SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

NINTH REPORT

OF

2003

10 September 2003

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ISSN 0729-6258

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MEMBERS OF THE COMMITTEE

Senator T Crossin (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator D Johnston
Senator J McLucas
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

NINTH REPORT OF 2003

The Committee presents its Ninth Report of 2003 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:

Australian National Training Authority Amendment Bill 2003

Australian Protective Service Amendment Bill 2003

Communications Legislation Amendment Bill (No. 3) 2003

Taxation Laws Amendment Bill (No. 8) 2002

Australian National Training Authority Amendment Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 9 of 2003*, in which it made various comments. The Minister for Education, Science and Training has responded to those comments in a letter dated 8 September 2003. 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. 9 of 2003

[Introduced into House of Representatives on 14 August 2003. Portfolio: Education, Science and Training]

This bill amends the *Australian National Training Authority Act 1992* to provide for an Australian National Training Authority Agreement for the period 2004 to 2006. The Agreement, between the Commonwealth, states and territories, sets out planning, accountability and funding arrangements for vocational education and training, and is re-negotiated every 3 years.

The bill also increases the number of members of the Authority from seven to nine and increases the number of members required for a quorum and voting majority at its meetings.

Insufficient parliamentary scrutiny
Item 2 of Schedule 2

The current Australian National Training Authority Agreement, which expires on 31 December 2003, is contained in Schedule 1 of the Principal Act. Item 2 of Schedule 2 to this bill provides that the Schedule containing the Agreement will be repealed and will not be replaced. The Explanatory Memorandum indicates that a new Agreement is being negotiated and that, when agreed to by the Commonwealth, the states and the territories, it will be tabled in each House of the Parliament. Past practice has been to incorporate each new Agreement in the Principal Acts by way of an amending bill, enabling consideration and debate in either chamber.

The Committee considers it likely that the Agreement, when concluded, will be legislative in character. If that were not the case there would have been no need to include the current Agreement in the Act. The question which then arises is whether the Parliament is being afforded adequate opportunity to scrutinise this exercise of legislative power. The Committee considers that, by proposing merely to table the new Agreement, the Minister will have insufficiently subjected his exercise of legislative power to parliamentary scrutiny. The Committee therefore **seeks the Minister's advice** as to the reason for this provision.

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

Relevant extract from the response from the Minister

I refer to a letter dated 21 August 2003 from the Secretary to the Committee, drawing my attention to the Committee's comments on the *Australian National Training Authority Amendment Bill 2003* (the Bill) in the Scrutiny of Bills Alert Digest No. 9 of 20 August 2003. I apologise for the delay in my reply.

In its Digest the Committee noted that Bill proposes to repeal Schedule 1 of the *Australian National Training Authority Act 1992* which contains the current Australian National Training Authority Agreement (ANTA Agreement) between the Australian Government and the States and Territories. This Agreement will expire on 31 December 2003. Negotiations for an Agreement to cover 2004-2006 are currently underway.

In its Digest, the Committee raised a concern that the Agreement, when concluded, would be "legislative in character". I have sought legal advice from the Australian Government Solicitor on this point and am advised that neither the ANTA Agreement 2001-2003 nor the ANTA Agreement 2004-2006, when concluded, are legislative in nature.

I am advised that this is the case because the ANTA Agreement does not determine the content of the law. Instead, it represents an exercise of the power that the Australian Government is granted under section 61 of the Constitution, amongst other things, to enter into agreements or arrangements with the States and Territories on matters of the kind dealt with in the Agreement.

The ANTA Agreement has not been included in Schedule 1 of the Principal Act because it involves an exercise of legislative power, but rather because it has been common to include copies of intergovernmental agreements in schedules to Acts.

The mere fact that the agreement is reproduced in the schedule does not make it legally enforceable.

After the ANTA Agreement for 2004 to 2006 is signed by the Australian Government together with the governments of the States and Territories, I will make it public by tabling it in both Houses and it will be available on the internet.

This being the case, and the new Agreement not being legislative in character, I do not agree with the Committee that Item 2 of Schedule 2 to the Bill, which has the effect of not including the new Agreement in a schedule to the ANTA Act, insufficiently exposes the exercise of legislative power to parliamentary scrutiny.

The Committee may also wish to note that the amendment to define the Agreement is expressed to replace the agreement known as the "ANTA Agreement for 2001 to 2003".

Only the next Agreement can be expressed to replace the 2001-03 Agreement. When the Government wants to replace the 2004-06 Agreement, the legislation will need to be amended at that time to refer either to the 2007-09 Agreement, or to the agreement 'expressed to replace the 2004-06 Agreement'. In other words, the way this amendment is written means it will not apply to any agreements other than the one replacing the current 2001-03 agreement.

The Committee thanks the Minister for this response.

Australian Protective Service Amendment Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2003,* in which it made various comments. The Minister for Justice and Customs has responded to those comments in a letter dated 9 September 2003. 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. 8 of 2003

[Introduced into the Senate on 26 June 2003. Portfolio: Justice and Customs]

The bill amends the *Australian Protective Service Act 1987* to confer additional powers on protective service officers undertaking protective security functions to request personal identification details and information; to stop, detain and search certain persons for security purposes, and to seize things found during such a search.

Search without warrant
Schedule 1, item 1

Proposed new sections 18B and 18C of the *Australian Protective Service Act 1987*, to be added by item 1 of Schedule 1 to this bill, would permit a protective service officer, in some circumstances, to stop and search a person, without either obtaining a warrant for that purpose, or formally arresting the person. Regrettably, the Explanatory Memorandum does not indicate whether consideration was given to the Committee's *Fourth Report of 2000* on powers of search and seizure in formulating these provisions. The Committee **seeks the Minister's advice** as to whether consideration was given to the principles, conclusions and recommendations contained in that report.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Minister

The Committee seeks my advice on whether consideration was given to the principles, conclusions and recommendations contained in the Committee's *Fourth Report of 2000* on powers of search and seizure in formulating the search powers contained in the Bill.

The Government's policy on entry and search powers forms part of the Commonwealth's criminal law policy. The Committee's views, including those expressed in its *Fourth Report of 2000*, have figured prominently in the development of the guidelines setting out this policy. The report on entry and search provisions has formed the basis for developing and evaluating law enforcement powers in Commonwealth legislation over a number of years and was considered during the development of the Australian Protective Service Amendment Bill 2003.

I will ensure that the Explanatory Memorandum is more comprehensive about this on future occasions.

I trust this advice addresses the Committee's concerns satisfactorily.

The Committee thanks the Minister for this response. The Committee is pleased that its views have been taken into account in the development of this legislation, and thanks the Minister for his undertaking to ensure that Explanatory Memorandum is more comprehensive about this on future occasions. The Committee is looking forward to receiving the Government's response to its *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation* later this year.

Communications Legislation Amendment Bill (No. 3) 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 7 of 2003*, in which it made various comments. The Minister for Communications, Information Technology and the Arts has responded to those comments in a letter dated 1 August 2003. 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. 7 of 2003

This bill was introduced into the House of Representatives on 19 June 2003 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the:

- *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992* to vary the conditions for the introduction of additional commercial television licences to existing licensees in single- ('solus') and two-service television markets;
- *Broadcasting Services Act 1992* to allow the Australian Broadcasting Authority to determine a date from which certain licensees may apply for an additional commercial television licence; and delegation of power to approve variations to approved digital broadcasting plans for national broadcasters;
- *Radiocommunications Act 1992* to remove certain prohibitions on the transmission of datacasting services; and the
- *Telecommunications Act 1997* to provide for a 'penalty in lieu of prosecution' scheme for certain offences.

Parliamentary scrutiny
Schedule 1, item 10

Proposed new subsection 38B(27) of the *Broadcasting Services Act 1992*, to be inserted by item 10 of Schedule 1 to this bill, would permit the Australian Broadcasting Authority to make a determination fixing a date from which a commercial licensee may apply for an additional commercial television broadcasting licence. It appears that this power to determine the relevant time is legislative in character, and yet there is no provision for the exercise of this power to be subject to Parliamentary scrutiny. The Committee **seeks the Minister's advice** as to whether this power is legislative in character, and, if so, whether it should be subject to Parliamentary scrutiny.

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

Relevant extract from the response from the Minister

The Committee noted in *Alert Digest 7/03* that the exercise of proposed new subsection 38B(27) of the *Broadcasting Services Act 1992* (the Act), which would permit the Australian Broadcasting Authority (the ABA) to make a determination fixing a date from which commercial television broadcasting licensees in a two-service market may apply for an additional commercial television broadcasting licence, would not be subject to any form of parliamentary scrutiny. The Committee seeks my advice regarding whether this power is legislative in character, and if so, whether the exercise of the power should be subject to parliamentary scrutiny.

I am advised that the power set out in proposed new subsection 38B(27) may be characterised as a legislative power. However, it is my view that a determination made under subsection 38B(27) should not be subjected to parliamentary scrutiny, for the following reasons:

- firstly, subjecting a determination under new subsection 38B(27) to possible disallowance would create considerable uncertainty for the industry and the regulator;
- secondly, such a determination is a minor procedural measure which does not affect the ABA's existing powers in a substantial way; and

- thirdly, such a determination does not change the substantive provisions of section 38B.

Industry and Regulator Uncertainty

If proposed new subsection 38B(27) were subject to the disallowance process, substantial uncertainty would arise with respect to the practical operation of the section 38B mechanism as a whole.

If the ABA determined a designated date for a particular licence area under new subsection 38B(27), and this determination was subject to disallowance, licensees could not be certain that their applications for section 38B licences had been validly made. Section 48 of the *Acts Interpretation Act 1901* provides that a disallowable instrument may be disallowed by Parliament at any time within 15 sitting days from the date of tabling. As instruments must be tabled within 15 sitting days of executing the instrument, and a further 15 sitting days is allowed for debate of a disallowance motion, the disallowance process may stretch over a period of up to 45 sitting days.

Conceivably, there may be a significant delay between the execution of the instrument and parliamentary disallowance. As licensees have only 90 days after the designated time to apply for an additional broadcasting licence under subsection 38B(1) of the Act, there would be uncertainty for licensees and the ABA in relation to the operation of the scheme. In particular:

- if a licensee applied for a s38B licence after the determination of the designated time, and the ABA granted an additional broadcasting licence under that section of the Act, significant practical and legal consequences may arise from the subsequent disallowance of the designated time determination as a result of reliance by the licensee on the ABA's actions in granting a section 38B licence; and
- if a licensee intended to apply for a s38B licence but wished to await the outcome of the disallowance process, the 90 day statutory period may expire before the disallowance process is complete (depending upon the sitting pattern for that year and the date of executing the instrument).

Minor Procedural Matter

Further, the substance of a determination made under proposed new subsection 38B(27) would be of such a minor nature as to not warrant additional parliamentary scrutiny.

In 2000, Parliament considered the scheme for allocating additional commercial television broadcasting licensees in two-service markets, and passed section 38B of the Act. Proposed new subsection 38B(27) does not substantially alter the power currently exercised by the ABA under existing paragraph 38B(26)(b), which allows the ABA to determine the time for licence areas overlapping with remote licence areas. Proposed new subsection 38B(27) will eliminate a technical anomaly which currently prevents licensees in any regional licence area incidentally overlapped by a remote licence area from applying for an additional broadcasting licence under section 38B at an earlier time to that designated for the remote licence area.

The proposed new provision does not significantly alter the ABA's powers to determine a designated time for the receipt of applications for additional section 38B commercial broadcasting licences.

Effect on the Operation of Section 38B

Finally, the determination of designated times does not affect the substance of the law. Rather, a determination of a designated time for a particular licence area commences the application of the section 38B scheme for allocating additional commercial television broadcasting licences in that area. An instrument made under proposed new subsection 38B(27) would merely affect the application of the legal rules, in a way contemplated by the law as scrutinised by Parliament, rather than affect the substantive content of the legal rules applicable under section 38B of the Act.

For the reasons outlined above, it is my view that a determination under proposed new subsection 38B(27) need not be, and should not be, a disallowable instrument.

The Committee thanks the Minister for this response. The Committee notes the Minister's advice that proposed new subsection 38B(27) may be characterised as a legislative power and his view that a determination made under the subsection should not be subjected to parliamentary scrutiny.

The Committee takes the view that whenever the Parliament delegates legislative power to others it must address the question of how much oversight it should maintain over the delegated power. A bill may insufficiently subject the exercise of delegated legislative power to parliamentary scrutiny by giving a power to make subordinate legislation which is not tabled in the Parliament or, where tabled, is free from the risk of disallowance.

The Minister argues that subjecting a determination under the subsection to possible disallowance would create 'considerable uncertainty for the industry and the regulator'. The Committee notes that the potential for uncertainty applies to all disallowable instruments, and is in fact the price of the administrative convenience implicit in the making of delegated legislation. The Committee has consistently taken the view that this, in itself, does not provide sufficient reason for the Parliament to abrogate its responsibility to properly scrutinise delegated legislation.

The Minister further argues that parliamentary oversight is unwarranted because the substance of a determination under the subsection would be of such a minor nature. The Committee finds it difficult to reconcile the claim that the measure is a 'minor procedural matter' with the concern that the potential for disallowance would cause 'considerable uncertainty'.

Finally, the Minister indicates that a determination under the subsection affects not the substance of the law, but its application: 'a determination of a designated time for a particular licence area commences the application' of the scheme for allocating additional licences. It is this very point that concerns the Committee – that the responsibility for determining the time for the commencement of the law (a legislative power) is delegated without provision for parliamentary scrutiny.

The Committee continues to draw Senators' attention to the provision, as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Taxation Laws Amendment Bill (No. 8) 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 16 of 2002*, in which it made various comments. The Minister for Revenue and Assistant Treasurer has responded to those comments in a letter received on 30 January 2003. 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. 16 of 2002

This bill was introduced into the House of Representatives on 5 December 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

Schedule 1 to the bill proposes to amend the *Income Tax Assessment Act 1997* and the *Income Tax Assessment Act 1936* to allow income tax deductions for gifts of $2 or more made to certain organisations.

Schedule 2 to the bill proposes to amend the capital gains tax provisions in the *Income Tax Assessment Act 1997*, the *Income Tax (Transitional Provisions) Act 1997* and the *Fringe Benefits Tax Assessment Act 1986* that deal with employee share schemes to:

- ensure capital gains or capital losses that arise while shares or rights are held in trust are recognised;
- ensure the 12-month minimum qualifying period for the capital gains tax 50% discount begins from the time the trustee acquires the shares; and
- to make technical amendments to the capital gains tax and fringe benefit tax provisions as they relate to employee share schemes.

Schedule 3 to the bill proposes to amend provisions relating to the franking of distributions by co-operative companies in the *Income Tax Assessment Act 1997* and the *Income Tax Assessment Act 1936* to enable a co-operative company to either frank distributions to shareholders or, alternatively, to claim the existing deduction for distributions of assessable income to shareholders.

Schedule 4 to the bill proposes to amend the *Income Tax Assessment Act 1936* to rectify an anomaly in the Reasonable Benefit Limit provisions so that a reversionary pension benefit paid on the death of the original recipient will receive the same proportion of concessional taxation rebate as applied to the original pension.
Schedule 5 to the bill proposes to amend the *Petroleum Resource Rent Tax Assessment Act 1987* to:

- allow expenditures associated with closing down a facility that has ceased to be used in relation to a petroleum resource rent tax (PRRT) project, but continues to be used under an infrastructure licence, to be deductible against the project's PRRT receipts; and
- produce a more equitable and uniform treatment of partial use arrangements by extending the PRRT to include all receipts received; and allow a deduction for all expenditures incurred, that relate to certain PRRT project's petroleum activities.

Schedule 6 to the bill proposes to makes a number of technical corrections to the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* and other tax-related legislation.

Retrospectivity
Part 1 of Schedule 2

By virtue of subitem 12(1) in Part 1 of Schedule 2 to this bill, many of the amendments proposed in Part 1 of that Schedule will apply to assessments from the 1998-99 income year. However, those amendments are technical, and have no financial effect. However, the amendments proposed by items 3, 5, 6 and 9 of that Schedule will apply from 5 pm on 27 February 2001, that being the date of the Press Release issued by the former Assistant Treasurer. Unfortunately, it is not entirely clear from the Explanatory Memorandum whether those amendments would impose new liabilities on taxpayers. The Committee would also appreciate advice on the length of time since 27 February 2001 that it has taken to introduce these provisions. The Committee therefore **seeks the Treasurer's advice** on these questions.

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

Relevant extract from the response from the Minister

I am writing in response to the Committee's concerns with Schedule 2 of the Taxation Laws Amendment Bill (No. 8) 2002 that are raised in Alert Digest No. 16 of 11 December 2002. The Treasurer has asked me to respond to your letter of 12 December 2002 on his behalf.

Schedule 2 of the Bill proposes to amend provisions in the *Income Tax Assessment Act 1997* the *Income Tax (Transitional Provisions) Act 1997* and the *Fringe Benefits Tax Assessment* Act 1986 that deal with employee share schemes. The Committee is concerned that items 3, 5, 6 and 9 of Part 1 of Schedule 2 may trespass unduly on personal rights and liberties by imposing new liabilities on taxpayers. The amendments in question apply to shares or rights acquired after 5 p.m. eastern summer time on 27 February 2001, the date of announcement.

Items 6 and 9 contain the primary amendments. These amendments ensure the law operates as intended by providing that changes in value that accrue while shares or rights are held in an employee share trust are taken into account when calculating a capital gain or capital loss upon eventual disposal. This is achieved by providing that the cost to the employee of shares or rights held in an employee share trust is their market value at the time they are first allocated by the trustee for the benefit of the employee (rather than the time when they are transferred out of the trust).

The amendments made by items 3 and 5 of Part 1 of Schedule 2 are consequential to the primary amendments. The consequential amendments ensure that, for employees who obtain shares or rights through an employee share trust after the date of announcement, the 12-month minimum qualifying period for the capital gains tax 50% discount begins at the time the trustee of an employee share trust acquires the shares or rights. The consequential amendments ensure consistency with the primary amendments which have the effect of treating the employee as the owner of the shares or rights held in an employee share trust and not the trustee.

The Government decided that the amendments should apply to shares or rights acquired after this date so that the change in tax treatment would not affect transactions already entered into. In relation to the primary amendments, taxpayers can choose that the measures apply to shares or rights acquired via an employee share trust *before* the date of announcement. As outlined below, this change to the commencement time was made as a result of representations from industry.

In relation to shares or rights acquired by an employee share trust *before* the date of announcement, taxpayers *will not* have any changes in value, during the time the rights or shares are so held, taken into account in determining a capital gain or loss unless they elect for that to happen. In relation to shares or rights acquired by an employee share trust *after* the date of announcement, taxpayers will have changes in value taken into account.

Taxpayers may make a capital gain or capital loss as a result of this extra period being taken into account, depending upon movements in the share market in this period and the time they dispose of the shares or rights.

The Committee also expressed concerns at the length of time since 27 February 2001 that it has taken to introduce the amendments. The amendments have been delayed because of representations made by industry on the commencement time. For shares or rights acquired before the commencement time it is difficult in some cases to determine the market value of shares or rights at the time the trust transfers the shares or rights to them out of the trust. Following consultations with industry and other stakeholders the commencement time was modified so that, in relation to shares or rights acquired via an employee trust before the commencement time, a taxpayer can choose that the amendments apply to them. It has taken time to consider the form of the amendment and also to evaluate other impacts that would result from the change.

I trust that the above comments address the concerns of the Committee.

The Committee thanks the Minister for this response.

Trish Crossin
Chair

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

Senator Trish Crossin
Chair, Standing Committee on Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

08 SEP 2003

Dear Senator Crossin

I refer to a letter dated 21 August 2003 from the Secretary to the Committee, drawing my attention to the Committee's comments on the *Australian National Training Authority Amendment Bill 2003* (the Bill) in the Scrutiny of Bills Alert Digest No. 9 of 20 August 2003. I apologise for the delay in my reply.

In its Digest the Committee noted that Bill proposes to repeal Schedule 1 of the *Australian National Training Authority Act 1992* which contains the current Australian National Training Authority Agreement (ANTA Agreement) between the Australian Government and the States and Territories. This Agreement will expire on 31 December 2003. Negotiations for an Agreement to cover 2004 – 2006 are currently underway.

In its Digest, the Committee raised a concern that the Agreement, when concluded, would be "legislative in character". I have sought legal advice from the Australian Government Solicitor on this point and am advised that neither the ANTA Agreement 2001 – 2003 nor the ANTA Agreement 2004 – 2006, when concluded, are legislative in nature.

I am advised that this is the case because the ANTA Agreement does not determine the content of the law. Instead, it represents an exercise of the power that the Australian Government is granted under section 61 of the Constitution, amongst other things, to enter into agreements or arrangements with the States and Territories on matters of the kind dealt with in the Agreement.

The ANTA Agreement has not been included in Schedule 1 of the Principal Act because it involves an exercise of legislative power, but rather because it has been common to include copies of intergovernmental agreements in schedules to Acts. The mere fact that the agreement is reproduced in the schedule does not make it legally enforceable.

After the ANTA Agreement for 2004 to 2006 is signed by the Australian Government together with the governments of the States and Territories, I will make it public by tabling it in both Houses and it will be available on the internet.

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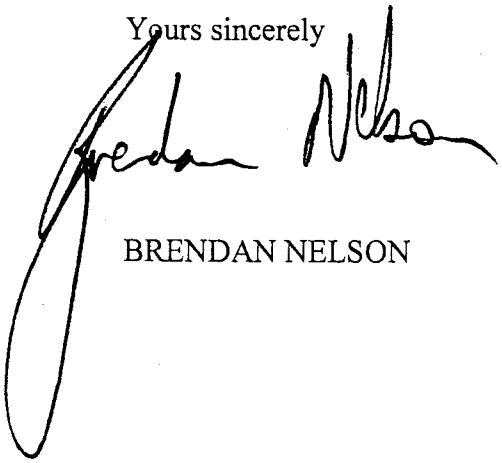
This being the case, and the new Agreement not being legislative in character, I do not agree with the Committee that Item 2 of Schedule 2 to the Bill, which has the effect of not including the new Agreement in a schedule to the ANTA Act, insufficiently exposes the exercise of legislative power to parliamentary scrutiny.

The Committee may also wish to note that the amendment to define the Agreement is expressed to replace the agreement known as the "ANTA Agreement for 2001 to 2003".

Only the next Agreement can be expressed to replace the 2001-03 Agreement. When the Government wants to replace the 2004-06 Agreement, the legislation will need to be amended at that time to refer either to the 2007-09 Agreement, or to the agreement 'expressed to replace the 2004-06 Agreement'. In other words, the way this amendment is written means it will not apply to any agreements other than the one replacing the current 2001-03 agreement.

Yours sincerely



BRENDAN NELSON

SENATOR THE HON. CHRISTOPHER ELLISON
Minister for Justice and Customs
Senator for Western Australia

03/234105 CRJ MC

Senator Trish Crossin
Chair
Senate Standing Committee for
the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

I refer to the Scrutiny of Bills Committee's Alert Digest No. 8 of 2003, particularly the comments about the Australian Protective Service Amendment Bill 2003. The Committee seeks my advice on whether consideration was given to the principles, conclusions and recommendations contained in the Committee's *Fourth Report of 2000* on powers of search and seizure in formulating the search powers contained in the Bill.

The Government's policy on entry and search powers forms part of the Commonwealth's criminal law policy. The Committee's views, including those expressed in its *Fourth Report of 2000*, have figured prominently in the development of the guidelines setting out this policy. The report on entry and search provisions has formed the basis for developing and evaluating law enforcement powers in Commonwealth legislation over a number of years and was considered during the development of the Australian Protective Service Amendment Bill 2003.

I will ensure that the Explanatory Memorandum is more comprehensive about this on future occasions.

I trust this advice addresses the Committee's concerns satisfactorily.

Yours sincerely

CHRIS ELLISON
Senator for Western Australia

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

Senator T Crossin
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

01 AUG 2003

Dear Senator Crossin Trish .

I refer to a letter of 26 June 2003 from the Secretary of the Standing Committee for the Scrutiny of Bills to my Office drawing attention to a matter raised in *Alert Digest* 7/03 regarding a provision in the Communications Legislation Amendment Bill (No 3) 2003.

The Committee noted in *Alert Digest* 7/03 that the exercise of proposed new subsection 38B(27) of the *Broadcasting Services Act 1992* (the Act), which would permit the Australian Broadcasting Authority (the ABA) to make a determination fixing a date from which commercial television broadcasting licensees in a two-service market may apply for an additional commercial television broadcasting licence, would not be subject to any form of parliamentary scrutiny. The Committee seeks my advice regarding whether this power is legislative in character, and if so, whether the exercise of the power should be subject to parliamentary scrutiny.

I am advised that the power set out in proposed new subsection 38B(27) may be characterised as a legislative power. However, it is my view that a determination made under subsection 38B(27) should not be subjected to parliamentary scrutiny, for the following reasons:

- firstly, subjecting a determination under new subsection 38B(27) to possible disallowance would create considerable uncertainty for the industry and the regulator;
- secondly, such a determination is a minor procedural measure which does not affect the ABA's existing powers in a substantial way; and
- thirdly, such a determination does not change the substantive provisions of section 38B.

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Industry and Regulator Uncertainty
If proposed new subsection 38B(27) were subject to the disallowance process, substantial uncertainty would arise with respect to the practical operation of the section 38B mechanism as a whole.

If the ABA determined a designated date for a particular licence area under new subsection 38B(27), and this determination was subject to disallowance, licensees could not be certain that their applications for section 38B licences had been validly made. Section 48 of the *Acts Interpretation Act 1901* provides that a disallowable instrument may be disallowed by Parliament at any time within 15 sitting days from the date of tabling. As instruments must be tabled within 15 sitting days of executing the instrument, and a further 15 sitting days is allowed for debate of a disallowance motion, the disallowance process may stretch over a period of up to 45 sitting days.

Conceivably, there may be a significant delay between the execution of the instrument and parliamentary disallowance. As licensees have only 90 days after the designated time to apply for an additional broadcasting licence under subsection 38B(1) of the Act, there would be uncertainty for licensees and the ABA in relation to the operation of the scheme. In particular:

- if a licensee applied for a s38B licence after the determination of the designated time, and the ABA granted an additional broadcasting licence under that section of the Act, significant practical and legal consequences may arise from the subsequent disallowance of the designated time determination as a result of reliance by the licensee on the ABA's actions in granting a section 38B licence; and
- if a licensee intended to apply for a s38B licence but wished to await the outcome of the disallowance process, the 90 day statutory period may expire before the disallowance process is complete (depending upon the sitting pattern for that year and the date of executing the instrument).

Minor Procedural Matter
Further, the substance of a determination made under proposed new subsection 38B(27) would be of such a minor nature as to not warrant additional parliamentary scrutiny.

In 2000, Parliament considered the scheme for allocating additional commercial television broadcasting licensees in two-service markets, and passed section 38B of the Act. Proposed new subsection 38B(27) does not substantially alter the power currently exercised by the ABA under existing paragraph 38B(26)(b), which allows the ABA to determine the time for licence areas overlapping with remote licence areas. Proposed new subsection 38B(27) will eliminate a technical anomaly which currently prevents licensees in any regional licence area incidentally overlapped by a remote licence area from applying for an additional broadcasting licence under section 38B at an earlier time to that designated for the remote licence area.

The proposed new provision does not significantly alter the ABA's powers to determine a designated time for the receipt of applications for additional section 38B commercial broadcasting licences.

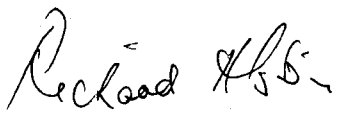
Effect on the Operation of Section 38B

Finally, the determination of designated times does not affect the substance of the law. Rather, a determination of a designated time for a particular licence area commences the application of the section 38B scheme for allocating additional commercial television broadcasting licences in that area. An instrument made under proposed new subsection 38B(27) would merely affect the application of the legal rules, in a way contemplated by the law as scrutinised by Parliament, rather than affect the substantive content of the legal rules applicable under section 38B of the Act.

For the reasons outlined above, it is my view that a determination under proposed new subsection 38B(27) need not be, and should not be, a disallowable instrument.

As requested, I will ask the Department of Communications, Information Technology and the Arts to provide the Secretariat with a copy of this response by email.

Yours sincerely



RICHARD ALSTON
Minister for Communications,
Information Technology and the Arts

MINISTER FOR REVENUE AND
ASSISTANT TREASURER
Senator the Hon Helen Coonan

PARLIAMENT HOUSE
CANBERRA ACT 2600

Telephone: (02) 6277 7360
Facsimile: (02) 6273 4125

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Senator J McLucas
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator McLucas

Taxation Law Amendment Bill (No. 8) 2002

I am writing in response to the Committee's concerns with Schedule 2 of the Taxation Laws Amendment Bill (No. 8) 2002 that are raised in Alert Digest No. 16 of 11 December 2002. The Treasurer has asked me to respond to your letter of 12 December 2002 on his behalf.

Schedule 2 of the Bill proposes to amend provisions in the *Income Tax Assessment Act 1997* the *Income Tax (Transitional Provisions) Act 1997* and the *Fringe Benefits Tax Assessment* Act *1986* that deal with employee share schemes. The Committee is concerned that items 3, 5, 6 and 9 of Part 1 of Schedule 2 may trespass unduly on personal rights and liberties by imposing new liabilities on taxpayers. The amendments in question apply to shares or rights acquired after 5 p.m. eastern summer time on 27 February 2001, the date of announcement.

Items 6 and 9 contain the primary amendments. These amendments ensure the law operates as intended by providing that changes in value that accrue while shares or rights are held in an employee share trust are taken into account when calculating a capital gain or capital loss upon eventual disposal. This is achieved by providing that the cost to the employee of shares or rights held in an employee share trust is their market value at the time they are first allocated by the trustee for the benefit of the employee (rather than the time when they are transferred out of the trust).

The amendments made by items 3 and 5 of Part 1 of Schedule 2 are consequential to the primary amendments. The consequential amendments ensure that, for employees who obtain shares or rights through an employee share trust after the date of announcement, the 12-month minimum qualifying period for the capital gains tax 50% discount begins at the time the trustee of an employee share trust acquires the shares or rights. The consequential amendments ensure consistency with the primary amendments which have the effect of treating the employee as the owner of the shares or rights held in an employee share trust and not the trustee.

The Government decided that the amendments should apply to shares or rights acquired after this date so that the change in tax treatment would not affect transactions already entered into. In relation to the primary amendments, taxpayers can choose that the measures apply to shares or rights acquired via an employee share trust *before* the date of announcement. As outlined below, this change to the commencement time was made as a result of representations from industry.

In relation to shares or rights acquired by an employee share trust *before* the date of announcement, taxpayers *will not* have any changes in value, during the time the rights or shares are so held, taken into account in determining a capital gain or loss unless they elect for that to happen. In relation to shares or rights acquired by an employee share trust *after* the date of announcement, taxpayers *will* have changes in value taken into account.

Taxpayers may make a capital gain or capital loss as a result of this extra period being taken into account, depending upon movements in the share market in this period and the time they dispose of the shares or rights.

The Committee also expressed concerns at the length of time since 27 February 2001 that it has taken to introduce the amendments. The amendments have been delayed because of representations made by industry on the commencement time. For shares or rights acquired before the commencement time it is difficult in some cases to determine the market value of shares or rights at the time the trust transfers the shares or rights to them out of the trust. Following consultations with industry and other stakeholders the commencement time was modified so that, in relation to shares or rights acquired via an employee trust before the commencement time, a taxpayer can choose that the amendments apply to them. It has taken time to consider the form of the amendment and also to evaluate other impacts that would result from the change.

I trust that the above comments address the concerns of the Committee.

Yours sincerely

HELEN COONAN