The approach in the Bill does not exempt contracted service providers from having to observe the NPPs. The Bill acknowledges that there may be apparent inconsistency between what a private sector organisation can do under the NPPs and what it can do under the Commonwealth contract, and that where there is inconsistency the contract prevails. Proposed new subsections 6A(2) and 6B(2) are to ensure that the standards imposed under the Commonwealth contract (which, by virtue of proposed new section 95B, are to be the more stringent IPPs) will be paramount when it comes to an act or practice undertaken by a contracted service provider pursuant to a Commonwealth contract.

The Committee has asked for an example of how the proposed approach would operate in practice. Under NPP 2 an organisation may use or disclose personal information it holds for purposes other than the purposes for which the information was collected in the situations set out in the NPP. A Commonwealth agency contracting with that organisation may want to limit the use and disclosure of the personal information held by the organisation for the purposes of the contract in a manner that is consistent with obligations that apply to Government held information, but which may be inconsistent with what the organisation could otherwise have done under NPP 2. The Bill ensures that the Commonwealth agency can do so.

While I note the Committee's view that the provisions may be considered to inappropriately delegate legislative powers, I do not agree that this is the case. What they are intended to do is ensure that personal information collected by Commonwealth Government agencies remains appropriately protected in the outsourcing context. The provisions ensure that, where appropriate, the more stringent legislative privacy standards (the IPPs) can be applied to private sector organisations contracting with the Government than the NPPs that would otherwise apply to those organisations.

I hope that the above satisfactorily clarifies these matters for the Committee.

Yours sincerely

Daryl Williams

DARYL WILLIAMS