



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTH REPORT

OF

2002

19 June 2002

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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

FIFTH REPORT OF 2002

The Committee presents its Fifth Report of 2002 to the Senate.

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

Aboriginal and Torres Strait Islander Commission Amendment
Bill 2002

Migration Legislation Amendment (Transitional Movement) Act 2002

Plant Breeder's Rights Amendment Bill 2002

Superannuation Legislation (Commonwealth Employment) Repeal and
Amendment Bill 2002

Workplace Relations Amendment (Prohibition of Compulsory Union
Fees) Bill 2002

Aboriginal and Torres Strait Islander Commission Amendment Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made various comments. The Minister for Immigration and Multicultural and Indigenous Affairs has responded to those comments in a letter received on 13 May 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. 3 of 2002

This bill was introduced into the House of Representatives on 13 March 2002 by the Minister for Immigration and Multicultural and Indigenous Affairs. [Portfolio responsibility: Immigration and Multicultural and Indigenous Affairs]

The bill proposes to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* (the Act) to:

- implement some of the recommendations contained in the review of the Act conducted under section 26 of the Act, and some of the recommendations of the Review Panel established by section 141 of the Act;

- prevent an ATSIC Commissioner or Regional Councillor who has been removed from office for misbehaviour from standing for the next round of Regional Council elections;

- entitle corporations to appeal to the ATSIC Board and Administrative Appeals Tribunal against refusals of loans for business enterprises;

- allow the Commission to delegate its power to review delegates' decisions;

- allow review by the Administrative Appeals Tribunal of the merits of a decision to refuse a loan or guarantee once internal review by the Commission has been exhausted; and

- amend financial provisions of the ATSIC Act to ensure consistency with the accrual budgeting system.

Retrospective application

Subclause 4(1) and Schedule 1, items 1, 3, 6, 8, 28, 30, 33, 34, 40 and 41

By virtue of subclause 4(1), the above amendments contained in Schedule 1 will have a measure of retrospective application, as they render a person ineligible to stand for election where he or she has been convicted of an offence prior to the commencement of Schedule 1. The Explanatory Memorandum provides no reason for this retrospective application. The Committee, therefore, **seeks the Minister's advice** as to why these provisions should apply retrospectively.

Pending the Minister's response, 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

I understand that the Committee is seeking information as to why the amendments in relation to criminal convictions have retrospective application so as to render a person ineligible to stand for election as a member of a Regional Council where he or she has been convicted of an offence prior to the commencement of Schedule 1.

The Bill does have a measure of retrospective application in relation to persons standing for office. The amendments in Schedule 1 disqualify a person from standing for election as a member of a Regional Council or being appointed as a Commissioner where they have been convicted and given a single sentence of imprisonment for multiple offences. The amendments also provide that a person must be removed from the office of a Regional Council Chair or Commissioner if convicted and given a single sentence of imprisonment for multiple offences.

Under the *Aboriginal and Torres Strait Islander Commission Act 1989* (the ATSIC Act) persons are disqualified from standing for election as a Regional Councillor and appointment as a Commissioner if they have been convicted and sentenced to certain periods of imprisonment for single offences. The Bill will amend the ATSIC Act so that persons who receive a single sentence of imprisonment for multiple offences are similarly disqualified from election or appointment.

The ATSIC Act operates so that a degree of retrospectivity applies to ATSIC elected and potential office holders in relation to matters dealing with their conduct prior to occupation of a relevant office. Regional Councillors and Commissioners hold responsible and representative offices on behalf of Australia's Indigenous people. In order to maintain public confidence in office holders it is necessary to ensure that such persons meet a high standard of probity. As such, the Bill like the ATSIC Act contains provisions which make recent past conduct relevant to their fitness for office.

I consider the retrospective application of the criminal conviction and sentencing provisions in the Bill to be necessary and reasonable. The amendments will ensure

that termination and eligibility provisions in the ATSIC Act are consistent across the office holders.

Thank you for drawing this matter to my attention. I trust that the above information allays your concerns.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Migration Legislation Amendment (Transitional Movement) Act 2002

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 3 of 2002*, in which it made various comments. The Minister for Immigration and Multicultural and Indigenous Affairs has responded to those comments in a letter dated 15 May 2002.

Although this bill has now been passed by both Houses of Parliament (and received Royal Assent on 4 April 2002), the response may, nevertheless, be of interest to Senators. 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. 3 of 2002

This bill was introduced into the House of Representatives on 13 March 2002 by the Minister for Immigration and Multicultural and Indigenous Affairs. [Portfolio responsibility: Immigration and Multicultural and Indigenous Affairs]

The bill proposes to amend the *Migration Act 1958* to:

- allow a “transitory person” to be brought to Australia without a visa for a temporary purpose;
- bar a “transitory person” from making a valid application for any visa whilst in Australia, unless the Minister believes it is in the public interest to allow the person to apply for a visa;
- stop legal proceedings being taken in relation to the “transitory person’s” presence in Australia; and
- provide clear statutory authority to remove the person from Australia.

Abrogation of common law rights of action

Proposed new section 494AB

Item 6 of Schedule 1 to this bill proposes to insert a new section 494AB in the *Migration Act 1958*. This new section will prohibit various rights of action (which would presumably otherwise be available) from being pursued in any court against the Commonwealth, an officer of the Commonwealth or a person acting on behalf of the Commonwealth.

The Explanatory Memorandum does not indicate the reason for this abrogation of common law rights. The Committee, therefore, **seeks the Minister's advice** as to the reason for abrogating these rights.

Pending the Minister's response, 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 Minister

As you may recall, the *Migration Legislation Amendment (Transitional Movement) Bill 2002* was passed by the Parliament on 21 March 2002 and received the Royal Assent on 4 April 2002.

3. Section 494AB prohibits a transitory person from instituting certain legal actions against the Commonwealth, an officer of the Commonwealth or a person acting on behalf of the Commonwealth. The Committee seeks advice as to the reasons for "abrogating" these common law rights of action, in relation to transitory persons.

4. First, it is important to note that these common law rights of action are not totally abrogated. A transitory person can still appeal to the High Court in relation to the matters listed in paragraphs 494AB(1)(a) - (d) under the jurisdiction conferred on the High Court by section 75 of the Constitution.

5. Second, the bar on legal proceedings is intended to limit the potential for future abuse of legal proceedings by persons seeking to frustrate the resolution of their immigration status, removal or to obtain desirable migration outcomes. The bar on legal proceedings means that Commonwealth officers are able to undertake their duties without fear of being unreasonably brought to court for the performance of their legal duties.

6. In this regard, it is important to note that the transitory person still has common law rights of action. The bar is limited to those matters set out in paragraphs 494AB(1)(a) - (d) and the right to bring legal action in relation to all other matters, for example, negligence, is unaffected.

7. Finally, the Government remains committed to preserving the integrity of Australia's immigration processes and a balance between the "rights" of the individual and the interests of the wider Australian community. I believe that section 494AB strikes such an appropriate balance.

The Committee thanks the Minister for this response, which indicates that common law rights of action have not been completely extinguished. The Minister advises that there is still a right of appeal to the High Court in relation to certain matters and that the bar on rights of action is expressly limited to specified matters, thus preserving the right to take legal action in respect of all other matters.

The Minister also advises that the bar on legal action is intended to frustrate abuse of proceedings and to deter unreasonable actions against Commonwealth officials. In this context, the Committee notes that courts and tribunals have long held powers to deal with frivolous or vexatious actions.

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.

Plant Breeder's Rights Amendment Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 3 of 2002*, in which it made various comments. The Minister for Agriculture, Fisheries and Forestry has responded to those comments in a letter dated 22 May 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.

Extract from Alert Digest No. 3 of 2002

This bill was introduced into the Senate on 13 March 2002 by the Minister for Health and Ageing. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *Plant Breeder's Rights Act 1994* to:

- clarify the rights of plant breeders in certain circumstances where restrictions are imposed;
- enhance the access of breeders to the Plant Breeder's Rights (PBR) scheme; and
- improve the administration of the Act and the PBR scheme.

The bill also contains application provisions.

The rights of users

General comment

As noted above, this bill proposes to clarify the rights of plant breeders in certain circumstances where restrictions are imposed. The Explanatory Memorandum observes that plant breeder's rights (PBR) are negative rights, to exclude others from doing certain acts, thereby providing the PBR owner with the opportunity to gain a commercial reward.

The Committee **seeks the Minister's advice** as to whether the amendments proposed in this bill will further affect the rights of farmers and other users or consumers of seeds.

Pending the Minister's response, 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 Minister

I wish to confirm that the proposed amendments will not further affect the rights of farmers and other users or consumers of seeds, including the ability of farmers to condition and use farm saved seed and of the general public to use seed for private, experimental or breeding purposes.

The Committee thanks the Minister for this response, which gives an assurance that the bill will not further affect the rights of farmers and other users or consumers of seeds.

Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2002*, in which it made various comments. The Minister for Finance and Administration has responded to those comments in a letter dated 15 May 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.

Extract from Alert Digest No. 2 of 2002

This bill was introduced into the House of Representatives on 21 February 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to amend the following Acts:

- *Superannuation Act 1976* in relation to reversionary benefits; consolidation of funds from other superannuation arrangements into the Commonwealth Superannuation Scheme (CSS); and powers of Reconsideration Advisory Committees;
- *Superannuation Act 1976* and the *Superannuation Act 1990* in relation to the scope and administration of the Acts, the CSS and the Public Sector Superannuation Scheme (PSS); delegations by the relevant Board; and benefit options for members who cease membership on the sale of an asset or the transfer or outsourcing of a function;
- *Parliamentary Contributory Superannuation Act 1948* in relation to reversionary benefits, orphan benefits, transfer values and rollover funds; and the
- *Administrative Appeals Tribunal Act 1975*, *Law Officers Act 1964*, and the *Workplace Relations Act 1996* in relation to benefits for CSS and PSS members who join the Judges' Pension Scheme and the *Superannuation Legislation Amendment Act (No. 1) 1995*, to remove redundant references.

Retrospective commencement

Schedule 1, items 175, 183, 186, 187; Schedule 2, items 8 and 14

By virtue of the table in subclause 2(1) of this bill, the amendments proposed by items 175, 183, 186 and 187 of Schedule 1, and items 8 and 14 of Schedule 2, will commence retrospectively on 1 July 1995.

It appears that these amendments are technical in nature, being designed solely to clarify the operation of provisions which have been in force since 1 July 1995. For example, the Explanatory Memorandum states that item 175 of Schedule 1 is intended to ensure that Board members of the Commonwealth Superannuation Scheme “may only be indemnified in circumstances permitted by SIS”. Item 187 of that Schedule is intended to amend the Act in the same terms as regulations which modified the Act in 1995 to apply less stringent preservation rules. The Committee **seeks the Minister’s confirmation** that the retrospective commencement of these provisions will not detrimentally affect the rights of any person.

Pending the Minister’s confirmation, 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

All of these items other than item 8 of Schedule 2 clarify or correct provisions of the *Superannuation Act 1976* (the 1976 Act) and the *Superannuation Act 1990* (the 1990 Act) that were inserted into those Acts or amended with effect from 1 July 1995 by the *Superannuation Legislation Amendment Act 1995*. The 1976 Act provides the rules for the Commonwealth Superannuation Scheme (CSS). The 1990 Act and the Trust Deed under that Act provide the rules for the Public Sector Superannuation Scheme (PSS).

Item 175 of Schedule 1 and item 14 of Schedule 2 ensure that members of the CSS and PSS Boards can only be indemnified in circumstances permitted by the Superannuation Industry (Supervision) Act 1993 and its regulations (SIS). Items 183 and 187 of Schedule 1 correct provisions relating to the release of benefits as permitted by SIS. These provisions have already been amended by regulations made under section 155C of the Act. When section 155C was inserted into the Act the then Minister for Finance assured the Committee that the Act itself would be amended in line with any regulations made under that provision on the first possible occasion. The date of effect of these items is the same as the date of effect of the regulations under section 155C. These provisions ensure that the schemes comply with the national regulatory scheme for superannuation as provided for by SIS.

Item 186 of Schedule 1 corrects an error of drafting relating to the date on which deferred benefits become payable. The error occurred when section 138 was redrafted in 1995 and instead of providing, as had been done by the provision since

1976, that benefits become payable after a particular event, eg, death, it inadvertently provided that benefits should be payable from the day before the event. This creates a situation where a benefit appears to become payable from a day before the person was eligible for the benefit. As it was not intended that the provision be changed in this way, it has been administered since 1995 as if the error had not been made.

Item 8 of Schedule 2 amends the definition of Trust Deed included in the 1990 Act to ensure changes made to the Trust Deed through an Act of Parliament are included in the definition. The definition as currently drafted only includes amendments made under an Amending Deed. The definition is being retrospectively changed from 1 July 1995 in order to ensure that amendments made by item 17 of Schedule 2 (which take effect from that date) can be encompassed in the definition of Trust Deed. (Amendments made by item 17 of Schedule 2 are being made as a result of a request made by the Senate Standing Committee on Regulations and Ordinances in 1995.) This is a technical amendment that will not detrimentally affect the rights of any person.

The retrospective amendments clarify provisions amended or inserted with effect from 1 July 1995, or are consequential on such amendments, and the schemes have been administered as if these amendments were in place from that date. I therefore consider that the retrospective commencement will not detrimentally affect the rights of any person.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Retrospective commencement

Schedule 1, items 176, 182 and 194 and Schedule 3

The table in subclause 2(1) will also permit the amendments proposed by items 176, 182 and 194 of Schedule 1, and the whole of Schedule 3, to commence retrospectively on 27 June 1997 – the date of a ministerial announcement.

It appears that these amendments may be beneficial to members of public service superannuation schemes who cease to be scheme members on the sale or transfer of government businesses or assets or as a result of outsourcing, but this is not clear from either the Explanatory Memorandum or the Minister's Second Reading Speech. The Committee, therefore, **seeks the Minister's confirmation** that these amendments are beneficial to those retrospectively affected.

Pending the Minister's confirmation, 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

These amendments relate to changes to the 1976 Act and the PSS Trust Deed under the 1990 Act to reflect changes to the scheme announced on 27 June 1997.

Items 176 and 194 of Schedule 1 amend the 1976 Act to remove existing restrictions on the payment of certain benefits from the CSS to persons who involuntarily retired as a result of a sale of an asset or the transfer of a function. Item 182 of Schedule 1 further amends the 1976 Act to provide a new benefit option for CSS members who cease CSS membership in those circumstances but who are not involuntarily retired. This can occur where a CSS member resigns from Commonwealth employment in some cases to work for the new owner of the asset or provider of the function.

Schedule 3 amends the PSS Trust Deed to remove similar restrictions on the payment of benefits from the PSS and provide a similar new benefit option in relation to PSS members who cease PSS membership in those circumstances.

The relevant benefit options have been available on an administrative basis since 27 June 1997 and are beneficial to the members concerned.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Retrospective commencement Schedule 1, item 193

The table in subclause 2(1) will also permit the amendment proposed by item 193 of Schedule 1 to commence retrospectively on 18 December 1992. This item amends section 155B of the *Superannuation Act 1976*. Section 155B provides for the making of regulations to modify the Principal Act in relation to members of the Commonwealth Superannuation Scheme (CSS) who cease to be members on the sale of an asset or the transfer of a function.

The Explanatory Memorandum states that section 155B was intended to apply to all persons who cease membership in those circumstances “but this is unclear”. Item 193 amends section 155B to make this intent clear.

Again, it appears that this amendment is beneficial to former members of the CSS, but this is not clear from either the Explanatory Memorandum or the Minister’s Second Reading Speech. The Committee, therefore, **seeks the Minister’s confirmation** that these retrospective amendments will not adversely affect any person.

Pending the Minister’s confirmation, 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

This amendment clarifies the original intention of section 155B of the 1976 Act in relation to its application to all CSS members who cease membership through the sale of an asset or the transfer of a function. Legal advice has been received that the section as currently drafted would only apply to a person whose position ceases to exist in those circumstances. However, some persons may continue in their position but cease their CSS membership because an organisation is sold as a going concern to the private sector.

Regulations made under section 155B allow me to make declarations which provide for the early payment of benefits where a person is made redundant within three years of the sale or transfer. The amendment made by item 193 of Schedule 1 is necessary to allow this benefit to apply where a person ceases CSS membership because a body by which they are employed is sold as a going concern.

Because the provision has been administered as originally intended and is a beneficial provision I do not consider the retrospective commencement will adversely affect any person.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Declarations having retrospective effect

Schedule 1, items 12 to 15 and Schedule 2, items 4 to 7

The amendments proposed by items 12 to 15 of Schedule 1, and items 4 to 7 of Schedule 2, will permit the Minister to make declarations (for example, a declaration to include an authority or body as an approved authority) which have effect before the date on which those amendments have commenced.

It appears that any such declarations may be beneficial to members of public service superannuation schemes, but this is not clear from either the Explanatory Memorandum or the Minister's Second Reading Speech. The Committee, therefore, **seeks the Minister's confirmation** that these amendments are beneficial to those retrospectively affected.

Pending the Minister's confirmation, 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

Items 12 to 15 of Schedule 1 and items 4 to 7 of Schedule 2 to the Bill will amend the 1976 and 1990 Acts in relation to my power to make declarations that an authority or body should be, or should not be, an approved authority for the purposes of the Act.

A retrospective declaration that an authority or body is an approved authority is beneficial in effect to the employees of the authority or body because it validates their membership of the relevant scheme during the period of retrospectively.

In the case of a declaration that an authority or body is not an approved authority I can not make a declaration with retrospective effect if any persons employed by that authority or body have been treated as CSS or PSS members during the period of retrospectivity. The amendments do not allow the making of a declaration that would disadvantage a person who has been contributing to either the CSS or the PSS.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002

Introduction

The Committee dealt with this bill in *Alert Digest No. 2 of 2002*, in which it made various comments. The Minister for Employment and Workplace Relations has responded to those comments in a letter dated 21 May 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.

Extract from Alert Digest No. 2 of 2002

This bill was introduced into the House of Representatives on 20 February 2002 by the Minister for Employment and Workplace Relations. [Portfolio responsibility: Employment and Workplace Relations]

The bill proposes to amend the *Workplace Relations Act 1996* to amend the certified agreement and freedom of association provisions. The proposed amendments will:

- prevent the Australian Industrial Relations Commission (the AIRC) from certifying or varying an agreement that contains a provision requiring the payment of a bargaining services fee;
- amend section 298Y to make clear that bargaining services fee clauses in certified agreement are void and authorise the AIRC to remove these clauses on application by a party to the agreement or the Office of the Employment Advocate; and
- prohibit conduct designed to compel individuals to pay bargaining services fees.

The amendments proposed apply equally to fees for bargaining services imposed by trade unions or by employer associations.

Retrospective application Schedule 1, item 11

By virtue of item 14 of Schedule 1 to this bill, the amendment proposed by item 11 would apply retrospectively to any certified agreement, whenever it had been certified. Since the effect of the amendment proposed by item 11 is to render void certain provisions in certified agreements, the operation of item 14 may retrospectively avoid a provision in a certified agreement which has been in force, and on which the parties have been acting, for some time.

Neither the Explanatory Memorandum nor the Minister's Second Reading Speech seeks to justify this retrospective application. The Committee, therefore, **seeks the Minister's advice** as to why this provision applies retrospectively.

Pending the Minister's response, 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 Minister

The Bill prohibits a range of conduct related to the imposition of bargaining services fees; as well as addressing bargaining services fee clauses in existing certified agreements and prohibiting certification of further agreements containing such clauses.

The Alert Digest draws attention to the effect of item 11 of Schedule 1, which is to render void a provision of certified agreement to the extent that it requires payment of a bargaining services fee. The Alert Digest then suggests that the operation of item 14 may retrospectively make void a provision in a certified agreement which has been in force, and on which the parties have been acting, for some time. The Committee seeks advice as to why this provision applies retrospectively.

Item 11 of the Bill seeks to ensure that parties are clear about their legal rights and obligations, and that they not mislead by the existence of a void clause in an agreement, by confirming the current legal position, which is that bargaining services fees clauses in certified agreements are not enforceable. In this respect, the Bill does not seek to amend (but to clarify) the existing law. (This objective is further reflected in the power the Bill vests in the Australian Industrial Relations Commission to remove such clauses from agreements.)

In the Federal Court judgment in *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600, Merkel J held that a so-called 'bargaining agent fee' clause is not a matter that pertains to the relationship between employers and employees and therefore cannot be included in claims for a certified agreement. Against that background, item 14 cannot be regarded as taking away rights retrospectively, as these rights never existed.

Although the judgment of Merkel J has been appealed, the Government is of the view that his Honour's finding that a bargaining services fee clause is not a matter pertaining to the relationship between employers and employees is likely to be upheld, as it is consistent with High Court authorities about analogous clauses. In his judgment, Merkel J noted the similarities (in terms of their relevance to the employment relationship) between bargaining agent fees and the payment of union dues by union members. His Honour referred to the judgments of the High Court in *R v Portus; Ex parte Australian and New Zealand Banking Group Limited* (1972) 172 CLR 353, and *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96. In those cases the High Court found that provision by employers of a facility for payroll deduction of union dues was not a matter pertaining to the employment relationship between employers and employees.

I hope this information addresses the Committee's concerns.

The Committee thanks the Minister for this response, but notes that its work is assisted if the Explanatory Memorandum which accompanies a bill includes appropriate details of its background. Accordingly, the Committee requests the Minister to arrange for the tabling of an additional Explanatory Memorandum setting out this material.

Barney Cooney
Chairman



RECEIVED

13 MAY 2002

Senate Standing Committee
for the Scrutiny of Bills

THE HON PHILIP RUDDOCK MP
Minister for Immigration and Multicultural and Indigenous Affairs
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The Hon Senator B Cooney
Chairman
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

**Aboriginal and Torres Strait Islander Commission Amendment Bill 2002 – Alert
Digest 3/02**

I refer to a letter, dated 21 March 2002, from Mr James Warmenhoven regarding concerns raised by the Senate Standing Committee for the Scrutiny of Bills in relation to the retrospective nature of provisions in Schedule 1 of the Aboriginal and Torres Strait Islander Commission Amendment Bill 2002 (the Bill).

I understand that the Committee is seeking information as to why the amendments in relation to criminal convictions have retrospective application so as to render a person ineligible to stand for election as a member of a Regional Council where he or she has been convicted of an offence prior to the commencement of Schedule 1.

The Bill does have a measure of retrospective application in relation to persons standing for office. The amendments in Schedule 1 disqualify a person from standing for election as a member of a Regional Council or being appointed as a Commissioner where they have been convicted and given a single sentence of imprisonment for multiple offences. The amendments also provide that a person must be removed from the office of a Regional Council Chair or Commissioner if convicted and given a single sentence of imprisonment for multiple offences.

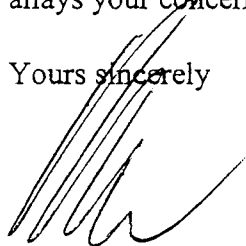
Under the *Aboriginal and Torres Strait Islander Commission Act 1989* (the ATSIC Act) persons are disqualified from standing for election as a Regional Councillor and appointment as a Commissioner if they have been convicted and sentenced to certain periods of imprisonment for single offences. The Bill will amend the ATSIC Act so that persons who receive a single sentence of imprisonment for multiple offences are similarly disqualified from election or appointment.

The ATSIC Act operates so that a degree of retrospectivity applies to ATSIC elected and potential office holders in relation to matters dealing with their conduct prior to occupation of a relevant office. Regional Councillors and Commissioners hold responsible and representative offices on behalf of Australia's Indigenous people. In order to maintain public confidence in office holders it is necessary to ensure that such persons meet a high standard of probity. As such, the Bill like the ATSIC Act contains provisions which make recent past conduct relevant to their fitness for office.

I consider the retrospective application of the criminal conviction and sentencing provisions in the Bill to be necessary and reasonable. The amendments will ensure that termination and eligibility provisions in the ATSIC Act are consistent across the office holders.

Thank you for drawing this matter to my attention. I trust that the above information allays your concerns.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Philip Ruddock', written over the words 'Yours sincerely'.

Philip Ruddock



15 MAY 2002

RECEIVED

27 MAY 2002

Senate Standing C'ttee
for the Scrutiny of Bills

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

Dear Senator Cooney

I refer to two letters of 21 March 2003 from Mr James Warmenhoven, Secretary to the Committee, to my Senior Adviser referring to the comments contained in the Scrutiny of Bills Alert Digest No. 3 of 2002 (20 March 2002) concerning the:

- Migration Legislation Amendment (Transitional Movement) Bill 2002; and
- Migration Legislation Amendment (No. 1) Bill 2002.

As you may recall, the *Migration Legislation Amendment (Transitional Movement) Bill 2002* was passed by the Parliament on 21 March 2002 and received the Royal Assent on 4 April 2002. The *Migration Legislation Amendment (No. 1) Bill 2002* is presently before the House of Representatives but is expected to be ready for consideration by the Senate during the Spring Sittings 2002.

The Committee seeks my advice in relation to a number of matters concerning the above Bills. Advice on these matters is contained in Attachment A to this letter.

I trust that the attached comments will be of assistance to the Committee.

Yours sincerely

A large, stylized handwritten signature in black ink, likely belonging to Philip Ruddock.

Philip Ruddock

Migration Legislation Amendment (Transitional Movement) Bill 2002

1. This Bill is now an Act, having been passed by the Parliament on 21 March 2002 and receiving the Royal Assent on 4 April 2002. It commenced operation on 12 April 2002.
2. The Act amends the *Migration Act 1958* to:
 - allow a “transitory person” to be brought to Australia without a visa for a temporary purpose;
 - bar the person from making a valid visa application in Australia, unless the Minister believes that it is in the public interest to allow the person to apply for a visa
 - bar the person from instituting certain legal proceedings against the Commonwealth, an officer of the Commonwealth, or any other person acting on behalf of the Commonwealth whilst in Australia; and
 - allow certain transitory persons to make a request for an assessment by the Refugee Review Tribunal as to whether they are a “refugee” where they have been in Australia for a continuous period of six months and have cooperated with relevant authorities.

Section 494AB – Bar on certain legal proceedings relating to transitory persons.

3. Section 494AB prohibits a transitory person from instituting certain legal actions against the Commonwealth, an officer of the Commonwealth or a person acting on behalf of the Commonwealth. The Committee seeks advice as to the reasons for “abrogating” these common law rights of action, in relation to transitory persons.
4. First, it is important to note that these common law rights of action are not totally abrogated. A transitory person can still appeal to the High Court in relation to the matters listed in paragraphs 494AB(1)(a) – (d) under the jurisdiction conferred on the High Court by section 75 of the Constitution.
5. Second, the bar on legal proceedings is intended to limit the potential for future abuse of legal proceedings by persons seeking to frustrate the resolution of their immigration status, removal or to obtain desirable migration outcomes. The bar on legal proceedings means that Commonwealth officers are able to undertake their duties without fear of being unreasonably brought to court for the performance of their legal duties.
6. In this regard, it is important to note that the transitory person still has common law rights of action. The bar is limited to those matters set out in paragraphs 494AB(1)(a) – (d) and the right to bring legal action in relation to all other matters, for example, negligence, is unaffected.

7. Finally, the Government remains committed to preserving the integrity of Australia's immigration processes and a balance between the "rights" of the individual and the interests of the wider Australian community. I believe that section 494AB strikes such an appropriate balance.



HON WARREN TRUSS MP
Minister for Agriculture, Fisheries and Forestry

22 MAY 2002

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23 MAY 2002

Senate Standing Committee
for the Scrutiny of Bills

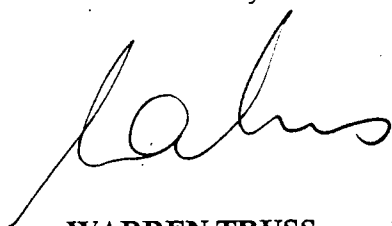
Mr James Warmenhoven
Secretary
Standing Committee for the Scrutiny of Bills
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Mr Warmenhoven

I refer to your letter of 21 March 2002 seeking, on behalf of the Committee, my response to the Committee's comments as set out in the Scrutiny of Bills Alert Digest No. 3 of 2002 (20 March 2002) regarding the *Plant Breeder's Rights Amendment Bill 2002*.

I wish to confirm that the proposed amendments will not further affect the rights of farmers and other users or consumers of seeds, including the ability of farmers to condition and use farm saved seed and of the general public to use seed for private, experimental or breeding purposes.

Yours sincerely



WARREN TRUSS



2002 Year of the Outback



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15 MAY 2002

Senate Standing Committee
for the Scrutiny of Bills

SENATOR THE HON NICK MINCHIN

Minister for Finance and Administration

15 MAY 2002

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

Thank you for the letter of 14 March 2002 from the Secretary of your Committee concerning the Committee's comments on the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002. I am happy to provide the following comments.

Retrospective commencement - Schedule 1, items 175, 183, 186, 187 and Schedule 2, items 8 and 14

All of these items other than item 8 of Schedule 2 clarify or correct provisions of the *Superannuation Act 1976* (the 1976 Act) and the *Superannuation Act 1990* (the 1990 Act) that were inserted into those Acts or amended with effect from 1 July 1995 by the *Superannuation Legislation Amendment Act 1995*. The 1976 Act provides the rules for the Commonwealth Superannuation Scheme (CSS). The 1990 Act and the Trust Deed under that Act provide the rules for the Public Sector Superannuation Scheme (PSS).

Item 175 of Schedule 1 and item 14 of Schedule 2 ensure that members of the CSS and PSS Boards can only be indemnified in circumstances permitted by the *Superannuation Industry (Supervision) Act 1993* and its regulations (SIS). Items 183 and 187 of Schedule 1 correct provisions relating to the release of benefits as permitted by SIS. These provisions have already been amended by regulations made under section 155C of the Act. When section 155C was inserted into the Act the then Minister for Finance assured the Committee that

the Act itself would be amended in line with any regulations made under that provision on the first possible occasion. The date of effect of these items is the same as the date of effect of the regulations under section 155C. These provisions ensure that the schemes comply with the national regulatory scheme for superannuation as provided for by SIS.

Item 186 of Schedule 1 corrects an error of drafting relating to the date on which deferred benefits become payable. The error occurred when section 138 was redrafted in 1995 and instead of providing, as had been done by the provision since 1976, that benefits become payable after a particular event, eg, death, it inadvertently provided that benefits should be payable from the day before the event. This creates a situation where a benefit appears to become payable from a day before the person was eligible for the benefit. As it was not intended that the provision be changed in this way, it has been administered since 1995 as if the error had not been made.

Item 8 of Schedule 2 amends the definition of Trust Deed included in the 1990 Act to ensure changes made to the Trust Deed through an Act of Parliament are included in the definition. The definition as currently drafted only includes amendments made under an Amending Deed. The definition is being retrospectively changed from 1 July 1995 in order to ensure that amendments made by item 17 of Schedule 2 (which take effect from that date) can be encompassed in the definition of Trust Deed. (Amendments made by item 17 of Schedule 2 are being made as a result of a request made by the Senate Standing Committee on Regulations and Ordinances in 1995.) This is a technical amendment that will not detrimentally affect the rights of any person.

The retrospective amendments clarify provisions amended or inserted with effect from 1 July 1995, or are consequential on such amendments, and the schemes have been administered as if these amendments were in place from that date. I therefore consider that the retrospective commencement will not detrimentally affect the rights of any person.

Retrospective commencement - Schedule 1, items 176, 182, and 194 and Schedule 3

These amendments relate to changes to the 1976 Act and the PSS Trust Deed under the 1990 Act to reflect changes to the scheme announced on 27 June 1997.

Items 176 and 194 of Schedule 1 amend the 1976 Act to remove existing restrictions on the payment of certain benefits from the CSS to persons who involuntarily retired as a result of a sale of an asset or the transfer of a function. Item 182 of Schedule 1 further amends the 1976 Act to provide a new benefit option for CSS members who cease CSS membership in those circumstances but who are not involuntarily retired. This can occur where a CSS member resigns from Commonwealth employment in some cases to work for the new owner of the asset or provider of the function.

Schedule 3 amends the PSS Trust Deed to remove similar restrictions on the payment of benefits from the PSS and provide a similar new benefit option in relation to PSS members who cease PSS membership in those circumstances.

The relevant benefit options have been available on an administrative basis since 27 June 1997 and are beneficial to the members concerned.

Retrospective commencement - Schedule 1, item 193

This amendment clarifies the original intention of section 155B of the 1976 Act in relation to its application to all CSS members who cease membership through the sale of an asset or the transfer of a function. Legal advice has been received that the section as currently drafted would only apply to a person whose position ceases to exist in those circumstances. However, some persons may continue in their position but cease their CSS membership because an organisation is sold as a going concern to the private sector.

Regulations made under section 155B allow me to make declarations which provide for the early payment of benefits where a person is made redundant within three years of the sale or transfer. The amendment made by item 193 of Schedule 1 is necessary to allow this benefit to apply where a person ceases CSS membership because a body by which they are employed is sold as a going concern.

Because the provision has been administered as originally intended and is a beneficial provision I do not consider the retrospective commencement will adversely affect any person.

Declarations having retrospective effect – Schedule 1, items 12 to 15 and Schedule 2, items 4 to 7

Items 12 to 15 of Schedule 1 and items 4 to 7 of Schedule 2 to the Bill will amend the 1976 and 1990 Acts in relation to my power to make declarations that an authority or body should be, or should not be, an approved authority for the purposes of the Act.

A retrospective declaration that an authority or body is an approved authority is beneficial in effect to the employees of the authority or body because it validates their membership of the relevant scheme during the period of retrospectively.

In the case of a declaration that an authority or body is not an approved authority I can not make a declaration with retrospective effect if any persons employed by that authority or body have been treated as CSS or PSS members during the period of retrospectivity. The amendments do not allow the making of a declaration that would disadvantage a person who has been contributing to either the CSS or the PSS.

A copy of this letter has been sent to the Secretary to the Committee and e-mailed to the Secretariat as requested.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nick Minchin', with a stylized, cursive script.

Nick Minchin

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22 MAY 2002

Senate Standing C'ttee
for the Scrutiny of Bills



THE HON TONY ABBOTT MP

MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
Leader of the House of Representatives
Minister Assisting the Prime Minister for the Public Service

PARLIAMENT HOUSE
CANBERRA ACT 2600

21 MAY 2002

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

Dear Senator Cooney

A handwritten signature in dark ink, appearing to be 'Tony Abbott'.

I am writing in response to your Committee's comments concerning the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002 contained in the Scrutiny of Bills Alert Digest No. 2 of 2002 (13 March 2002).

The Bill prohibits a range of conduct related to the imposition of bargaining services fees; as well as addressing bargaining services fee clauses in existing certified agreements and prohibiting certification of further agreements containing such clauses.

The Alert Digest draws attention to the effect of item 11 of Schedule 1, which is to render void a provision of certified agreement to the extent that it requires payment of a bargaining services fee. The Alert Digest then suggests that the operation of item 14 may retrospectively make void a provision in a certified agreement which has been in force, and on which the parties have been acting, for some time. The Committee seeks advice as to why this provision applies retrospectively.

Item 11 of the Bill seeks to ensure that parties are clear about their legal rights and obligations, and that they not mislead by the existence of a void clause in an agreement, by confirming the current legal position, which is that bargaining services fees clauses in certified agreements are not enforceable. In this respect, the Bill does not seek to amend (but to clarify) the existing law. (This objective is further reflected in the power the Bill vests in the Australian Industrial Relations Commission to remove such clauses from agreements.)

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In the Federal Court judgment in *Electrolux Home Products Pty Ltd v Australian Workers Union* [2001] FCA 1600, Merkel J held that a so-called 'bargaining agent fee' clause is not a matter that pertains to the relationship between employers and employees and therefore cannot be included in claims for a certified agreement. Against that background, item 14 cannot be regarded as taking away rights retrospectively, as these rights never existed.

Although the judgment of Merkel J has been appealed, the Government is of the view that his Honour's finding that a bargaining services fee clause is not a matter pertaining to the relationship between employers and employees is likely to be upheld, as it is consistent with High Court authorities about analogous clauses. In his judgment, Merkel J noted the similarities (in terms of their relevance to the employment relationship) between bargaining agent fees and the payment of union dues by union members. His Honour referred to the judgments of the High Court in *R v Portus; Ex parte Australian and New Zealand Banking Group Limited* (1972) 172 CLR 353, and *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96. In those cases the High Court found that provision by employers of a facility for payroll deduction of union dues was not a matter pertaining to the employment relationship between employers and employees.

I hope this information addresses the Committee's concerns.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tony Abbott', with a long horizontal line extending to the left.

TONY ABBOTT