
# SENATE STANDING COMMITTEE

# FOR THE

# SCRUTINY OF BILLS

## SECOND REPORT

## OF

## 2002

## 13 March 2002

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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

## SECOND REPORT OF 2002

The Committee presents its Second Report of 2002 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:

*Coal Industry Repeal Act 2001*

Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002

Higher Education Legislation Amendment Bill (No. 1) 2002

# *Coal Industry Repeal Act 2001*

## *Introduction*

The Committee dealt with the bill for this Act in *Alert Digest No. 10 of 2000* and commented in relation to the bill's commencement. In *Alert Digest No. 1 of 2002*, in response to correspondence received, the Committee made further comment about the notification of the proclamation of the Act's commencement. The Minister for Industry, Tourism and Resources has responded to those comments in a letter dated 5 March 2002. 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.

It is noted that, on 20 February 2002, the government introduced the Coal Industry Repeal (Validation of Proclamation) Bill 2002 to retrospectively validate all matters relating to the proclamation of the Act and any actions taken on the assumption of the Act's validity.

## *Extract from Alert Digest No. 1 of 2002*

The bill for this Act was introduced into the House of Representatives on 28 June 2000 by the Parliamentary Secretary to the Minister for Industry, Science and Resources, and was considered by the Committee in *Alert Digest No 10. of 2000*.

The Act repeals the Commonwealth *Coal Industry Act 1946* and provides for the dissolution of the Joint Coal Board as constituted under that Act and the New South Wales *Coal Industry Act 1946*. The Act also supports New South Wales in making a law to provide for the transfer of all the assets, rights, liabilities and existing staff of the Joint Coal Board to a new State-administered corporation or entity; and other matters incidental to the dissolution of the Joint Coal Board.

### Notification of commencement
### Section 2

In *Alert Digest No 10. of 2000* the Committee dealt with this legislation in bill form. Specifically the Committee noted that clause 2 of the bill provided that it was to commence on Proclamation, with no further date set within which it must commence in any event.

The Committee noted that this was a departure from the approach to commencement referred to in *Drafting Instruction No. 2 of 1989*, issued by the Office of Parliamentary Counsel. However, the Explanatory Memorandum stated that the commencement of the bill depended on the passage of complementary legislation through the New South Wales Parliament, and that this was one of the recognised exceptions to that *Drafting Instruction*. As a consequence, the Committee made no further comment on the bill.

The Committee has since received some further information concerning the Proclamation of this Act.

On 20 December 2001 the Governor-General, by proclamation, fixed 1 January 2002 as the day on which this Act commenced. However, this proclamation was apparently not published until 1 February 2002 (see *Gazette* No S 37, Friday 1 February 2002). Therefore, it would seem that the Act was in operation for 1 month, yet no-one had been made aware of that fact.

The Committee is unaware of other occasions on which this approach to the notification of commencement has been taken, and considers that it appears to represent an unfortunate precedent. The Committee would, therefore, **appreciate the Minister's advice** as to why this proclamation was published after the date on which the Act commenced, and whether anyone has been disadvantaged as a result.

*Pending the Minister's response, the Committee draws Senators' attention to this approach to the notification of commencement, 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 Minister*

> Thank you for your letter of 21 February 2002 concerning the notification of the commencement of the *Coal Industry Repeal Act 2001* (the Act).
>
> As is noted in the Committee's *Alert Digest* 1/02, on 20 December 2001 the Governor-General in Executive Council made a Proclamation setting the Act's commencement date at 1 January 2002. Due to an administrative oversight however, the Proclamation was not Gazetted before that date.
>
> Legal advice is that as a result of this oversight, there is doubt that the Act has commenced, either on 1 January 2002 as intended or such later date (including from the date of Gazettal of the Proclamation). Under complementary New South Wales legislation which commenced on 1 January 2002, New South Wales proceeded on the assumption that the Proclamation was effective and that the Act had commenced. The validity of actions that rely on the Act having commenced are now in doubt.

This includes the ongoing activities of a new corporation, Coal Services Pty Ltd, which was established under the New South Wales legislation to manage the former functions of the Joint Coal Board. New legislation is required to validate these actions.

Accordingly, on 20 February 2002, I introduced the *Coal Industry Repeal (Validation of Proclamation) Bill 2002* (the Bill) into the House of Representatives. This Bill confirms that 1 January 2002 is the commencement date of the *Coal Industry Repeal Act 2001* and validates actions taken on the assumption that the Act commenced on this date.

To help ensure that no-one is disadvantaged, the Bill also makes it clear that Section 7 of the Act, which provides for just terms compensation for any Commonwealth acquisition of property arising from the operation of the Act, also applies to the Bill. The bill was also prepared in consultation with New South Sales stakeholders.

I am seeking the support of all Members and Senators to pass this Bill in the current Parliamentary sitting to ensure that this administrative oversight is remedied as soon as possible.

The Committee thanks the Minister for this response and notes that the issue raised by the Committee has been remedied by the introduction of the Coal Industry Repeal (Validation of Proclamation) Bill 2002.

# Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2002*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 8 March 2002. 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. 1 of 2002*

This bill was introduced into the House of Representatives on 13 February 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend:

- the *Criminal Code Act 1995* to add new offences relating to the sending of dangerous, threatening and hoax material through the post or similar services; and
- the *Crimes Act 1914* to replace existing outdated postal offences.

The bill proposes that federal offences cover the use of all postal and other like services, not just Australia Post as at present. The bill also increases the penalties for the offences of sending threatening, dangerous or hoax material through postal and similar services to more appropriate levels which reflect the harm that can be caused by material.

**Legislation by press release**
**Schedule 1**

Schedule 1 to this bill proposes to amend the Criminal Code by creating a new offence dealing with the use of the post to send hoax material. These amendments are expressed to commence at 2pm on 16 October 2001, thus retrospectively creating a criminal offence. The justification given for this retrospectivity (as set out in the Explanatory Memorandum) is that this is the time and date at which the Prime Minister publicly announced that he would introduce such provisions.

Notwithstanding the seriousness of the conduct at which this bill is directed, the retrospective creation of a criminal offence is similarly a serious matter. The bill itself is a very clear example of "legislation by press release" – a practice which the Committee has consistently brought to the attention of Senators. As the Committee has previously noted, "the fact that a proposal to legislate has been announced is no justification for treating that proposal as if it were enacted legislation".

*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 Attorney-General*

The Committee observed that the retrospective creation of a criminal offence is a serious matter and further stated that the announcement of a proposal to legislate provides no justification for treating that proposal as if it were enacted legislation. The Government agrees that the retrospective creation of an offence is a serious matter. However, in the case of the new hoax offence there are exceptional circumstances justifying retrospectivity. During October 2001, hoaxes were causing significant concern and disruption. Following the terrorist attacks of 11 September 2001, police investigated over 3000 incidents involving suspicious packages of which over 1000 involved anthrax hoaxes. As a result of these hoaxes, mail centres and offices had to be decontaminated, security measures enhanced and emergency services diverted from other duties. These false alarms cost the community both in terms of unnecessary use of public resources and in terms of increased fear and anxiety.

As stated in the Explanatory Memorandum, it was necessary to ensure that such conduct was adequately deterred in the period before the resumption of Parliament. The Prime Minister's announcement of 16 October 2001 provided this deterrence. The Prime Minister's announcement was in very clear terms, and received immediate, widespread publicity. The amendments operate only from the time of that announcement.

It has been accepted that amendments to taxation law may apply retrospectively where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and the Bill is introduced within 6 months after the date of the announcement (Senate Resolution of 8 November 1988). The new hoax offence was introduced within 4 months after the date of the Prime Minister's announcement.

An additional consideration is that there is no circumstance in which the perpetration of a hoax that a dangerous or harmful thing has been sent could be considered a legitimate activity in which a person was entitled to engage pending these amendments. The amendments do not retrospectively abrogate a legitimate right or entitlement. For all these reasons, the retrospective application of these amendments is not considered to contravene fundamental principles of fairness or due process.

The Committee thanks the Attorney-General for this response which acknowledges that the retrospective creation of an offence is a serious matter. Specifically, the Attorney draws attention to the apparently analogous practice of legislation by press release when retrospectively amending taxation law, and states that there are no circumstances in which perpetrating a hoax "could be considered a legitimate activity" and that, therefore, the amendments "do not retrospectively abrogate a legitimate right or entitlement".

The Committee has often expressed concern at the prevalence of 'legislation by press release' in amendments to taxation law. Taxation law is concerned with financial arrangements, and appropriate behaviour in relation to them. Imprecision in the commencement of amendments may have behavioural and financial consequences. Taxation law is essentially regulatory in nature. However, these amendments propose to retrospectively create criminal offences – a much more serious issue when considering the merits of retrospectivity. The practices developed for amending taxation law are not an appropriate precedent for amendments which go to criminal responsibility.

In addition, while it is undeniable that perpetrating a hoax cannot be considered a 'legitimate' activity, what this bill proposes to do is retrospectively declare it to be 'criminal' activity – again, a different, and more serious, issue of principle. Not every 'illegitimate' activity is 'criminal' activity. Declaring something 'illegitimate', and then retrospectively declaring it to be a crime, would seem to establish an unfortunate and undesirable precedent. A crime may be created by a simple announcement. The Committee **asks the Attorney-General** to reconsider these provisions so that, before they become law, they can be adequately scrutinised by both the House of Representatives and the Senate.

*For these reasons, 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.*

**Creation of criminal offence by regulation**
**Proposed new subsection 471.15(1)**

Clause 6 of Schedule 2 to this bill proposes to insert a new subsection 471.15(1) in the Criminal Code. This will allow for the further definition, by regulation, of those dangerous or harmful substances the posting of which will be an offence. To that extent, this subsection allows for the creation of a criminal offence by Executive Order – in a regulation – rather than by primary legislation, which would be debated in both Houses of the Parliament.

This proposed new provision is apparently in the same form as the existing section 85X of the *Crimes Act 1914*. Nevertheless, the Committee **seeks the Minister's** advice as to why it is appropriate that an offence of such seriousness should be addressed through subordinate, rather than primary, legislation.

*The Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, 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 also sought my advice as to why it is appropriate that proposed subsection 471.15(1), which makes it an offence to cause an explosive or a dangerous or harmful substance to be carried by post, provides for dangerous or harmful substances to be specified in regulations. As stated in the Explanatory Memorandum, it is necessary to have the scope to add items by regulation, because the specific items that are prohibited for posting with Australia Post may change at short notice, including where new types of goods come into existence.
>
> The proposed offence replicates the existing offence in subsection 85X(2) of the *Crimes Act 1914*, which also relies on the prescription of dangerous substances in regulations. The current descriptions of dangerous substances in the regulations are based on the Technical Instructions for the Safe Transport of Dangerous Goods by Air published by the International Civil Aviation Organisation, which are updated every two years. By continuing to allow for the prescription of dangerous substances in regulations, proposed subsection 471.15(1) will enable the list of dangerous substances to be revised quickly to ensure consistency with international standards.
>
> I hope that this information is of assistance to the Committee.

The Committee thanks the Attorney-General for this response. While mindful of the precedent provided by the existing subsection 85X(2) of the *Crimes Act 1914*, the Committee continues to have concerns where serious criminal offences can be created or modified by regulation.

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

# Higher Education Legislation Amendment Bill (No. 1) 2002

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2002*, in which it made various comments. The Minister for Education, Science and Training has responded to those comments in a letter received 12 March 2001. 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. 1 of 2002*

This bill was introduced into the House of Representatives on 14 February 2002 by the Minister for Education, Science and Training. [Portfolio responsibility: Education, Science and Training]

The bill proposes to amend the *Higher Education Funding Act 1988* to create a HECS-style, interest-free loans scheme for overseas trained professionals to undertake a course of study to enable them to meet formal recognition requirements for their professional in Australia to be called the Bridging for Overseas-trained Professional Loan Scheme (BOTP Loan Scheme).

The bill also provides transitional arrangements for participants who started a bridging course in first semester 2002.

### Extension of tax file number scheme
### Proposed new sections 98Y and 98ZB

Schedule 1 to this bill proposes to insert a new Chapter 4B in the *Higher Education Funding Act 1988*. This new Chapter sets up a scheme for Commonwealth loans to overseas-trained professionals who undertake bridging courses to enable them to meet the requirements for entry to their professions in Australia.

This new Chapter includes proposed new section 98Y. The effect of this section will be to require students seeking such a loan to provide their tax file number (TFN) to the tertiary education institution involved. Proposed new section 98ZB reinforces the effect of this provision by denying Commonwealth liability to make such a loan if a student does not have a tax file number.

The Committee has consistently drawn attention to instances where tax file numbers are required for purposes much beyond those originally contemplated (tax avoidance). For example, in 2001 it sought advice from the then Minister for Education, Training and Youth Affairs on the extension of the tax file number scheme to students wishing to participate in the Postgraduate Education Loan Scheme. In summary, the Minister responded that:

- the provision of TFNs was not a compulsory requirement – the consequence of not providing a TFN was that the student would not be eligible to access the loan facility provided by the Commonwealth, however they could continue to pay their tuition fees directly to the relevant higher education institution;
- requiring the provision of TFNs was consistent with arrangements that currently applied to the Higher Education Contribution Scheme and the Open Learning Deferred Payment Scheme; and
- TFNs were used by higher education institutions to advise the Tax Office of the amounts that students were deferring.

The Committee acknowledges that the purpose of these provisions is undoubtedly to minimise the possibility for fraud in the administration of this and other education loan schemes. However, the TFN scheme was introduced specifically and solely for the use of the Tax Office. It has since been made available much more widely than originally contemplated. This bill represents yet another instance of this extension.

*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*

Specifically the Committee expressed concern that use of the tax file number regime in relation to the new Bridging for Overseas-Trained Professionals Loan Scheme (BOTPLS) may trespass unduly on personal rights and liberties, in breach of principle 1(a)(1) of the Committee's terms of reference. I would make the following comments on the Committee's report:

- The provision of Tax File Numbers (TFNs) by students who wish to participate in the BOTPLS will not breach principle 1(a)(i) of the Committee's terms of reference as it is not a compulsory requirement for a student to quote their Tax File Number.

- The provision of TFNs for BOTPLS is consistent with arrangements that currently apply to the Higher Education Contribution Scheme (HECS) and the Postgraduate Education Loan Scheme (PELS).

- TFNs are used by higher education institutions to advise the Australian Taxation Office of the amount a student is deferring. Students begin repaying their debt when their repayment income reaches the minimum threshold for any particular year, which is $23,242 in the 2001-02 income year.

- Under legislation, students have a right to choose not to quote a TFN, consistent with the *Tax File Guidelines 1992* issued under the Privacy Act 1988. The consequence of not providing a TFN is that the student will not be eligible to access the loan facility provided lay the Commonwealth. In these instances, students can continue to pay their tuition fees direct to the institution.

- Sections 52 and 53 of the *Higher Education Funding Act* 1988 (HEFA) specifically prohibit institutions from requiring a student to provide their TFN or from unauthorised use or disclosure of a student's TFN for any purpose other than processing the deferred HECS amounts. Penalties are imposed for breaches. Section 98Y of HEFA (as amended by the *Higher Education Legislation Amendment Bill (No. 1) 2002)* will have the effect of extending sections 52 and 53 of HEFA to BOTPLS.

- Section 78 of BEFA provides for the imposition of penalties for the unauthorised recording or disclosure of a person's personal information. It also prohibits the provision of personal information to any Minister. New section 98ZD of HEFA will have the effect of extending section 78 of HEFA to BOTPLS.

- TFNs and the BOTPLS loan request form documentation are to be retained by institutions until such time as the institution is satisfied that the calculation of a student's final semester debt has been completed, the student's account with the institution is finalised, and the ATO has been notified of the final semester date. In keeping with the *Tax File Number Guidelines 1992,* issued by the Privacy Commissioner, any disposal of TFN information shall be by appropriate and secure means.

I trust that this information addresses the Committee's concerns.

The Committee thanks the Minister for this response.

Barney Cooney
Chairman

**The Hon Ian Macfarlane MP**
**Minister for Industry, Tourism and Resources**



PARLIAMENT HOUSE
CANBERRA ACT 2600

-5 MAR 2002

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

Dear Senator Cooney

***Coal Industry Repeal Act 2001: notification of commencement***

Thank you for your letter of 21 February 2002 concerning the notification of the commencement of the *Coal Industry Repeal Act 2001* (the Act).

As is noted in the Committee's *Alert Digest* 1/02, on 20 December 2001 the Governor-General in Executive Council made a Proclamation setting the Act's commencement date at 1 January 2002. Due to an administrative oversight however, the Proclamation was not Gazetted before that date.

Legal advice is that as a result of this oversight, there is doubt that the Act has commenced, either on 1 January 2002 as intended or such later date (including from the date of Gazettal of the Proclamation). Under complementary New South Wales legislation which commenced on 1 January 2002, New South Wales proceeded on the assumption that the Proclamation was effective and that the Act had commenced. The validity of actions that rely on the Act having commenced are now in doubt. This includes the ongoing activities of a new corporation, Coal Services Pty Ltd , which was established under the New South Wales legislation to manage the former functions of the Joint Coal Board. New legislation is required to validate these actions.

Accordingly, on 20 February 2002, I introduced the *Coal Industry Repeal (Validation of Proclamation) Bill 2002* (the Bill) into the House of representatives. This Bill confirms that 1 January 2002 is the commencement date of the *Coal Industry Repeal Act 2001* and validates actions taken on the assumption that the Act commenced on this date.

To help ensure that no-one is disadvantaged, the Bill also makes it clear that Section 7 of the Act, which provides for just terms compensation for any Commonwealth acquisition of property arising from the operation of the Act, also applies to the Bill. The bill was also prepared in consultation with New South Sales stakeholders.

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I am seeking the support of all Members and Senators to pass this Bill in the current Parliamentary sitting to ensure that this administrative oversight is remedied as soon as possible.

Yours sincerely

Ian Macfarlane

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8 MAR 2002
Senate Standing Cttee
for the Scrutiny of Bills

- 8 MAR 2002

ATTORNEY-GENERAL
THE HON. DARYL WILLIAMS AM QC MP

02/1404 CRJ

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

Dear Senator Cooney

I refer to the Scrutiny of Bills *Alert Digest No. 1 of 2002* in which your Committee sought my advice on aspects of the Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002.

The Committee observed that the retrospective creation of a criminal offence is a serious matter and further stated that the announcement of a proposal to legislate provides no justification for treating that proposal as if it were enacted legislation. The Government agrees that the retrospective creation of an offence is a serious matter. However, in the case of the new hoax offence there are exceptional circumstances justifying retrospectivity. During October 2001, hoaxes were causing significant concern and disruption. Following the terrorist attacks of 11 September 2001, police investigated over 3000 incidents involving suspicious packages of which over 1000 involved anthrax hoaxes. As a result of these hoaxes, mail centres and offices had to be decontaminated, security measures enhanced and emergency services diverted from other duties. These false alarms cost the community both in terms of unnecessary use of public resources and in terms of increased fear and anxiety.

As stated in the Explanatory Memorandum, it was necessary to ensure that such conduct was adequately deterred in the period before the resumption of Parliament. The Prime Minister's announcement of 16 October 2001 provided this deterrence. The Prime Minister's announcement was in very clear terms, and received immediate, widespread publicity. The amendments operate only from the time of that announcement.

It has been accepted that amendments to taxation law may apply retrospectively where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and the Bill is introduced within 6 months after the date of the announcement (Senate Resolution of 8 November 1988). The new hoax offence was introduced within 4 months after the date of the Prime Minister's announcement.

An additional consideration is that there is no circumstance in which the perpetration of a hoax that a dangerous or harmful thing has been sent could be considered a legitimate activity in which a person was entitled to engage pending these amendments. The amendments do not retrospectively abrogate a legitimate right or entitlement. For all these reasons, the

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retrospective application of these amendments is not considered to contravene fundamental principles of fairness or due process.

The Committee also sought my advice as to why it is appropriate that proposed subsection 471.15(1), which makes it an offence to cause an explosive or a dangerous or harmful substance to be carried by post, provides for dangerous or harmful substances to be specified in regulations. As stated in the Explanatory Memorandum, it is necessary to have the scope to add items by regulation, because the specific items that are prohibited for posting with Australia Post may change at short notice, including where new types of goods come into existence.

The proposed offence replicates the existing offence in subsection 85X(2) of the *Crimes Act 1914*, which also relies on the prescription of dangerous substances in regulations. The current descriptions of dangerous substances in the regulations are based on the Technical Instructions for the Safe Transport of Dangerous Goods by Air published by the International Civil Aviation Organisation, which are updated every two years. By continuing to allow for the prescription of dangerous substances in regulations, proposed subsection 471.15(1) will enable the list of dangerous substances to be revised quickly to ensure consistency with international standards.

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

Yours sincerely

Daryl Williams

DARYL WILLIAMS

MINISTER FOR EDUCATION, SCIENCE AND TRAINING
THE HON DR BRENDAN NELSON MP

RECEIVED
12 MAR 2002
Senate Standing C'ttee
for the Scrutiny of Bills

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

Dear Senator Cooney

Thank you for your letter of 21 February 2002, concerning comments made by the Committee in the Alert Digest No 1 of 2002 in relation to the Higher Education Legislation Amendment Bill (No.1) 2002.

Specifically the Committee expressed concern that use of the tax file number regime in relation to the new Bridging for Overseas-Trained Professionals Loan Scheme (BOTPLS) may trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. I would make the following comments on the Committee's report:

- The provision of Tax File Numbers (TFNs) by students who wish to participate in the BOTPLS will not breach principle 1(a) (i) of the Committee's terms of reference as it is not a compulsory requirement for a student to quote their Tax File Number.

- The provision of TFNs for BOTPLS is consistent with arrangements that currently apply to the Higher Education Contribution Scheme (HECS) and the Postgraduate Education Loan Scheme (PELS).

- TFNs are used by higher education institutions to advise the Australian Taxation Office of the amount a student is deferring. Students begin repaying their debt when their repayment income reaches the minimum threshold for any particular year, which is $23,242 in the 2001-02 income year.

- Under legislation, students have a right to choose not to quote a TFN, consistent with the *Tax File Guidelines 1992* issued under the Privacy Act 1988. The consequence of not providing a TFN is that the student will not be eligible to access the loan facility provided by the Commonwealth. In these instances, students can continue to pay their tuition fees direct to the institution.

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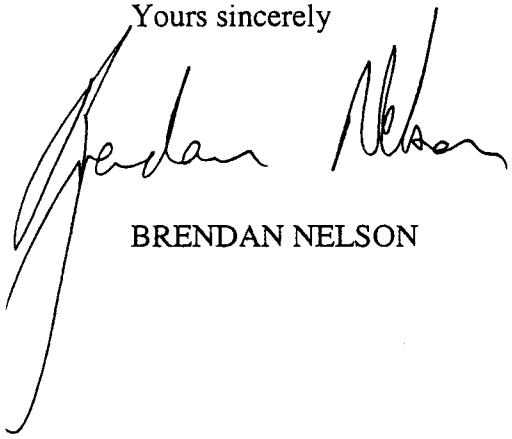
- Sections 52 and 53 of the *Higher Education Funding Act 1988* (HEFA) specifically prohibit institutions from requiring a student to provide their TFN or from unauthorised use or disclosure of a student's TFN for any purpose other than processing the deferred HECS amounts. Penalties are imposed for breaches. Section 98Y of HEFA (as amended by the *Higher Education Legislation Amendment Bill (No.1) 2002)* will have the effect of extending sections 52 and 53 of HEFA to BOTPLS.

- Section 78 of HEFA provides for the imposition of penalties for the unauthorised recording or disclosure of a person's personal information. It also prohibits the provision of personal information to any Minister. New section 98ZD of HEFA will have the effect of extending section 78 of HEFA to BOTPLS.

- TFNs and the BOTPLS loan request form documentation are to be retained by institutions until such time as the institution is satisfied that the calculation of a student's final semester debt has been completed, the student's account with the institution is finalised, and the ATO has been notified of the final semester date. In keeping with the *Tax File Number Guidelines 1992*, issued by the Privacy Commissioner, any disposal of TFN information shall be by appropriate and secure means.

I trust that this information addresses the Committee's concerns.

Yours sincerely



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