SCRUTINY OF BILLS ALERT DIGEST

NO. 1 OF 1992

26 FEBRUARY 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

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 such 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.

The Committee has considered the following Bills:

* Construction Industry Reform and Development Bill 1991

Migration Amendment Bill (No. 4) 1991

* Taxation Laws Amendment Bill (No. 4) 1991

Trade Practices Amendment Bill (No. 2) 1991

*** The Committee has commented on these Bills**

NOTE: This Digest is circulated to all Honourable Senators. Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

CONSTRUCTION INDUSTRY REFORM AND DEVELOPMENT BILL 1991

This Bill was introduced into the Senate on 19 December 1991 by the Minister for Industrial Relations.

The Bill proposes to establish the Construction Industry Development and the Construction Industry Reform Agency.

General comment

The Committee notes that clause 55 of the Bill provides for periodic reporting by the proposed Construction Industry Reform Agency. It states:

> **Period reports**
>
> 55.(1) The Agency must, in addition to the requirement to prepare an annual report under section 63M of the *Audit Act 1901* (as applied under subsection 51(1) of this Act) prepare a report in accordance with the regulations for each prescribed period.
>
> (2) The Board must, as soon as possible after a report under subsection (1) is prepared, cause a copy of it to be given to each of the following:
>
> (a) the Minister;
> (b) the Minister for Small Business and Customs;
> (c) the Minister for Administrative Services;
> (d) the Minister for Employment, Education and Training;

(e) the Minister for Health, Housing and Community Services;

(f) the Minister for Defence.

(3) The Board may cause a copy of a report prepared under subsection (1) to be given to the Council.

The Committee notes that, while there is a requirement that the Agency report to various Ministers, there is no obligation to table such reports in the Parliament. Given that the Agency would be appropriated funds by the Parliament, the Committee suggests that it would be appropriate for the legislation to contain a requirement that periodic reports by the Agency be tabled in the Parliament.

MIGRATION AMENDMENT BILL (NO. 4) 1991

This Bill was introduced into the Senate on 19 December 1991 by the Minister Representing the Minister for Immigration, Local Government and Ethnic Affairs.

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

- make changes to the merits review system;
- distinguish the power to detain a person under the Act;
- increase certain penalty provisions in line with Commonwealth criminal law policy and allow consistent application of pecuniary penalties under the *Crimes Act 1914;* and
- provide that the obligation to endorse a visa or entry permit will be satisfied by an endorsement being recorded in a notified data base.

The Committee has no comment on this Bill.

TAXATION LAWS AMENDMENT BILL (NO. 4) 1991

This Bill was introduced into the House of Representatives on 19 December 1991 by the Minister Assisting the Treasurer.

The Bill proposes to amend various taxing Acts, to effect changes in the following areas:

- depreciation;
- avoidance of tax on recoupment of deductions allowed under capital allowance provisions
- optional balancing adjustment roll-over relief;
- rebates of tax on share dividends for company beneficiaries registered in the name of a trustee or partnership;
- deferral of deductions for trading stock purchases involving prepayments;
- tax file number arrangements;
- capital gains tax roll-over relief for partnerships;
- publishing indexation factors for the motor vehicle depreciation limit and capital gains tax;
- foreign source income;
- foreign exchange gains and losses;
- rehabilitation in respect of mining, quarrying and petroleum sites;
- deductions for certain research and development expenditure;
- Commissioner's discretion regarding fringe benefits;
- education entry payment to sole parent pensioners;

- carry-forward of excess foreign tax credits; and
- the Australia-Fiji comprehensive taxation agreement.

'Legislation by press release'
Clauses 15 to 20 and subclause 26(2); clauses 23, 36, 39, 41 and 48

Clause 15 of the Bill proposes to amend section 54 of the *Income Tax Assessment Act 1936*. That section deals with depreciation.

Clause 16 proposes to amend section 55 of the Income Tax Assessment Act, which deals with the effective life of property.

Clause 17 proposes to amend section 56 of the Income tax Assessment Act, which deals with the calculation of depreciation (as affected by section 55).

Clause 18 proposes to amend section 57AF of the Income Tax Assessment Act, which deals with the depreciation of motor vehicles.

Clause 19 proposes to repeal section 57AG of the Income Tax Assessment Act, which deals with special depreciation on 'plant'.

Clause 20 proposes to amend section 57AK of the Income Tax Assessment Act, which deals with the special depreciation on property used for basic iron or steel production.

Subclause 26(2) proposes to amend section 73A of the Income Tax Assessment Act, which deals with deductions for expenditure on scientific research.

Pursuant to subclause 64(4) of the Bill, the amendments proposed by clauses 15 to 20 and subclause 26(2) would apply to assessments in respect of the 1 July 1991 year of income. This would appear to involve a degree of retrospective operation.

Paragraph 1.1 of the Explanatory Memorandum states:

> This Bill puts into effect changes announced in the March 1991 Industry Statement and on 26 September 1991 to simplify the operation of the depreciation provisions of the income tax law and to allow taxation depreciation rates to be set objectively by reference to a statutory definition of effective life.

This would, therefore, appear to be an example of 'legislation by press release', a practice in relation to which the Committee has previously expressed its concern. However, the Committee notes that the amendments in question appear to be beneficial to taxpayers. In addition, the Committee notes that the Bill was introduced with 6 months of the statement which it proposes to put into effect. This is, therefore within the limits set out in the Senate's resolution of 8 November 1988 (see Journals of the Senate, No. 109, p1101). Accordingly the Committee makes no further comment on the provisions.

Clause 23 of the Bill proposes to amend section 59AA of the Income Tax Assessment Act, which deals with the disposal of depreciated property on change of ownership or interest.

Clause 36 proposes to amend section 122R of the Income Tax Assessment Act, which deals with changes in interests in property.

Clauses 39 and 41 propose to amend sections 123F and 124AO of the Income Tax Assessment Act, respectively, which also deal with changes in interests in property.

Clause 48 proposes to amend section 124W of the Income Tax Assessment Act, which deals with disposal of units of industrial property on a change of ownership.

According to the Explanatory Memorandum (page 2, first dot-point), these proposed amendments give effect to an announcement by the Treasurer on 8 December 1990. While this would, therefore, also seem to be an example of 'legislation by press release', the Committee notes that the amendments would appear to be beneficial to taxpayers. Accordingly, the Committee makes no further comment on the clauses.

Retrospective operation
Clause 63

The Committee notes that, while clause 2 of the Bill indicates that it will not commence until Royal Assent, various provisions in clause 63 are intended to apply to activities engaged in by taxpayers prior to that assent. Those provisions can be summarised as follows:

(a) sub-clause 63(3) would allow for retrospective application from 17 August 1976. However, the amendments referred to in that sub-clause are beneficial to taxpayers;

(b) sub-clauses 673(4), (6), (7) (8), (9) and (10) refer to amendments which would increase liability to income tax and all are to apply to activities

undertaken from the date of introduction of this Bill, 19 December 1991;

(c) sub-clause 63(12) would apply retrospectively to the amendments there referred to, from 1 July 1991. However, those amendments are beneficial to taxpayers;

(d) sub-clause 63(13) would apply retrospectively the amendment to be made by clause 51 from 6 December 1990. While that amendment appears to be adverse to taxpayers, the Explanatory Memorandum (at para 7.12) explains that the amendment is necessary to correct an unintended consequence of amendments made in 1990;

(e) sub-clause 63(14) to (17) would apply retrospectively the amendments there referred to, from the 1990/91 tax year (see Explanatory Memorandum, para 9.21). However, the amendments are beneficial to taxpayers. Further, the Committee notes that the Explanatory Memorandum points out (at para 9.22) that the Bill would ensure that no criminal offence is created retrospectively. The Committee also notes that the amendments would give effect to the (then) Treasurer's Press Release of 28 June 1991 (see Explanatory Memorandum, penultimate dot-point on p.4). This exercise is, therefore, within the 6 months allowed for by the Senate resolution of 8 November 1988.

The Committee makes no further comment on the clauses.

Retrospectivity
Clause 73

Clause 73 of the Bill provides:

> **Transitional - section 160AFE of the Principal Act**
> 73. Subsection 160AFE(1C) of the Principal Act applies, and is taken to have applied, if, and only if, the original year of income referred to in that subsection was the 1990-91 year of income or a subsequent year of income.

If enacted, this clause would appear to disapply subsection 160AFE(1C) of the Income Tax Assessment Act in relation to all years of income prior to the 1990-91 income year.

The Explanatory Memorandum states that this is:

> [a] technical amendment to clarify the operation of the provisions that deal with the carry forward of excess foreign tax credits.

It goes on to say:

> 15.2 A taxpayer whose assessable income includes foreign income is entitled to a credit against the Australian tax payable on that income for the foreign tax paid. The amount of foreign tax paid that can be utilised in a particular year cannot exceed, for each class of foreign income, the Australian tax payable on the foreign income of that year.
>
> 15.3 For the income years 1987-88, 1988-89, 1989-90, the first three years in which the foreign tax credit system operated, a taxpayer was not able to carry forward an excess of foreign tax credits for an income year to a later income year. With the

introduction of the Foreign Source Income legislation with general effect from the 1990-91 income year, the law was amended to allow the taxpayer to carry forward an excess credit in relation to a class of foreign income for five succeeding years.

15.4 It was intended that only excess credits that arose from the 1990-91 and subsequent years could be carried forward. This was clearly stated in the Explanatory Memorandum to the *Taxation Laws Amendment (Foreign Income) Act 1990.*

15.5 However, section 160AFE which deals with the carry forward of excess foreign tax credits could be interpreted as allowing a taxpayer to carry forward to the 1990-91 income year excess credits of prior income years.

15.6 Subsection 160AFE(1C) deals with the calculation of an excess foreign tax credit of an income year. [Clause 73] will provide that subsection 160AFE(1C) will have the effect that an excess credit can arise only for the 1990-91 or a later year of income. That subsection is to be read as always having had that effect.

The Committee makes no further comment on the clause.

TRADE PRACTICES AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the Senate on 19 December 1991 by the Minister for Justice and Consumer Affairs.

The Bill proposes to establish a strict product liability regime in Australia based on the 1985 European Community Product Liability Directive.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 2 OF 1992

2 MARCH 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

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 such 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.

The Committee has considered the following Bills:

Appropriation Bill (No. 3) 1991-92

Appropriation Bill (No. 4) 1991-92

Appropriation (Parliamentary Departments) Bill (No. 2) 1991-92

Asian Development Fund Bill 1992

Child Support Legislation Amendment Bill 1992

* Coarse Grains Levy Bill 1992

Coarse Grains Levy (Consequential Provisions) Bill 1992

* Corporations Legislation (Evidence) Amendment Bill 1992

* Customs and Excise Legislation Amendment Bill 1992

Deer Export Charge Bill 1992

* Deer Slaughter Levy Bill 1992

Deer Velvet Export Charge Bill 1992

Deer Velvet Levy Bill 1992

Defence Legislation Amendment Bill 1992

Law and Justice Legislation Amendment Bill (No. 2) 1992

* Mutual Assistance in Business Regulation Bill 1992

Primary Industries Levies and Charges Collection Amendment Bill 1992

* Sales Tax Laws Amendment Bill (No. 1) 1992

* Social Security and Veterans' Affairs Legislation Amendment Bill 1992

* Transport and Communications Legislation Amendment Bill 1992

*** The Committee has commented on these Bills**

NOTE: This Digest is circulated to all Honourable Senators. Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

APPROPRIATION BILL (NO. 3) 1991-92

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Finance.

The Bill proposes to appropriate an additional $834.2 million to meet payments for the ordinary annual services of the Government.

The Committee has no comment on this Bill.

APPROPRIATION BILL (NO. 4) 1991-92

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Finance.

The Bill proposes to appropriate an additional $277.1 million for capital works and services, payments to or for the States, the Northern Territory and the Australian Capital Territory, advances and loans, and other services.

The Committee has no comment on this Bill.

APPROPRIATION (PARLIAMENTARY DEPARTMENTS) BILL (NO. 2) 1991-92

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Finance.

The Bill proposes to appropriate an additional $5.3 million for recurrent expenditures of the Parliamentary Departments.

The Committee has no comment on this Bill.

ASIAN DEVELOPMENT FUND BILL 1992

This Bill was introduced into the House of Representatives on 27 February 1992 by the Parliamentary Secretary to the Minister for Foreign Affairs and Trade.

The Bill proposes to authorise a contribution of $A350 million towards the fifth Replenishment of the Asian Development Fund.

The Committee has no comment on this Bill.

CHILD SUPPORT LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 27 February 1992 by the Minister Assisting the Treasurer.

The Bill proposes to make a series of amendments to the child support legislation in the following areas:

- the eligibility of a child subject to a child welfare law;
- administrative review of child support assessments;
- special provisions for pensioners with consent orders;
- urgent maintenance orders;
- elections to end an administrative assessment;
- overlapping liability provisions;
- private receipt of maintenance for pensioners;
- child support debt due to payee when enforced overseas;
- authorising the Registrar of Child Support to credit payment against a registered liability; and
- payment and recovery of child support debts.

The Committee has no comment on this Bill.

COARSE GRAINS LEVY BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to incorporate the existing levies on barley and triticale and introduce new levies for oats and cereal rye, for the purpose of funding research.

Inappropriate delegation of legislative power
Clause 3, subclause 11(1)

The Committee notes that clause 3 of the Bill sets out various definitions for the purposes of the Bill. It defines 'leviable coarse grain' as

> (a) the grain harvested from:
>
> (i) barley; or
> (ii) triticale; or
> (iii) oats; or
> (iv) cereal rye; or
>
> (b) any other kind of coarse grain prescribed for the purposes of this definition.

Paragraph (b) of the definition may be considered an inappropriate delegation of legislative power, as it would allow the range of coarse grains upon which a levy could be imposed to be, in effect, widened by regulation. As such, this may be considered a matter which ought not to be left to the regulations but should be

dealt with by amendment of the primary legislation.

Similarly, the Committee notes that clause 3 states that

> 'leviable weight', in relation to a financial year, means 15 tonnes or, if, before the commencement of the financial year, another weight is prescribed in relation to that year, that prescribed weight.

This definition, if enacted, would allow a 'leviable weight' different to that set out in the primary legislation to be prescribed by regulation. As such, this may be considered an inappropriate delegation of legislative power.

In a similar vein, the Committee notes that clause 11 of the Bill provides:

> **Rates of levy - other leviable coarse grain**
>
> 11.(1) The rate of levy in respect of oats or cereal rye is the rate specified in the following table in respect of that grain or such other rate (not being a rate higher than 5% of the value of the grain) as is from time to time prescribed in respect of that grain.
>
> | Leviable coarse grain | Rate |
> |---|---|
> | oats | 0.5% of the value of the grain |
> | cereal rye | 0.5% of the value of the grain |
>
> (2) Where a coarse grain is prescribed for the purpose of the definition of 'leviable coarse grain' in section 3, the rate of levy in respect of the grain is such rate (not being a rate higher than 5% of the value of the grain) as is from time to time prescribed in respect of that grain.

Clause 3 defines 'value' as sales value ascertained in accordance with the regulations.

If this definition is considered in relation to clause 11, it would appear that, while the rate of levy can be set (by regulation) at no higher than 5% of the value of the grain, the 'value' of the grain can, itself, be amended by regulation. This would mean that the 5% limit is of little or no effect, as the 'value' on which it is based can always be increased by regulation. Accordingly, this may be considered an inappropriate delegation of legislative power.

The Committee draws Senators' attention to the clauses referred to above, as they may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

COARSE GRAINS LEVY (CONSEQUENTIAL PROVISIONS) BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Primary Industries and Energy.

The Bill complements the Coarse Grains Levy Bill 1992, enacting certain consequential amendments, repealing the *Barley Research Levy Act 1980* and *Triticale Levy Act 1988* and provide other transitional arrangements.

The Committee has no comment on this Bill.

CORPORATIONS LEGISLATION (EVIDENCE) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to remove certain immunities available to witnesses under the Australian Securities Commission Law and the Corporations Law.

General comment - abrogation of the privilege against self-incrimination

The Committee notes that this Bill contains several proposed amendments which, if enacted, would alter the immunity which several provisions of the existing Corporations Law provide in relation to the giving of information or the production of documents in certain circumstances. The Explanatory Memorandum to the Bill states:

> Serious difficulties in investigations and prosecutions have been caused by the compensatory provision that neither a person's self-incriminatory statements, nor the signing of a record nor the fact of having produced a book ('use immunity'), nor any information of material derived from, or obtained as a result of, these statements or actions ('derivative use immunity') are admissible in evidence against the person in criminal proceedings and other proceedings for the recovery of a penalty.

It goes on to state:

> The major problems are caused by:
>
> . the derivative use immunity which places an excessive burden on the prosecution to prove beyond a reasonable doubt the negative fact that any item of evidence (of which there may be thousands in a complex case) has not been obtained as a result of information subject to the use immunity; and
>
> . that aspect of the use immunity which prevents the admission into evidence of the fact that a person, having claimed that to do so might tend to be self-incriminatory, has produced a book (which is broadly defined to include virtually all business-related records). This immunity may prevent a person from being linked in the chain of evidence with the documents which establish the commission of a corporate offence, preventing any effective prosecution of that person.

In relation to the particular amendments, the Explanatory Memorandum states:

> The proposed amendments to the *Australian Securities Commission Act 1989* provide for the removal of the derivative use immunity available to witnesses giving evidence under compulsion in investigations under that Act, and, for witnesses who have produced a document under claim of potential self-incrimination, of the use immunity currently available in relation to the fact of that production. The proposed amendments would also deny to bodies corporate the benefit of any use or derivative use immunity in proceedings under the Act, since these would be available only to natural persons.
>
> The proposed amendments to section 597 of the Corporations Law (which relates to evidence given under compulsion in examinations before the Court) provide for the removal of the derivative use immunity available to witnesses under the existing subsection 597(12), leaving the use immunity intact. Neither the

use immunity nor the derivative use immunity is to be available to bodies corporate.

Proposed section 1316A is inserted to ensure that in any Corporations Law criminal proceeding a body corporate, whether it is a defendant or not, may not refuse or fail to comply with a requirement to provide evidence on the ground that to do so might tend to be incriminating or to make the body liable to a penalty.

The outline of the amendments concludes by stating:

The proposed amendments are required to ensure that effective investigation and prosecution of corporate offences is not hindered by inappropriate evidentiary requirements in the particular circumstances of corporate crime. In such cases frequently the perpetrator is the only person having knowledge of the details of complex transactions by which an offence has been committed or concealed, and may consciously use the present immunities, provided by operation of statute, to make a full confession of crimes for which he or she may then not be prosecuted.

By way of further explanation for the proposed amendments, the Attorney-General noted in his Second Reading speech on the Bill that

The issue was recently re-examined by the Parliamentary Joint Committee on Corporations and Securities, which in its report tabled on 15 November 1991, recommended the removal of the derivative use immunity from the national scheme, together with the use immunity with regard to the fact that a person has produced a document. It also recommended that corporations be expressly excluded from claiming the privilege against self incrimination. These recommendations followed the recognition that the availability of full use/derivative use immunity is threatening to defeat the purpose of significant portions of the corporations legislation.

> This Bill adopts those recommendations by removing the derivative use immunity from subsection 68(3) of the Australian Securities Commission Act 1989 and from subsection 597(12) of the Corporations Law contained in section 82 of the Corporations Act 1989, It removes the immunity in respect of the fact that a person had produced a document from subsection 68(3) of the Australian Securities Commission Act 1989, and confines the availability of the remaining use immunity to natural persons.

The common law privilege against self-incrimination is a fundamental right. As a result, the Committee has, since its inception, maintained a serious concern about provisions which abrogate the privilege. While maintaining its concern, however, the Committee has, in the past, accepted that the right might be altered in certain limited circumstances and for good reasons.

In this instance, the amendment proposes to alter a provision which abrogates the privilege against self-incrimination but which, as it stands, is in a form which the Committee has been prepared to accept. It is evident from the material which has been extracted above that arguments have been advanced to support the need for the proposed amendment. Further, the Committee notes that these arguments have, in effect, been endorsed by the majority of the Joint Parliamentary Committee on Corporations and Securities in its recommendation that the immunities be removed. The Committee acknowledges those arguments but also re-states its in-principle concern that the privilege against self-incrimination is a fundamental right which, in the absence of good reasons, ought not to be interfered with.

In making this comment, the Committee also seeks the Attorney-General's advice as to whether there might be alternative methods of addressing the problems identified in the Explanatory Memorandum and the Second Reading speech.

The Committee draws Senators' attention to the clauses referred to, 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.

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Small Business, Construction and Customs.

The Bill proposes to:

- provide for electronic transmission and lodgement of information concerning imported goods;
- amend the advance reporting regime for ships and aircraft and their cargo, passengers and crew; and
- streamline the claims procedure, accountability and administration of the diesel fuel rebate scheme.

Reversal of the onus of proof
Clause 12 - proposed new subsection 64AE(3) of the *Customs Act 1901*

Clause 12 of the Bill proposes to insert a new section 64AE into the *Customs Act 1901*. If enacted, that new section would require the master and owner of a ship or the pilot and owner of an aircraft to answer questions and produce documents in certain circumstances. Failure to do so would carry a $500 penalty. However, proposed new subsection 64AE(3) goes on to provide:

> It is a defence to a prosecution for an offence against subsection (1) or (2) if the person charged had a reasonable excuse for:

(a) refusing or failing to answer questions asked by a Collector; or

(b) refusing or failing to produce documents when so requested by a Collector.

This clause involves a reversal of the onus of proof, as it is ordinarily incumbent on the prosecution to prove all the elements of an offence. Pursuant to the proposed amendment, if a person had a reasonable excuse for failing to provide such information, it would be incumbent on them to prove it. In making this observation, the Committee notes that it would not be unusual for the provisions relating to the provisions of information to state that it is an offence for a master, pilot or owner to fail, 'without reasonable excuse', to answer a question or produce documents.

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.

Inappropriate delegation of legislative power
Clause 13 - proposed new paragraph 68(1)(i) of the *Customs Act 1901*

Clause 13 of the Bill proposes to repeal sections 68, 69, 71, 71A and 71B of the *Customs Act 1901,* and to substitute a series of new sections. Proposed new section 68 deals with entry of imported goods. If enacted, it would apply to certain types of goods but not apply to a series of other categories of goods. Proposed paragraph 68(1)(i) provides that the section will not apply to:

> goods that, under the regulations, are exempted from this section, either absolutely or on such terms and conditions as are specified in the regulations.

This may be considered an inappropriate delegation of legislative power. If enacted, the paragraph would enable the Governor-General (acting on the advice of the Federal Executive Council) to pass regulations to exempt (either absolutely or conditionally) further goods (ie goods additional to those set out in proposed new paragraphs 68(1)(d) - (h)) from the operation of the section.

The Committee draws Senators' attention to the provision, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

DEER EXPORT CHARGE BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to impose a charge on the export of deer produced in Australia.

The Committee has no comment on this Bill.

DEER SLAUGHTER LEVY BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to impose a levy on the slaughter of deer, effective from 1 July 1992, to fund a research and development program.

Inappropriate delegation of legislative power
Subclause 5(1)

Subclause 5(1) of the Bill contains various definitions, including the following:

> **'cold dressed carcase weight'**, in relation to a slaughtered deer, means the weight of its dressed carcase determined in accordance with the regulations;
>
> ...
>
> **'dressed carcase'** has the meaning that is specified in the regulations;
>
> **'hot dressed carcase weight'**, in relation to a slaughtered deer, means the weight of its dressed carcase determined in accordance with the regulations.

These definitions are relevant to clause 7 of the Bill, which provides for the rate of levy to be imposed on the slaughter of deer. Subclauses 7(1) and (2) provide:

(1) The rate of levy imposed on deer slaughtered at an abattoir where the hot dressed carcase weight of the slaughtered deer is determined is the prescribed amount per kilogram of that weight of each slaughtered deer.

(2) The rate of levy imposed on deer slaughtered at an abattoir where the cold dressed carcase weight of the slaughtered deer is determined is the prescribed amount per kilogram of that weight of each slaughtered deer, multiplied by 1.03.

It would appear that, as a result of the definitions, the rate of levy could, in effect, be set by the regulations, because definitions relevant to the levy can be set by the regulations. If that is the case, this might be considered an inappropriate delegation of legislative power, as the level of the levy could be regarded as a matter more appropriately dealt with in the primary legislation rather than the regulations.

The Committee draws Senators' attention to the clause, as it may be considered an inappropriate delegation of the legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

DEER VELVET EXPORT CHARGE BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to impose a charge on the export of deer velvet produced in Australia.

The Committee has no comment on this Bill.

DEER VELVET LEVY BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to impose a levy on the sale of deer velvet produced and sold in Australia, or used in the production of other goods in Australia.

The Committee has no comment on this Bill.

DEFENCE LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Employment, Education and Training.

The Bill proposes to amend the *Defence Act 1903*, to:

- require prior parliamentary approval for conscription;
- allow conscientious objection to particular wars;
- define 'conscientious belief';
- provide for tribunals to consider claims and appeals of conscientious belief;
- remove discriminatory provisions; and
- allow for call-up in the prescribed order of classes.

Further, this Bill:

- repeals the *National Service Act 1951* and *National Service Termination Act 1973;*
- enables the appointment of the Defence Force Assistant Chief of Personnel to the Defence Housing Authority;
- makes miscellaneous amendments to other defence-related legislation.

The Committee has no comment on this Bill.

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Parliamentary Secretary to the Attorney-General.

This portfolio Bill proposes to amend the following Acts:

- *Judges' Pension Act 1968;*
- *Defence Force Discipline Appeals Act 1955;* and
- *Family Law Act 1975.*

The Committee has no comment on this Bill.

MUTUAL ASSISTANCE IN BUSINESS REGULATION BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to proposes to enable prescribed Australian agencies, with the Attorney-General's consent, to compel the provision of information documents and sworn testimony in aid of requests from foreign agencies.

Abrogation of the privilege against self-incrimination
Clause 14

Clause 10 of the Bill, if enacted, would allow 'the Commonwealth regulator' (as defined in clause 3 of the Bill) to require a person or a body corporate to provide information or produce documents in certain circumstances.

Subclause 13(1) provides that a failure to comply with such a requirement, without reasonable excuse, is punishable by imprisonment for 1 years.

Clause 14 provides:

> (1) For the purposes of subsection 13(1), it is not a reasonable excuse for a person to refuse or fail to give information or evidence, or to produce documents, in accordance with a requirement under section 10, that the information, evidence or production of the documents might tend to incriminate the person or make the person liable to a penalty.

(2) Subsection (3) applies if:

(a) before giving information or evidence in accordance with such a requirement, a person claims that the information or evidence might tend to incriminate the person or make the person liable to a penalty; and

(b) the information or evidence might in fact tend to incriminate the person or make the person liable to a penalty.

(3) The information or evidence, as the case may be, is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition of a penalty;

other than a proceeding in respect of the falsity of the information or evidence, as the case may be.

The Committee notes that this is a 'use indemnity', in that it would protect a person from having information provided by them in response to such a requirement used against them in criminal-type proceedings. However, the Committee notes that the provision would not protect the person providing the information from such information being used against them *indirectly*, eg as a lead to further evidence of an offence. Protection against such use would be a 'derivative use' indemnity.

As the Committee has noted elsewhere in this *Alert Digest*, (in relation to the Corporations Legislation (Evidence) Amendment Bill 1992), it has maintained a serious concern about any abrogation of the common law privilege against self-incrimination. However, the Committee has been prepared to accept a degree of interference with this privilege, if it is for good reason and applies in limited circumstances only. The so-called 'use/derivative use indemnity' is the best example of an approach to the abrogation of the privilege which the Committee has been

prepared to accept. A plain 'use indemnity' is, by definition, not as acceptable, as it provides less protection to an individual whose privilege against self-incrimination is abrogated.

Accordingly, the Committee draws Senators' attention to the clause, 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.

PRIMARY INDUSTRIES LEVIES AND CHARGES COLLECTION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to attach the deer industry levy and charge bills to the Principal Act to provide an administrative infrastructure for their collection.

The Committee has no comment on this Bill.

SALES TAX LAWS AMENDMENT BILL (NO. 1) 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister Assisting the Treasurer.

The Bill proposes to reduce the sales tax rate on passenger motor vehicles from 20 per cent to 15 per cent, effective from 27 February 1992.

General comment

The Committee notes that, pursuant to clause 2, this Bill (if enacted) would commence on 27 February 1992. In his Second Reading speech, the Minister Assisting the Treasurer indicated that the Bill was intended to give effect to an announcement made by the Prime Minister earlier that evening, in his *One Nation* address. While the Bill would, if enacted, have a degree of retrospective operation, the Committee notes that it may be considered a Budget-like measure and, accordingly, makes no further comment.

SOCIAL SECURITY AND VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Minister for Social Security.

The Bill proposes to effect:

- a one-off family allowance bonus payment;
- an increased family allowance supplement and additional pension/benefit in respect of children; and
- abolition of the waiting period for rental assistance for certain pensioners and beneficiaries.

General comment

The Committee notes that, pursuant to clause 2, this Bill (if enacted) would commence on 27 February 1992. In his Second Reading speech, the Minister for Social Security indicated that the Bill was intended to give effect to an announcement made by the Prime Minister earlier that evening, in his *One Nation* address. While the Bill would, if enacted, have a degree of retrospective operation, the Committee notes that it may be considered a Budget-like measure and, accordingly, makes no further comment.

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 February 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to make minor miscellaneous amendments to the following portfolio Acts:

- *Air Navigation Act 1920;*
- *Broadcasting Act 1942;* and
- *Radio Licence Fees Act 1964.*

Retrospectivity
Subclauses 2(4) and (5)

Subclause 2(4) of the Bill provides that Part 3 of the Bill is to be taken to have commenced immediately after the commencement of the *Broadcasting Amendment Act (No. 2) 1991* (other than sections 19, 20 and 21 of that Act). The Act referred to commenced on 3 January 1992 and the proposed amendments would, therefore, have a slight retrospective effect. However, as the Explanatory Memorandum to the Bill notes that Part 3 makes 'minor amendments to the Broadcasting Act to correct drafting defects and anomalies arising from the changes in the 1991 Regional Radio Program amendments', the Committee makes no further comment on the Subclause.

Subclause 2(5) provides that clauses 21, 22, 23 and 24 of the Bill are to be taken to have commenced on 1 January 1992, which would also involve a degree of retrospective operation. Those clauses contain proposed amendments to the *Radio Licence Fees Act 1964*. The Explanatory memorandum indicates that the proposed amendments, if enacted, would be beneficial to licence holders. The Committee makes no further comment on the clause.

Insufficient parliamentary scrutiny
Clause 12 - proposed new section 18 of the *Air Navigation Act 1920*

Clause 12 of the Bill proposes to insert a new section 18 into the *Air Navigation Act 1920*. That proposed new section provides:

> The Secretary must cause any determinations made under subsections 13A(3), 14(3A), 15(2C) and 17(1B) to be included in the Aeronautical Information Publications published under section 18 of the *Civil Aviation Act 1988*.

The determinations referred to are provided for in proposed new sections and subsections of the Air Navigation Act which are to be inserted by clauses 7, 8, 9 and 11 of the Bill. They relate to approvals for non-scheduled international flights by Australian aircraft and to certain categories of commercial non-scheduled flights being exempted from the existing requirements of obtaining prior permission.

It appears that these matters are currently dealt with by regulation and that the effect of the amendments proposed by the Bill would be to allow these matters to be dealt with by a determination by the Secretary. If this is the case, it would be a significant change, as the determinations, unlike the regulations which they replace,

would not be subject to any form of Parliamentary scrutiny. Indeed, there would not even be a requirement to table such determinations in the Parliament.

The Committee would appreciate the Minister's advice as to whether or not this is the case and, if so, why it is not considered appropriate that the matters to be dealt with by the determinations should be subject to scrutiny by the Parliament. Further, the Committee would appreciate the Minister's advice as to the types of matters which the determinations will cover and the extent to which those matters are limited.

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.

SCRUTINY OF BILLS ALERT DIGEST

NO. 3 OF 1992

25 MARCH 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

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 such 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.

The Committee has considered the following Bills:

* Australian National University Amendment (Autonomy) Bill 1992

Crimes (Protection of Australian Flags) Bill 1992

Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Amendment Bill 1992

Motor Vehicle Standards Amendment Bill 1992

Ozone Protection Amendment Bill 1992

Parliament House Construction Authority Repeal Bill 1992

* Service and Execution of Process Bill 1992

Service and Execution of Process (Transitional Provisions and Consequential Amendments) Bill 1992

* Threatened Species Bill 1992

*** The Committee has commented on these Bills**

AUSTRALIAN NATIONAL UNIVERSITY AMENDMENT (AUTONOMY) BILL 1992

This Bill was introduced into the Senate on 4 March 1992 by Senator Tierney as a Private Senator's Bill.

The Bill proposes to ensure that the Council of the Australian National University has the sole responsibility for the application of money appropriated by the Parliament for the purposes of the University and its management.

Retrospectivity
Clause 3

Clause 3 of the Bill proposes to insert two new subsections into section 42 of the *Australian National University Act 1991.* That section deals with the appropriation of money to the University by the Parliament. It also allows the Minister to give directions as to how that money is to be paid to the University.

Proposed new subsections 42(4) and (5) provide:

> (4) The power of the Minister under subsection (2) may not be exercised so as to allow any person or body other than the Council effectively to control the application of money payable to the University, or otherwise to abridge the entire control and management of the University vested in the Council by subsection 9(1).
>
> (5) A direction under this section which is contrary to subsection (4), whether given before or after the commencement of that subsection, is of no effect.

The Committee notes that, if enacted, proposed new subsection (5) could operate retrospectively to invalidate a Ministerial direction given prior to the commencement of the new sections.

The Committee draws 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.

CRIMES (PROTECTION OF AUSTRALIAN FLAGS) BILL 1992

This Bill was introduced into the House of Representatives on 5 March 1992 by Mr Cobb as a Private Member's Bill.

The Bill is identical in substance to three Bills previously introduced in the House of Representatives, which subsequently lapsed. Again, this Bill proposes to impose a penalty of $5000 (or imprisonment for two years, or both) on any person who desecrates, dishonours, burns, mutilates or otherwise destroys the Australian National Flag or an Australian Ensign.

The Committee has no comment on this Bill.

CRIMES (TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 5 March 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to:

- make it an offence to launder property or money derived from serious drug offences;
- define various offences called 'serious state drug offences' involving 'dealing in drugs'; and
- make provision for Regulations to prescribe States and Territories to which the legislation will not apply.

If enacted, the Bill will enable Australia to meet the remaining unfulfilled obligations under the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which will then allow Australia to ratify the Convention.

The Committee has no comment on this Bill.

MOTOR VEHICLE STANDARDS AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 5 March 1992 by Mr Hawker as a Private Member's Bill.

The Bill proposes to amend the *Motor Vehicle Standards Act 1989* so that Australian Design Rule 19/01, clause 19.6.106.9 is not enforced. That clause is intended to ensure that all motorcycles sold from 1 March 1992 have their headlights wired so that they come on automatically when the engine is started.

The Committee has no comment on this Bill.

OZONE PROTECTION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 March 1992 by the Minister for the Arts, Sport, the Environment and Territories.

The Bill proposes to:

- give effect to the Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, to enable Australia to ratify the Amended Protocol; and
- amend the *Ozone Protection Act 1989* to:
  - extend the quota control system provisions to encompass ten additional chlorofluorocarbons (CFCs) and methyl chloroform;
  - introduce a restricted licence system for carbon tetrachloride;
  - require that importers and manufacturers of hydrochlorofluorocarbons (HCFCs) report on quantities being imported/ manufactured.

The Committee has no comment on this Bill.

PARLIAMENT HOUSE CONSTRUCTION AUTHORITY REPEAL BILL 1992

This Bill was introduced into the Senate on 5 March 1992 by the Minister for Administrative Services.

The Bill proposes to repeal the *Parliament House Construction Authority Act 1979*, which was enacted to establish the Authority which undertook control of the design and construction of new Parliament House.

The Committee has no comment on this Bill.

SERVICE AND EXECUTION OF PROCESS BILL 1992

This Bill was introduced into the House of Representatives on 5 March 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to replace the *Service and Execution of Process Act 1901*, which is to be repealed by the Service and Execution of Process (Transitional Provisions and Consequential Amendments) Bill 1992. This Bill will provide for:

- interstate service of court and other process;
- interstate service and enforcement of subpoenas;
- bringing prisoners interstate to give evidence;
- interstate enforcement of civil judgments of courts;
- interstate arrest and return of persons to face criminal charges; and
- interstate enforcement of lower court fines.

Strict liability offence / reversal of the onus of proof
Subclause 103(2)

Clause 103 of the Bill provides:

> (1) A person must not fail or refuse to comply with a suppression order.
> Penalty: Imprisonment for 12 months.
>
> (2) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that:

(a) he or she did not know of the existence of the suppression order; and
(b) he or she had made all reasonable inquiries in the circumstances regarding the existence of a suppression order.

(3) A publishing organisation, or an employee or agent of a publishing organisation, it taken not to have made all reasonable inquiries regarding the existence of a suppression order if the organisation, or the employee or agent, as the case requires, has not made inquiries of the magistrate or Court in which the relevant proceedings are being, or were, heard as to whether a suppression order has been made in relation to the proceedings.

This provision, in effect, creates a strict liability offence, the defence to which is also set out in the provision. The onus of proving that defence would lie with the person charged. This may be regarded as a reversal of the onus of proof, as it would ordinarily be incumbent on the prosecution to prove all the elements of an offence. However, the Committee accepts that in the situation dealt with by the provision, the matters to be proved in establishing the defence would be peculiarly within the knowledge of the defendant. Accordingly, the Committee makes no further comment on the provision.

SERVICE AND EXECUTION OF PROCESS (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1992

This Bill was introduced into the House of Representatives on 5 March 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to:

- repeal the *Service and Execution of Process Act 1901;*
- continue the application of certain parts of the above Act before the commencement of the 1992 Bill; and
- make consequential amendments to the following Acts:
  - the *Admiralty Act 1988;*
  - the *Foreign Judgments Act 1991;*
  - the *Proceeds of Crime Act 1987;* and
  - the *Transfer of Prisoners Act 1983.*

The Committee has no comment on this Bill.

THREATENED SPECIES BILL 1992

This Bill was introduced into the Senate on 5 March 1992 by Senator Coulter as a Private Senator's Bill.

The Bill incorporates amendments to the Draft Bill (introduced in the Senate on 9 September 1991), following consultation with conservation and farmer organisations. It proposes to protect threatened species, populations and ecological communities through the establishment of several organisations to be responsible for the management of certain plans and strategies.

Inappropriate delegation fo legislative power
Subclauses 27(3) and 28(3)

Clause 27 of the Bill provides:

> (1) Schedule 1 sets out a list of species, populations and ecological communities which are threatened in Australia.
>
> (2) Any species listed in the Conservation Council endangered species list at the commencement of this Act is deemed to be included in Schedule 1.
>
> (3) Subject to sections 30 and 31, the regulations may add or remove species, populations and ecological communities from Schedule 1.
>
> (4) A species, population or ecological community is eligible to be listed:
>
> (a) if it is in a state of decline which could potentially result in extinction; or

(b) if the species so closely resembles in appearance, at any stage in its biological development, a species which has been listed that:

(i) any person or public authority would have substantial difficulty in differentiating between the species; and

(ii) the effect of this difficulty is an additional threat to the listed species; and

(iii) such treatment of an unlisted species will substantially facilitate the achievement of the Act's objects.

Subclause 27(3) may be considered to be an inappropriate delegation of legislative powers, as it would allow Schedule 1 (which governs the species, etc. that are to be protected by the Bill) to be amended by regulation. Given that the list of species set out in Schedule 1 is central to the operation of the legislation (and bearing in mind that clause 34 would create criminal offences by reference to the species set out in the Schedule), the Committee suggests that this may be considered to be a matter which is more appropriately dealt with by primary rather than subordinate legislation.

In any event, the Committee notes that, in its present form, 'Schedule 1' merely contains a description of the kinds of items which it will contain.

Similarly, the Committee notes that clause 28 of the Bill provides:

(1) Schedule 2 sets out a list of species, populations and ecological communities which are threatened overseas.

(2) Any species listed by the International Union for the Conservation of Nature ('the International Union') as being threatened in its Red Data lists at the commencement of this Act is deemed to be included in Schedule 2.

> (3) Subject to sections 30 and 31, the regulations may add or remove species, populations and ecological communities from Schedule 2.

For the reasons discussed above in relation to subclause 27(3), this may also be considered to be a matter which is more appropriate for primary rather than subordinate legislation. The Committee also notes that, in its present form, 'Schedule 2' merely contains a description of the kinds of items which it will contain.

In this regard, the Committee notes that, pursuant to clauses 5 and 6, the Bill is intended to have a wide application. If enacted, it would apply to Commonwealth agencies, trading corporations, foreign corporations and all Australian citizens, whether at home or abroad. The Committee is concerned that it may not be practicable for some of these persons and bodies to keep themselves up-to-date with the species listed (and deemed to be listed) in the Schedules to the Bill and, consequently, protected by the provisions of the Bill.

Finally, the Committee notes that subclauses 27(2) and 28(2) provide that the species listed **at the commencement of the legislation** by the Conservation Council as 'endangered' and by the International Union for the Conservation of Nature as 'threatened', respectively, are to constitute part of Schedules 1 and 2, respectively. Pursuant to clause 2 of the Bill, the legislation would commence upon receiving the Royal Assent. The Committee is concerned there is a capacity for the lists relied upon to be added to in the time between the passage of the legislation by the Parliament and its commencement. The Committee would prefer that this be limited in such a way that the Parliament can be certain, if and when it passes the legislation, as to the species that are to be covered by it.

The Committee draws Senators' attention to the provisions, as they may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Inappropriate delegation of legislative power
Clause 42

Clause 42 of the Bill provides:

> Except with the consent in writing of the Minister, it is unlawful to breach an Interim Order or a Permanent Order.
>
> Penalty: (a) for an individual, 2 years imprisonment or $10,000 or both.
> (b) for a corporation, $1,000,000 for each day.

An 'Interim Order' is a notice made by the Minister and published in the *Gazette* pursuant to clause 39 of the Bill. A 'Permanent Order' is a notice made by the Minister and published in the *Gazette* pursuant to clause 40 of the Bill.

In effect, clause 42 (if enacted) would allow the Minister to create criminal offences (punishable by imprisonment or significant fines) without reference to the Parliament.

The Committee draws Senators' attention to the provision, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Inappropriate delegation of legislative power
Clauses 74 and 75

Clause 74 of the Bill provides:

> The Minister, on the advice of the [Scientific Advisory] Panel, may declare information about flora or fauna or critical habitat to be confidential if the [Scientific Advisory] Panel is of the opinion that the disclosure of that information is likely to result in an unreasonable level of harm being done.

Clause 75 then provides:

> (1) Where the Minister has declared information about flora or fauna or critical habitat to be confidential no person who has obtained such information under this Act is to disclose such information to any person.
>
> Penalty: $1,000 or imprisonment for 6 months or both.
>
> (2) The Minister may exempt persons from subsection (1).

A declaration pursuant to clause 74 would not have to be tabled in the Parliament, notified in the *Gazette* or otherwise made known to persons who may be affected by the declaration and who may, therefore, commit an offence pursuant to clause 75 without knowing that they are doing so.

Further, the Committee notes that subclause 75(2), if enacted, would give the Minister an unfettered power to exempt persons from the penalty provisions in subclause 75(1). This power would not be subject to any form of parliamentary scrutiny.

The Committee draws attention to the provisions, as they may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)iv) of the Committee's terms of reference.

Power to appoint 'a person'
Subclause 78(1)

Clause 78 of the Bill deals with the appointment and powers of inspectors under the legislation. Subclause (1) provides

> The Minister may, in writing, appoint a person to be an inspector for the purposes of this Act.

The Committee notes that this subclause is identical to subclause 65(1) of the 'Draft Bill', which the Committee commented on in Alert Digest No. 16 of 1991. As it did on that occasion, the Committee notes that there is no suggestion contained in the Bill as to what qualifications or attributes such a person should possess. The Minister could appoint anyone as an inspector. The Committee has generally regarded such a wide appointment power as being inappropriate.

The Committee draws Senators' attention to the provision as it may be considered to make personal rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

SCRUTINY OF BILLS ALERT DIGEST

NO. 4 OF 1992

1 APRIL 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

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 such 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.

The Committee has considered the following Bills:

Appropriation Bill (No. 5) 1991-92

Motor Vehicle Standards (Headlights) Amendment Bill 1992

Supply Bill (No. 1) 1992-93

Supply Bill (No. 2) 1992-93

Supply (Parliamentary Departments) Bill 1992-93

* The Committee has commented on these Bills

NOTE: This Digest is circulated to all Honourable Senators. Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

APPROPRIATION BILL (NO. 5) 1991-92

This Bill was introduced into the House of Representatives on 24 March 1992 by the Minister for Finance.

The Bill proposes to appropriate a sum out of the Consolidated Revenue Fund, additional to the sum appropriated by the *Appropriation Act (No. 1) 1991-92*, for the service of the year ending on 30 June 1992, and for related purposes.

The Committee has no comment on this Bill.

MOTOR VEHICLE STANDARDS (HEADLIGHTS) AMENDMENT BILL 1992

This Bill was introduced into the Senate on 26 March 1992 by Senator Panizza as a Private Senator's Bill.

The Bill proposes to repeal part of the Australian Design Rule No. 19.01, which deals with electrical connections on motor cycles.

The aim of the relevant design rule, which has come into effect as of 1 March 1992, is to force all new motor cycles that are sold from 1 March onwards to have the headlight wired in such a way that when the engine is started the headlight will automatically come on.

The Committee has no comment on this Bill.

SUPPLY BILL (NO. 1) 1992-93

This Bill was introduced into the House of Representatives on 24 March 1992 by the Minister for Finance.

The Bill proposes to make interim provision for the appropriation of money out of the Consolidated Revenue Fund for the service of the year ending on 30 June 1993, and for related purposes.

The Committee has no comment on this Bill.

SUPPLY BILL (NO. 2) 1992-93

This Bill was introduced into the House of Representatives on 24 March 1992 by the Minister for Finance.

The Bill proposes to make interim provision for the appropriation of money out of the Consolidated Revenue Fund for certain expenditure in respect of the year ending on 30 June 1993, and for related purpose.

The Committee has no comment on this Bill.

SUPPLY (PARLIAMENTARY DEPARTMENTS) BILL 1992-93

This Bill was introduced into the House of Representatives on 24 March 1992 by the Minister for Finance.

The Bill proposes to make interim provision for the appropriation of money out of the Consolidated Revenue Fund for certain expenditure in relation to the Parliamentary Departments in respect of the year ending on 30 June 1993, and for related purposes.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 5 OF 1992

29 APRIL 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

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 such 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.

The Committee has considered the following Bills:

* Australian Nuclear Science and Technology Organisation Amendment Bill 1992

Health Insurance (Pathology) Amendment Bill 1992

Income Tax Assessment (Isolated Area Zone Extension) Amendment Bill 1992

* Remuneration and Allowances Legislation Amendment Bill 1992

* Social Security Legislation Amendment Bill 1992

Superannuation Guarantee (Administration) Bill 1992

Superannuation Guarantee Charge Bill 1992

* Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 1992

* Taxation Laws Amendment Bill (No. 2) 1992

* The Committee has commented on these Bills

AUSTRALIAN NUCLEAR SCIENCE AND TECHNOLOGY ORGANISATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Minister for Science and Technology.

The Bill proposes to amend the *Australian Nuclear Science and Technology Organisation Act 1987*, to implement the Government's decision to:

- increase the functions of the Australian Nuclear Science and Technology Organisation (ANSTO), to allow for the conditioning, storage and management of radioactive materials and radioactive wastes and to allow for more commercial operations for ANSTO;
- provide ANSTO with an immunity from specified classes of State and Territory laws and regulations;
- include provisions relating to resignation and termination of appointment of Executive Director;
- provide the National Safety Bureau with independence from ANSTO; and
- make changes of an administrative nature.

Retrospectivity
Subclause 5(1) - proposed new section 7A of the *Australian Nuclear Science and Technology Organisation Act 1987*

Subclause 5(1) of the Bill proposes to insert a new section 7A into the *Australian*

Nuclear Science and Technology Organisation Act 1987. Proposed new subsection 7A(1) provides:

> Subject to subsection (4), a law to which this section applies does not apply, and is taken never to have applied, in relation to:
>
> (a) the Organisation; or
> (b) the Organisation's property or transactions; or
> (c) anything done by or on behalf of the Organisation.

The effect of the proposed amendment would be to exempt the Australian Nuclear Science and Technology organisation (ANSTO) from the operation of certain State and Territory laws. Further, its effect would be retrospective, as those laws would be taken to have never applied to ANSTO.

By way of explanation, the Explanatory Memorandum to the Bill states that the intention of the proposed amendment is to

> provide for the immunity of ANSTO from specified classes of State and Territory laws and regulations .. following advice that, although not intended by the Government, ANSTO may be fully subject to State and Territory laws.

On the basis of this explanation, the amendment would, therefore, appear to be merely declaratory. In addition, the Committee notes that the Minister's Second Reading speech on the Bill states that, while the amendment has been prompted by a matter which was recently before the New South Wales Land and Environment Court, the amendments 'respect the order' of that Court. In the light of this explanation, the Committee makes no further comment on the Bill.

Exercise of legislative power insufficiently subject to parliamentary scrutiny / delegation of power to 'a person'
Clause 12

Clause 12 of the Bill proposes to insert a new Part VIIA into the Australian Nuclear Science and Technology Organisation Act. That proposed new Part deals with the establishment, functions, operations, etc. of the Nuclear Safety Bureau. Proposed new section 37U provides:

> 37U(1) The Bureau may submit to the Minister such reports relating to the performance of the Bureau's functions as the Bureau considers appropriate.
>
> (2) The Bureau must submit to the Minister such reports relating to the performance of its functions as the Minister directs.
>
> (3) The Minister may cause a copy of a report received by the Minister under this section to be laid before each House of the Parliament if the Minister considers that the report is of sufficient importance to justify it being brought to the attention of the Parliament.

The Committee notes that, pursuant to proposed new subsection 37U(3), the Minister has an unfettered discretion to decide which reports of the Bureau are of sufficient importance to justify it being brought to the attention of the Parliament. The Committee seeks the Minister's advice as to why it is necessary to give the Minister this discretion. Further, the Committee notes that, pursuant to section 42 of the Principal Act, the Minister can delegate to 'a person' the power to decide whether or not a report is of sufficient importance to justify it being tabled in the Parliament. In the circumstances, this may be considered to be inappropriate.

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.

HEALTH INSURANCE (PATHOLOGY) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by Dr R L Woods as a Private Member's Bill.

The Bill proposes to alter the definition of an 'Approved Pathology Authority'.

The Committee has no comment on this Bill.

INCOME TAX ASSESSMENT (ISOLATED AREA ZONE EXTENSION) AMENDMENT BILL 1992

This Bill was introduced into the Senate on 1 April 1992 by Senator Panizza as a Private Senator's Bill.

The Bill proposes to amend the *Income Tax Assessment Act 1936*, to provide for an extension of the definition of isolated areas to include the seas situated in certain adjacent areas.

The rebate available through the Zone A and Zone B, as defined in the present legislation, ceases at the Australian shore line or the shore line of an off-shore island. This means that any man-made construction, such as an oil rig or oil and gas platform in those seas off the shore of either Zone, is not regarded as being part of that Zone.

The Committee has no comment on this Bill.

REMUNERATION AND ALLOWANCES LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Minister for Finance.

The Bill proposes to alter the salaries of members of the Australian Industrial Relations Commission (AIRC) and senior officers of Commonwealth universities. It also makes a wider range of persons eligible to be appointed Chairman of the Remuneration Tribunal.

Retrospectivity
Subclauses 2(2) to (5)

Subclauses 2(2) to (5) of the Bill provide that various amendments proposed by the Bill are to be retrospective to various dates, the earliest being 1 January 1990. However, as the Explanatory Memorandum states that each of the amendments proposed are either technical in nature or correct drafting errors, the Committee makes no further comment on the clauses.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Minister for Social Security.

The Bill proposes to implement changes in the areas of telephone concessions, Job Search Allowance and Newstart Allowance, social security agreements with other countries, debt recovery, the income and assets test, compensation payments and data-matching. The Bill also provides for a number of minor and technical amendments.

Retrospectivity
Subclauses 2(3) to (10)

Subclauses 2(3) to (10) of the Bill provide that various amendments proposed by the Bill are to operate retrospectively from various dates, the earliest being 1 July 1991. The Committee notes that, according to the Explanatory Memorandum to the Bill, the amendments referred to are essentially either beneficial to social security recipients or else they correct drafting oversights.

However, the Committee notes that the Explanatory Memorandum states that the amendments proposed by Division 14 of Part 2 of the Bill, which deal with recovery of social security debts,

> will validate consents already given by Social Security recipients [in relation to certain instalment deductions] and will provide a statutory basis for previous deductions.

The Committee would appreciate some further background from the Minister on these amendments. In particular, the Committee would appreciate advice as to why it is necessary to 'validate' the consents referred to.

Privilege against self-incrimination
Clause 115

Clause 115 of the Bill proposes to repeal various provisions of the *Social Security Act 1991* which abrogate the privilege against self-incrimination. Amendments included in Schedule 1 of the Bill also amend related provisions, the effect of which is that a person who has a 'reasonable excuse' may decline to give to the Department information requested by it. One such reasonable excuse is that the information requested may tend to incriminate the person from whom it is sought. The overall effect of these amendments is that, unless a person declines to provide information on the grounds of self-incrimination, the information obtained by the Department may be used for any purpose and is admissible as evidence of any criminal conduct on the part of any person - not only the person providing the information.

Clearly, the Committee welcomes the proposal to repeal the provisions which abrogate the privilege against self-incrimination. However, the Committee is also mindful that persons who are requested to provide information may be unaware that they have the right to decline to answer a question or to provide information on the grounds that it may tend to incriminate them. The Committee would, therefore, appreciate the Minister's advice as to whether or not persons are advised of their rights before being requested to provide information and whether any warnings are given as to the use to which any information may be put.

Concerns raised by Privacy Commissioner
Schedule 2 - proposed new subsection 10(2), (3), (3A), (3B), 11(1) and (2) of the *Data-matching Program (Assistance and Tax) Act 1990*

On 2 April 1992, the Privacy Commissioner wrote to the Committee raising various matters in relation to certain proposed amendments to the *Data-matching Program (Assistance and Tax) Act 1990,* which are contained in Schedule 2 of the Bill. A copy of that letter is attached to this Alert Digest for the information of Senators. However, the Privacy Commissioner's concerns may be summarised as follows.

The Schedule proposes to omit subsection 10(2) of the Data-matching Program (Assistance and Tax) Act and replace it with the following new subsection (2):

> Where a source agency receives particular information under Step 1, 4 or 6 of a data matching cycle, the agency must destroy that particular information within 90 days of its receipt unless, within those days:
>
> (a) the agency has considered that particular information and made a decision:
>
> (i) to take action allowed by subsection (1) on the basis of that particular information; or
>
> (ii) to carry out an investigation of the need to take action allowed by subsection (1) on the basis of that particular information; or
>
> (b) the agency has, by using sampling procedures, identified that particular information as information that will form the basis for the agency:
>
> (i) to take action allowed by subsection (1) on the basis of that particular information; or

(ii) to carry out an investigation of the need to take action allowed by subsection (1) on the basis of that particular information.

The Privacy Commissioner states:

> ... I am concerned that the text of the proposed amendment is so broadly expressed that an inadequate level of screening could occur. I believe that a systematic process of screening results should occur within the 90 day period. The present language of the amendment would appear to allow agencies routinely to defer any action of this kind being taken at all. This could lead to a situation where large numbers of untested matching results - results which bring together data given confidentially in different settings to government agencies - could remain in circulation for very long periods of time. I regard that as a situation which should be avoided.

The Privacy Commissioner goes on to say:

> If agencies feel that bulk deferral of results may sometimes be unavoidable, and wish to put the legal authority for this beyond doubt, I would prefer to have an approach which allowed an extension for say a further 90 days where the Secretary certifies to the Privacy Commissioner that exceptional circumstances exist.

The Committee does not necessarily adopt the Privacy Commissioner's interpretation of proposed paragraph 10(2)(b). On its reading of the proposed new paragraph, an agency must destroy information within 90 days, unless *within that period of 90 days* the agency has, by using sampling procedures, identified the information as being a basis for action. In other words, an agency cannot defer a sampling process for any more than 90 days.

The Committee would, nevertheless, appreciate the Minister's views on what the Privacy Commissioner has stated.

Schedule 2 also proposes to omit subsection 10(3) of the Data-matching Program (Assistance and Tax) Act and substitute the following new subsection (3):

> Subject to subsection (3A), a source agency must commence any action in relation to information it receives under subsection (1) within 12 months from the date that it receives the information from the matching agency.

Proposed new subsection (3A) provides:

> The Secretary to an assistance agency, the Commissioner of Taxation or a Deputy Commissioner of Taxation may grant an extension or extensions of time for up to 12 months each of the 12 month period referred to in subsection (3).

Proposed new subsection (3B) provides:

> The power to grant an extension or extensions of time referred to in subsection (3A) must not, despite any other law, be delegated.

The Privacy Commissioner states:

> This amendment seeks to allow a decision on extending an investigation beyond 12 months to be made by Deputy Commissioners of Taxation. In the absence of any evidence that the current provision (decision to be taken by Commissioner) is proving unworkable, I can see no reason for the amendment.

He goes on to say:

> In passing the Act, Parliament provided that this decision should be made only by Secretaries of Departments and the Commissioner of Taxation, and should not be delegated. I would not expect this provision to create a significant problem, given that it confers a discretion intended to be used occasionally. As with the section 10(2) provision, the clear intention of the legislation is that data-matching results should be dealt with expeditiously.

The Committee notes that these provisions are essentially a re-drafting of the existing subsection 10(3). As the Privacy Commissioner observes, the only change of substance is to allow a Deputy Commissioner of Taxation, as well as the Commissioner of Taxation, the power to grant an extension of time for taking action under subsection 10(1). This would not appear to be a matter which is within the Committee's terms of reference, though the Committee would be interested in the Privacy Commissioner's further views if he believes that this is not the case.

The Privacy Commissioner has also drawn the Committee's attention to some proposed amendments to section 11 of the Data-matching Program (Assistance and Tax) Act which are contained in Schedule 2 to the Bill. Section 11 currently provides:

> **Notice of proposed action**
>
> 11.(1) Subject to subsection (4), where, solely or partly because of information given in Step 6 of a data matching cycle, an assistance agency considers taking action:
>
> (a) to cancel or suspend any personal assistance to; or
>
> (b) to reject a claim for personal assistance to; or

(c) to reduce the rate or amount of personal assistance to; or

(d) to recover an overpayment of personal assistance made to;

a person, the agency:

(e) must not take that action unless it had given the person written notice:

(i) giving particulars of the information and the proposed action; and

(ii) stating that the person has 21 days from the receipt of the notice in which to show cause in writing why the action should not be taken; and

(f) must not take that action until the expiration of those 21 days.

(2) Subject to subsection (5), where, solely or partly because of information given in Step 6 of a data matching cycle, the tax agency considers taking action to issue an assessment or an amended assessment of tax to a person, the agency:

(a) must not take that action unless it has given the person written notice:

(i) giving particulars of the information and the proposed action; and

(ii) stating that the person has 21 days from the receipt of the notice in which to show cause in writing why the action should not be taken; and

(b) must not take that action until end of those 21 days.

[The remaining subsections are not relevant in the context of this comment]

The amendment proposed by the Schedule would apply the same regimen currently operating in relation to information obtained in Step 6 of a data-matching cycle to information obtained in Steps 1 and 4 of a cycle. In the context of the proposed section 11 amendments, the Privacy Commissioner states:

> I support ... the proposal to refer in section 10(1)(a) and (b) to another type of administrative action that may be taken on the basis of data-matching results - this being:
>
> > "to correct the personal identity data it [the agency] holds ..."
>
> This amendment allows agencies to make any factual corrections to file-data that come to light in the course of the matching, thereby enabling agencies to fulfil their responsibilities under the Privacy Act in relation to the accuracy and completeness of data.

He goes on to say:

> The question then arises as to whether the usual requirement - (s.11) that prior notice of any proposed action be given to individuals - should apply to this new type of administrative action.
>
> Clearly this would not be appropriate in cases where the correction was trivial, e.g. an incorrect postcode. I am however concerned that some changes to an individual's file could prove more significant and if not notified or checked with the individual lead to significant and potentially adverse consequences. This could for example occur if an assumption were made about a discrepancy in name or address, and a correction made to relevant records. If the assumption was incorrect, this could then result in communications going astray, or in the individual being targeted for action, perhaps even as a result of a later data-matching cycle.

> An approach which might relieve agencies of the need to give notice in minor cases but preserve the basic principle of section 11 might be to include a further sub-section in section 11 which would allow the Privacy Commissioner to specify in the guidelines circumstances in which it would be permissible for an agency not to give a section 11 notice of correction of a record arising from data-matching, or to allow for notices of correction to be given promptly after-the-event.

The Privacy Commissioner concludes by saying:

> The principle of section 11 is that individuals should be given notice, and the opportunity to comment, before any action is taken on the basis of a data-matching result. I believe this principle should extend to alteration of records.

The Committee agrees that it may be considered to trespass unduly on a person's rights and liberties if, as the Privacy Commissioner points out, that person was not given notice of (and the opportunity to correct) an incorrect amendment of his or her record. Accordingly, the Committee draws Senators' attention to the provision, as it may be considered to be in breach (by omission) of principle 1(a)(i) of the Committee's terms of reference.

SUPERANNUATION GUARANTEE (ADMINISTRATION) BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Treasurer.

The Bill proposes to implement the Government's decision, announced in the 1991-92 Budget, to impose a tax on an employer where the employer provides superannuation support below a minimum levy. The purpose of the Bill is to encourage employers to provide a minimum level of superannuation support for employees.

All employers are potentially liable for the tax. However, the tax will not apply if the employer has provided the minimum level of superannuation support for each employee, or if the employer is exempt in respect of a particular employee.

The Committee has no comment on this Bill.

SUPERANNUATION GUARANTEE CHARGE BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Treasurer.

The Bill proposes to implement the Government's decision, announced in the 1991-92 Budget, to impose a tax on an employer where the employer provides superannuation support below a minimum levy. The purpose of the Bill is to encourage employers to provide a minimum level of superannuation support for employees.

All employers are potentially liable for the tax. However, the tax will not apply if the employer has provided the minimum level of superannuation support for each employee, or if the employer is exempt in respect of a particular employee.

The Committee has no comment on this Bill.

SUPERANNUATION LEGISLATION (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Minister for Finance.

The Bill proposes to amend 28 Acts, to update provisions relating to superannuation. The amendments are required as a result of the enactment of the *Superannuation Act 1990* and also amendments made to the *Superannuation Act 1976*, with effect from 1 July 1990.

The *Superannuation Act 1990* provided for the establishment of the Public Sector Superannuation Scheme, a new superannuation scheme for Commonwealth employees.

The *Superannuation Act 1976* provides for the Commonwealth Superannuation Scheme, which was previously the main scheme for Commonwealth employees.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that clause 3 of the Bill is to be taken to have commenced on 1 July 1990. Clause 3, if enacted, would give effect to the proposed amendments set out in the Schedule to the Bill. Those amendments are essentially technical in nature. They make provision for such matters as changing references in other Acts to the *Superannuation Act 1976* to the "Superannuation Act 1990". Clauses 4 to 7 provide for certain transitional arrangements, to cover matters

occurring after 1 July 1990. The Committee is concerned, however, that these amendments were not introduced at the same time as the Superannuation Bill 1990 and, further, that it has taken almost two years for the provisions to be introduced. Accordingly, the Committee would appreciate the Minister's advice as to why this delay has occurred.

TAXATION LAWS AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the income tax law by making changes in the following areas:

- depreciation;
- the goodwill exemption from the Capital Gains Tax;
- the Capital Gains Tax;
- deductions for superannuation contributions on behalf of employees to three Superannuation Funds;
- deductions for superannuation contributions by substantially self-employed people;
- the taxation of Foreign Source Income;
- the deferral of initial payment of company tax for 1992-92;
- the exemption from claw back provisions of grants or recoupments made under the Co-operative Research Centres Program;
- the gift provisions, relating to the World Wide Fund for Nature Australia;
- the exemption of the pay and allowance of members of the Defence Force serving in Cambodia;
- the definition of 'Resident' and 'Resident of Australia';
- Medicare levy relief, relating to blind pensioners and sickness beneficiaries.

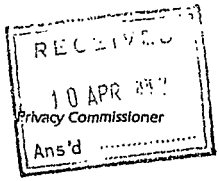
Retrospectivity
Clauses 2, 65, 66 and 68

Clause 2 of the Bill provides:

> 2(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
>
> (2) If the day (in this subsection called the **"TLAA day"**) on which the *Taxation Laws Amendment Act 1992* receives the Royal Assent is a later day than the day on which this Act receives the royal Assent, sections 7, 8, 9, 10, 11, 18, 22, 54 to 59 (inclusive), subsection 60(1), section 66, subsections 68(1), (2), (3) and (4) and section 74 commence on the day after the TLAA day.

The Committee notes that the effect of subclause 2(2), if enacted, could be to give the proposed amendments referred to in that clause a degree of retrospective effect. The Committee also notes that clauses 65 (which would amend the definition of "resident" in relation to members of the Public Sector Superannuation Scheme), 66 (which would amend certain depreciation provisions) and 68 (which deals with the application of the amendments to Controlled Foreign Corporations) are expressed to apply to certain 'matters and things occurring', 'expenditure occurred', 'periods', 'contracts entered into', etc. prior to the commencement of the Bill. However, since (according to the Explanatory Memorandum) the amendments in question are either beneficial to taxpayers or are technical in nature (correcting drafting errors), the Committee makes no further comment on the clauses.

Human Rights Australia



Our reference 90/464-5

Senator Barney Cooney
Chairman
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2601

Dear Senator Cooney

Proposed Amendments to the Data-matching Program (Assistance and Tax) Act 1990

I understand that a Bill amending the above Act will shortly be tabled, and will be referred to your committee.

My views on the proposed amendments follow.

There have been extensive discussions between my staff and the agencies participating in the Data-matching Program. Most of the proposed amendments arise out of practical difficulties which have arisen in the operation of the program, oversights in the original drafting, or unanticipated consequences of some provisions.

I am satisfied that most of them do not affect the policy intent of the legislation, and have no adverse consequences for individuals. Indeed one of the changes puts beyond doubt the ability of the program to identify underpayments of assistance by the agencies.

I do however have three concerns, and one other comment to make. I would be grateful if your Committee could take account of these concerns in deciding whether to recommend further consideration of the Bill.

Section 10 (2)

In my view, the policy intent of section 10 was to require agencies to deal with matching results relatively quickly and not to merge the initial analysis of these results with other internal review processes.

Nonetheless I have recognised in discussions with agencies that because of the volume of the output from some cycles it is probably not practical for them to engage in case-by-case examination of all matching results before carrying them over into their review systems.

I am agreeable to "rule-based" sampling or screening of results taking place as a means of assessing which results should be referred for further investigation.

But I am concerned that the text of the proposed amendment is so broadly expressed that an inadequate level of screening could occur. I believe that a systematic process of screening results should occur within the 90 day period. The present language of the amendment would appear to allow agencies routinely to defer any action of this kind being taken at all. This could lead to a situation where large numbers of untested matching results - results which bring together data given confidentially in different settings to government agencies - could remain in circulation for very long periods of time. I regard that as a situation which should be avoided.

If agencies feel that bulk deferral of results may sometimes be unavoidable, and wish to put the legal authority for this beyond doubt, I would prefer to have an approach which allowed an extension for say a further 90 days where the Secretary certifies to the Privacy Commissioner that exceptional circumstances exist.

Section 10 (3)

This amendment seeks to allow a decision on extending an investigation beyond 12 months to be made by Deputy Commissioners of Taxation. In the absence of any evidence that the current provision (decision to be taken by Commissioner) is proving unworkable, I can see no reason for the amendment.

In passing the Act, Parliament provided that this decision should be made only by Secretaries of Departments and the Commissioner of Taxation, and should not be delegated. I would not expect this provision to create a significant problem, given that it confers a discretion intended to be used occasionally. As with the section 10 (2) provision, the clear intention of the legislation is that data-matching results should be dealt with expeditiously.

Section 11 (1) and (2)

An amendment which I support is the proposal to refer in Section 10 (1) (a) and (b) to another type of administrative action that may be taken on the basis of data-matching results - this being:

> "to correct the personal identity data it [the agency] holds ..."

This amendment allows agencies to make any factual corrections to file-data that come to light in the course of the matching, thereby enabling agencies to fulfil their responsibilities under the Privacy Act in relation to the accuracy and

completeness of data.

The question then arises as to whether the usual requirement - (s.11) that prior notice of any proposed action be given to individuals - should apply to this new type of administrative action.

Clearly this would not be appropriate in cases where the correction was trivial, e.g. an incorrect postcode. I am however concerned that some changes to an individual's file could prove more significant and if not notified or checked with the individual lead to significant and potentially adverse consequences. This could for example occur if an assumption were made about a discrepancy in name or address, and a correction made to relevant records. If the assumption was incorrect, this could then result in communications going astray, or in the individual being targeted for action, perhaps even as a result of a later data-matching cycle.

An approach which might relieve agencies of the need to give notice in minor cases but preserve the basic principle of section 11 might be to include a further sub-section in s.11 which would allow the Privacy Commissioner to specify in the guidelines circumstances in which it would be permissible for an agency not to give a section 11 notice of correction of a record arising from data-matching, or to allow for notices of correction to be given promptly after-the-event.

The principle of Section 11 is that individuals should be given notice, and the opportunity to comment, before any action is taken on the basis of a data-matching result. I believe this principle should extend to alteration of records.

* * * * * * * *

In addition to the above concerns, I provide the following comment on another proposed amendment.

Section 7 - Step 5 - Payment matching

The problem being addressed is the need for payment amounts data to be used in the payment matching stage of step 5. I had previously understood that actual amounts were only needed in the separate income matching stage. The Department of Social Security had indicated that it was the mere fact of double payment that it wished to ascertain. I found last year that a number of the payment matching "projects" were making use of actual payment data. The matching agency now argues that this is permitted by the inclusion in the definition of "family identity data" of "kind of personal assistance".

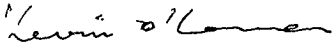
I have taken the view that this definition only allows the use of data indicating the <u>type</u> of payment being received - not the <u>amount</u>. This was consistent with the original assurances from DSS that payment matching was only concerned to establish

if someone was in receipt of a benefit for which they could not be eligible, and that it would not need to use amounts.

Experience over the last 12 months has shown that a distinction between "kind" and "amount" of payment can not always be easily drawn. Sometimes the "kind" of payment is dependent on the amount of payment. Consequently, I consider that the proposed amendment is acceptable if Parliament is prepared to allow the use of payment amounts in the payment matching stage of the program. In my view, the extra privacy intrusion involved appears marginal, given that the payment amounts are already used in income matching.

I would be happy to provide further explanation of these points.

Yours sincerely



KEVIN O'CONNOR
Privacy Commissioner

2 April 1992

SCRUTINY OF BILLS ALERT DIGEST

NO. 6 OF 1992

6 MAY 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

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 such 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.

The Committee has considered the following Bills:

* Aviation Fuel Revenues (Special Appropriation) Amendment Bill 1992

* Coal Industry Amendment Bill 1992

* Coal Mining Industry (Long Service Leave Funding) Bill 1992

* Coal Mining Industry (Long Service Leave) Payroll Levy Bill 1992

* Coal Mining Industry (Long Service Leave) Payroll Levy Collection Bill 1992

Coal Research Assistance Amendment Bill 1992

* Coal Tariff Legislation Amendment Bill 1992

* Commonwealth Employment (Miscellaneous Amendments) Bill 1992

Disability Services Amendment Bill 1992

Industrial Chemicals (Notification and Assessment) Amendment Bill 1992

* Social Security Legislation Amendment Bill 1992

* States and Northern Territory Grants (Rural Adjustment) Amendment Bill 1992

* States Grants (Coal Mining Industry Long Service Leave) Amendment Bill 1992

States Grants (Schools Assistance) Amendment Bill 1992

States Grants (TAFE Assistance) Amendment Bill 1992

Superannuation Guarantee (Consequential Amendments) Bill 1992

Training Guarantee (Administration) Amendment Bill 1992

*** The Committee has commented on these Bills**

AVIATION FUEL REVENUES (SPECIAL APPROPRIATION) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill proposes to make technical amendments to the *Aviation Fuel Revenues (Special Appropriation)Act 1988,* to enable reductions to be made to the customs and excise duty rate applicable to aviation gasoline ('avgas') while preserving the Civil Aviation Authority's revenue entitlement under the Act.

Delegation of legislative power
Clause 4 - proposed new section 3A of the *Aviation Fuel Revenues (Special Appropriation)Act 1988*

Clause 4 of the Bill proposes to insert a new section 3A into the *Aviation Fuel Revenues (Special Appropriation)Act 1988.* That proposed new section, if enacted, would allow the Minister and the Civil Aviation Authority, to issue a 'joint written determination' fixing the 'statutory rate' in relation to the customs and excise duty applicable to avgas.

The Committee suggests that this is an appropriate delegation of legislative power. The amount of the 'statutory rate' is essentially a matter which concerns only the Minister and the Authority. In addition, the Committee notes that the rate agreed on by the Minister and the Authority cannot be greater than the customs or excise duty levied on aviation fuel. Accordingly, the Committee makes no further comment on the clause.

Retrospectivity
Clause 8

Clause 8 of the Bill provides:

> **Special payment to Civil Aviation Authority**
> **[Definitions]**
> 8.(1) In this section:
> **"eligible payment to the Commonwealth"** means an amount paid to the Commonwealth as duty of Excise or duty of Customs in relation to eligible aviation fuel during the interim period;
> **"interim period"** means the period:
> (a) commencing on 1 May 1992; and
> (b) ending immediately before the commencement of this section;
> **"retrospectivity assumption"** means the assumption that the amendments made by this Act had applied in relation to eligible payments to the Commonwealth.
>
> **[Notional backdating of section 3A determinations]**
> (2) The first determination made under subsection 3A(1) or (2) of the Principal Act as amended by this Act may provide that, for the purposes of the retrospectivity assumption, the determination is taken to have come into force at a specified time during the interim period.
>
> **[Special payment to Civil Aviation Authority]**
> (3) If:
> - the total amount that would have been payable to the Civil Aviation Authority under section 4 of the Principal Act in respect of eligible payments to the Commonwealth if the retrospectivity assumption was made;

exceeds:

> - the amount that was actually payable to the Civil Aviation Authority under Section 4 of the Principal Act in respect of eligible payments to the Commonwealth;

the Civil Aviation Authority is to be paid an amount equal to the excess.

[Appropriation of Consolidated Revenue Fund]

(4) The Consolidated Revenue Fund is appropriated to the extent necessary for the payment under subsection (3).

The effect of this clause, if enacted, would be to allow the retrospective application of the determinations provided for by proposed new section 3A of the Aviation Fuel Revenues (Special Appropriation) Act (which is discussed above). However, the Committee notes that this would appear to be a matter which solely affects the Commonwealth and the Authority, as it relates to the funds to be appropriated by the Commonwealth to the Authority. Accordingly, the Committee makes no further comment on the clause.

COAL INDUSTRY AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the *Coal Industry Act 1946*. The amendments are designed to give effect to the Commonwealth and New South Wales Governments' decision to reform the powers, functions and activities of the Joint Coal Board.

Commencement by Proclamation
Subclause 2(2)

Subclause 2(2) of the Bill provides:

> **Commencement**
> 2.(1) Sections 1 and 2 commence on the day on which this Act receives the Royal Assent.
> (2) Subsection 3(1) commences on a day to be fixed by Proclamation.
> (3) Subsection 3(2) is taken to have commenced on 31 March 1992.

Clauses 1 and 2 of the Bill are formal. Subclause 3(1), if enacted, would give effect to the proposed amendments to the *Coal Industry Act 1946* which are set out in Schedules 1 to 4 of the Bill. Subclause 3(2) would enact the amendments set out in Schedule 5.

The Committee notes that the provision for commencement by Proclamation set out in subclause 2(2) is open-ended. In that respect, it would appear to be in

conflict with Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. That Drafting Instruction provides:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the "fixed time"). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or
>
> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the "repeal" option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

By way of explanation for the Proclamation provision in this Bill, the Explanatory

Memorandum to the Bill states:

> Clause 2 does not provide for the usual six month limit on Proclamation as commencement of these amendments has to be in parallel with New South Wales' Coal Industry Amendment Act 1992.

On its face, this explanation would appear to satisfy the criterion set out in paragraph 6 of the Drafting Instruction. However, the Committee notes by way of analogy that a similar situation arises in relation to the Coal Mining Industry (Long Service Leave Funding) Bill 1992, which is dealt with elsewhere in this Alert Digest. Subclause 2(2) of that Bill provides:

> Subject to subsection (3), sections 35 and 44 to 49 commence on a day or days to be fixed by Proclamation.

The Explanatory Memorandum to that Bill indicates that (as with this Bill) the commencement of the clauses referred to is dependent on the passage of complementary State legislation and the 6 month time limit contemplated by Drafting Instruction No. 2 is, therefore, inappropriate. Nevertheless, subclause 2(3) of the Coal Mining Industry (Long Service Leave Funding) Bill 1992 goes on to provide:

> (3) If a section mentioned in subsection (2) does not commence under that subsection within the period of 12 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

The Committee suggests that a similar approach in the Coal Industry Amendment Bill 1992 would be preferable to the open-ended Proclamation clause which is contained in this Bill. The Committee would appreciate the Minister's views on this suggestion.

Retrospectivity
Subclause 2(3)

As indicated above, subclause 2(3) of the Bill provides that the amendments of the Coal Industry Act proposed by Schedule 5 of the Bill are to commence on 31 March 1992. As a result, this clause, if enacted, would give those amendments a slightly retrospective operation.

The Explanatory Memorandum to the Bill indicates that the date of commencement nominated in relation to the Schedule 5 amendments is related to the commencement of Part 1 of Chapter 4 of the *Industrial Relations Act 1991* of New South Wales. The amendments in question are technical in nature. They change the references in section 30 of the Coal Industry Act to the 'Industrial Commission of the State' to the 'Industrial Relations Commission of the State or the Industrial Court of the State'. Accordingly, the Committee makes no further comment on the subclause.

Inappropriate delegation of legislative power
Schedule 2 - proposed new section 25 of the *Coal Industry Act 1946*

Schedule 2 of the Bill contains a series of proposed amendments to the Coal Industry Act which relate to the functions of the Joint Coal Board. Proposed new section 25 provides:

> Until such time as the Commonwealth Minister and the State Minister direct, the Board has the following powers and functions:
>
> (a) to monitor, promote and specify adequate training standards relating to health and safety for workers engaged in the coal industry;

(b) to monitor dust in coal mines;

(c) to collect, collate and disseminate statistics related to the coal industry, other than statistics related to the health and welfare of workers.

In relation to this proposed new section, the Explanatory Memorandum to the Bill states:

> This new section empowers the Board to continue with its powers and functions in relation to workers' training, dust monitoring and other industry statistics not related to the health and welfare of workers until such time as both the Commonwealth and State Ministers direct.

The effect of the proposed new section, if enacted, would be to allow the Commonwealth and State Minister to agree to, in effect, repeal the section or any of its parts. There is no requirement for the Parliament to be notified of such an action, by the tabling of the relevant direction or otherwise.

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

Exercise of legislative power insufficiently subject to parliamentary scrutiny
Schedule 2 - proposed new section 28 of the *Coal Industry Act 1946*

Schedule 2 to the Bill contains a proposed new section 28 of the Coal Industry Act, which provides:

> (1) The Board may, with the approval of the Commonwealth Minister and the State Minister, make orders, not

> inconsistent with this Act or the regulations, for or with respect to the Board's powers and functions under sections 23 and 25 to 27.
>
> (2) The Board may, with the approval of the Commonwealth Minister and the State Minister, by order amend or revoke any order made by the Board.

Proposed new section 28A, if enacted, would require orders made pursuant to proposed new section 28 to be published in the *Gazette* and the State Gazette.

Orders made pursuant to the proposed new section would be, on their face, delegated legislation. They could have significant effect. For example, proposed new subsection 53(1) (which is contained in Schedule 2 to the Bill), provides for a substantial monetary penalty in relation to the failure to comply with an order made under proposed new section 28. That being the case, it would appear to be appropriate that any orders made pursuant to the proposed section be subject to scrutiny by the Parliament.

On this point, the Explanatory Memorandum to the Bill states:

> 49. This new section empowers the Board to make orders in regard to its functions as set out in new sections 23 and 25 to 27 inclusive. The Board will need to obtain the approval of both the Commonwealth and State Ministers before making an order. Ministerial approval is also required before the Board can amend or revoke an order.
>
> 50. The order is not, as would normally be the case for such an instrument, disallowable. This is to avoid possible inconsistencies between the Commonwealth and State Parliaments, that is, where one Parliament disallows an order while the other Parliament allows it.

While the Committee accepts that, under the circumstances, a disallowance mechanism might provide difficulties in relation to such orders, it is not satisfactory

that, as a result, the orders should not be subject to any form of parliamentary scrutiny. In making this comment, the Committee notes that there are only two governments involved.

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.

Privilege against self-incrimination
Schedule 4 - proposed new subsection 53(2) of the *Coal Industry Act 1946*

Schedule 4 of the Bill proposes to insert a new section 53 into the Coal Industry Act. That proposed new section provides, in part:

> (2) A person must not, without reasonable excuse, refuse to answer any question referred to in section 51.
> Penalty:
> (a) in the case of an individual - $3,000; and
> (b) in the case of a body corporate - $10,000.
>
> (3) A person must not, without reasonable excuse, fail or refuse to produce any books, records or documents referred to in section 51.
> Penalty:
> (a) in the case of an individual - $3,000; and
> (b) in the case of a body corporate - $10,000.

The Committee assumes that, in each case, it would be a 'reasonable excuse' for a person to decline to answer questions or produce documents on the grounds that it might tend to incriminate him or her, relying on the common law privilege against self-incrimination. However, the Committee notes that many persons are not aware of this privilege. The Committee, therefore, requests the Minister's advice as to

whether there is any provision for a person who is asked questions or required to produce documents in these circumstances to be given a warning about the use that can be made of any information obtained and their rights to decline to answer questions, etc.

COAL MINING INDUSTRY (LONG SERVICE LEVY FUNDING) BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister Representing the Minister for Industrial Relations.

The Bill was introduced in conjunction with:

- the States Grants (Coal Mining Industry Long Service Leave) Amendment Bill 1992
- the Coal Mining Industry (Long Service Leave) Payroll Levy Bill 1992
- the Coal Mining Industry (Long Service Leave Payroll Levy Collection Bill 1992

These Bills propose to give effect to the Government's proposal to reform the funding of long service leave in the black coal mining industries of New South Wales, Queensland, Western Australia and Tasmania. The proposals were developed in response to the report of the Willett Inquiry, entitled 'Review of Funding Arrangements: Coal Mining Industry Long Service Leave', which was commissioned by the Minister for Industrial Relations in August 1990.

On the basis of these Bills, the Government aims to establish a compulsory, national industry scheme, to fully fund, on an accrual basis, the long service leave entitlements of persons employed in the black coal mining industry by participating producers. In particular, this Bill establishes the framework for the new scheme.

Prospective commencement
Subclause 2(2)

Subclause 2(2) of the Bill provides:

> Subject to subsection (3), sections 35 and 44 to 49 commence on a day or days to be fixed by Proclamation.

The clauses referred to govern the transition from the existing scheme relating to long service leave to the new scheme proposed by the Bill (and the Bills which have been introduced in conjunction with it).

In relation to this commencement clause, the Explanatory Memorandum to the Bill states:

> The transition from the old to the new scheme ... entails the transfer of current assets and liabilities as well as bringing to an end the existing excise funded arrangements. This hinges on the passage of separate legislation in four States.
>
> Whilst it is anticipated that the necessary changes will be enacted by the States by the end of 1992, it is not possible at this time to fix a date of effect for clauses 35 and 44 to 49 nor is it possible at present to say whether the necessary State legislation will be enacted within 6 months of this bill receiving Royal Assent.

The Committee notes that this is, therefore, the sort of explanation contemplated by paragraph 6 of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, which sets out the 'general rule' to be applied in relation to commencement by Proclamation.

The Explanatory Memorandum goes on to state:

> To allow time for the State Parliaments to pass complementary legislation, the commencement provision affecting clauses 35 and 44 to 49 extends the period in which the Government may choose to proclaim the provisions in question.

In fact, subclause 2(3) of the Bill provides:

> If a section mentioned in subsection (2) does not commence under that subsection within the period of 12 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

The Committee suggests that this is an appropriate method of both dealing with the problems caused by legislation which requires enactment of parallel legislation by States and/or Territories while, at the same time, ensuring that the legislation does not allow for open-ended commencement. Accordingly, the Committee makes no further comment on the clause.

Inappropriate delegation of legislative power
Subclause 4(1)

Subclause 4(1) of the Bill sets out various definitions which are relevant to the Bill. It defines 'eligible employee' as:

> (a) a person employed in the black coal mining industry under a relevant industrial instrument the duties of whose employment are carried out at or about a place where black coal is mined; or
> (b) a person employed by a company that mines black coal the duties of whose employment (wherever they are carried out) are directly connected with the day to day

operation of a black coal mine; or

(c) a person permanently employed on a full-time basis in connection with a mines rescue service for the purposes of the black coal mining industry the duties of whose employment require him or her to be located at a mines rescue station; or

(d) any prescribed person who is, or is any person who is included in a prescribed class of persons who are, employed in the black coal mining industry;

but does not include:

(e) a person the duties of whose employment are performed in South Australia; or

(f) a person who is, or a person who is included in a class of person who are, declared by the regulations not to be an eligible employee or eligible employees for the purposes of this Act.

By way of explanation, the Explanatory Memorandum states:

> This provision allows coverage of the scheme to be varied, without the need for further legislation, to take account of changed circumstances including revised work practices and job classifications. The Minister's powers in relation to the scope of the Act are to be exercised on the advice of the Board.

Paragraphs (d) and (f) may be considered an inappropriate delegation of legislative power, as they would allow the Governor-General (acting on the advice of the Federal Executive Council) to issue regulations which would have the effect of amending the definition of 'eligible persons', by either reducing or enlarging the range of persons covered. As the definition appears to be central to the Bill, this may be considered to be a matter which is more appropriately dealt with by amendment to the primary legislation.

In making this comment, the Committee notes the extract from the Explanatory Memorandum quoted above but seeks from the Minister examples of the kinds of 'changed circumstances' with which the clause is intended to deal.

The Committee draws Senators' attention to the subclause, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Delegation of power to 'a person'
Subclause 8(2)

Clause 8 of the Bill sets out the powers of the Coal Mining Industry (Long Service Leave Funding) Corporation which is to be established by the Bill. It provides, in part:

> (1) The Corporation has power to do all things that are necessary or convenient to be done for, or in connection with, the performance of its functions and, in particular, may:
>
> (a) acquire, hold and dispose of real or personal property; and
> (b) enter into contracts; and
> (c) occupy, use and control any land or building owned or leased by the Commonwealth and made available for the purposes of the Corporation; and
> (d) appoint agents and attorneys; and
> (e) do anything incidental to any of its powers.
>
> (2) The power of the Corporation to enter into contracts includes the power to enter into a contract with a person under which that person will administer the [Coal Mining Industry (Long Service Leave)] Fund on behalf of the Board.

Subclause 8(2), if enacted, would allow the Corporation to contract out the administration of the Coal Mining Industry (Long Service Leave) Fund. Administration of the Fund would appear to be central to the responsibilities of the Corporation. Proper management of the Fund would appear to be essential in

terms of the welfare of the workers whose long service leave entitlements are to be drawn from it. In these circumstances, it may be inappropriate that the Corporation be able, pursuant to subclause 8(2), to enter into a contract with 'a person', with no limit as to the qualification of the person to whom the power can be contracted, under which that person administers the Fund on behalf of the Corporation.

The Committee draws attention to the provision as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

COAL MINING INDUSTRY (LONG SERVICE LEAVE) PAYROLL LEVY BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister Representing the Minister for Industrial Relations.

The Bill, which is part of a package of Bills, proposes to give effect to the Government's proposal to reform the funding of long service leave in the black coal mining industries of New South Wales, Queensland, Western Australia and Tasmania. The proposals were developed in response to the report of the Willett Inquiry, entitled 'Review of Funding Arrangements: Coal Mining Industry Long Service Leave', which was commissioned by the Minister for Industrial Relations in August 1990.

The Bills propose to implement the Government's aim to establish a compulsory, national industry scheme, to fully fund, on an accrual basis, the long service leave entitlements of persons employed in the black coal mining industry by participating producers. In particular, this Bill proposes to impose a levy upon the wages paid to certain employees in the black coal mining industry.

Commencement by Proclamation
Subclause 2(1)

Subclause 2(1) of the Bill provides:

> Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.

Subclause 2(2) then provides:

> If this Act does not commence under subsection (1) within the period of 12 months beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

In relation to the 12 month limit on commencement, the Explanatory Memorandum gives a similar explanation to that given in relation to similar clauses in the Coal Mining Industry (Long Service Leave Funding) Bill 1992, which the Committee has discussed elsewhere in this Alert Digest. As with that Bill, the Committee suggests that the commencement provision is, in this case, appropriately limited and, accordingly, makes no further comment on the subclause.

Setting of rate of levy by regulation
Clause 5

Clause 5 of the Bill provides:

> The rate of levy is the prescribed percentage of the eligible wages paid.

Clause 8 provides:

> (1) The Governor-General may make regulations prescribing a percentage for the purposes of section 5.
>
> (2) Before making a regulation under subsection (1), the Governor-General is to take into consideration any advice given to the Minister by the Corporation under the Funding Act.

There is no limit as to the rate of levy which could be applied by the regulations.

The Committee has consistently drawn attention to such provisions, on the basis that they leave open the possibility of something being imposed as a 'levy' which, in fact, could amount to a tax. Generally, the Committee prefers in these circumstances, that the maximum rate of levy (or a means of calculating the maximum rate) be set out in the primary legislation. In making this comment, the Committee notes that clause 7 of the Bill provides that the purpose of the levy is to fund payments made to eligible employees in respect of long service leave.

While this statement of purpose may be regarded as some limitation on the rate of the levy, it does not allay the Committee's concerns.

In the same vein, the Committee notes that, in relation to clause 5 of the Bill, the Explanatory Memorandum states:

> The initial rate of the levy is yet to be determined but is unlikely to exceed 6.5 percent of payroll.

Further, in his Second Reading speech on the Coal Mining Industry (Long Service Leave Funding) Bill 1992, the Minister stated:

> It is envisaged that the scheme is to be fully funded over a period of ten years including the unfunded liability for leave accrued prior 1 January 1993. Presently, it is estimated the initial levy will be in the vicinity of 6% of payroll. The actual rate of levy will be precisely determined by an actuarial review conducted under the auspices of the Corporation.

These statements do not allay the Committee's concerns either. On the face of the Bill, it remains open to the Governor-General, acting on the advice of the Federal Executive Council and taking into account any advice given to the Minister, by the Corporation, pursuant to paragraph 6(c) of the Coal Mining Industry (Long Service

Leave Funding) Bill 1992, to make regulations imposing a rate of 'levy' which amounts to a tax. If, as the Minister and the Explanatory Memorandum state, a maximum rate of levy is contemplated, then a maximum rate should preferably be provided for in the primary legislation.

The Committee draws Senators' attention to the clause, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

COAL MINING INDUSTRY (LONG SERVICE LEAVE) PAYROLL LEVY COLLECTION BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister Representing the Minister for Industrial Relations.

The Bill, which is part of a package of Bills, proposes to give effect to the Government's proposal to reform the funding of long service leave in the black coal mining industries of New South Wales, Queensland, Western Australia and Tasmania. The proposals were developed in response to the report of the Willett Inquiry, entitled 'Review of Funding Arrangements: Coal Mining Industry Long Service Leave', which was commissioned by the Minister for Industrial Relations in August 1990.

Through these Bills, the Government aims to establish a compulsory, national industry scheme, to fully fund, on an accrual basis, the long service leave entitlements of persons employed in the black coal mining industry by participating producers. In particular, this Bill proposes to allow for the collection of the levy which is to be imposed by the Coal Mining Industry (Long Service Leave) Payroll Levy Collection Bill 1992.

Strict liability offences / reversal of the onus of proof
Subclauses 5(1) and (3), clause 10

Subclause 5(1) of the Bill provides:

> A person who employs eligible employees at any time during a

month that ends after the commencement of this Act must, within 28 days after the end of that month, make a return of the eligible wages paid by the person to those employees during that month.
Penalty: $1,000.

Subclause 5(3) provides:

It is a defence to a prosecution for failure to comply with subsection (1) if the defendant establishes that there was a reasonable excuse for the failure.

Similarly, clause 10 of the Bill provides, in part:

(1) If a company, at any time during a financial year of the company, employed eligible employees, the auditor of the company appointed under the Corporations Law must give to the Corporation, not later than 6 months after the end of that year, a certificate stating whether, in the opinion of the auditor, the company has paid all amounts of levy, or amounts of additional levy under section 7, that the company was required to pay in respect of that year.
Penalty: $1,000.

(2) The Board may give to the auditor of a company that employed eligible employees at any time during a particular period a written notice requiring the auditor to give to the Corporation, not later than 28 days after receiving the notice, a certificate stating whether in the opinion of the auditor, the company has paid all amounts of levy, or amounts of additional levy under section 7, that the company was required to pay in respect of the first-mentioned period, and, if such a notice is given, the auditor must comply with the notice.
Penalty: $1,000.

(3) If the auditor of a company gives a certificate under subsection (1) or (2) stating that, in the opinion of the auditor, the company has not paid all the amounts of levy, or the amounts of additional levy under section 7, that the company was required to pay in respect of a financial year or other period, the auditor must also state in the certificate in what respect and to what extent, in

the auditor's opinion, the company has not paid those amounts. Penalty: $1,000.

. . .

(6) It is a defence to a prosecution for failure to comply with a provision of this section if the defendant establishes that there was a reasonable excuse for the failure.

The offences created by subclauses 5(1) and 10(1), (2) and (3) may be regarded as strict liability offences, as they provide that, if a certain fact exists or a certain event occurs, then an offence has been committed. No further proof on the part of the prosecution would be required, beyond the fact or event alleged.

However, subclauses 5(3) and 10(6), respectively, provide a defence in relation to such an offence, if **the person charged** establishes that there was a reasonable excuse for the failure.

The Committee accepts that, as a matter of policy, there are matters which are appropriately dealt with by imposing strict liability and then providing a defence of 'reasonable cause' for failure to meet the obligations imposed. However, in scrutinising such provisions, the Committee looks to whether the mechanism is appropriate, taking into account all the circumstances of the proposed offence. In addition, the Committee is mindful of the extent to which such provisions (and their increasing use) create a precedent.

In making these comments, the Committee notes that the provision in question is different to similar criminal offences, which include the lack of reasonable excuse as an element of the offence (ie by stating that it is an offence for a person without reasonable excuse to not do a particular thing - see, for example, subclause 13(8) of this Bill). This places the onus of proving that the person charged did not have a reasonable excuse on the prosecution. The Committee would appreciate the

Minister's advice as to why the offence has been cast differently in this case.

The Committee draws Senators' attention to the clauses, 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.

Delegation of power to 'a person'
Subclause 11(2)

Clause 11 of the Bill sets out the functions of the Coal Mining Industry (Long Service Leave Funding) Corporation, which is to be established by the Coal Mining Industry (Long Service Leave Funding) Bill 1992. Subclause 11(1) provides:

> The Corporation has the following functions on behalf of the Commonwealth under this Act:
>
> (a) to receive returns made, or financial statements or certificates given, under this Act; and
> (b) to receive payments of levy made under this Act; and
> (c) to receive payments of additional levy made under section 7; and
> (d) to sue for and recover amounts of levy and amounts of additional levy that have not been paid.

Subclause 11(2) provides:

> The Corporation may, on behalf of the Commonwealth, enter into an agreement with a person authorising that person to perform on behalf of the Commonwealth any one or more of the functions referred to in subsection (1).

There is no limit as to the 'persons' to whom the Corporation could delegate, pursuant to subclause (2), the important functions set out in subclause (c). The Committee has consistently drawn attention to such unlimited powers of delegation, on the basis that there should be some limit as to the types of persons to whom the power can be delegated or as to the qualifications or attributes which such persons should have.

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

Vesting of powers of entry and investigation in 'an officer of the Commonwealth' Subclauses 12(2) and 13(2)

Clause 12 of the Bill provides:

> (1) This section applies if the Corporation enters into an agreement under subsection 11(2) authorising the Commissioner of Taxation to perform a function referred to in subsection 11(1).
>
> (2) An officer of the Commonwealth authorised in writing by the Commissioner of Taxation to exercise powers under this section is entitled at all reasonable times to full and free access to all premises and books for the purpose of performing the function, and for that purpose may make copies of, or take extracts from, any such book.
>
> (3) An officer is not entitled to enter or remain in or on any premises under this section if, on being requested by the occupier of the premises for proof of authority, the officer does not produce his or her authority under subsection (2).
>
> (4) The occupier of any premises entered or proposed to be entered by an officer under subsection (2) must provide the officer with all reasonable facilities and assistance for the effective

exercise of powers under this section.
Penalty: $3,000.

Clause 13 provides, in part:

(1) This section applies if the Corporation enters into an agreement under subsection 11(2) authorising the Commissioner of Taxation to perform a function referred to in subsection 11(1).

(2) The Commissioner of Taxation, or an officer of the Commonwealth authorised in writing by the Commissioner of Taxation to exercise powers under this section, by written notice given to a person, including a person employed by or in connection with a Department, or an authority, of the Commonwealth, of a State or of a Territory, may require the person:

(a) to give to the Commissioner of Taxation or officer such information as the Commissioner of Taxation or officer requires for the purpose of the performance of the function; and

(b) to attend before the Commissioner of Taxation or officer and:

(i) give evidence; and

(ii) produce all books in the possession of the person;

relating to any matters connected with the performance of the function.

(3) The Commissioner of Taxation or authorised officer may require the information or evidence to be given on oath, and either orally or in writing, and for that purpose may administer an oath.

. . .

(8) A person must not, without reasonable excuse, fail to comply with a notice under subsection (2).
Penalty: $3,000.

. . .

Clearly, clauses 12 and 13, if enacted, would allow for the vesting of significant powers of entry and investigation in 'an officer of the Commonwealth'. The Committee notes that this term is not defined, either in the Bill or in the *Acts Interpretation Act 1901*. While, on its face, the meaning of this term might be regarded as being well-known, it may be preferable for the power to be delegated only to an officer of the Corporation or of the Australian Taxation Officer or of any other relevant agencies.

Further, the Committee notes that the effect of subclause 13(2), if enacted, would be to allow the Commissioner of Taxation or 'an officer of the Commonwealth', to require certain persons to provide information or documents. Pursuant to subclause 13(2), the Commissioner or officer could require the information or documents to be provided under oath. The Commissioner or officer would be empowered to administer such an oath, if it was required.

Pursuant to subclause 13(8), a person must not 'without reasonable excuse' fail to comply with a notice to provide information of documents under subclause 13(2). Failure to comply carries a penalty of $3,000. A 'reasonable' excuse, presumably, would be that the information or documents might tend to incriminate the person providing it. This excuse relies on the common law privilege against self-incrimination. However, the Committee notes that a person required to give evidence or produce documents pursuant to such an order may not be aware of their rights in this regard. The Committee, therefore, seeks the Minister's advice as to whether or not there is any provision for a person who is questioned under the circumstances contemplated by clause 13 to be apprised of their rights in this regard.

The Committee draws attention to the clauses, 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.

COAL RESEARCH ASSISTANCE AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to transfer responsibility for coal research and development in Australia from a Commonwealth Government-run system to an industry-funded and managed scheme. This new arrangement was announced by the Government on 2 December 1991, as part of a major package of institutional reform in the coal industry.

The Committee has no comment on this Bill.

COAL TARIFF LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to repeal the *Customs Tariff (Coal Export Duty) Act 1975* and amend the *Excise Tariff Act 1921* in response to the Government's decision that the industry take responsibility for its own research efforts and that long service leave arrangements be transferred from a Government-imposed scheme to a scheme funded and managed by the industry.

Commencement by Proclamation
Subclause 2(3)

Subclause 2(3) of the Bill provides:

> Subsections 5(1) and (2) commence on such days as are fixed by Proclamation.

The amendments referred to propose to amend the *Excise Tariff Act 1921*, to alter certain rates of duty.

Subclause 2(4) provides:

> If either subsection 5(1) or 5(2) does not commence under subsection (3) within the period of 12 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

By way of explanation for the provisions, (and as contemplated by paragraph 6 of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989), the Explanatory Memorandum states:

> Subclause (3) provides for the Proclamation commencement of both the removal of the coal research and development portion of the excise levy on coal, and the removal of the long service leave portion of that excise.
>
> . The provision associated with the removal of the research and development excise levy (subclause 5(1)) is to commence by Proclamation to enable administrative arrangements regarding the transfer of coal [research and development] to be put into place and to enable assets held by the Commonwealth in relation to coal research to be transferred in a coordinated manner to the coal industry.
>
> . The provision associated with the removal of excise funding arrangements for long service leave (subclause 5(2)) is to commence by Proclamation so that the various State parliaments have an opportunity to pass consequential legislation winding up the old long service leave funding scheme.
>
> It is considered the above matters may extend beyond the end of 1992, and for these reasons the above Proclamation commencements are made subject to a deemed commencement on the first day after a period of 12 months from Royal Assent, rather than the standard 6 month "sunset" provision (subclause (4) refers).

In the light of this explanation, the Committee makes no further comment on the subclause.

COMMONWEALTH EMPLOYMENT (MISCELLANEOUS AMENDMENTS) BILL 1992

This Bill was introduced into the House of Representatives on 3 April 1992 by the Minister Representing the Minister for Industrial Relations.

The Bill proposes amendments which fall into three main classes. The first comprises amendments to the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (CERC Act). The amendments are designed to allow the licensing of authorities to carry out the functions of and exercise the powers of Comcare under the Act.

The second class of amendments proposed by the Bill relate to finances under the CERC Act. Pursuant to the amendments, Comcare will be allowed to enter into arrangements, under which Comcare will provide and charge for agreed services.

The third class of amendments will allow for the recovery, from Commonwealth Departments and authorities, of the costs of implementation of the *Occupational Health and Safety (Commonwealth Employment) Act 1991.*

The Bill also proposes minor drafting or technical amendments to the *Industrial Relations Legislation Amendment Act 1991* and the *Industrial Relations Legislation Amendment Act (No. 3) 1991.* Amendments to the *Superannuation Act 1976* which are consequential upon the licensing arrangements are also proposed.

Retrospectivity
Subclause 2(5)

Subclause 2(5) of the Bill provides that the proposed amendments which are set out in Part 3 of the Bill are to be taken to have commenced on 27 June 1991. Part 3 contains a series of proposed amendments to the *Industrial Relations Legislation Amendment Act 1991*. While the amendments proposed would, pursuant to subclause 2(5), have retrospective operation, the Committee notes that, according to the Explanatory Memorandum, each of the amendments is technical in nature, correcting earlier drafting errors. Accordingly, the Committee makes no further comment on the subclause.

DISABILITY SERVICES AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by Mr Braithwaite as a Private Member's Bill.

The Bill proposes to amend the *Disability Services Act 1986*, to provide for increased flexibility in delivering financial and allied assistance to persons with disabilities. The explanatory material to the Bill states that experience has shown that the Act (and administration of the Act) is not providing sufficient flexibility and certainty to persons with disabilities nor to those who deliver services to persons with disabilities. The Bill seeks to remedy this deficiency.

The Committee has no comment on this Bill.

INDUSTRIAL CHEMICALS (NOTIFICATION AND ASSESSMENT) AMENDMENT BILL 1992

This Bill was introduced into the Senate on 30 April 1992 by the Minister for Industrial Relations.

The Bill proposes to amend the *Industrial Chemicals (Notification and Assessment) Act 1989*, to introduce a new Division 1A. The new Division establishes a commercial evaluation permit system for new industrial chemicals. This system will allow for new industrial chemicals to be manufactured or imported in order to determine their potential for commercial application.

The Committee has no comment on this Bill.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 2 April 1992 by the Minister for Social Security.

The Bill proposes to implement changes in the areas of telephone concessions, Job Search Allowance and Newstart Allowance, social security agreements with other countries, debt recovery, the income and assets test, compensation payments and data-matching. The Bill also provides for a number of minor and technical amendments.

The Committee dealt with the Bill in Alert Digest No. 5 of 1992, in which it made certain comments. The Committee now makes the following additional comment.

Inappropriate delegation of legislative power
Clause 81 - proposed new subsection 1208 of the *Social Security Act 1991*

Clause 81 of the Bill proposes to amend section 1208 of the *Social Security Act 1991*. That section currently provides:

> (1) The provisions of a **scheduled international social security agreement** have effect despite anything in this Act.
>
> (2) Subsection (1) does not apply to a provision of an agreement before the day on which the agreement enters into force.
>
> (3) Subsection (1) applies to a provision of an agreement only in so far as the provision remains in force and affects the operation of this Act.

(4) An agreement is a **scheduled international social security agreement** if:

(a) the agreement is between Australia and a foreign country; and

(b) the agreement relates to reciprocity in social security matters; and

(c) the text of the agreement is set out in a Schedule to this Act.

(5) A reference in this Act to a **scheduled international social security agreement** includes a reference to a scheduled international social security agreement as amended by further agreements between Australia and the foreign country concerned.

Clause 81 of the Bill proposes to insert a new subsection (4A), which provides:

(4A) An agreement is also a **scheduled international social security agreement** if:

(a) the agreement is between Australia and the Republic of Austria; and

(b) the agreement relates to reciprocity in social security matters.

The effect of this provision, if enacted, would be to allow the Government to override provisions of the Social Security Act on the basis of an agreement between Australia and the Republic of Austria relating to reciprocity in social security matters. Unlike the existing provision relating to such agreements, there would be no need to include the text of such an agreement in a schedule to the Social Security Act. Indeed, there would appear to be no requirement for the Parliament even to be notified of the existence of such an agreement.

The Committee draws Senators' attention to the clause, as it may be considered an inappropriate delegation of legislative powers, in breach of principle 1(a)(iv) of the Committee's terms of reference.

STATES AND NORTHERN TERRITORY GRANT (RURAL ADJUSTMENT) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to give effect to changes in the provisions of the Rural Adjustment Scheme which were introduced to provide additional assistance measures to farmers experiencing or facing financial difficulties during the rural downturn. These amendments were announced in media statements made by the Minister for Primary Industries and Energy in April and October 1991 and by the Prime Minister in his Economic Statement of 26 February 1992.

Retrospectivity
Subclauses 2(2) and (3)

Subclause 2(2) of the Bill provides:

> Sections 6 and 7, subsection 10(1) and sections 11 and 12 are taken to have commenced on 20 December 1991.

Essentially, the clauses referred to relate to the approval and execution of the first amending agreement to the original Agreement under which the Rural Adjustment Scheme operates.

Subclause 2(3) provides:

> Section 8, subsection 10(2) and section 13 are taken to have commenced on 1 March 1992.

Essentially, these clauses relate to the approval and execution of the second amending agreement.

The commencement dates nominated in clause 2 appear to relate to the dates on which the first and second amending agreements, respectively, were entered into, though the Committee notes that neither the Explanatory Memorandum to the Bill nor the Minister's Second Reading speech give any indication as to the relevance of the dates.

The Committee assumes that, given the general intention of the Bill, the retrospectivity proposed by subclauses 2(2) and (3) is beneficial to persons other than the Commonwealth. However, in the absence of any clear statement to this effect in the Explanatory Memorandum, the Committee would appreciate the Minister's confirmation that this is the case.

General comment

The Committee notes that, at paragraph 3, the Explanatory Memorandum states:

> Under section 27 of the Agreement, these amendments can be introduced through agreement between the Commonwealth and the States prior to amendment of the legislation.

The Committee notes that section 27 of the Agreement provides:

> (1) The operation of the Scheme in relation to all of the States will be reviewed from time to time as appropriate by the Commonwealth and the States in the light of experience in its administration.
>
> (2) Where on a review of the operation of the Scheme the Ministers of the Commonwealth and of the States consider an amendment to the agreement should be made the Commonwealth Minister will seek to have the agreement so amended.

The Committee is unsure what is meant by paragraph 3 of the Explanatory Memorandum. It appears to suggest that amendments to the Agreement can be 'introduced' prior to the amendment of the legislation. Section 27 of the Agreement is given as authority for this proposition. On its face, section 27 does not appear to be open to such an interpretation.

The Committee would appreciate the Minister's clarification as to what is meant by paragraph 3 of the Explanatory Memorandum.

STATES GRANTS (COAL MINING INDUSTRY LONG SERVICE LEAVE) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister Representing the Minister for Industrial Relations.

The Bill is part of a package of Bills which propose to give effect to the Government's proposal to reform the funding of long service leave in the black coal mining industries in New South Wales, Queensland, Western Australia and Tasmania. The proposals were developed in response to the report of the Willett Inquiry, entitled 'Review of Funding Arrangements: Coal Mining Industry Long Service Leave', which was commissioned by the Minister for Industrial Relations in August 1990.

Through the Bills, the Government aims to establish a compulsory, national industry scheme, to fully fund, on an accrual basis, the long service leave entitlements of persons employed in the black coal mining industry by participating producers. In particular, this Bill proposes to allow for the whole of the excise raised under existing arrangements to be paid from the Consolidated Revenue Fund into the existing Coal Mining Industry Long Service Leave Fund.

Commencement by Proclamation
Subclauses 2(2) and (3)

Subclause 2(2) of the Bill provides:

> Section 3 commences on a day to be fixed by Proclamation.

Clause 3 is the 'effective' clause of the Bill. It enacted, it would require the payment of the whole of the excise raised under the existing scheme from the Consolidated Revenue Fund into the Coal Mining Industry Long Service Leave Fund.

Subclause 2(4) provides:

> If section 3 does not commence under subsection (2) within the period of 12 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

By way of explanation for these provisions (and in accordance with paragraph 6 of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989), the Explanatory Memorandum to the Bill states:

> As commencement is dependent on the passage of legislation in four State parliaments, a fixed date for the commencement of this Bill cannot be determined at this stage.

As the Committee has noted elsewhere in this Alert Digest, in relation to a similar provision in the Coal Mining Industry (Long Service Leave Funding) Bill 1992, this would appear to be an appropriate commencement provision in the circumstances of the Bill.

STATES GRANTS (SCHOOLS ASSISTANCE) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister for Employment Education and Training.

The Bill proposes to amend the *States Grants (Schools Assistance) Act 1988,* to give effect to an initiative for schools announced by the Prime Minister in his February 1992 'One Nation' statement. The Bill provides for an additional $15 million for capital grants to non-government schools for the 1992 calendar year.

The Committee has no comment on this Bill.

STATES GRANTS (TAFE ASSISTANCE) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister for Employment, Education and Training.

The Bill proposes to appropriate funds for technical and further education, in accordance with the Government's November 1991 Statement on the Economy and Employment. The Bill provides for supplementation of grants for 1992 in accordance with agreed supplementation procedures.

The Committee has no comment on this Bill.

SUPERANNUATION GUARANTEE (CONSEQUENTIAL AMENDMENTS) BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister Assisting the Treasurer.

The Bill proposes to make a number of consequential amendments to:

- the *Occupational Superannuation Standards Act 1987;*
- the *Defence Act 1903;*
- the *Defence Force Retirements and Death Benefits Act 1973;*
- the *Military Superannuation and Benefits Act 1991;*
- the *Income Tax Assessment Act 1936* (and certain other Tax Acts)

as a result of the introduction of the superannuation guarantee charge. In particular, the various Defence Acts will be amended to ensure that superannuation benefits for members of the Defence Forces are consistent with the benefits required by the superannuation guarantee scheme. These consequential amendments will apply from 1 July 1992.

The Committee has no comment on this Bill.

TRAINING GUARANTEE (ADMINISTRATION) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 30 April 1992 by the Minister for Employment, Education and Training.

The Bill proposes to amend the *Training Guarantee (Administration) Act 1990*, to give effect to a recommendation of the Report of the Australian Education Council Review Committee entitled 'Young People's Participation in Post-Compulsory Education and Training' (the Finn Report). It also makes some minor technical amendments to the Act's provisions and clarifies the legislation regarding trustees. In line with the Finn Report's recommendations, the Bill provides for work experience and supervised practice for students and teachers to be included in an eligible training program of an employer.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 7 OF 1992

29 MAY 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

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 such 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.

The Committee has considered the following Bills:

A.C.T. Supreme Court (Transfer) Bill 1992

* Commonwealth Electoral Amendment Bill 1992

* Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Bill 1992

* Customs Tariff Amendment Bill 1992

Customs Tariff (Anti-Dumping) Amendment Bill 1992

Dairy Produce Amendment Bill 1992

Dairy Produce Levy (No. 1) Amendment Bill 1992

* Health, Housing and Community Services Legislation Amendment Bill 1992

Higher Education Funding Amendment Bill 1992

Industrial Relations Legislation Amendment Bill 1992

Local Government (Financial Assistance) Amendment Bill 1992

Migration Amendment Bill (No. 2) 1992

Ministers of State Amendment Bill 1992

* Primary Industries and Energy Legislation Amendment Bill (No. 2) 1992

* Social Security (Family Payment) Amendment Bill 1992

* Transport and Communications Legislation Amendment Bill (No. 2) 1992

*** The Committee has commented on these Bills**

* Veterans' Affairs Legislation Amendment Bill 1992

Wool Tax (Nos. 1 - 5) Amendment Bills 1992

Wool Tax (Administration) Amendment Bill 1992

* The Committee has commented on these Bills

NOTE: This Digest is circulated to all Honourable Senators. Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

A.C.T. SUPREME COURT (TRANSFER) BILL 1992

This Bill was introduced into the House of Representatives on 6 May 1992 by the Attorney-General.

The Bill relates to the transfer of the legislative power in relation to the establishment and administration of courts in the Australian Capital Territory to the Australian Capital Territory Government on 1 July 1992. Under the provisions of the *Australian Capital Territory (Self-Government) Act 1988*, (the Self-Government Act), the Assembly is to have power to legislate in relation to the establishment of courts from that date. The Bill provides for the protection of the independence of the Australian Capital Territory Supreme Court once this legislative power is transferred to the Australian Capital Territory Government.

The Committee has no comment on this Bill.

COMMONWEALTH ELECTORAL AMENDMENT BILL 1992

This Bill was introduced into the Senate on 7 May 1992 by the Minister for Administrative Services.

The Bill proposes to alleviate some of the administrative burden on registered political parties which are imposed by Part 3 of the *Political Broadcasts and Political Disclosure Act 1991* by nominating thresholds below which records need not be kept. Total amounts of income, expenditure and debt will still be required to be disclosed and the enhanced spot audit power will be available to the Australian Electoral Commission to enforce the disclosure provisions. The Bill also proposes to amend to commencement date so that the first returns will cover the period 1 July 1992 to 30 June 1993.

Inappropriate delegation of legislative power
Clause 8 - proposed new paragraph 305A(1)(c) of the *Commonwealth Electoral Act 1918*

Clause 8 of the Bill proposes to insert a new section 305A into the *Commonwealth Electoral Act 1989*. That proposed new section provides, in part:

> (1) If a person (other than a registered political party, a State branch of a registered political party, a candidate in an election or a member of a group) makes a gift, during the disclosure period in relation to an election, to:
>
> (a) any political party or State branch of a political party; or

(b) any candidate in an election or member of a group; or

(c) any person or body (whether incorporated or not) specified by the Electoral Commission by notice in the *Gazette;*

the person must, within 15 weeks after the polling day in the election, furnish to the Electoral Commission a return, in an approved form, setting out the required details of all gifts made during the disclosure period.

(2) A person need not make a return under subsection (1) if:

(a) the total amount or value of gifts referred to in paragraph (1)(a) was less than the amount prescribed for the purpose of this paragraph or, if no amount is prescribed, $4,500; and

(b) the total amount or value of gifts referred to in paragraph (1)(b) was less than the amount prescribed for the purpose of this paragraph or, if no amount is prescribed, $200; and

(c) the total amount or value of gifts referred to in paragraph (1)(c) was less than the amount prescribed for the purpose of this paragraph or, if no amount is prescribed, $1,000.

Proposed new paragraph 305A(1)(c) may be regarded as an inappropriate delegation of legislative power. If enacted, it would allow the Electoral Commission to, in effect, widen the range of persons and bodies to whom certain persons cannot make a gift during an election period without having to furnish a return to the Commission. In making this comment, the Committee notes that there is no indication as to what sorts of persons or bodies might be so specified.

In addition, the Committee notes that, under this provision, the Commission would be able to widen the definition by merely publishing a notice in the *Gazette.* There

would be no scope for Parliamentary scrutiny of the notice.

The Committee draws attention to the provision, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Inappropriate delegation of legislative power
Clause 12 - proposed new subsections 314AA(2) and (3) of the *Commonwealth Electoral Act 1918*

Clause 12 of the Bill proposes to repeal Division 5A of Part XX of the *Commonwealth Electoral Act 1918*, and to replace it with a new Division 5A. That Division deals with annual returns by registered political parties. Proposed new section 314AA provides:

> (1) In this Division:
> **'amount'** includes the value of a gift or bequest.
>
> (2) Without limiting the kinds of events that are fund-raising events, a class of events are taken to be fund-raising events for the purposes of this Division if the regulations so provide.
>
> (3) For the purposes of this Division, a class of events are taken not to be fund-raising events if the regulations so provide.

Proposed new subsections 314AA(2) and (3) may be regarded as inappropriate delegations of legislative power. Proposed new subsection (2), if enacted, would allow the Governor-General (acting on the advice of the Federal Executive Council) to issue regulations to, in effect, define 'fund-raising events'. In making this comment, the Committee notes that, there does not appear to be any guidance in either the legislation or the accompanying material as to what sort of 'events' might be covered.

Similarly, proposed new subsection (3), if enacted, would allow the Governor-General (acting on the advice of the Federal Executive Council) to issue regulations which, in effect, would exclude certain classes of 'events' from the definition.

The Committee suggests that the substance of the definition of 'fund-raising event' may be considered to be a matter which is more appropriately dealt with in the primary legislation. Accordingly, the Committee draws Senators' attention to the provisions, as they may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

CUSTOMS LEGISLATION (TARIFF CONCESSIONS AND ANTI-DUMPING) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Minister for Small Business, Construction and Customs.

The Bill is an omnibus Bill which proposes a series of amendments to:

- the *Anti-Dumping Authority Act 1988;*
  the *Customs Act 1901;* and
- the *Customs Tariff (Miscellaneous Amendments) Act 1987.*

The two major changes are:

- to amend the Customs Act in order to give legislative effect to the Government's response (announced on 24 September 1991) to the Industry Commission's report on the Tariff Concessions System;
- to amend the Customs Act and the Anti-Dumping Authority Act to give legislative effect to the Government's review of Australia's anti-dumping and countervailing system. These measures were announced by the Government on 5 December 1991.

Retrospectivity
Subclause 2(3)

Subclause 2(3) of the Bill provides that the amendments proposed by clause 23 of the Bill are to be taken to have commenced on 1 January 1988. Clause 23 proposes

to amend section 8 of the *Customs Tariff (Miscellaneous Amendments) Act 1987*. The Explanatory Memorandum indicates that the amendments is intended to 'overcome a defect' in the *Customs Tariff Act 1987*. That Act commenced on 1 January 1988. The Explanatory Memorandum goes on to indicate that the proposed amendments will be beneficial to persons other than the Commonwealth. Accordingly, the Committee makes no further comment on the provision.

CUSTOMS TARIFF AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 6 May 1992 by the Minister for Small Business, Construction and Customs.

The Bill proposes to enact various changes to the *Customs Tariff Act 1987*. Many of the amendments have already been introduced as customs tariff proposals. The purpose of the amendments is to:

- subtract the customs duty component from the New Zealand rate of duty for tobacco products;
- allow for motor vehicle component manufacturers to use directly import credits which they earn under the motor vehicle export facilitation scheme;
- allow certain capital equipment which is technologically more advanced, more efficient or more productive than equipment available from Australian manufacturers to be imported free;
- allow certain materials to be imported duty free for specific end-uses, in order to assist the competitiveness of certain Australian industries;
- change the concessional tariff treatment accorded to goods from Yugoslavia and its Republics;
- amend the definition of off-road and passenger motor vehicles;
- insert new quote tender and tender extension duty rates for textile, clothing and footwear;
- clarify the clearance levels applicable to off-road vehicles;
- reduce the duty on cold-rolled, and clad, plated or coated flat-rolled steel products;
- impose a $12,000 per vehicle duty on imported used or second-hand cars;

- provide a new tariff structure for short stack bicycles;
- clarify the customs co-operation council in relation to the classification of certain goods; and
- provide for a number of technical and administrative changes.

Retrospectivity
Subclauses 2(3) to (9)

Subclauses 2(3) to (9) of the Bill, if enacted, would make the amendments proposed by clauses 6 to 12 of the Bill retrospective to various dates, the earliest being 1 July 1990. The Committee notes that this is a common practice in relation to amendments of this type and one which the Committee has previously been prepared to accept. Accordingly, the Committee makes no further comment on the provisions.

Commencement by Proclamation
Subclauses 2(12) and (13)

Subclauses 2(12) and (13) of the Bill, if enacted, would allow clauses 3 and 15 of the Bill, respectively to commence either on Proclamation or 12 months after the Bill receives the Royal Assent, whichever occurs first. The Committee notes that, while the Proclamation period is closed, the period specified is in excess of the 6 months 'general rule' provided for in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

By way of explanation for the clauses, the Explanatory Memorandum states that the amendments to be made by clauses 3 and 15 are consequential on the amendments to be made to the *Customs Act 1901* by the Customs Legislation (Tariff

Concessions and Anti-Dumping) Amendment Bill 1992. The Committee notes that, pursuant to subclause 2(2) of that Bill, the amendments in question would commence not later than 6 months from that Bill receiving the Royal Assent.

In the circumstances, the Committee does not understand why the 12 month period within which commencement must take place is specified in the Bill, rather than some lesser period, (ie a period closer to 6 months). The Committee would, therefore, appreciate the Minister's advice as to why this is the case.

CUSTOMS TARIFF (ANTI-DUMPING) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Minister for Small Business, Construction and Customs.

The Bill proposes to amend the *Customs Tariff (Anti-Dumping) Act 1975*. The amendments are part of a legislative package which contains a series of reforms to Australia's anti-dumping and countervailing systems that were announced by the Government on 5 December 1991.

The principal purpose of this Bill is to vest a new power in the Minister to apply either anti-dumping or countervailing duties, or both, where the Minister is satisfied that the combined effect of dumping and subsidisation has caused or threatened material injury to an Australian industry, or has materially hindered the establishment of an Australian industry.

The Committee has no comment on this Bill.

DAIRY PRODUCE AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 6 May 1992 by the Minister for Primary Industries and Energies.

The Bill proposes to set the rate of assistance for manufactured dairy exports for each year to 30 June 2000, to provide for the termination of Commonwealth underwriting for dairy exports from 30 June 1992 and to provide more flexibility in the way promotional and other industry funds can be expended.

The Committee has no comment on this Bill.

DAIRY PRODUCE LEVY (NO. 1) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 6 May 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the *Dairy Produce Levy (No. 1) Act 1986,* to complete the measures that will set the framework for the Commonwealth's dairy marketing arrangements. This Bill extends to 30 June 2000 the imposition of the market support levy, which provides funds for the market support payments on manufactured dairy exports.

The Committee has no comment on this Bill.

HEALTH, HOUSING AND COMMUNITY SERVICES LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Parliamentary Secretary to the Minister for Health, Housing and Community Services.

The Bill proposes to make amendments to a number of Acts within the Health, Housing and Community Services portfolio. The major changes proposed by the Bill are intended to:

- assist Commonwealth funded organisations improve the standard of service they provide for people with a disability;
- allow monthly payments of First Home Owner assistance to be resumed once the applicant supplies the required tax file number data;
- enable the Minister to refer medical practitioners who initiate excessive pathology services to a Medical Services Committee of Inquiry;
- limit the protection afforded by section 66 of the *Hearing Services Act 1991*, to the name National Acoustics Laboratories, the acronym 'NAL' and the NAL logo;
- extend the Safety Net arrangements under the Pharmaceutical Benefits Scheme, to include medication supplied through out-patient departments of State public hospitals and Repatriation hospitals;
- improve the administration of nursing homes under the Aged and Community Care program;
- clarify the definition of 'therapeutic devices' for the purposes of the *Therapeutic Goods Act 1989*.

Retrospectivity
Subclauses 2(3), (4) and (6)

Pursuant to subclauses 2(3) , (4) and (6) of the Bill, if enacted, Part 3, clause 44 and (most of) Part 5 of the Bill would commence on various dates prior to the passage of the Bill, the earliest being 1 January 1991. In each case, on the basis of the Explanatory Memorandum, the proposed amendments appear to be beneficial to persons other than the Commonwealth. Accordingly, the Committee makes no further comment on the provisions.

General comment

The Committee notes with approval that the amendment to the *Hearing Services Act 1991* proposed by clause 47 of the Bill gives effect to an undertaking given to the Committee by the Minister for Health, Housing and Community Services in a letter dated 4 November 1991. That letter was dealt with in the Committee's *Eighteenth Report of 1991*. The Committee thanks the Minister for proposing the amendments in question.

HIGHER EDUCATION FUNDING AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the *Higher Education Funding Act 1988*, to provide increased funding in relation to the years 1992, 1993 and 1994. The proposed amendments are in accordance with the Government's cost supplementation arrangements, taking account of movements in the Department of Employment, Education and Training Higher Education Non-salary, Equipment and Building Cost Indexes from the June quarter of 1991 to the December quarter of 1991.

The Committee has no comment on this Bill.

INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the Senate on 7 May 1992 by the Minister for Industrial Relations.

The Bill proposes to amend the *Industrial Relations Act 1988* and the *National Labour Consultative Council Act 1977.* The Bill has five main elements. These are:

- a fundamental revision of the provisions of the *Industrial Relations Act 1988,* to facilitate and encourage workplace bargaining. The parties to a dispute within the jurisdiction of the Australian Industrial Relations Commission will be enabled to reach agreement on terms to settle the dispute and to have the agreement certified by the Commission and to operate as an award;
- to enable the Commission to prevent or settle disputes over contract arrangements and review sham or unfair contracts;
- the conferral of specific duties on the office of Vice-President of the Commission in relation to registered organisations of employers and workers;
- to provide for simpler processes for the recovery of unpaid award wages; and
- to provide for improved machinery for national consultation on industrial relations matters.

The Committee has no comment on this Bill.

LOCAL GOVERNMENT (FINANCIAL ASSISTANCE) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Minister for Local Government.

The Bill proposes to put in place arrangements for the provision of identified local road funding to local government for the three years 1992-93 to 1994-95 inclusive.

The Committee has no comment on this Bill.

MIGRATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes a number of amendments to the *Migration Act 1958.* These amendments:

- introduce a scheme to allow the Minister to maintain effective control of the refugee processing;
- establish a mechanism for the cancellation of business permits or business visas in specified circumstances;
- create a liability in favour of the Commonwealth in respect of illegal fisherman who have been taken into custody under section 88(3) of the Act;
- clarify certain of the provisions which relate to review or applications made under the Migration Act;
- provide for various technical amendments.

The Committee has no comment on this Bill.

MINISTERS OF STATE AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Minister Representing the Minister for Administrative Services.

The Bill proposes to amend the *Ministers of State Act 1952*, to increase the limit on the annual sum appropriated from the Commonwealth Consolidated Revenue Fund in respect of the salaries of Ministers, consequent upon the increase in salaries as provided for by the National Wage Case increase of 15 August 1991.

The Committee has no comment on this Bill.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 6 May 1992 by the Minister Representing the Minister for Primary Industries and Energy.

The Bill is an omnibus Bill for legislation administered within the Primary Industries and Energy portfolio. It proposes to make a number of amendments to existing legislation. The Bill proposes to amend the following Acts:

- *Australian Meat and Live-stock Corporation Act 1987;*
- *Australian Wool Corporation Act 1991;*
- *Australian Wool Realisation Commission Act 1991;*
- *Primary Industries and Energy Research and Development Act 1987;*
- *Primary Industries Levies and Charges Collection Act 1991;*
- *Snowy Mountains Hydro-electric Power Act 1949.*

General comment

Part 6 of the Bill proposes to make certain amendments to the *Primary Industries Levies and Charges Collection Act 1991.* In particular, clause 29 of the Bill proposes to insert definitions of 'leviable amount' and 'leviable weight' into section 4 of that Act. The Committee is uncertain as to the need for these definitions in the Act and would, therefore, appreciate the Minister's advice as to the purpose of inserting the definitions.

SOCIAL SECURITY (FAMILY PAYMENT) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Minister for Family Support.

The Bill proposes to introduce a new system of social security payments to families with children. The legislation involved is the *Social Security Act 1991* and the *Income Tax Assessment Act 1936*. The integration of family allowance supplement and additional pension and benefit will result in a program of nearly $2 billion, which will assist about 800,000 families or nearly 1½ million children. In addition, family allowance and family allowance supplement will be amalgamated into a single payment with entitlement calculated under a two-step income and asset test.

Requirement to provide tax file number
Clause 3 - proposed new sections 855 and 856 of the *Social Security Act 1991*

Clause 3 of the Bill proposes to repeal Parts 2.17 and 2.18 of the *Social Security Act 1991* and replace them with 2 new Parts. Proposed new Part 2.17, if enacted, would provide for a 'family payment' in substitution of the 'family allowance' payable under the existing legislation.

Proposed new sections 855 and 856, if enacted, would allow the Secretary of the Department of Social Security to require a recipient of or a claimant for family payment or their partner to provide the Secretary with their tax file number.

The Committee has previously indicated (most recently in Alert Digest No. 10 of 1991, in relation to the Social Security (Disability and Sickness Support)

Amendment Bill 1991) that, while such provisions may be seen as necessary to prevent persons defrauding the social security system, they may also be considered as unduly intrusive upon a person's privacy. Accordingly, 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.

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill proposes to make amendments to ten Acts administered within the Transport and Communications portfolio. The amendments do not introduce substantial new policy schemes but contain provisions intended to enhance existing schemes, to improve mechanisms for implementing them, or to remove drafting problems.

Retrospectivity / commencement by Proclamation
Clause 2

Clause 2 of the Bill provides for the commencement of the various provisions contained in the Bill. Subclauses 2(2) and (3) provide that clauses 16 and 21 and clauses 18 and 20, respectively, are to be taken to have commenced on 1 July 1991 and 13 June 1986, respectively. The Explanatory Memorandum to the Bill indicates that the provisions in question are intended to ratify and confirm certain existing practices.

Subclauses 2(4) and (9) provide that Parts 7 and 11 of the Bill are to be taken to have commenced on 8 April 1992 and 21 January 1991, respectively. The Explanatory Memorandum to the Bill indicates that the provisions in question are intended to correct drafting errors.

Subclause 2(6) provides:

> Subsection 28(3), sections 34 to 40 (inclusive) and subsection 42(4) commence on a day to be fixed by Proclamation, being the day on which the Protocol on Environmental Protection to the Antarctic Treaty (being the Protocol a copy of the English text of which, apart from Annexes I, II, III and V to it, is set out in the Schedule set out in Schedule 6) enters into force.

The Committee notes with approval that, while the period within which the Proclamation must be made under this clause is not limited in time, it is limited by reference to the entering into force of the treaty to which the proposed amendments in question relate.

The Committee makes no further comment on the provisions.

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 May 1992 by the Minister for Veterans' Affairs.

The Bill is a portfolio Bill, which proposes to introduce a number of technical and minor amendments to the veterans' affairs legislation. The Bill also contains some minor consequential and technical amendments to other legislation. Among the most important measures contained in this Bill are:

- the extension of benefits to members of the Australian Defence Force serving in Cambodia;
- the replacement of the existing voucher system for telephone rental concessions with an annual telephone allowance; and
- changes to the assessment rules for unlisted property trust investments.

Retrospectivity
Subclauses 2(2) - (12)

Subclauses 2(2) to (12) of the Bill provide that various amendments proposed by the Bill are to be taken to have commenced on various specified dates, the earliest being 22 May 1986. In all but one instance, the Explanatory Memorandum to the Bill indicates that the amendments in question are either beneficial to persons other than the Commonwealth or correct drafting errors.

The exception is the amendments proposed by Part 7 of the Schedule to the Bill which, pursuant to subclause 2(6), would be taken to have commenced on 25 June

1991. These amendments relate to Section 74 of the *Veterans' Entitlements Act 1986,* which relates to payments by way of compensation or damages. It would appear that the amendments proposed would reduce or extinguish certain pension entitlements under the Veterans' Entitlements Act if that pensioner has received a lump sum payment under section 30 of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988.* The amendments proposed would, therefore, appear to be prejudicial to such persons. Accordingly, the Committee would appreciate the Ministers' advice as to why the retrospectivity is considered necessary.

WOOL TAX (ADMINISTRATION) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 6 May 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the *Wool Tax (Administration) Act 1964*, to provide that, where the Minister for Primary Industries and Energy determines that a rebate of wool tax will be applicable to shorn wool tax payable in the following financial year, persons liable to pay the shorn wool tax will be entitled to the rebate.

The Committee has no comment on this Bill.

WOOL TAX (NOS. 1 - 5) AMENDMENT BILLS 1992

These Bills were introduced into the House of Representatives on 6 May 1992 by the Minister Primary Industries and Energy.

The Bills propose to amend the *Wool Tax Acts (Nos 1-5) 1964,* to increase the maximum rate of wool tax that can be imposed on carpet wool from 4% to 6%.

The Committee has no comment on these Bills.

SCRUTINY OF BILLS ALERT DIGEST

NO. 8 OF 1992

3 JUNE 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

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 such 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.

The Committee has considered the following Bills:

Australian Sports Drug Agency Amendment Bill 1992

Development Allowance Authority Bill 1992

* Disability Discrimination Bill 1992

Human Rights and Equal Opportunity Legislation Amendment Bill 1992

Migration Agents Registration (Application) Levy Bill 1992

Migration Agents Registration (Renewal) Levy Bill 1992

* Migration Amendment Bill (No. 3) 1992

National Crime Authority Amendment Bill 1992

* Pooled Development Funds Bill 1992

* Sales Tax Amendment (Transitional) Bill 1992

* Sales Tax Assessment Bill 1992

Sales Tax (Exemptions and Classifications) Bill 1992

Sales Tax Imposition (Customs) Bill 1992

Sales Tax Imposition (Excise) Bill 1992

Sales Tax Imposition (General) Bill 1992

Sugar Cane Levy Amendment Bill 1992

*** The Committee has commented on these Bills**

Taxation Administration Amendment Bill 1992

* Taxation Laws Amendment Bill (No. 3) 1992

* Taxation Laws Amendment (Self Assessment) Bill 1992

* Telecommunications (Public Mobile Licence Charge) Bill 1992

* Territories Law Reform Bill 1992

* Trade Practices Amendment Bill 1992

* The Committee has commented on these Bills

NOTE: This Digest is circulated to all Honourable Senators. Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

AUSTRALIAN SPORTS DRUG AGENCY AMENDMENT BILL 1992

This Bill was introduced into the Senate on 27 May 1992 by the Minister Representing the Minister for the Arts, Sport, the Environment and Territories.

The Bill proposes to make amendments to the *Australian Sports Drug Agency Act 1990.* These amendments have become necessary due to recent developments both overseas and in Australia.

The definition of a 'competitor' for the purpose of the Act will be expanded (and related amendments made) to enable the Australian Sports Drug Agency to test a wider range of persons for the presence of prohibited drugs in Australia and overseas. The Agency is increasingly being recognised overseas and domestically as having the professional expertise to arrange for the presence of prohibited drugs and will, therefore, be increasingly called on to conduct such tests in Australia and overseas, at the request of both Australian and overseas authorities.

The Committee has no comment on this Bill.

DEVELOPMENT ALLOWANCE AUTHORITY BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister assisting the Treasurer.

The Bill proposes to establish a one member statutory authority to be known as the Development Allowance Authority (DAA).

The primary purpose of DAA is to assess the eligibility of large projects in Australia (with a total capital cost of $50 million, or more) for the development allowance. This will be achieved by DAA's assessing each application for registration and pre-qualifying certification against basic eligibility criteria and, in some instances, competitiveness criteria.

The Committee has no comment on this Bill.

DISABILITY DISCRIMINATION BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the *Minister for Health, Housing and Community Services.*

The Bill proposes to introduce national legislation to make unlawful discrimination against people with disabilities in certain circumstances. The Bill makes unlawful discrimination on the grounds of disability in the areas of:

- employment;
- education;
- the provision of goods, services and facilities;
- accommodation;
- the disposal of land;
- the activities of clubs;
- sport;
- the administration of Commonwealth laws and programs; and
- in requests for certain information

Harassment of a person on the grounds of disability is also made unlawful.

Commencement by Proclamation
Subclauses 2(2) and (3)

Clause 2 of the Bill provides:

> (1) Sections 1 and 2 commence on the day on which this Act receives the Royal Assent.
>
> (2) Subject to subsection (3), the remaining provisions of this Act commence on a day or days to be fixed by Proclamation.
>
> (3) If a provision of this Act does not commence under subsection (2) within the period of 12 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

The Committee notes that while (pursuant to subclause 2(3)) the period within which the substantive parts of the Bill must be proclaimed is closed, the period specified is longer than the 'general rule' provided for in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. However, the Committee also notes that the Explanatory Memorandum to the Bill contains the following statement:

> It is intended that Part 1 and clauses 66, 67 and 68 of Part 4 and Part 6 of the Act will come into force earlier than the rest of the Act. *This will allow the Disability Discrimination Commissioner to* conduct an awareness and education campaign concerning the Act before the complaints mechanism actually comes into force.

In the light of this explanation, the Committee makes no further comment on the clause.

Power to appoint 'a person'
Subclause 74(1)

Part 4 of the Bill provides for inquiries and civil proceedings to be undertaken in relation to certain alleged unlawful acts. Division 2 of Part 4 provides for inquiries to be conducted by the Disability Discrimination Commissioner, who is to be appointed pursuant to clause 113 of the Bill.

Clauses 74 and 75 of the Bill, if enacted, would empower the Commissioner to convene 'compulsory conferences' in relation to alleged unlawful acts. Subclause 74(1) provides:

> Subject to section 85, for the purpose of inquiring into an act, and endeavouring to settle the matter to which the act relates, under section 71, the Commissioner may, by notice in writing, direct the persons referred to in subsection (2) of this section to attend, at a reasonable:
>
> (a) time; and
>
> (b) place;
>
> specified in the notice, a conference presided over by the Commissioner or a person appointed by the Commissioner.
>
> [Clauses 71 and 85 are not relevant for the purposes of this comment]

This subclause would allow the Commissioner to appoint 'a person' to preside over a compulsory conference. There is no indication as to the qualities or attributes which such a person should have. The Committee has regularly drawn attention to such provisions, on the basis that the discretion to appoint 'a person' should be limited either by reference to the qualities or attributes which such a person should possess or by reference to the designation or office which such a person should hold (ie by limiting it to members of the Senior Executive Service or the staff of the Human Rights and Equal Opportunity Commission).

The Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Abrogation of the privilege against self-incrimination
Subclause 111(1)

Clause 109 of the Bill provides:

> **Failure to give information or produce documents**
> 109.(1) A person must not, without reasonable excuse, refuse or fail:
>
> (a) to give information; or
> (b) to produce a document;
>
> when so required under section 73, 74 or 75.
> Penalty: $1,000.
>
> (2) Subsection 4K(2) of the *Crimes Act 1914* does not apply to this section.

Clause 110 provides:

> **Offences in relation to Commission**
> 110.(1) A person served, as prescribed, with a summons to appear before the Commission as a witness must not, without reasonable excuse:
> (a) fail to attend as required by the summons; or
> (b) fail to appear and report from day to day unless excused, or released from further attendance, by the Commission.
>
> (2) A person appearing before the Commission as a witness at an inquiry must not, without reasonable excuse:
> (a) refuse or fail to be sworn or make an affirmation; or
> (b) refuse or fail to answer a question that is required by the member presiding at the inquiry to be answered; or
> (c) refuse or fail to produce a document that was required to be produced by a summons under this Act served on that person as prescribed.

(3) A person must not:

(a) interrupt an inquiry or proceedings of the Commission; or

(b) use insulting language towards a member of the Commission when the member is exercising any powers or performing any functions as a member; or

(c) make a publication in contravention of any direction given under section 87; or

(d) create a disturbance or take part in creating or continuing a disturbance in or near a place where the Commission is meeting or holding an inquiry.

Penalty: $1,000.

Clause 111 provides:

Self-incrimination

111.(1) It is not a reasonable excuse for the purposes of section 109 for a person to refuse or fail to give information or produce a document that the giving of the information or the production of the document might incriminate the person, but any information given, document produced or evidence given under section 73, 74 or 75, and any information or thing (including any document) obtained as a direct or indirect consequence of the giving of the information or production of the document is not admissible in evidence against the person in any civil or criminal proceedings before a court, other than a proceeding for an offence under section 112.

[Clause 112 would make it an offence to give false or misleading information.]

(2) Without limiting the generality of the expression "reasonable excuse" in section 110, it is a reasonable excuse for the purposes of that section for a person to refuse or fail to answer a question put to the person at an inquiry, or to refuse to produce a document, that the answer to the question or the production of the document might incriminate the person.

Subclause 111(1) is an abrogation of the common law privilege against self-incrimination. However, it is in a form which the Committee has previously been prepared to accept, as it contains a limit as to the use to which any information obtained can be put. The Committee notes, in particular, that the *indirect* as well as the direct use of such information would be precluded. This is, therefore a 'use/derivative use' indemnity.

The Committee notes with approval that subclause 111(2) confirms that it is a 'reasonable excuse' for the person to refuse or fail to answer a question put at an inquiry or to refuse to produce a document on the ground that such answer or production might tend to incriminate him or her.

The Committee makes no further comment on the clauses.

Power to delegate to 'a person'
Paragraphs 121(1)(d) and (2)(b)

Clause 121 of the Bill provides:

> (1) The Commission may, by writing under its seal, delegate to:
> (a) a member of the Commission; or
> (b) the Commissioner; or
> (c) a member of the staff of the Commission; or
> (d) another person or body of persons;
> all or any of the powers conferred on the Commission under this Act, other than powers in connection with the performance of the functions that, under section 67, are to be performed by the Commissioner on behalf of the Commission.
>
> (2) The Commissioner may, by writing signed by the Commissioner, delegate to:
> (a) a member of the staff of the Commission; or

(b) any other person or body of persons;
approved by the Commission, all or any of the powers exercisable by the Commissioner under this Act.

The Committee notes that, pursuant to clauses 121(1)(d) and (2)(b), the Human Rights an Equal Opportunity Commission and the Disability Discrimination Commissioner, respectively, would be able to delegate (with one limitation) all or any of their powers under the Bill to 'any other person or body of persons'., As the Committee has stated above in relation to subclause 74(1), it is a matter of concern that there is no limit on the persons to whom these powers can be delegated, preferably by reference to the qualities and attributes which such persons should possess.

The Committee draws Senators' attention to the provisions as they may be considered to make rights, liberties and obligation subject to insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

HUMAN RIGHTS AND EQUAL OPPORTUNITY LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister for Community Services and Health.

The Bill proposes to make amendments to the *Human Rights and Equal Opportunity Commission Act 1986* which are required by the proposed Disability Discrimination Bill 1992. It also makes other amendments to bring Commonwealth anti-discrimination law up to date with existing practice in a number of areas.

The Committee has no comment on this Bill.

MIGRATION AGENTS REGISTRATION (APPLICATION) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 27 May 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to provide for the levying of application fees which (pursuant to the Migration Amendment Bill (No. 3) 1991) will be payable by all persons applying for registration as a migration agent, unless exempted.

These fees are characterised as taxes and are imposed by two separate bills, in order to satisfy the requirement of section 55 of the Constitution.

The Committee has no comment on this Bill.

MIGRATION AGENTS REGISTRATION (RENEWAL) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 27 May 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to provide for the levying of renewal fees in relation to persons registered as migration agents, subject to certain exemptions. The requirement for registration is contained in *Migration Amendment Bill (No. 3) 1992*.

These fees are characterised as taxes and, as a result, are imposed by two separate bills, in order to satisfy the requirement of section 55 of the Constitution.

The Committee has no comment on this Bill.

MIGRATION AMENDMENT BILL (NO. 3) 1992

This Bill was introduced into the House of Representatives on 27 May 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill is being introduced with the Migration Agents Registration (Application) Levy Bill 1992 and the Migration Agents Registration (Renewal) Levy Bill 1992. These Bills propose to establish a comprehensive regime to regulate the conduct of migration agents.

This Bill provides a wide definition for migration agents. The central feature of the proposed regime is that it will require migration agents to be registered on a Register of Migration Agents to be maintained by the Secretary of the Department of Immigration, Local Government and Ethnic Affairs.

It will be a criminal offence to practise as a migration agent without being registered.

Disciplinary proceedings
Clause 4 - proposed new paragraph 114ZE(g) of the *Migration Act 1958*

Clause 4 of the Bill proposes to inert a new Part 2A into the *Migration Act 1958*. That proposed new Part deals with migration agents and the provision of 'immigration assistance'.

Proposed new section 114ZE deals with discretionary cancellation or suspension of migration agents' registration. It provides:

> The [Migration Agents Registration] Board may:
> (a) cancel the registration of a registered agent by removing his or her name from the register; or
> (b) suspend his or her registration; or
> (c) caution him or her;
> if it becomes satisfied that:
> (d) the agent's application for registration was known by the agent to be false or misleading in a material particular; or
> (e) the agent becomes bankrupt;
> (f) the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance; or
> (g) an individual related by employment to the agent is not a person of integrity; or
> (h) the agent has not complied with the Code of Conduct prescribed under section 114ZR.

The Committee is concerned by paragraph (g) above which, if enacted, would allow the Migration Agents Registration Board to cancel the registration of a migration agent if 'an individual related by employment to the agent is not a person of integrity'. While the phrase 'related by employment' is defined in proposed new section 114D, there is no indication of who would come within the definition of being 'not a person of integrity'. The provision would, therefore, appear to impose on migration agents an obligation which is both onerous and, at the same time, vague.

In making this comment, the Committee notes a similar requirement in proposed new section 114V, which sets out the qualifications for registration as a migration agent. Proposed new subsection 114V(2) provides:

> An applicant for registration as a migration agent must not be registered if the application is dealt with by the [Migration Agents Registration] Board and the Board is satisfied that:
> (a) the applicant is not a person of integrity or is otherwise not a fit and proper person to give

immigration assistance; or

(b) the applicant:

(i) is related by employment to an individual who is not a person of integrity; and

(ii) should not be registered because of the fact described in subparagraph (i).

Under this provision, the prohibition against registration relies not only on the 'relation by employment' to an individual who is 'not a person of integrity' but also the relevance of this fact to whether or not the agent should be registered. The duty to be imposed on agents in proposed new paragraph 114ZE(g) would appear to be more onerous.

The Committee would appreciate the Minister's advice as to the need for the onerous obligations to be imposed on migration agents by proposed new paragraph 114ZE(g). Further, the Committee would appreciate the Minister's advice as to why a different test is to be applied in relation to proposed new paragraph 114ZE(g) as compared to proposed new paragraph 114V(2)(b)

NATIONAL CRIME AUTHORITY AMENDMENT BILL 1992

This Bill was introduced into the Senate on 27 May 1992 by the Minister for Justice.

The Bill proposes to provide that the appointment of all categories of members of the National Crime Authority shall be for a period or periods of up to four years, and that members may be re-appointed to the extent of that maximum period. At present, while all categories of members may initially be appointed for a maximum period of four years, only a member occupying an office created under the authority of section 7(8AA) of the Principal Act may be re-appointed up to the maximum period of appointment of four years.

The Committee has no comment on this Bill.

POOLED DEVELOPMENT FUNDS BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Bill proposes to set up a mechanism for channelling patient equity capital into eligible 'small and medium-sized' Australian companies. The benchmark for 'small and medium-size' is to be total assets of no more than $30 million. The mechanism for providing funds involves the creation of concessionally-taxed investment companies, which are to be called 'Pooled Development Funds'.

Inappropriate delegation of legislative power
Subclauses 3(2), 4(1)

Clause 3 of the Bill sets out the objects of the legislation:

> (1) This Act sets up a scheme under which companies and their shareholders can qualify for certain income tax concessions.
>
> (2) The object is to encourage the provision of patient equity capital to small or medium-sized Australian companies whose primary activities are not excluded activities.

On the basis of subclause 3(2), it would appear that the concept of 'excluded activities' is central to the legislation.

'Excluded activity' is defined in subclause 4(1) of the Bill as follows:

> **"excluded activity"** means a prescribed activity.

This means that 'excluded activities' are those activities prescribed as such by regulations issued under clause 76 of the Bill. If, as the Committee has suggested above, the concept of 'excluded activities' is central to the Bill, it may be inappropriate for the definition of the term to be, in effect, left to the regulations.

The Committee draws Senators' attention to the provisions, as they may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

SALES TAX AMENDMENT (TRANSITIONAL) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

In the 1990-91 Budget, the Government announced that there would be a review of the Wholesale Sales Tax System, with a view to the simplification of that system. On 2 April 1992, the Treasurer announced that the Government had accepted the recommendations of the review which had subsequently taken place and that legislation to implement these recommendations should be introduced in the Parliament during the Autumn Sittings 1992. The new legislation comprises six Bills.

These Bills propose to replace the existing 27 Acts that deal exclusively with Wholesale Sales Tax (WST). The WST legislation has been restructured so that it will be easier to use. The new law has been drafted in plain English.

The primary features of the new legislation are as follows:

- the existing exemption from WST for manufacturers with only a small sales tax liability will be extended to include all taxpayers;
- the existing administrative arrangements which allow unregistered persons, who are entitled to WST exemption, to obtain tax free will be enacted in the new law;
- there will be special provisions to ensure that all costs incurred in connection with the manufacture of goods, and any royalty incurred in connection with goods, are included in the value for WST purposes;
- the new law will contain a general anti-avoidance provision.

This Bill will explain when and how the existing law will cease to apply, and when the new law will commence to apply.

General comment

The Schedule to the Bill contains proposed consequential amendments to various Acts. A series of amendments to the *Crimes (Taxation Offences) Act 1980* are proposed. One of those proposed amendments is to replace the term 'future sales tax' in paragraph 3(2)(b) of that Act with the term 'future old sales tax'.

Paragraph 3(2)(b) currently provides that:

> (b) a reference to future sales tax payable by a company or trustee, in relation to the purpose, or a purpose, of a person in entering into, or the knowledge or belief of a person concerning, an arrangement or transaction, shall be read as a reference to some or all of:
>
> (i) the sales tax (if any) that will become payable by the company or trustee, after the arrangement or transaction is entered into, in relation to transactions entered into, operations carried out and acts done by the company or trustee before the arrangement or transaction is entered into; and
>
> (ii) the sales tax that may reasonably be expected by that person to become payable by the company or trustee after the arrangement or transaction is entered into:
>
> (A) *in relation to likely transactions*, operations and acts of the company or trustee; or
>
> (B) by reason of the Commissioner altering the sale value of goods in pursuance of a power to do so conferred on him by some one or other of the Sales Tax Assessment Acts.

It would appear that (contrary to first impressions) the effect of the proposed amendment is not to make what is currently 'young' sales tax, 'old' sales tax at some time in the future. Rather, the proposed amendment refers to sales tax which would be imposed in the future under an Act which will shortly terminate. This would appear to make something which no longer exists apply to something which has not yet occurred.

SALES TAX ASSESSMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

In the 1990-91 Budget, the Government announced that there would be a review of the Wholesale Sales Tax System, with a view to the simplification of that system. On 2 April 1992, the Treasurer announced that the Government had accepted the recommendations of the review which had subsequently taken place and that legislation to implement these recommendations should be introduced in the Parliament during the Autumn Sittings 1992. The new legislation comprises six Bills.

These Bills propose to replace the existing 27 Acts that deal exclusively with Wholesale Sales Tax (WST). The WST legislation has been restructured so that it will be easier to use. The new law has been drafted in plain English.

The primary features of the new legislation are as follows:

- the existing exemption from WST for manufacturers with only a small sales tax liability will be extended to include all taxpayers;
- the existing administrative arrangements which allow unregistered persons, who are entitled to WST exemption, to obtain tax free will be enacted in the new law;
- there will be special provisions to ensure that all costs incurred in connection with the manufacture of goods, and any royalty incurred in connection with goods, are included in the value for WST purposes;
- the new law will contain a general anti-avoidance provision.

This Bill will define the situations in which tax is payable and the value to be given to the goods in order to calculate the amount of tax. It also will replace the 11 separate Assessment Acts of the existing law.

Retrospectivity
Subclause 3(2)

Clause 3 of the Bill provides:

> **How the sales tax law applies to things outside Australia and things happening before commencement**
>
> 3.(1) The sales tax law extends to acts, omissions, matters and things outside Australia (except where a contrary intention appears).
>
> (2) The sales tax law applies to acts and omissions happening before or after the commencement of this Act (except where there is an express statement to the contrary).

On its face, subclause 3(2) would appear to provide for the retrospective operation of the Bill, to the detriment of persons who have conducted their affairs on the basis of the current sales tax legislation. However, the Committee notes that the Explanatory Memorandum states:

> 2.7 The new law will apply to acts and omissions that happen before the law comes into operation. This is an important concept in the new law and an integral part of the transitional arrangements that will apply. [subclause 3(2)]
>
> **Note:** This new law will not impose tax on dealings with goods that happened before the *first taxing day.* [subclause 16(2)]

The 'first taxing day' is defined in clause 5 of the Bill as the first day of the fourth month following the month in which the Bill receives the Royal Assent.

The Explanatory Memorandum goes on to state:

> 2.8 The main purpose of these provisions is to ensure that a course of conduct (or omission) does not fall outside the new law (and the existing law) simply because one of the elements of the course of conduct happens before the new law starts.

In the light of these explanations, the Committee makes no further comment on the clause.

SALES TAX (EXEMPTIONS AND CLASSIFICATIONS) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

In the 1990-91 Budget, the Government announced that there would be a review of the Wholesale Sales Tax System, with a view to the simplification of that system. On 2 April 1992, the Treasurer announced that the Government had accepted the recommendations of the review which had subsequently taken place and that legislation to implement these recommendations should be introduced in the Parliament during the Autumn Sittings 1992. The new legislation comprises six Bills.

These Bills propose to replace the existing 27 Acts that deal exclusively with Wholesale Sales Tax (WST). The WST legislation has been restructured so that it will be easier to use. The new law has been drafted in plain English.

The primary features of the new legislation are as follows:

- the existing exemption from WST for manufacturers with only a small sales tax liability will be extended to include all taxpayers;
- the existing administrative arrangements which allow unregistered persons, who are entitled to WST exemption, to obtain tax free will be enacted in the new law;
- there will be special provisions to ensure that all costs incurred in connection with the manufacture of goods, and any royalty incurred in connection with goods, are included in the value for WST purposes;
- the new law will contain a general anti-avoidance provision.

This Bill will list the goods that are exempt from WST, either generally or in particular situations. It will also list those goods that are taxable at particular rates (rather than being taxable at the general rate of 20%). In addition, the Bill sets out general rules for interpreting the descriptions of the goods contained in the Bill.

The Committee has no comment on this Bill.

SALES TAX IMPOSITION (CUSTOMS) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

In the 1990-91 Budget, the Government announced that there would be a review of the Wholesale Sales Tax System, with a view to the simplification of that system. On 2 April 1992, the Treasurer announced that the Government had accepted the recommendations of the review which had subsequently taken place and that legislation to implement these recommendations should be introduced in the Parliament during the Autumn Sittings 1992. The new legislation comprises six Bills.

These Bills propose to replace the existing 27 Acts that deal exclusively with Wholesale Sales Tax (WST). The WST legislation has been restructured so that it will be easier to use. The new law has been drafted in plain English.

The primary features of the new legislation are as follows:

- the existing exemption from WST for manufacturers with only a small sales tax liability will be extended to include all taxpayers;
- the existing administrative arrangements which allow unregistered persons, who are entitled to WST exemption, to obtain tax free will be enacted in the new law;
- there will be special provisions to ensure that all costs incurred in connection with the manufacture of goods, and any royalty incurred in connection with goods, are included in the value for WST purposes;
- the new law will contain a general anti-avoidance provision.

This Bill will impose the WST on the complete range of dealings with goods that are to be subject to WST. The Bill will replace the separate Acts which currently set out the law.

The Committee has no comment on this Bill.

SALES TAX IMPOSITION (EXCISE) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

In the 1990-91 Budget, the Government announced that there would be a review of the Wholesale Sales Tax System, with a view to the simplification of that system. On 2 April 1992, the Treasurer announced that the Government had accepted the recommendations of the review which had subsequently taken place and that legislation to implement these recommendations should be introduced in the Parliament during the Autumn Sittings 1992. The new legislation comprises six Bills.

These Bills propose to replace the existing 27 Acts that deal exclusively with Wholesale Sales Tax (WST). The WST legislation has been restructured so that it will be easier to use. The new law has been drafted in plain English.

The primary features of the new legislation are as follows:

- the existing exemption from WST for manufacturers with only a small sales tax liability will be extended to include all taxpayers;
- the existing administrative arrangements which allow unregistered persons, who are entitled to WST exemption, to obtain tax free will be enacted in the new law;
- there will be special provisions to ensure that all costs incurred in connection with the manufacture of goods, and any royalty incurred in connection with goods, are included in the value for WST purposes;
- the new law will contain a general anti-avoidance provision.

This Bill will impose the WST on the complete range of dealings with goods that are to be subject to WST. The Bill will replace the separate Acts which currently set out the law.

The Committee has no comment on this Bill.

SALES TAX IMPOSITION (GENERAL) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

In the 1990-91 Budget, the Government announced that there would be a review of the Wholesale Sales Tax System, with a view to the simplification of that system. On 2 April 1992, the Treasurer announced that the Government had accepted the recommendations of the review which had subsequently taken place and that legislation to implement these recommendations should be introduced in the Parliament during the Autumn Sittings 1992. The new legislation comprises six Bills.

These Bills propose to replace the existing 27 Acts that deal exclusively with Wholesale Sales Tax (WST). The WST legislation has been restructured so that it will be easier to use. The new law has been drafted in plain English.

The primary features of the new legislation are as follows:

- the existing exemption from WST for manufacturers with only a small sales tax liability will be extended to include all taxpayers;
- the existing administrative arrangements which allow unregistered persons, who are entitled to WST exemption, to obtain tax free will be enacted in the new law;
- there will be special provisions to ensure that all costs incurred in connection with the manufacture of goods, and any royalty incurred in connection with goods, are included in the value for WST purposes;
- the new law will contain a general anti-avoidance provision.

This Bill will impose the WST on the complete range of dealings with goods that are to be subject to WST. The Bill will replace the 14 separate Acts which currently set out the law.

The Committee has no comment on this Bill.

SUGAR CANE LEVY AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend Section 7 of the *Sugar Cane Levy Act 1987*, to increase the maximum rate of levy which is currently payable on sugar cane produced in Australia and accepted for processing at a sugar mill. The levy is collected to fund the activities of the Sugar Research and Development Corporation.

The Committee has no comment on this Bill.

TAXATION ADMINISTRATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Treasurer.

The Bill proposes to amend the *Taxation Administration Act 1953*, in order to provide Royal Commissions with the same authority to seek tax information that is currently available to specified law enforcement agencies under section 3E of the Act.

This Bill will give effect to the announcement by the Prime Minister on 15 May 1992 that section 3E of the Act would be amended to allow the Western Australian Royal Commission into Commercial Activities of Government and future Royal Commissions access to relevant taxation information under the Act.

The Committee has no comment on this Bill.

TAXATION LAWS AMENDMENT BILL (NO. 3) 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the *Income Tax Assessment Act 1936* and the *Occupational Superannuation Standards Act 1987.* In particular, the Bill proposes to make changes in the following areas:

- the definition of primary production;
- expenditure on research and development activities;
- Pooled Development Funds
- bad debts;
- tax exempt infrastructure borrowing;
- depreciation on property on leased land;
- traveller accommodation;
- industrial building;
- income-producing structural improvements; and
- development allowance tax deduction.

Retrospectivity
Clauses 5, 10, 31, 38 and 57

Clause 2 of the Bill provides that the Bill, with the exception of Division 6 of Part 2, is to commence on Royal Assent. Subclause 2(2) provides that Division 6 of Part 2 is to commence on the day after the day on which the Bill receives the Royal Assent.

The Committee notes that clauses 5, 20, 31, 38 and 57 of the Bill would, nevertheless, apply various amendments to be made by the Bill to 'acts and circumstances' occurring prior to the commencement of the Bill. For example, clause 5 provides that the amendments to be made by Division 2 of Part 2 of the Bill are to apply to 'the doing of things after 26 May 1992'. However, the Committee notes that, in each case, the retrospectivity is relatively slight and that, in any event, the proposed amendments referred to appear to be beneficial to persons other than the Commonwealth.

Retrospectivity
Clause 7

Clause 7 of the Bill provides that the amendments which are to be made by Division 3 of Part 2 of the Bill are to apply to 'activities carried on after 1 July 1985'. In relation to this part of the Bill, the Explanatory Memorandum states:

> 2.1. This Bill will amend the *Income Tax Assessment Act 1936* (ITAA) to confirm that prospecting, exploring or drilling for minerals, petroleum or natural gas is not as such research and development (R&D) for the purpose of the special R&D deduction of up to 150% of expenditure.
>
> 2.2. This will make it clear that ordinary exploration, prospecting or drilling expenditure does not qualify for more than full deductions, but will not affect the treatment of R&D activities relevant to the exploration, prospecting, mining or quarrying industries.
>
> ...
>
> 2.11. The law will therefore be amended to confirm that prospecting, exploring or drilling for minerals, petroleum or natural gas is not as such R&D for the purpose of the special R&D deduction, and never has been. [Clause 6]

While it is clear that the proposed (retrospective) amendments are intended to merely confirm the existing state of the legislation, it is not clear whether the retrospectivity is likely to adversely affect taxpayers. The Committee would, therefore, appreciate the Treasurer's advice as to whether or not this is the case.

TAXATION LAWS AMENDMENT (SELF ASSESSMENT) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Minister Assisting the Treasurer.

The Bill proposes to improve the system of self assessment taxation which Australia has had since 1986. The changes are intended to make that system fairer and more certain for taxpayers.

The Bill proposes changes to the law to:

- introduce a new system of Public and Private Rulings, which are to apply to income tax, Medicare levy, withholding taxes, franking deficit tax and fringe benefits tax;
- introduce a new system of reviewing Private and Public Rulings;
- limit objection rights against an assessment, to prevent a review of matter that is already the subject of a review of a Private Ruling;
- extend the period within which a taxpayer can object against assessments and related determinations, from 60 days to 4 years;
- allow the Commissioner, in making assessments, to rely on statements made by taxpayers made other than in tax returns;
- introduce a new system of penalties for understatements of income tax and franking tax deficit liability;
- introduce a new interest system for underpayments and late payments of income tax;
- reduce late payment penalties, to take into account the new interest system;

- provide deductibility to all taxpayers for interest payments made to the Australian Taxation Office;
- remove, in most cases, the requirement for taxpayers to lodge notices of elections or other notifications with the Commissioner.

Inappropriate delegation of legislative power
Clause 22 - proposed new sections 170BA and 170BB of the *Taxation Administration Act 1953*

Clause 22 of the Bill proposes to insert a series of new sections into the *Taxation Administration Act 1953* relating to the Taxation Commissioner's 'public rulings' and 'private rulings'. Basically, a public ruling is a statement issued by the Commissioner in which the Commissioner indicates the Australian Taxation Office's views in relation to the interpretation or the administration of a particular aspect of the taxation laws. Public rulings are issued for the guidance of taxpayers, tax practitioners and officers of the Australian Taxation Office and are of general application.

A private ruling, on the other hand, only applies to the particular circumstances in which it was given. Private rulings are generally sought by taxpayers who are uncertain about the tax effect of an arrangement that is proposed, commenced or completed.

Under the provisions of the Bill, it is proposed to make both public rulings and private rulings binding on the Commissioner.

Proposed new section 170BA of the *Taxation Administration Act 1953* provides:

Effect of public ruling on tax other than withholding tax

170BA.(1) In this section:

'final tax', in relation to a person, means ruling affected tax payable in relation to the person after allowing:

(a) a credit within the meaning of Division 19 of Part III; or

(b) an offset within the meaning of Division 1 of Part IIIAA;

'ruling affected tax' means:

(a) income tax; or

(b) franking deficit tax within the meaning Part IIIAA; or

(c) Medicare levy;

but does not include withholding tax;

'withholding tax' includes mining withholding tax.

(2) Expressions used in this section have the same meanings as in Part IVAAA of the *Taxation Administration Act 1953*.

(3) Subject to section 170BC, if:

(a) there is a public ruling on the way in which an income tax law applies to a person in relation to an arrangement (**'ruled way'**); and

(b) that law applies to a person in relation to that arrangement in a different way; and

(c) the amount of final tax under an assessment in relation to that person would (apart from this section and section 170BC) exceed what it would have been if that law applied in the ruled way;

the assessment and amount of final tax must be what they would be if that law applied in the ruled way.

Proposed new section 170BB provides:

Effect of private rulings on tax other than withholding tax

170BB.(1) In this section:

'final tax' has the same meaning as in section 170BA.

(2) Expressions used in this section have the same meanings as in Part IVAA of the *Taxation Administration Act 1953*.

(3) Subject to sections 170BC, 170BG and 170BH, if:

(a) there is a private ruling on the way in which an income tax law applies to a person in respect of a year of income in relation to an arrangement ('**ruled way**'); and

(b) that law applies to that person in respect of that year in relation to that arrangement in a different way; and

(c) the amount of final tax under an assessment in relation to that person would (apart from this section and section 170BC) exceed what it would have been if that law applied in the ruled way;

the assessment and amount of final tax must be what they would be if that law applied in the ruled way.

(4) Subsection (3) applies to an assessment whether or not in respect of the year of income in paragraphs 3(a) and (b).

These provisions may be considered to be an inappropriate delegation of legislative power, as it would appear that, in each case, a ruling by the Commissioner could operate to over-ride the taxation law. It would appear that if, on the basis of a ruling by the Commissioner, a lower liability to taxation is calculated than that applicable on the face of the taxation law, the lower figure is to apply. The Commissioner would appreciate the Treasurer's confirmation that this is the case.

The Committee draws Senators' attention to the provisions, as they may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

TELECOMMUNICATIONS (PUBLIC MOBILE LICENCE CHARGE) BILL 1992

This Bill was introduced into the House of Representatives on 26 May 1992 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill proposes to impose a charge on the grant of certain public mobile licences under the *Telecommunications Act 1991*. The Bill should be read in conjunction with the Transport and Communications Legislation Amendment Bill (No. 2) 1992. That Bill contains amendments to the Telecommunications Act which, together with this Bill, will enable a fee to be charged for the grant of the third public mobile licence.

Setting of charges by regulation
Paragraph 5(b)

Clause 5 of the Bill provides:

> **Amount of charge**
>
> 5. The amount of the charge payable in respect of the grant of a public mobile licence is such amount as is equal to:
>
> (a) in a case in which tenders were called in respect of the grant of the licence - the amount of the bid:
>
> (i) submitted by the grantee of the licence under the allocation system relating to the licence; and
>
> (ii) accepted under that system; or
>
> (b) in any other case - such amount as is calculated in accordance with the regulations.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

The Committee notes that, pursuant to paragraph 5(b), the amount of the charge is, in certain circumstances, to be determined in accordance with the regulations. Given the importance of the charge, this may be considered a matter which is not appropriately left to the regulations.

In making this comment, the Committee notes that the Long Title to the Bill indicates that the Bill imposes 'a charge in the nature of a tax'. Further, the Committee notes that there is no upper limit set out in the primary legislation as to the rate of the charge, nor is there a method by which such an upper limit could be calculated.

This is a matter to which the Committee has consistently drawn attention. Accordingly, the Committee draws Senators' attention to the clause, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of references.

TERRITORIES LAW REFORM BILL 1992

This Bill was introduced into the Senate on 27 May 1992 by the Minister Representing the Minister for the Arts and Territories.

The Bill proposes to reform the legal regimes of the Indian Ocean Territories, namely Christmas Island and the Cocos (Keeling) Islands, with effect from 1 July 1992. This will implement in large measure the Government's response, tabled in the House of Representatives on 10 September 1992, to the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Islands in the Sun'.

The Bill will amend the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1955,* so as to:

- repeal current Indian Ocean Territories law (unless specified in the new Schedules);
- apply Western Australian laws in force from time to time (subject to modification by Ordinance, made under the Christmas Island Act or the Cocos (Keeling) Islands Act); and
- extend the operation of Commonwealth laws to the Territories (unless expressed not to extend).

Commencement by Proclamation
Subclauses 2(2) and (4)

Clause 2 of the Bill provides:

Commencement

2.(1) Sections 1, 2, 25 and 26 commence on the day on which this Act receives the Royal Assent.

(2) Sections 9, 10, 19, 21 and 22 commence on a day to be fixed by Proclamation.

(3) The remaining provisions of this Act commence on 1 July 1992.

(4) If the provisions mentioned in subsection (2) do not commence under that subsection within the period of 12 months beginning on the day on which this Act receives the Royal Assent, the provisions are repealed on the first day after the end of that period.

The Committee notes that the prospective commencement of certain clauses of the Bill which is provided for in subclause 2(2) is limited by subclause 2(4). However, the Committee also notes that the 12 month limit on Proclamation which is set by subclause (4) is in excess of the 6 month 'general rule' which is provided for in *Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.*

By way of explanation for this clause, the Explanatory Memorandum to the Bill states:

> Sections 9, 10, 19, 21 and 22, which relate to conferral of jurisdiction in respect of the Indian Ocean Territories (IOTs) on the courts of Western Australia (WA), will commence on a day to be proclaimed. This is because jurisdiction is not to be conferred until there is a formal agreement between the Commonwealth and WA on the terms for provision of judicial services to the IOTs. If these sections do not commence within 12 months of Royal Assent, they will be repealed.

In the light of this explanation, the Committee makes no further comment on the provisions.

Delegation of powers to 'a person'
Clauses 6 (proposed new subsection 8D(6) and paragraph 8D(7)(n) of the *Christmas Island Act 1958*) and 16 (proposed new subsection 8D(6) and paragraph 8D(7)(n) of the *Cocos (Keeling) Islands Act 1955*)

Clause 6 of the Bill proposes to repeal Part III of the *Christmas Island Act 1958* and to insert a new Part III. In that proposed new Part, proposed new section 8D deals with various powers and functions which are to be vested under laws of Western Australia which, pursuant to the provisions of the Bill, are to apply to Christmas Island. Subclause 8D(6) provides:

> The Minister may appoint, on such terms and conditions as are determined by the Minister, such persons as the Minister considers necessary to exercise a power under this section.

Subclause 8D(7)(n) provides:

> This subsection applies to the following persons and authorities:
>
> ...
>
> (n) a person appointed by the Minister under subsection (6).

Similarly, clause 16 of the Bill proposes to repeal Division 1 of Part III of the *Cocos (Keeling) Islands Act 1955* and to substitute a new Division 1.

In that proposed new Division, proposed new section 8D deals with the various powers and functions which are to be vested under laws of Western Australia which, pursuant to the provisions of the Bill, are to apply to the Cocos (Keeling) Islands. Subclause 8D(6) provides:

> The Minister may appoint, on such terms and conditions as are determined by the Minister, such persons as the Minister considers necessary to exercise a power under this section.

Subclause 8D(7)(n) provides:

> This subsection applies to the following persons and authorities:
>
> ...
>
> (n) a person appointed by the Minister under subsection (6).

As a preliminary comment, the Committee suggests that the reference to 'subsection' in proposed new subsection 8D(7) of the Christmas Island Act and proposed new subsection 8D(7) of the Cocos (Keeling) Islands Act should, in fact, be a reference to 'section'. Of greater concern to the Committee is the fact that, if enacted, the provisions referred to would allow the Minister to delegate a range of powers to 'a person', without there being any indication of the qualities or attributes of such a person. The Committee has consistently maintained that, in such circumstances, there should be a limit on either the powers which can be delegated or the persons (or classes of persons) to whom such powers can be delegated.

The Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations subject to insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

TRADE PRACTICES AMENDMENT BILL 1992

This Bill was introduced into the Senate on 26 May 1992 by the Minister for Justice.

The Bill proposes to introduce into Australia a strict product liability regime, based on the 1985 European Community Product Liability Directive, by way of amendments to the *Trade Practices Act 1974.* It provides a regime of strict liability, whereby a person who is injured or suffers property damage as a result of a defective product, has a right to compensation against the manufacturer, without the need to prove negligence on the part of the manufacturer.

Survival of liability actions
Clause 4 - proposed new section 75AH of the *Trade Practices Act 1974*

Clause 4 of the Bill proposes to insert a new Part VA into the *Trade Practices Act 1974.* That proposed new Part deals with the liability of manufacturers and importers for defective goods. Proposed new section 75AH provides:

> **Survival of liability actions**
> 75AH. A law of a State or Territory about the survival of causes of action vested in persons who die applies to actions under section 75AD, 75AE, 75AF or 75AG.

Currently, the Trade Practices Act contains no similar provision in relation to the survival of liability in relation to other actions under that Act. The Committee would, therefore, appreciate the Attorney-General's advice as to the effect of the proposed amendment on the rest of the Trade Practices Act. In particular, the

Committee would appreciate the Attorney-General's advice as to whether the insertion of the proposed new section would mean that, on the basis of the legal doctrine of *expressio unius personae vel rei, est exclusio alterius* (ie the express reference to survival of liability in respect of the actions nominated operates to exclude survival of liability in respect of all other actions under the Act) would operate.

SCRUTINY OF BILLS ALERT DIGEST

NO. 9 OF 1992

17 JUNE 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator J Powell
Senator N Sherry
Senator J Tierney

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 such 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.

The Committee has considered the following Bills:

* Broadcasting Services Bill 1992

* Broadcasting Services (Transitional Provisions and Consequential Amendments) Bill 1992

Forest Conservation and Development Bill 1992

Industrial Relations Amendment Bill 1992

International Air Services Commission Bill 1992

* The Committee has commented on these Bills

BROADCASTING SERVICES BILL 1992

This Bill was introduced into the Senate on 4 June 1992 by the Minister for Transport and Communications.

The Bill proposes to introduce a large number of changes to the broadcasting industry.

Since 1983, there have been at least 20 substantial amendments to the *Broadcasting Act 1942*. These amendments have mostly been ad hoc in nature, in that they were responses to emerging circumstances rather than anticipating and providing for trends in the provision of broadcasting-type services. The result has been that the Broadcasting Act has become complicated and difficult to follow.

The main features of the Bill are:

- to provide a simple regulatory regime for broadcasting services that applies irrespective of the technical means of delivery;
- to create a new regulatory authority, the Australian Broadcasting Authority (the ABA);
- to provide for a broadcasting planning process which is open to the public and in the course of which social, economic and technical factors are all brought to bear;
- to establish a streamlined licence allocation and renewal process;
- to provide, in relation to commercial broadcasting services, an ownership and control regime;

- to provide for price-based competitive allocation of 'satellite subscription television broadcasting licences';
- to provide for the ABA to determine the program standards that are to apply to commercial and community broadcasting services;
- to provide for the ABA to supervise the development of 'codes of practices' by groups representing the providers of the different types of categories of broadcasting services, to be observed in the conduct of the broadcasting operations of those sections of the broadcasting industry;
- to provide for the ABA to hear complaints from members of the public relating to the broadcasting services provided by the Australian Broadcasting Commission and Special Broadcasting Service if they have failed to resolve satisfactorily a complaint.

On 15 June 1992, the Committee received a submission on the Bill from Blake Dawson Waldron Solicitors, on behalf of the Federation of Australian Commercial Television Stations. A copy of that submission is attached to this Alert Digest for the information of Senators. Where relevant, the submission is referred to in the Committee's comments on the Bill, which are set out below.

Definition of 'associate' - reversal of the onus of proof
Subclause 6(1)

Clause 6 of the Bill sets out various definitions. In subclause 6(1), 'associate' is defined as follows:

> **'associate'**, in relation to a person in relation to control of a licence or a newspaper, or control of a company in relation to a licence or a newspaper, means:
> (a) the person's spouse (including a *de facto*

spouse) or a parent, child, brother or sister of the person; or

(b) a partner of the person or, if a partner of the person is a natural person, a spouse or a child of a partner of the person; or

(c) if the person or another person who is an associate of the person under another paragraph receives benefits or is capable of benefiting under a trust - the trustee of the trust; or

(d) a person (whether a company or not) who:

(i) acts, or is accustomed to act; or

(ii) under a contract or an arrangement or understanding (whether formal or informal) is intended or expected to act;

in accordance with the directions, instructions or wishes of, or in concert with, the first-mentioned person or of the first-mentioned person and another person who is an associate of the first-mentioned person under another paragraph; or

(e) if the person is a company - another company if:

(i) the other company is a related body corporate of the person for the purposes of the *Corporations Act 1990;* or

(ii) the person, or the person and another person who is an associate of the person under another paragraph, are in a position to exercise control of the other company;

but:

(f) persons are not associates if the ABA is satisfied that they do not, in any relevant dealings relating to that company, licence or newspaper, act together, and neither of them is in a position to exert influence over the business dealings of the other in relation to that company, licence or newspaper; and

(g) persons are not associates only because of an association between them in relation to their participation in a venture that operates the initial satellite licence.

The Blake Dawson Waldron submission states (at page 4):

> The effect of this section is to create a reverse onus of proof, whereby a person falling within one of those categories must prove that they are not an associate of the other person. This is fundamentally repugnant, particularly as the definition of associate is so wide. In accordance with normal legal principles, the ABA should be required to demonstrate that persons act in concert, before finding that they are associates.

The Committee agrees. Prima facie, a person would be an 'associate' for the purposes of the legislation if they come within paragraphs (a) to (e) of the definition. Paragraphs (f) and (g) then provide exceptions to the general rule set out in paragraphs (a) to (e). Paragraph (f), in particular, would appear to place the onus of proving that a person should not be treated as an 'associate' for the purposes of the legislation on the person concerned. This may, therefore, be regarded as a reversal of the onus of proof.

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.

Non-reviewable decisions
Clause 21

Clause 21 of the Bill, if enacted, would allow the proposed Australian Broadcasting Authority (ABA) to provide, on request, an advisory opinion as to which category of broadcasting services a particular service falls into. This categorisation is relevant in determining whether an individual licence is required for the service, which program standards and codes of practice apply, which licence conditions apply and

also in determining various other significant obligations under the legislation. Subclause 21(5) provides:

> If the ABA has given an opinion under this section to the provider of a broadcasting service, neither the ABA nor any other Government agency may, while the circumstances relating to the broadcasting service remain substantially the same as those advised to the ABA in relation to the application for the opinion;
>
> (a) take any action against the provider of the service during the period of 5 years commencing on the day on which the opinion is given on the basis that the service falls into a different category of broadcasting services than that advised in the opinion; or
>
> (b) unless the ABA has made a determination or clarification under section 19 after that opinion was given that places the broadcasting service in a different category - take any action against the provider of the service after the end of that period on the basis that the service falls into a different category of broadcasting services.

Despite being (pursuant to subclause 21(5)) binding on the ABA and any other Government agency for 5 years, an advisory opinion under clause 21 would not be reviewable, on its merits, by the Administrative Appeals Tribunal (AAT). In making this comment, the Committee notes that a decision under clause 21 is not a decision listed in clause 203 of the Bill as being subject to review by the AAT.

(This point is also made in the Blake Dawson Waldron submission, at page 2.)

In making this comment, the Committee accepts that there may be good reasons for these decisions not being open to such review. The Committee accepts that these reasons may relate to the character of the decision-maker (ie the ABA) as much as the character of the decision. The Committee would, nevertheless,

appreciate the Minister's views.

The Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Non-reviewable decision
Clause 70

Clause 70 of the Bill, if enacted, would allow the proposed ABA to issue to a person a 'notice', directing them to take whatever action is necessary to cease their breaching of the ownership and control provisions of the Bill, if it is satisfied that the person is in breach of those provisions. It provides:

> (1) If the ABA is satisfied that a person is in breach of a provision of Division 2, 3, 4 or 5, the ABA may, by notice in writing given to:
>
> (a) the person; or
>
> (b) if the person is not the licensee and the breach is one that can be remedied by the licensee - the licensee;
>
> direct the person or the licensee to take action so that the person is no longer in breach of that provision.
>
> (2) The ABA is not to give a notice to a person under subsection (1) in relation to a breach if an approval under section 67 has been given in respect of the breach and the period specified under that section, or an extension of that period, has not expired.
>
> (3) The notice is to specify a period during which the person must take action to ensure that the person is no longer in that position.
>
> (4) The period must be one month, 6 months, one year or 2 years.

(5) If the ABA is satisfied the breach was deliberate and flagrant, the period specified in the notice must be one month.

(6) If the ABA gives a notice under subsection (1) in respect of a breach that the ABA had approved under section 67, the ABA must specify a period of one month in the notice under subsection (1).

(7) If the ABA is satisfied that the person breached the relevant provision as a result of the actions of other persons none of whom is an associate of the person, a period of one year or 2 years must be specified, but such a period must not be specified in other circumstances.

(8) The Parliament recognises that, if a period of one month is specified in a notice, the person to whom the notice is given or another person may be required to dispose of shares in a way, or otherwise make arrangements, that could cause the person a considerable financial disadvantage. Such a result is seen as necessary in order to discourage deliberate and flagrant breaches of this Part.

Pursuant to clause 72 of the Bill, failure to comply with such a notice is an offence, carrying a penalty of up to $2 million per day (clause 76 of the Bill and section 4K of the *Crimes Act 1914* refer).

The Committee notes that, despite the significant penalties attaching to a failure to comply with a notice issued under clause 70, the issuing of the notice (and the ABA's decision that the person is in breach of the ownership and control provisions) would not be open to review, on the merits, by the AAT. In the circumstances, such an avenue for review may be considered to be appropriate. If it is not considered to be appropriate (eg because of the character of either the decision or the decision-maker), the Committee would appreciate the Minister's views as to why.

(This point is also made in the Blake Dawson Waldron submission, at pages 3 to 4.)

The Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Non-reviewable decision
Subclause 93(4)

Division 1 of Part 7 of the Bill deals with the allocation of subscription television broadcasting licences. Clause 93 provides:

> **Minister to determine allocation system**
> 93.(1) The Minister is to determine in writing a price-based allocation system for allocating:
> (a) a licence to provide subscription television broadcasting services with the use of 4 transponders on a subscription television satellite; and
> (b) at least 2 licences to provide subscription television broadcasting services with the use of one transponder on a subscription television satellite.
>
> (2) The licences referred to in paragraph (1)(b) must be made available for allocation at the end of one year after the allocation of the initial satellite licence.
>
> (3) The system so determined may provide that the ABA is to allocate the licences, and may require an application fee.
>
> (4) If the Minister decides, in accordance with the system, that a licence referred to in subsection (1) is to be allocated to a particular person, the Minister may direct

> the ABA to allocate that licence to that person and, subject to section 97, the ABA must allocate that licence to that person.
>
> (5) If a satellite subscription television broadcasting licence is allocated, the Minister must publish in the *Gazette* the name of the successful applicant and the amount that the applicant agreed to pay to the Commonwealth for the allocation of the licence.

Subclause 93(4) would allow the Minister to decide which of the applicants for a subscription television licence is to be granted that licence, subject only to the ABA being satisfied that the applicant is a suitable person. While such a decision would presumably have far-reaching financial implications for an unsuccessful applicant, there appears to be no scope in the Bill for an unsuccessful applicant to challenge the Minister's decision. In the circumstances, such a review mechanism might be considered appropriate. If it is not considered to be appropriate (eg because of the character of either the decision or the decision-maker), the Committee would appreciate the Minister's views as to why.

(This point is also addressed in the Blake Dawson Waldron submission, at pages 2 to 3. However, the submission suggests that Ministerial decisions in this area should be subject to Parliamentary disallowance rather than independent review.)

The Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Non-reviewable decisions
Clauses 135 and 139

Clause 135 of the Bill provides:

> If the ABA is satisfied that:
> (a) a person is providing:
> (i) a commercial television broadcasting service; or
> (ii) a commercial radio broadcasting service; or
> (iii) a subscription television broadcasting service;
> without a licence to provide that service; or
> (b) a person is providing a community broadcasting service without a licence to provide that service;
> the ABA may, by notice in writing given to the person, direct the person to cease to provide that service.

Pursuant to clause 136 of the Bill, failure to comply with a notice issued under clause 135 would be an offence, attracting a penalty of up to $2 million per day.

The Committee notes that, despite the substantial penalties involved, the Bill does not appear to provide for a review of the ABA's decision (either that a person is in breach or that the person continues to be in breach of the legislation). In the circumstances, such an avenue of review might be considered appropriate. If such review is not considered to be appropriate (eg because of the character of either the decision or the decision-maker), the Committee would appreciate the Minister's views as to why.

(This point is also addressed in the Blake Dawson Waldron submission, at pages 3 to 4.)

Similarly, clause 139 of the Bill provides:

Notices to stop breaches of conditions of licences, class licences or of codes of practice

139.(1) If the ABA is satisfied that:

(a) a commercial television broadcasting licensee, a commercial radio broadcasting licensee or a community broadcasting licensee is breaching a condition of the licence; or

(b) a person who is in a position to exercise control of a commercial television broadcasting licence or a commercial radio broadcasting licence is causing the licensee to breach a condition of the licence; or

(c) a subscription television broadcasting licensee is breaching a condition of a subscription television broadcasting licence; or

(d) a person is providing subscription radio services, subscription narrowcasting services or open narrowcasting services otherwise than in accordance with the relevant class licence;

the ABA may, by notice in writing given to the person, direct the person to take action to ensure that the service is provided in a way that conforms to the requirements of the licence or class licence.

(2) If the ABA is satisfied that a person who is providing subscription radio broadcasting services, subscription narrowcasting services or open narrowcasting services is doing so in deliberate disregard of a code of practice that applies to those services and that is included in the Register of codes of practice, the ABA may, by notice in writing given to the person, direct the person to take action to ensure that those services are provided in accordance with that code of practice.

(3) The notice is to specify a period, not exceeding one month, during which the relevant action must be taken.

Clause 140 provides that a failure to comply with a notice issued under clause 139 is an offence, attracting a penalty of up to $2 million. As with clause 135, the relevant ABA decisions would not be open to review by the AAT. If such review is not considered to be appropriate (eg because of the character of either the decision or the decision-maker), the Committee would appreciate the Minister's views as to why.

(This point is also addressed in the Blake Dawson Waldron submission, at pages 3 to 4.)

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

Publication of reports of private investigations
Clause 177

Part 13 of the Bill deals with information gathering by the proposed ABA. Division 2 of Part 13 deals with investigations by the ABA. Clause 176 provides:

> (1) The ABA may prepare a report on an investigation, and must prepare a report on an investigation conducted at the direction of the Minister and give a copy of each report conducted at the direction of the Minister to the Minister.
>
> (2) If a report on an investigation relates to conduct that could constitute an offence under this Act or another law of the Commonwealth, the ABA may give a copy of the report or of a part of the report to the Director of Public Prosecutions.

Clause 177 provides:

> (1) Except in the case of a report prepared as a result of an investigation directed by the Minister, the ABA may cause a copy of a report on an investigation to be published.
>
> (2) The Minister may direct the ABA to publish a report on an investigation directed by the Minister.
>
> (3) The ABA is not required to publish, or to disclose to a person to whose affairs it relates, a report or part of a report if the publication or disclosure would:
> (a) disclose matter of a confidential character; or
> (b) be likely to prejudice the fair trial of a person.

In relation to this provision, the Blake Dawson Waldron submission states (at page 4):

> Such a procedure is likely to be just as (if not more) damaging to a person's reputation and livelihood than the commencement of criminal proceedings. The stigma attached to publication of such a report will be impossible to remove, given that the investigation which led to the report took place away from the public gaze. In addition, no worthwhile public interest would be served by this procedure. If a private investigation reveals some wrongdoing, the ABA should commence licence action or prosecution proceedings, rather than relying on publication of a report as a form of sanction or threat. For these reasons clause 177 should be deleted.

The Committee believes that there is merit in this proposition. If the proposition is correct, the publication of an adverse report on a person could cause great damage to the person's reputation and livelihood and yet, unlike criminal proceedings, the person would not appear to have the capacity to challenge the contents of the report.

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.

Ministerial control over broadcasting
Paragraph 7(1)(d) of Schedule 2

Schedule 2 of the Bill sets out certain 'standard conditions' which are to apply to each type of broadcasting service licence. Item 7 of Schedule 2 provides, in part:

> (1) Each commercial television broadcasting licence is subject to the following conditions:
>
> ...
>
> (d) the licensee will, if the Minister, by notice in writing given to the licensee, so requires broadcast, without charge, such items of national interest as are specified in the notice.
>
> ...

In relation to this provision, the Blake Dawson Waldron submission states (at pages 4 to 5):

> This paragraph [ie paragraph 7(1)(d)] is based on section 104 of the [*Broadcasting Act 1942*]. However, whereas section 104 provides that the Minister may not require a licensee to broadcast items of national interest for more than 30 minutes in any 24 hour period, paragraph 7(1)(d) contains no limitation whatsoever. Such a sweeping power is contrary to basic notions of democracy - at its widest, the power would enable a Government to turn commercial broadcasting into a vehicle for its own information. Although that might be unlikely in the present political

> climate, it is necessary to limit this power. We submit that the limitation already contained in section 104 should be retained.

The Committee believes that there is merit in what the Blake Dawson Waldron submission suggests. Section 104 of the Broadcasting Act currently provides:

> The Minister may, by notice given by telegram or otherwise in writing, require a licensee to broadcast, without charge, such items of national interest as the Minister specifies, but the Minister shall not require the broadcasting of matter for a period in excess of 30 minutes in any period of 24 consecutive hours.

The Committee would appreciate the Minister's advice as to why the standard condition contained in paragraph 7(1)(d) of Schedule 2 does not contain the same limitations as section 104 of the existing legislation.

Other matters raised by the Blake Dawson Waldron submission

The Blake Dawson Waldron submission sets out various other concerns in relation to the Bill which are of more general application. Those concerns are set out briefly below.

(i) Accountability of the Australian Broadcasting Authority

The Blake Dawson Waldron submission (at page 1) expresses a general concern about the effect of the wide-ranging powers to be conferred on the ABA, coupled with (according to the submission) the devolution of the 'ultimate Ministerial responsibility for many decisions'. The submission suggests that there are three basic

sets of amendments which should be made to the Bill to ensure that the ABA is properly accountable for its actions. They are:

a) the provision for a 'mandatory inquiry procedure' in relation to certain 'critical decisions' (pages 1 to 2 of the submission);

b) an increase in the number of decisions subject to AAT review (page 2 of the submission); and

c) an increase in the scope for Parliamentary scrutiny of decisions by the ABA (pages 2 to 3 of the submission).

While some of the decisions referred to have already been dealt with by the Committee in its earlier comments, the Committee, nevertheless, believes there is merit in these general comments. The Committee would, therefore, appreciate the Minister's views on the points made in the Blake Dawson Waldron submission under these headings.

(ii) Basic rights and notions of fairness

At page 2, the Blake Dawson Waldron submission states:

> The Bill does not expressly provide that the ABA is subject to the requirements of procedural fairness (or natural justice, as it is otherwise known). An established presumption of statutory interpretation is that the exercise of administrative powers is subject to the requirements of procedural fairness. However, it is arguable that in the absence of an express provision confirming those requirements, this presumption has been displaced or weakened by other provisions of the Bill.

The submission goes on to provide the following example:

> For example, clause 167 provides that when making a decision on any matter, the ABA is not limited to a consideration of material made available through an investigation or hearing, but may take into account the knowledge and experience of its members. On one view, this provision would entitle the ABA to make a decision which adversely affects the rights of a person, without putting to the person some information which one of its members had obtained privately or at least otherwise than through the usual investigative or inquiry procedures established by the Bill. Such a result would be fundamentally unfair. A provision which expressly stated that the ABA was subject to the requirements of procedural fairness would remove any doubt. It also does no more than section 80A of the current Broadcasting Act, which provides that the Australian Broadcasting Tribunal is subject to the rules of natural justice. Given the far larger range of powers vested in the ABA, it is important that this provision is retained in the Bill.

The Committee believes that there is merit in this suggestion and, accordingly, would appreciate the Minister's views.

Under this heading, the submission goes on to say:

> Recent judicial decisions in relation to privilege under the Corporations Law indicate that the questions whether and in what circumstances common law privileges are cut down by legislation is unclear. To avoid expensive and unnecessary litigation, it is important that legislation which contains powers to compulsorily obtain documents and receive evidence expressly states the legislative intention regarding privilege. The only relevant provision in the Bill is sub-clause 201(3), which preserves the privilege against self-incrimination. However, the Bill is silent regarding other privileges, such as legal professional privilege, which have long been regarded as basic rights. It is a short and

> sensible step to amend sub-clause 201(3) so that it applies generally to all privileges. In the absence of this amendment, the express reference to the privilege against self-incrimination might ground an inference that the Bill abrogates other privileges. Such a result would be totally unfair.

Again, the Committee believes that there is merit in what the submission states and would, therefore, appreciate the Minister's views.

(iii) Breach notices

The Blake Dawson Waldron submission states (at pages 3 to 4):

> The Bill contains several provisions under which the ABA may issue a person with a notice that the person is in breach of the Act. The notice will require the alleged breach to be rectified within a specified period (clauses 67, 69, 70, 72, 135, 136, 139 and 140). Failure to comply with the notice constitutes an offence. When prosecuting a person for an offence of failure to comply with such a notice, the ABA will not be required to prove that the original breach of the Act (upon which the notice was based) had been committed, nor would it be a defence to such a prosecution to establish that this breach had not occurred.

The Committee notes that it has already dealt with some of the provisions referred to in its earlier comments.

The submission goes on to say:

> This procedure is fundamentally unfair. It permits the ABA to administratively determine whether or not a person has

> breached the Act, without ever being required to prove in a Court of law that the breach had occurred. Although judicial review of the ABA's decision to issue the breach notice could be sought, the grounds of judicial review are very limited. Judicial review can be obtained only to correct errors of law, not errors of fact, contained in a decision. Furthermore, in instituting proceedings, an applicant would be required to prove its case, thereby reversing the onus that a prosecuting authority is required to establish that an offence has occurred. Due to the limits of judicial review, it is quite possible for the ABA to wrongly issue a breach notice and for a person to have no redress - even though the ultimate consequence of this process is liability be fined up to $2 million per day.
>
> These notice of breach provisions are unnecessary. In any given situation, a person should be prosecuted for a primary breach of a provision of the Act, rather than a failure to comply with an ABA notice. In our submission they should deleted from the Bill.

The Committee would appreciate the Minister's views on this suggestion and the statements made in the course of making it.

(iv) Penalties

The Blake Dawson Waldron submission makes a general observation about the level of the monetary penalties provided for by the Bill. As the Committee has already noted, various offence provisions carry a penalty of up to $2 million per day. The submission states (at page 5):

> These astronomical penalties are completely out of kilter with other Commonwealth legislation and any need for a reasonable deterrent. By comparison even the proposed revision of penalties under the Trade Practices Act will establish penalties at a maximum of only $10 million.

> Penalties under the Trade Practices Act are currently set at a maximum of $250,000. The public interests relating to enforcement of the Trade Practices Act are at least as important as those relating to the Broadcasting Services Bill. There are no reasons for imposing such draconian penalties on broadcasters, the only effect of which would be to drive them into liquidation, when no comparable penalties appear in any other Commonwealth legislation.

The submission goes on to say:

> By comparison, we understand that in the United States the Federal Communications Commission is empowered to impose maximum penalties on an American television network of $US250,000. These penalties must be seen within the context that each American television network is in itself far larger than the entire Australian television industry. In our submission the penalties under the Bill should be reduced to $100,000 per day, which would continue to far exceed the penalties set by any other legislation, with a maximum cap tied to the same penalties as the Trade Practices Act (ie. $250,000 at present).

In the light of these comments, the Committee would appreciate the Minister's views on the level of the penalties provided for by the Bill.

(iv) Prior approval of temporary breaches

Clause 67 of the Bill provides for applications for prior approval of temporary breaches of the provisions of the Bill. In relation to this clause, the Blake Dawson Waldron submission states (at pages 5 to 6):

> There is a commercial need for these provisions and FACTS supports them. Due to the extensive ownership and control provisions of the Bill, a person may be placed

> in breach of those provisions for some period, in consequence of a commercial transaction.

The submission goes on to say:

> However, the clause is deficient in not allowing for the ABA to approve temporary breaches where an application for approval is made after the relevant agreement or transaction is entered into. There may be circumstances where it is impossible to obtain pre-transaction approval, due to the commercial speed with which a transaction takes place (such as a share transaction). In addition, the requirements of confidentiality often may prevent pre-transaction disclosure to the ABA, unless the other party to the transaction consents. In those circumstances the clause should provide for some limited form of post-transaction approval.

This would not appear to be a matter that falls within the Committee's terms of reference. Indeed, it is possible that a provision which did provide for 'post-transaction approval' might attract the Committee's attention by virtue of its retrospective operation (though the retrospectivity would presumably be beneficial to persons other than the Commonwealth). The Committee would appreciate the Minister's views.

BROADCASTING SERVICES (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1992

This Bill was introduced into the Senate on 4 June 1992 by the Minister for Transport and Communications.

The Bill proposes to make certain transitional and consequential provisions, pursuant to the proposed replacement of the regulatory scheme for broadcasting services provided for by the *Broadcasting Act 1942*, with the new scheme proposed by the Broadcasting Services Bill 1992.

The new scheme will cover a wide range of developing services which do not fall within the traditional definition of broadcasting, but which, nevertheless, will have substantial potential to influence public thought and attitudes. This ensures that appropriate controls can be placed on all services of this nature to protect the public interest.

General comment - submission from Blake Dawson Waldron Solicitors

On 16 June 1992, the Committee received a submission on this Bill from Blake Dawson Waldron Solicitors, on behalf of a client. A copy of that submission is attached to this digest for the information of Senators. The submission states (at page 1) that the client will be adversely affected by the Bill, if enacted. The submission further states (at page 1) that a number of other commercial radio licensees in Australia are likely to suffer the same prejudice. A subsequent submission from Blake Dawson Waldron (which is also attached to this Alert Digest), dated 17 June 1992, confirms the existence of at least one other licensee in a similar position.

The submission of 16 June gives the following background on the problems caused by the Bill:

> Clause 12 of the Transitional Provisions Bill provides that applications for the grant of commercial radio licences or public radio licences may proceed under the Broadcasting Act, notwithstanding the general repeal of that Act effected by clause 27. However, no equivalent provision exists in respect of supplementary FM licence applications. In other words, those applications will cease to exist. The unfairness of this provision is obvious, when it is applied to [the client]. [The client] originally applied for a supplementary licence in accordance with Government policy in 1984. After several changes in that policy, its application was finally referred to the Australian Broadcasting Tribunal late last year. A hearing of its application is scheduled to be held in Cairns on 21 and 22 July 1992. It is possible for the Tribunal to decide to grant [*the client*] a supplementary licence between the date of that hearing and the date of commencement of the transitional provisions but that decision will have absolutely no legal effect once the transitional provisions commence operation. Consequently, the time, effort and expense in prosecuting the supplementary licence application will have been entirely wasted. In our submission no legislation should operate to destroy rights in this way.

The submission goes on to say:

> We should also indicate that in addition to our client's supplementary licence application, the Tribunal is also considering an application for an independent FM licence for Cairns. Under the transitional provisions, that licence application will proceed. Present Government policy would allow [the client] to convert to FM (if it is not granted a supplementary licence) upon the introduction of the independent commercial FM licence. However, both the transitional provisions and the Broadcasting Services Bill are completely silent on the question of conversion of an AM licensee to FM. In our submission the transitional

> provisions should expressly preserve the current position, under which our client would be entitled to convert to FM upon the introduction of another FM licence.

It continues:

> Clause 39 of the Broadcasting Services Bill provides in essence that in a solus (or one-station) regional market, the incumbent licensee may automatically obtain another licence, if two or more licences are available for allocation. We understand that these provisions were inserted as an alternative to the present supplementary licence scheme. Because the application for a commercial FM licence in Cairns can proceed under the transitional provisions, our client will cease to operate in a solus market at some time in the near future. In that situation clause 39 would have no application to it. Consequently, having been deprived of its right to pursue a supplementary licence application lodged with the Minister some 8 years ago, the Broadcasting Services Bill offers it no alternative path.

Having given this background and made these comments, the submission goes on to recommend (at pages 2 to 3) that:

- the transitional provisions should be amended to permit supplementary licence applications to remain on foot;
- the transitional provisions should be amended to permit regional AM licensees to convert to FM in accordance with current legislation;
- alternatively, clause 39 of the Broadcasting Services Bill should be amended to permit a licensee in [the client's] circumstances to be able to apply for another licence under that clause. We appreciate that this latter submission involves a substantive amendment to the Bill. However, it is made to address the problems described above, under which

> our client and other regional radio licensees will be deprived of their existing rights.

If the submission from Blake Dawson Waldron is correct, the Committee is concerned that the transitional provisions in the Bill could operate to the detriment of a person who has an application for a licence on foot. This would appear to be contrary to the usual effect of transitional provisions.

In making this comment, the Committee accepts that the question turns largely on the nature of the applicants' existing rights (if, indeed, they can be classified as 'rights') and the extent to which the proposed new legislation impinges on those rights. The Committee would appreciate the Minister's views on the matters raised by the submission.

FOREST CONSERVATION AND DEVELOPMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 June 1992 by Mr Miles as a Private Member's Bill.

The Bill proposes to facilitate co-operation between the Commonwealth and the States in relation to forest industries. The Bill also proposes, where appropriate, to assist in furthering the objects of relevant State laws by providing Commonwealth legislative support to those laws and also recognition by the Commonwealth of the responsibilities of the States in relation to land use issues. The Bill also proposes to facilitate investment on forest programs.

The objects of the Bill are to be achieved by establishing programs and conditions relating to the granting of resource security and also conditions relating to the granting of resource security, if necessary on a regional basis, to forest programs on public and private land. The Bill also proposes to prevent the exercise of Commonwealth decision making powers in relation to forest programs otherwise than in the exceptional circumstances provided for in this Bill.

The Committee has no comment on this Bill.

INDUSTRIAL RELATIONS AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 June 1992 by Mr Charles as a Private Member's Bill.

The Bill proposes to amend section 299 of the *Industrial Relations Act 1988*, which deals with offences in relation to the Australian Industrial Relations Commission. Subparagraph 299(1)(d)(ii) currently provides that a person shall not, by writing or speech, use words calculated to bring the Commission or a member of the Commission into disrepute. Contravention of this subparagraph is an offence punishable upon conviction by a penalty.

It is contended that this provision is a clear denial of the inalienable right of free speech in a democratic society. This Bill aims to effect the removal of the provision from the Industrial Relations Act.

The Committee has no comment on this Bill.

INTERNATIONAL AIR SERVICES COMMISSION BILL 1992

This Bill was introduced into the Senate on 4 June 1992 by the Minister for Transport and Communications.

The purpose of this Bill is to enhance international air services by fostering:

- increased competition between Australian carriers and greater economic efficiency in the airline industry;
- increased responsiveness by airlines to the needs of consumers, including an increased range of choices and benefits;
- Australian tourism and trade; and
- the maintenance of Australian carriers capable of competing effectively with airlines of foreign countries.

The Committee has no comment on this Bill.

Facsimile transmission from

BLAKE DAWSON WALDRON
SOLICITORS

Date	15 June 1992	Grosvenor Place 225 George Street Sydney NSW 2000 Australia
Our ref/File no	JFF.PRM.6459/91	
Your ref/File no		
To	Mr Stephen Argument Secretary to the Senate Standing Committee for the Scrutiny of Bills PARLIAMENT HOUSE CANBERRA	Telephone (02) 258 6000 Int + 61 2 258 6000 Telex AA22867 DWN DX 355 Sydney
Facsimile no	06 277 3289	Facsimile (02) 258 6999

Dear Mr Argument,

BROADCASTING SERVICES BILL

As you are aware we act for the Federation of Australian Commercial Television Stations, which represents all commercial television licensees in Australia.

We refer to your discussions with Mr Paul Mallam of this office. Please find attached a submission that we have been instructed to provide to the Committee. If you or any members of the Committee require any additional information, please do not hesitate to telephone Paul Mallam on 02 258 6065.

We would like to thank the Committee for the opportunity to make this submission and we trust that it assists the Committee's deliberations.

Yours faithfully,

Blake Dawson Waldron

If you do not receive 9 pages (including this page) please telephone or fax immediately.

SUBMISSIONS ON THE BROADCASTING SERVICES BILL
TO THE SENATE STANDING COMMITTEE
FOR THE SCRUTINY OF BILLS

Executive Summary

The Broadcasting Services Bill ("the Bill") contains the following deficiencies:

- The Australian Broadcasting Authority is not sufficiently accountable.
- Basic rights are not recognised or properly protected.
- The penalties established under the Bill are disproportionately high.

Accountability of ABA

- The ABA will exercise a wide range of powers which will mould the future structure of, and the services provided by, Australia's electronic media. However, despite the width of those powers, the Bill does not contain sufficient checks on ABA decisions. Major ABA decisions should be subject to a mandatory public inquiry procedure, to ensure transparency in the ABA's decision making processes, public confidence in the outcome of those processes and an appropriate level of public accountability. Those decisions should include:

  (a) licence suspensions or cancellations (cl. 141);

  (b) the setting of program standards (cl. 120 and 123);

  (c) the imposition of conditions on licences (cl. 43 and 87);

  (d) frequency allotment plans and licence area plans (cl. 25 and 26).

- In addition, each of the following instruments will have such far-reaching consequences that they should be disallowable instruments, required to be laid before the Parliament:

  (a) frequency allotment plans and licence area plans (cl. 25 and 26);

  (b) the price based allocation system determined by the ABA in respect of commercial licences (cl. 36);

  (c) the price based allocation system determined by the Minister in respect of subscription television broadcasting licences (cl. 93).

- The AAT appeal mechanisms at cl. 203 should be expanded to include decisions which set program standards (cl. 120 and 123) and opinions given by the ABA (cl. 21 and 74).

2.

Protection of Rights

- The Bill contains no express recognition of the rules of natural justice and only limited recognition of common law privileges. Provisions should be inserted which clearly preserve those rights.

- Under various provisions a person could be prosecuted on the basis of an ABA notice alleging a breach of the Act, without any requirement that the ABA prove in a Court of law that the breach occurred (cl. 67, 69, 70, 72, 135, 136, 139 and 140). Those provisions cut down the safeguards normally recognised by criminal law and should be deleted.

- Provisions in respect of "associates" reverse the onus of proof by requiring a person to disprove that he or she is an associate of some other person (cl. 6). This is contrary to the normal rule that a regulator or prosecuting authority be required to prove each element of its case. These provisions should be deleted.

- The ABA's power to publish a report of a private investigation will be destructive of reputations and livelihoods and should be deleted (cl. 177).

- The Minister's power to require licensees to broadcast matters of national interest is entirely unfettered (para 7(1)(d) of Schedule 2). It should be subject to the same restrictions as currently apply to that power.

Criminal Penalties

- Penalties will accrue at $2 million per day (or $730 million per year). This is totally out of proportion to any necessary deterrent. The maximum penalties imposed under the Bill should be reduced.

Other Matters

- Provisions which allow temporary approval of a breach of the Act only before the breach is committed are potentially unworkable (cl. 67). They should also allow for temporary approval to be given after entry into the transaction which caused the breach.

An extensive review of the Bill has been undertaken, in consultation with junior and senior Counsel. FACTS is able at short notice to provide the Committee with draft provisions which would overcome the problems identified above. Alternatively, FACTS would also be able at short notice to meet with the Committee.

A more detailed analysis of these issues is attached.

Blake Dawson Waldron
for and on behalf of the
Federation of Australian Commercial
Television Stations

15 June, 1992

SUBMISSIONS ON THE BROADCASTING SERVICES BILL

ACCOUNTABILITY OF ABA

Few bodies in Australia exercise such a wide array of powers as will be conferred on the ABA, with such far ranging consequences for Australian society, and with so few accountability mechanisms. ABA decisions will dictate the future "look" of Australian culture, as well as having long-term effects on industry investment, production levels and employment.

The ABA will exercise far more powers than the current Australian Broadcasting Tribunal For example, nearly all planning and licensing powers will be vested in the ABA, whereas under the present Broadcasting Act planning powers are exercised by the Minister The conferral of very wide powers on the ABA, together with the loss of ultimate Ministerial responsibility for many decisions, requires a regulatory framework which ensures ABA accountability.

The ABA is not subject to any of the detailed procedures under which the Australian Broadcasting Tribunal operates Although those procedures obviously require some streamlining, the Bill's basic thrust is to do away with them completely. However, in our submission this approach places far too much emphasis on the exercise of unfettered administrative powers, at the expense of individual rights.

An appropriate balance between individual rights and administrative efficiency could be maintained by the inclusion of a handful of simple provisions in the Bill.

Mandatory Inquiry Procedure

There are a number of critical decisions by the ABA which could affect an extremely diverse range of interests, including large scale industry investment and the nature of electronic media services received by Australian audiences. Under the Bill as presently drafted those decisions could be made in private, and in some cases even without public consultation.

These critical decisions include:

(a) the suspension or cancellation of licences (clause 141);

(b) the imposition of licence conditions (clauses 43 and 87);

(c) the setting of program standards (clauses 120 and 123);

(d) the publication of frequency allotment plans and licence area plans (clauses 25 and 26).

2.

In our submission each of those decisions should be subject to a mandatory inquiry procedure, which facilitates public scrutiny of the ABA and also permits affected persons, including licensees, to present relevant evidence and submissions to the ABA. It is only through such an inquiry process that properly informed decisions, in which the public can have full confidence, can be guaranteed.

AAT Review

The rights to AAT appeal at clause 203 are deficient in at least two respects. Firstly, there is no right of AAT review of a decision to impose program standards on licensees (clauses 120 and 123). The program standards set by the ABA are perhaps the most important of its responsibilities. Curiously, the Bill provides for AAT review of the ABA's refusal to register a code of practice but not for a decision to impose a standard. Under the Bill codes of practice are intended to be a substitute for standards. If AAT review is available in respect of a code of practice, then it is logically consistent for the same rights to apply in respect of a decision to impose program standards.

Secondly, the ABA under clauses 21 and 74 has power to give opinions which will bind it to act in accordance with that opinion for the next five years. Consequently, the giving of an opinion is an extremely important decision. For example, an adverse ABA opinion will effectively act as a veto to a proposed commercial transaction for which an opinion has been obtained. The absence of AAT review will discourage persons from seeking ABA opinions, whereas the intent of the legislation is that licensees and others should use this avenue. ABA opinions should therefore be subject to AAT review.

Increased Parliamentary Scrutiny

It is also in the public interest that the Bill provide some Parliamentary scrutiny of frequency allotment plans, licence area plans, the ABA's price based allocation system in respect of commercial licences and the Minister's price based allocation in respect of satellite Pay TV licences. As the legislation is presently drafted the only accountability in respect of these decisions is a requirement for public consultation prior to the preparation of licence area plans and frequency allotment plans. This requirement does no more than reflect current Departmental practice in respect of the equivalent powers now exercised by the Minister under the Broadcasting Act. However, the political responsibility borne by the Minister in respect of these decisions will be lost, upon their conferral on the ABA. To ensure some degree of accountability, those decisions should be made by disallowable instrument, in order to ensure some Parliamentary scrutiny of them.

Although the powers to determine price-based allocation systems stand in a somewhat different category, those systems will provide the framework for future entry to the industry. That framework will establish the criteria for allocation of commercial licences and satellite Pay TV licences, and therefore involve issues of national importance. Given the pivotal nature of those systems, there is at the very least a need for them also to be made by disallowable instrument. We stress that it is not suggested that individual licence allocation decisions should be subject to

3.

Parliamentary scrutiny, but the system under which those decisions will be made. Indeed, there is a strong case that those systems should be established by delegated legislation. The requirement that they be made by disallowable instrument provides a minimum level of protection.

BASIC RIGHTS AND NOTIONS OF FAIRNESS

The Bill does not expressly provide that the ABA is subject to the requirements of procedural fairness (or natural justice, as it is otherwise known). An established presumption of statutory interpretation is that that the exercise of administrative powers is subject to the requirements of procedural fairness. However, it is arguable that in the absence of an express provision confirming those requirements, this presumption has been displaced or weakened by other provisions of the Bill. For example, clause 167 provides that when making a decision on any matter, the ABA is not limited to a consideration of material made available through an investigation or hearing, but may take into account the knowledge and experience of its members. On one view, this provision would entitle the ABA to make a decision which adversely affects the rights of a person, without putting to the person some information which one of its members had obtained privately or at least otherwise than through the usual investigative or inquiry procedures established by the Bill. Such a result would be fundamentally unfair. A provision which expressly stated that the ABA was subject to the requirements of procedural fairness would remove any doubt. It also does no more than section 80A of the current Broadcasting Act which provides that the Australian Broadcasting Tribunal is subject to the rules of natural justice. Given the far larger range of powers vested in the ABA, it is important that this provision is retained in the Bill.

Recent judicial decisions in relation to privilege under the Corporations Law indicate that the questions whether and in what circumstances common law privileges are cut down by legislation is unclear. To avoid expensive and unnecessary litigation, it is important that legislation which contains powers to compulsorily obtain documents and receive evidence expressly states the legislative intention regarding privilege. The only relevant provision in the Bill is sub-clause 201(3), which preserves the privilege against self-incrimination. However, the Bill is silent regarding other privileges, such as legal professional privilege, which have long been regarded as basic rights. It is a short and sensible step to amend sub-clause 201(3) so that it applies generally to all privileges. In the absence of this amendment, the express reference to the privilege against self-incrimination might ground an inference that the Bill abrogates other privileges. Such a result would be totally unfair.

Breach Notices

The Bill contains several provisions under which the ABA may issue a person with a notice that the person is in breach of the Act. The notice will require the alleged breach to be rectified within a specified period (clauses 67, 69, 70, 72, 135, 136, 139 and 140). Failure to comply with the notice constitutes an offence. When prosecuting a person for an offence of failure to comply with such a notice, the ABA will not be

required to prove that the original breach of the Act (upon which the notice was based) had been committed, nor would it be a defence to such a prosecution to establish that this breach had not occurred.

This procedure is fundamentally unfair. It permits the ABA to administratively determine whether or not a person has breached the Act, without ever being required to prove in a Court of law that the breach had occurred. Although judicial review of the ABA's decision to issue the breach notice could be sought, the grounds of judicial review are very limited Judicial review can be obtained only to correct errors of law, not errors of fact, contained in a decision. Furthermore, in instituting proceedings, an applicant would be required to prove its case, thereby reversing the onus that a prosecuting authority is required to establish that an offence has occurred. Due to the limits of judicial review, it is quite possible for the ABA to wrongly issue a breach notice and for a person to have no redress - even though the ultimate consequence of this process is liability be fined up to $2 million per day.

These notice of breach provisions are unnecessary. In any given situation, a person should be prosecuted for a primary breach of a provision of the Act, rather than a failure to comply with an ABA notice In our submission they should be deleted from the Bill.

Associates

"Associate" is defined in sub-clause 6(1) so as to deem certain categories of persons to be associates of other persons unless the ABA is satisfied that they do not exert relevant influence over the business dealings of each other The effect of this section is to create a reverse onus of proof, whereby a person falling within one of those categories must prove that they are not an associate of the other person. This is fundamentally repugnant, particularly as the definition of associate is so wide. In accordance with normal legal principles, the ABA should be required to demonstrate that persons act in concert, before finding that they are associates.

Publication of Reports

Clause 177 of the Bill empowers the ABA to publish a report of a private investigation. Such a procedure is likely to be just as (if not more) damaging to a person's reputation and livelihood than the commencement of criminal proceedings. The stigma attached to publication of such a report will be impossible to remove, given that the investigation which led to the report took place away from the public gaze. In addition, no worthwhile public interest would be served by this procedure. If a private investigation reveals some wrongdoing, the ABA should commence licence action or prosecution proceedings, rather than relying on publication of a report as a form of sanction or threat. For these reasons clause 177 should be deleted.

Ministerial Control Over Broadcasts

Paragraph 7(1)(d) of Schedule 2 empowers the Minister to require a licensee to broadcast such items of national interest as he specifies. This paragraph is based on

section 104 of the Broadcasting Act. However, whereas section 104 provides that the Minister may not require a licensee to broadcast items of national interest for more than 30 minutes in any 24 hour period, paragraph 7(1)(d) contains no limitation whatsoever. Such a sweeping power is contrary to basic notions of democracy - at its widest, the power would enable a Government to turn commercial broadcasting into a vehicle for its own information. Although that might be unlikely in the present political climate, it is necessary to limit this power. We submit that the limitation already contained in section 104 should be retained.

PENALTIES

Various clauses of the Bill create penalties of up to $2 million per day (or $730 million per year) for breaches of the Bill in respect of a commercial television licence. These astronomical penalties are completely out of kilter with other Commonwealth legislation and any need for a reasonable deterrent. By comparison even the proposed revision of penalties under the Trade Practices Act will establish penalties at a maximum of only $10 million. Penalties under the Trade Practices Act are currently set at a maximum of $250,000 The public interests relating to enforcement of the Trade Practices Act are at least as important as those relating to the Broadcasting Services Bill. There are no reasons for imposing such draconian penalties on broadcasters, the only effect of which would be to drive them into liquidation, when no comparable penalties appear in any other Commonwealth legislation.

By comparison, we understand that in the United States the Federal Communications Commission is empowered to impose maximum penalties on an American television network of $US250,000. These penalties must be seen within the context that each American television network is in itself far larger than the entire Australian television industry. In our submission the penalties under the Bill should be reduced to $100,000 per day, which would continue to far exceed the penalties set by any other legislation, with a maximum cap tied to the same penalties as the Trade Practices Act (ie. $250,000 at present).

OTHER MATTERS

Clause 67 permits persons to apply for prior approval of temporary breaches of the Bill. There is a commercial need for these provisions and FACTS supports them. Due to the extensive ownership and control provisions of the Bill, a person may be placed in breach of those provisions for some period, in consequence of a commercial transaction. However, the clause is deficient in not allowing for the ABA to approve temporary breaches where an application for approval is made after the relevant agreement or transaction is entered into. There may be circumstances where it is impossible to obtain pre-transaction approval, due to the commercial speed with which a transaction takes place (such as a share transaction). In addition, the requirements of confidentiality often may prevent pre-transaction disclosure to the

ABA, unless the other party to the transaction consents. In those circumstances the clause should provide for some limited form of post-transaction approval.

Blake Dawson Waldron
for and on behalf of the
Federation of Australian Commercial
Television Stations

15 June 1992

BLAKE DAWSON WALDRON

SOLICITORS

150

Grosvenor Place
225 George Street
Sydney NSW 2000
Australia

Private Bag N6
PO Grosvenor Place
Sydney NSW 2000

Telephone (02) 258 6000
Int+ 61 2 258 6000
Telex AA22867 DWN
Facsimile (02) 258 6999
DX 355 Sydney

YOUR REF   OUR REF JFF.PRM.6459/91   WRITER'S DIRECT LINE 258 6577

16 June 1992

Mr Stephen Argument
Secretary to the Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2601

Dear Mr Argument,

<u>BROADCASTING SERVICES BILL</u>

We act for Trans Media Holdings Pty Limited.

By way of background to this submission our client wholly owns the licensees of commercial radio licences 4CA Cairns, 4TO Townsville and 4MK Mackay, amongst other interests. It is also a very experienced media company and, consequently, has a vital interest in the Broadcasting Services Bill.

The purpose of this letter is to make a short submission to the Committee on some aspects of the Broadcasting Services Bill and the transitional provisions in the Broadcasting Services (Transitional Provisions and Consequential Amendments) Bill ("the Transitional Provisions Bill") which will unfairly deprive our client of various rights. We understand that a number of other commercial radio licensees in Australia are likely to suffer the same prejudice.

BLAKE DAWSON WALDRON

2.

Mr Stephen Argument
Secretary to the Senate Standing Committee
for the Scrutiny of Bills 16 June 1992

We are instructed to make the following submissions:

1. Clause 12 of the Transitional Provisions Bill provides that applications for the grant of commercial radio licences or public radio licences may proceed under the Broadcasting Act, notwithstanding the general repeal of that Act effected by clause 27. However, no equivalent provision exists in respect of supplementary FM licence applications. In other words, those applications will cease to exist. The unfairness of this provision is obvious, when it is applied to 4CA. 4CA originally applied for a supplementary licence in accordance with Government policy in 1984. After several changes in that policy, its application was finally referred to the Australian Broadcasting Tribunal late last year. A hearing of its application is scheduled to be held in Cairns on 21 and 22 July 1992. It is possible for the Tribunal to decide to grant 4CA a supplementary licence between the date of that hearing and the date of commencement of the transitional provisions but that decision will have absolutely no legal effect once the transitional provisions commence operation. Consequently, the time, effort and expense in prosecuting the supplementary licence application will have been entirely wasted. In our submission no legislation should operate to destroy rights in this way.

2. We should also indicate that in addition to our client's supplementary licence application, the Tribunal is also considering an application for an independent FM licence for Cairns. Under the transitional provisions, that licence application will proceed. Present Government policy would allow 4CA to convert to FM (if it is not granted a supplementary licence) upon the introduction of the independent commercial FM licence. However, both the transitional provisions and the Broadcasting Services Bill are completely silent on the question of conversion of an AM licensee to FM. In our submission the transitional provisions should expressly preserve the current position, under which our client would be entitled to convert to FM upon the introduction of another FM licence.

3. Clause 39 of the Broadcasting Services Bill provides in essence that in a solus (or one-station) regional market, the incumbent licensee may automatically obtain another licence, if two or more licences are available for allocation. We understand that these provisions were inserted as an alternative to the present supplementary licence scheme. Because the application for a commercial FM licence in Cairns can proceed under the transitional provisions, our client will cease to operate in a solus market at some time in the near future. In that situation clause 39 would have no application to it. Consequently, having been deprived of its right to pursue a supplementary licence application lodged with the Minister some 8 years ago, the Broadcasting Services Bill offers it no alternative path.

We submit that:

1. The transitional provisions should be amended to permit supplementary licence applications to remain on foot;

BLAKE DAWSON WALDRON

Mr Stephen Argument
Secretary to the Senate Standing Committee
for the Scrutiny of Bills 16 June 1992

2. The transitional provisions should be amended to permit regional AM licensees to convert to FM in accordance with current legislation;

3 Alternatively, clause 39 of the Broadcasting Services Bill should be amended to permit a licensee in 4CA's circumstances to be able to apply for another licence under that clause. We appreciate that this latter submission involves a substantive amendment to the Bill. However, it is made to address the problems described above, under which our client and other regional radio licensees will be deprived of their existing rights.

We wish to thank the Committee for this opportunity to put a submission before it. Should you or any member of the Committee have any queries, Paul Mallam of this office may be contacted on 02 258 6577.

Yours faithfully,

Blake Dawson Waldron

BLAKE DAWSON WALDRON

SOLICITORS

150

Grosvenor Place
225 George Street
Sydney NSW 2000
Australia

Private Bag N6
PO Grosvenor Place
Sydney NSW 2000

Telephone (02) 258 6000
Int+ 61 2 258 6000
Telex AA22867 DWN
Facsimile (02) 258 6999
DX 355 Sydney

YOUR REF   OUR REF JFF.PRM.357/89   WRITER'S DIRECT LINE 258 6577

17 June 1992

RECEIVED
17 JUN 1992
Senate Standing C'ttee for the Scrutiny of Bills

Mr Stephen Argument
Secretary to the Senate Standing Committee
for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2601

Dear Mr Argument,

BROADCASTING SERVICES BILL

We act for Radio Albury-Wodonga Limited.

Our client is the licensee of commercial radio licence 2AY Albury-Wodonga.

The purpose of this letter is to draw to the Committee's attention a serious, presumably unintended consequence flowing from some aspects of the Broadcasting Services Bill ("BSB") and the transitional provisions in the Broadcasting Services (Transitional Provisions and Consequential Amendments) Bill ("the Transitional Provisions Bill"). That consequence will unfairly deprive our client of its existing rights to obtain a licence under the Broadcasting Act. We understand that a number of other commercial radio licensees in Australia are likely to suffer the same prejudice.

We are instructed to make the following submissions:

1. Clause 12 of the Transitional Provisions Bill provides that pending applications for the grant of commercial radio licences or public radio licences may proceed under the

Broadcasting Act, notwithstanding the general repeal of that Act effected by clause 27. However, no equivalent provision exists in respect of supplementary FM licence applications. In other words, those applications will cease to exist. The unfairness of this provision is obvious, when it is applied to 2AY. Its application for a supplementary licence was referred to the Australian Broadcasting Tribunal by the Minister less than two months ago. The Tribunal is currenting conducting an inquiry into that application. Immediately, however, upon the Bills coming into force, the application ceases to exist. The time, effort and expense in prosecuting the supplementary licence application will have been entirely wasted. In our submission no legislation should operate to destroy rights in this way, particularly when the same legislation operates so as to preserve the rights of a competitor (see below).

2. We should also indicate that in addition to our client's supplementary licence application, the Tribunal is also considering an application for an independent FM licence for Albury-Wodonga to a third party. Under the transitional provisions, that licence application is entitled to proceed Present Government policy would allow 2AY to convert to FM (if it is not granted a supplementary licence) upon the introduction of the independent commercial FM licence. However, both the transitional provisions and the Broadcasting Services Bill are completely silent on the question of conversion of an AM licensee to FM In our submission the transitional provisions should also expressly preserve the current position, under which our client would be entitled to convert to FM upon the introduction of another FM licence operated by a third party, as well as preserving 2AY's entitlement to prosecute its supplementary licence application.

3. Clause 39 of the BSB provides in essence that in a solus (or one-station) regional market, the incumbent licensee may automatically obtain another licence, if two or more licences are available for allocation. We understand that these provisions were inserted as an alternative to the present supplementary licence scheme. Because the application for a commercial FM licence in Albury-Wodonga can proceed under the transitional provisions, our client could cease to operate in a solus market at some time in the near future. In that situation clause 39 would have no application to our client. Consequently, having been deprived of its right to pursue a supplementary licence application, the BSB offers our client no alternative path.

We submit that:

1. The transitional provisions should be amended to permit supplementary licence applications to remain on foot;

2. The transitional provisions should be amended to permit regional AM licensees to convert to FM in accordance with current legislation.

BLAKE DAWSON WALDRON

Mr Stephen Argument
Secretary to the Senate Standing Committee
for the Scrutiny of Bills

17 June 1992

We wish to thank the Committee for this opportunity to put a submission before it. Should you or any member of the Committee have any queries, Paul Mallam of this office may be contacted on 02 258 6577.

Yours faithfully,

Blake Dawson Waldron

SCRUTINY OF BILLS ALERT DIGEST

NO. 10 OF 1992

19 AUGUST 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Crowley
Senator J Powell
Senator N Sherry
Senator J Tierney

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 such 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.

The Committee has considered the following Bills:

* Arts, Environment and Territories Legislation Amendment Bill 1992

* Crimes (Ships and Fixed Platforms) Bill 1992

Grain Legumes Levy Amendment Bill 1992

* Health and Community Services Legislation Amendment Bill 1992

Honey Legislation (Repeal and Amendment) Bill 1992

* Income Tax Assessment Amendment (Foreign Investment) Bill 1992

Industry, Technology and Commerce Legislation Amendment Bill 1992

* Law and Justice Legislation Amendment Bill (No. 3) 1992

National Health and Medical Research Council Bill 1992

National Parks and Wildlife Conservation Amendment Bill 1992

Norfolk Island (Electoral and Judicial) Amendment Bill 1992

Oilseeds Levy Amendment Bill 1992

Parliamentary Presiding Officers Amendment Bill 1992

* Sales Tax (Exemptions and Classifications) Amendment Bill 1992

* Taxation Laws Amendment Bill (No. 4) 1992

* *Telecommunications (Interception - Carriers) Act 1992*

*** The Committee has commented on these Bills**

ARTS, ENVIRONMENT AND TERRITORIES LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the Senate on 25 June 1992 by the Minister representing the Minister for the Arts, Sport, the Environment and Territories.

The Bill proposes to amend 5 Acts administered in the Arts, Sport, Environment and Territories portfolio. The amendments include:

- an amendment to the *Australian Capital Territory (Planning and Land Management) Act 1988,* to enable the National Capital Planning Authority, with the approval of the Minister for the Arts, Sport, the Environment and Territories, to take over from the Department the management of land designated by the Minister as 'National Land', which is land required for the special purpose of Canberra as the National Capital;

- an amendment to the *National Gallery Act 1975,* to give effect to the change of the official name of the Gallery from 'Australian National Gallery' to 'National Gallery of Australia';

- an amendment to correct a minor typographical error in the *Australian Heritage Commission Act 1975;*

- an amendment to the *National Parks and Wildlife Conservation Act 1975,* to increase the value of contracts which the Director of Parks and Wildlife may enter into without the approval of the Minister;

The Bill also proposes to repeal two Acts administered by the Department: the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* and the

States Grants (Air Quality Monitoring) Act 1976. The provisions of both Acts are spent and there is no need or intention to revive them. It is, therefore, considered to be appropriate that they be repealed.

The Committee has no comment on this Bill.

CRIMES (SHIPS AND FIXED PLATFORMS) BILL 1992

This Bill was introduced into the Senate on 25 June 1992 by the Minister for Justice.

The Bill proposes to give effect to the Convention for the Suppression of Unlawful Acts Against Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against Fixed Platforms Located on the Continental Shelf. Both instruments were done in Rome in 1988. They fill an important gap in the present international regime to prevent and suppress maritime terrorism.

Commencement by Proclamation
Subclause 2(2) and (3)

Clause 2 of the Bill provides:

> (1) Parts 1 and 4 commence on the day on which this Act receives the Royal Assent.
>
> (2) Part 2 commences on a day to be fixed by Proclamation, being a day not earlier than the day on which the Convention enters into force for Australia.
>
> (3) Part 3 commences on a day to be fixed by Proclamation, being a day not earlier than the day on which the Protocol enters into force for Australia.

Parts 2 and 3 would implement the Convention for the Suppression of Unlawful Acts Against Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against Fixed Platforms Located on the Continental Shelf, respectively.

The Committee notes that there is no limit as to the time within which a Proclamation pursuant to subclause 2(2) or (3) must be made. This is contrary to the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. However, the Committee notes that the Explanatory Memorandum which accompanies the Bill offers the following information on these provisions:

> These provisions will be proclaimed to come into effect on the date on which Australia's accession to the Convention and Protocol takes effect. These provisions may not be proclaimed to commence before the Convention and Protocol come into force for Australia. As the commencement of these provisions depends entirely on the date of entry into force for Australia of the Convention and Protocol, it is not appropriate to have provision for the Act to be deemed to come into effect or be repealed after a certain period.

In the light of this explanation, the Committee makes no further comment on the subclauses.

Offence provisions
Clauses 12, 14, 15, 16 and 17

Clause 12 of the Bill provides:

> Destroying or damaging navigational facilities
> 12. A person must not destroy or seriously damage maritime navigational facilities or seriously interfere with their operation if that act is likely to endanger the safe navigation of a private ship.
> Penalty: 15 years imprisonment.

The Committee notes that, in the course of debate on the Bill in the Senate on 19 August 1992, Senators Hill and Spindler suggested that, on the face of the provision, there would be no requirement for the prosecution to prove that a

person charged with an offence under the provision actually intended to do the acts constituting the offence.

The Committee notes that the offences provided for in clauses 14 to 17 of the Bill are similarly couched. Those clauses provide:

> **Causing death**
> 14. A person who kills a person in connection with the commission or attempted commission of an offence against any of sections 8 to 13 is guilty of an offence.
> Penalty: Life imprisonment.
>
> **Causing grievous bodily harm**
> 15. A person who causes grievous bodily harm to a person in connection with the commission or attempted commission of an offence against any of sections 8 to 13 if guilty of an offence.
> Penalty: 15 years imprisonment.
>
> **Causing injury to a person**
> 16. A person who injures a person in connection with the commission or attempted commission of an offence against any of sections 8 to 13 is guilty of an offence.
> Penalty: 10 years imprisonment.
>
> **Threatening to endanger a ship**
> 17.(1) A person must not threaten to do an act that would constitute an offence against section 9, 10 or 12 with intent to compel an individual, a body corporate or a body politic to do or refrain from doing an act, if that threat is likely to endanger the safe navigation of the ship concerned.
> Penalty: 2 years imprisonment.
> (2) For the purpose of this section, a person is taken to threaten to do an act if the person makes any statement or does anything else indicating, or from which it could reasonably be inferred, that it is his or her intention to do that act.

The Committee notes that these provisions may be contrasted with clause 13 of the Bill, which provides:

> **Giving false information**
> 13. A person must not **knowingly** endanger the safe navigation of a private ship by communicating false information.
> Penalty: 15 years imprisonment. [emphasis added]

In making this comment, the Committee notes that Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, which these provisions seek to implement, makes it an offence for a person to 'unlawfully and intentionally' do the various acts referred to. The Committee also notes that when Senators Hill and Spindler raised their concerns in the Senate, the Minister for Justice indicated that the concerns appeared to be legitimate. The Committee would, therefore, appreciate the Attorney-General's views on the concerns raised by Senators Hill and Spindler.

Delegation of powers to 'a person authorised by the Attorney-General' Subclause 30(1), clause 32

Subclause 30(1) of the Bill provides:

> **Written consent of Attorney-General required**
> 30.(1) A prosecution for an offence:
> (a) against Division 1 of Part 2 or Part 3; or
> (b) arising under section 5 or 7 of the *Crimes Act 1914* in relation to an offence against any of sections 8 to 16 and sections 21 to 27;
> may not be begun except with the consent of the Attorney-General or of a person authorised by the Attorney-General to give consent.

Clause 32 provides:

> **Evidence of certain matters**
> 32. A certificate by the Attorney-General, or a person authorised by the Attorney-General to give such a certificate, stating any of the following:
>
> (a) that a specified State was, at specified times, a Convention of Protocol State;
> (b) the extent to which a specified Convention or Protocol State had, at specified times, extended its jurisdiction under Article 6(2) of the Convention or Article 3(2) of the Protocol;
> (c) that specified waters were, at a specified time:
> (i) within the internal waters or territorial sea, or above the continental shelf, or Australia or of a specified foreign country; or
> (ii) beyond the territorial sea of Australia and of any foreign country;
>
> is, for the purposes of any proceedings under this Act, evidence of the facts stated in the certificate.

The Committee notes that, in the case of subclause 30(1), the Attorney-General would be able to authorise 'a person' to give the consent for the prosecution of various offences which, otherwise, would only be able to be given by the Attorney-General him/herself. Similarly, the Committee notes that, in the case of clause 32, the Attorney-General would be able to authorise 'a person' to certify various matters on his or her behalf. There is no limit on the persons or classes of persons who could be so authorised.

In the circumstances, it may be considered appropriate that the Attorney-General's power of authorisation be limited, either by reference to particular office-holders (eg to members of the Senior Executive Service) or to persons holding particular qualifications. Accordingly, the Committee draws Senators' attention to the clauses, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

AD10/92

GRAIN LEGUMES LEVY AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 25 June 1992 by the Parliamentary Secretary to the Minister for Defence.

The Bill proposes to amend the *Grain Legumes Levy Act 1985,* to allow the basis on which research levies are imposed on specified grain legumes to be changed from a flat rate per tonne to an *ad valorem* rate (ie in proportion to the estimated value of the goods). Levy revenue attracts matching Commonwealth contributions and is used to fund grain legumes research programs. The funding program is administered by the Grains Research and Development Corporation.

The Grains Council of Australia has recommended an initial operative levy rate of 1 per cent of the net farm gate value and a maximum rate of 3 per cent. This rate will apply uniformly to all leviable oilseeds produced in Australia and will be payable when the oilseed is delivered for processing.

The Committee has no comment on this Bill.

AD10/92

HEALTH AND COMMUNITY SERVICES LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 25 June 1992 by the Parliamentary Secretary to the Minister for Health, Housing and Community Services.

The Bill proposes to:

- make a number of amendments to the *Health Insurance Act 1973,* to enable the Minister to make determinations that medical practitioners are specialists in a particular speciality;

- repeal those provisions of the *Health Legislation (Pharmaceutical Benefits) Amendment Act 1991* relating to interactive eligibility checking and the restriction of pharmaceutical benefits to Australian residents and other eligible persons;

- amend the *Hearing Services Act 1991,* to alter the definition of 'eligible persons';

- change the refund provision of the *National Health Act 1953;*

- amend the *National Health Act 1953,* so that the owner of a pharmacy (whether or not he or she is the pharmacist) will be deemed to hold the relevant approval; and

- amend the *National Health Act 1953,* to allow the approval of a supplier to be cancelled under certain circumstances.

Retrospectivity
Subclauses 2(2), (3) and (5)

Clause 2 of the Bill provides:

> **Commencement**
> 2.(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
>
> (2) Section 38, paragraph 39(a), sections 41 and 43, paragraph 44(d) and section 49 are taken to have commenced on the commencement of Part VII of the *National Health Act 1953*.
>
> (3) Section 40 is taken to have commenced on 1 July 1992.
>
> [There is no subclause (4).]
>
> (5) Sections 46 and 47 are taken to have commenced on 18 December 1990.

Clearly, subclauses 2(2), (3) and (5) would, if enacted, give varying degrees of retrospective operation to the substantive provisions concerned. Those provisions whose commencement is to be linked to the commencement of Part VII of the *National Health Act 1953*, for example, would be given retrospective operation to 12 May 1954. While the amendments in question would not appear to be proposing a change that would affect the substance of the law, neither the Explanatory Memorandum nor the Minister's Second Reading speech on the Bill provide any confirmation that this is the case. The Committee would, therefore, appreciate the Minister's advice as to the effect of the amendments referred to in subclause 2(2).

Pursuant to subclause 2(3), the amendments to the National Health Act which are proposed by clause 40 of the Bill would be given retrospective operation to 1 July 1992. However, as the Explanatory Memorandum indicates that the amendments would be beneficial to social security beneficiaries, the Committee makes no further comment on the subclause.

The proposed amendments to the National Health Act which are referred to in subclause 2(5) are to be given retrospective effect to 18 December 1990. The Explanatory Memorandum is of no assistance on this matter. It gives no information as to the need for the amendments to be retrospective or the relevance of the date nominated. Since the amendments in question do not appear to have any adverse effect on persons other than the Commonwealth, the Committee makes no further comment on the provisions. However, the Committee suggests that it would assist the Senate if the Explanatory Memorandum was more forthcoming on the question of the need for retrospectivity in this case.

Determinations to be given retrospective effect
Clauses 6, 7 and 9 - proposed new subsections 3D(2B), 3E(2B) and 61(4A) of the *Health Insurance Act 1973*

Section 3D of the *Health Insurance Act 1973* currently provides:

> 3D.(1) Where a medical practitioner domiciled in Australia:
>
> (a) who:
>
> (i) is a fellow of an organisation (in this subsection referred to as the **"relevant organisation"**) that is declared by the regulations to be a professional organisation in relation to a particular specialty (in this subsection referred to as the **"relevant specialty"**) for the purposes of this subsection; and
>
> (ii) has obtained, as a result of successfully completing an appropriate course of study, a qualification that is declared by the regulations to be a relevant qualification for the purposes of this subsection in relation to the relevant organisation; or
>
> (b) who is registered under a law of a State or Territory as a specialist in a particular specialty;

has paid the prescribed fee and applies in writing to the Minister for a determination by the Minister that the medical practitioner be recognised for the purposes of this Act as a specialist in the relevant specialty, the Minister shall:

(c) make such a determination in writing; or

(d) pursuant to subsection 61(1), refer to the Specialist Recognition Advisory Committee established for the State or Territory in which the medical practitioner is domiciled the question whether the medical practitioner should be so recognised.

(2) Where the Minister makes a determination under paragraph (1)(c) or refers a question to a specialist Recognition Advisory Committee as mentioned in paragraph (1)(d), the Minister shall notify the medical practitioner concerned, in writing, accordingly.

(3) A determination under paragraph (1)(c) ceases to have effect if the practitioner ceases to be domiciled in Australia or to practise medicine in Australia.

Clause 6 of the Bill proposes to insert new subclauses 3D(2A) and (2B), which provide:

(2A) A determination under paragraph (1)(c) has effect, or is taken to have had effect:

(a) on and from the day specified for the purpose by the Minister in the determination; or

(b) if no such day is specified - on and from the day on which the determination is made.

(2B) A day specified under paragraph (2A)(a) may be a day that occurred before the day on which the determination is made.

If enacted, these provisions would empower the Minister to make a determination

which could have retrospective effect. Though the Explanatory Memorandum does not address this aspect of the proposed amendments, it seems clear that any retrospective effect could only operate to the benefit of persons affected by a determination.

Similarly, section 3E of the Health Insurance Act currently provides:

> **Recognition as consultant physicians etc. of certain medical practitioners**
> 3E.(1) The Minister may make a determination in writing that a particular medical practitioner who is not domiciled in Australia should be recognised for the purposes of this Act for a specified period as a consultant physician, or as a specialist, in a particular specialty.
>
> (2) The Minister shall not make a determination under subsection (12) in relation to a medical practitioner except on application by the practitioner and on payment of the prescribed fee.
>
> (3) The Minister may at any time revoke a determination made in relation to a medical practitioner under subsection (1) by giving a notice in writing to that effect to the medical practitioner.

Clause 7 of the Bill proposes to insert new subsections (2A) and (2B), which provide:

> (2A) A determination under subsection (1) has effect, or is taken to have had effect:
> (a) on and from the day specified for the purpose by the Minister in the determination; or
> (b) if no such day is specified - on and from the day on which the determination is made.

> (2B) A day specified under paragraph (2A)(a) may be a day that occurred before the day on which the determination is made.

As with the proposed amendments discussed above, the effect of the proposed amendments would be to allow for determinations to have retrospective effect. However (though, as above, the Explanatory Memorandum does not address the point), as any retrospective effect would appear to only be able to operate to the benefit of a person affected by a determination, the Committee makes no further comment on the clause.

Similarly, clause 9 of the Bill proposes to amend section 61 of the Health Insurance Act to, among other things, allow the Minister to give retrospective effect to a determination made under that section in relation to a medical practitioner's recognition as a consultant physician or specialist. However, for the same reason given above (and in spite of the silence of the Explanatory Memorandum on this point), the Committee makes no further comment on the clause.

AD10/92

HONEY LEGISLATION (REPEAL AND AMENDMENT) BILL 1992

This Bill was introduced into the House of Representatives on 25 June 1992 by the Parliamentary Secretary to the Minister for Defence.

The Bill proposes to abolish the Australian Honey Board (AHB) (with effect from 1 January 1992), through the repeal of the *Honey Marketing Act 1988.* The Bill also proposes to make the necessary transitional arrangements to allow certain functions of the AHB to transfer from the umbrella of the Australian Horticultural Corporation.

The Committee has no comment on this Bill.

AD10/92

INCOME TAX ASSESSMENT AMENDMENT (FOREIGN INVESTMENT) BILL 1992

This Bill was introduced into the House of Representatives on 25 June 1992 by the Minister Assisting the Treasurer.

The Bill proposes to implement the third element of the Government's tax reform agenda in relation to the taxation of Foreign Source Income (FSI).

The FSI measures apply where Australian residents have substantial interests in Controlled Foreign Companies or have transferred property to certain foreign trusts for less than full value. The measures address the tax deferral problem that arises when those entities are used to shelter income from Australia tax by accumulating it in low-tax and tax-free jurisdictions. Such income is now taxed as it accrues.

The Foreign Investment Funds measures will not apply to income and gains accumulated in foreign companies that are not Australian controlled or foreign trusts that fall outside the scope of FSI measures. The measures will also apply to foreign life assurance policies that have an investment component, such as life bonds.

In addition, the Bill proposes to amend the existing trust provisions in Division 6 and 6AAA of the Principal Act in their application to non-resident trust income.

Retrospectivity
Clause 2

Clause 2 of the Bill provides:

> This Act is taken to have commenced on 1 July 1992.

If enacted, the clause would clearly give the substantive provisions of the Bill a degree of retrospective operation. However, the Committee notes that the degree of retrospectivity would be slight and that the measures in question have been foreshadowed (by virtue of the fact that the legislation was introduced prior to the proposed commencement date). Further, the Committee notes that, for practical reasons, the Senate has previously been prepared to accept a degree of retrospective operation in relation to taxation legislation, as is evident from the resolution of 8 November 1988 (see *Journals of the Senate,* No. 109, 8 November 1988, pp 1104-5). Accordingly, the Committee makes no further comment on the clause.

INDUSTRY, TECHNOLOGY AND COMMERCE LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the Senate on 25 June 1992 by the Minister for Industry, Technology and Commerce.

The Bill is an omnibus Bill dealing with legislation within the Industry, Technology and Commerce portfolio. The Bill proposes to amend the following Acts:

- the *Automotive Industry Authority Act 1985,* to change the termination date for the authority to 31 December 2000;

- the *National Measurement Act 1960,* to make various amendments in relation to certification and examinations; and

- the *Science and Industry Research Act 1949,* to give the Minister the power to determine the remuneration of the Chief Executive of the Commonwealth Scientific and Industrial Research Organisation.

The Committee has no comment on this Bill.

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 3) 1992

This Bill was introduced into the Senate on 25 June 1992 by the Minister for Justice.

The Bill proposes to make minor policy and technical amendments to legislation within the Attorney-General's portfolio.

The major amendments proposed are:

- to the *Administrative Appeals Tribunal Act 1975,* to require that persons affected by reviewable decisions be notified in writing of the decision and of their rights of review;

- to the *Freedom of Information Act 1982,* to amend the exemption provisions of that Act;

- to the *Judiciary Act 1903,* to allow the Attorney-General of the Australian Capital Territory to seek, as a right, removal of a cause involving a constitutional issue to the High Court, to provide legally qualified staff of the Attorney-General's Department with a clear statutory right to practice as a barrister, solicitor or barrister and solicitor in a Federal court or a court of a State or Territory and to confirm that Department's entitlement to charge clients for services;

- to the *Jurisdiction of Courts (Cross-Vesting) Act 1987,* to add to the definition of 'special federal matter' proceeding under the *Family Law Act 1975* for consent to step-parent adoption proceedings and to ensure that proceedings involving a special federal matter are only heard by State and Territory Courts in exceptional circumstances;

- to the *Racial Discrimination Act 1975*, to provide that where the Race Discrimination Commissioner decides not to inquire into a complaint, a review may be conducted by the President of the Human Rights and Equal Opportunity Commission;

- to the *Sex Discrimination Act 1984*, to provide access for insurance clients to the actuarial or statistical data on which sex discrimination in insurance policies is based. The amendments also propose to give the Human Rights and Equal Opportunity Commission a new power to grant exemptions from the requirement to supply such data and to provide that where the Sex Discrimination Commissioner decides not to inquire into a complaint, a review may be conducted by the President of the Human Rights and Equal Opportunity Commission; and

- to amend the *Statutory Declarations Act 1959*, to bring the penalties for a person who wilfully makes a false statement in a statutory declaration into line with current criminal law policy.

Prospective commencement
Subclauses 2(4) and (5)

Subclause 2(4) and (5) of the Bill provide:

> (4) Subject to subsection (5), the amendments of the *Jurisdiction of Courts (Cross-vesting) Act 1987* made by this Act commence on a day to be fixed by Proclamation.
>
> (5) If the amendments mentioned in subsection (4) do not commence under that subsection within the period of 12 months commencing on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.

The Committee notes that, in accordance with the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, subclause 2(5) proposes to, in effect, close the period within which a Proclamation pursuant to subclause (4) must be made. However, the Committee also notes that the 12 month period specified in this case is in excess of the 6 month period provided for in the Drafting Instruction.

By way of explanation, the Explanatory Memorandum states:

> Subclause 2(1) provides that the amendments of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* will not commence until a date fixed by proclamation. As the cross-vesting scheme is based on the enactment of complementary State and Federal legislation, a proclamation will not be made until reciprocal legislation has been enacted by the States and Territories. Subclause 2(5) provides for commencement after 12 months should a proclamation not be made within that time under subclause 2(4). This will allow time for the States and Territories to enact the necessary amendments to their legislation.

In the light of this explanation, the Committee makes no further comment on the subclauses.

Retrospectivity
Subclause 2(6)

Subclause 2(6) of the Bill provides:

> The amendment of the *Privacy Amendment Act 1990* made by this Act is taken to have commenced immediately after the commencement of section 18 of that Act.

If enacted, this provision would give the proposed amendment to the *Privacy Amendment Act 1990* which is set out in the Schedule to the Bill retrospective operation from 25 September 1991. However, as the Explanatory Memorandum makes it clear that the proposed amendment is intended to correct a drafting error, the Committee makes no further comment on the subclause.

AD10/92

NATIONAL HEALTH AND MEDICAL RESEARCH COUNCIL BILL 1992

This Bill was introduced into the House of Representatives on 25 June 1992 by the Minister for Health, Housing and Community Services.

The Bill proposes to establish the National Health and Medical Research Council (the NHMRC) as a body corporate. It outlines the role the NHMRC is to play in advising the Commonwealth, the States and Territories and the Australian community.

The Bill provides the NHMRC with functions that are designed to enable it to continue its existing role in providing advice, issuing guidelines and making recommendations in relation to the improvement of health, health and medical research, public health, health care and also health and medical ethics.

The Bill also:

- provides for the independence of the NHMRC;
- provides for accountability of the NHMRC to the public, Commonwealth and the States and Territories;
- requires the NHMRC to prepare triennial strategic plans to address health issues it sees as arising;
- provides for the appointment of members of the NHMRC and its Principal Committees to be appointed by the Minister; and
- provides for the staff and facilities for the NHMRC to be provided by the Department of Health, Housing and Community Services.

The Committee has no comment on this Bill.

AD10/92

NATIONAL PARKS AND WILDLIFE CONSERVATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 25 June 1992 by the Parliamentary Secretary to the Minister for Defence, representing the Minister for the Arts, Sport, the Environment and Territories.

The Bill proposes to amend certain provisions of the *National Parks and Wildlife Conservation Act 1975*, to ensure that the enforcement provisions of the Act are adequate for the purpose of protecting those marine reptiles, birds and mammals to which Part III of the National Parks and Wildlife Conservation Regulations applies. The effect of the proposed amendments can be summarised as follows:

- to establish a special category of wardens (to be known as wildlife inspectors) having the same powers as a warden but only in respect of those offences against the Regulations as specified in the instrument of appointment; and

- to extend the powers of wardens and wildlife inspectors with respect to:

  - the waters above the continental shelf and the Australian fishing zone; and
  - arrest, confiscation, forfeiture and retention of material relating to an offence, and search, pursuit, and obtaining of information.

The Committee has no comment on this Bill.

AD10/92

NORFOLK ISLAND (ELECTORAL AND JUDICIAL) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 25 June 1992 by the Minister for the Arts and Territories.

The Bill proposes to provide Australian citizens living on Norfolk Island the opportunity to vote in Federal elections. The proposal flows from the Government's response to a recommendation from the House of Representatives Legal and Constitutional Affairs Committee inquiry into the legal regimes of the External Territories.

The Legal and Constitutional Affairs Committee recommended that Australian citizens living on Norfolk Island be given the right of optional enrolment for the purposes of representation in the Australian Parliament. The Bill proposes to amend the *Commonwealth Electoral Act 1915,* in order to allow Norfolk Islanders who can establish a relevant connection with a State electoral subdivision to enrol in that subdivision. Those who cannot establish such a connection may enrol in a particular Territory division, currently the division of Canberra.

The Bill also proposes to make consequential amendments to the *Referendum (Machinery Provisions) Act 1984,* to allow those Norfolk Islanders who take up the option to enrol to participate in referendums as required by section 128 of the Constitution.

The Bill also proposes to amend the *Norfolk Island Act 1979,* to change the reference to 'travelling expenses', in section 56, to 'travelling allowances'.

The Committee has no comment on this Bill.

AD10/92

OILSEEDS LEVY AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 25 June 1992 by the Parliamentary Secretary to the Minister for Defence.

The Bill proposes to amend the *Oilseeds Levy Act 1985*, to allow the basis on which research levies are imposed on specific oilseeds to be changed from a flat rate per tonne to an *ad valorem* rate (ie in proportion to the estimated value of the goods). Levy revenue attracts matching Commonwealth contribution and is used to fund grain legumes research programs. This funding program is administered by the Grains Research and Development Corporation.

The Grains Council of Australia has recommended an initial operative levy rate of 1 per cent of the net farm gate value and a maximum rate of 3 per cent. This rate will apply uniformly to all leviable oilseeds produced in Australia, and will be payable when the oilseed is delivered for processing.

The Committee has no comment on this Bill.

AD10/92

PARLIAMENTARY PRESIDING OFFICERS AMENDMENT BILL 1992

This Bill was introduced into the Senate on 25 June 1992 by Senator Colston.

The Bill proposes to amend the *Parliamentary Presiding Officers Act 1965,* to take account of the change of title of the Deputy-President and Chairman of Committees of the Senate.

The Committee has no comment on this Bill.

SALES TAX (EXEMPTIONS AND CLASSIFICATIONS) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 25 June 1992 by the Minister Assisting the Treasurer.

The Bill proposes to remove the sales tax exemption for the following recycled paper products:

- books of paper;
- toilet and facial tissues; and
- paper bags.

The change will apply to any dealings with those goods that occur on or after 26 June 1992.

Retrospectivity
Subclause 2(1)

Subclause 2(1) of the Bill provides:

> Parts 1 and 2 are taken to have commenced on 26 June 1992.

Clearly, the effect of this provision (if enacted) would be to give the substantive amendments proposed by Part 2 of the Bill a retrospective effect. However, the Committee notes that, in this case, the retrospectivity is likely to be relatively slight and that it is only to operate from the date on which the Bill was introduced. Further, the Committee notes that, for practical reasons, the Senate has previously been prepared to accept a degree of retrospective operation in relation to taxation

legislation, as is evident from the resolution of 8 November 1988 (see *Journals of the Senate*, No. 109, 8 November 1988, pp 1104-5). Accordingly, the Committee makes no further comment on the clause.

AD10/92

TAXATION LAWS AMENDMENT BILL (NO. 4) 1992

This Bill was introduced into the House of Representatives on 25 June 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the income tax law by making changes in relation to the following:

- the Disability Support Pension;
- the Special Needs Support Pension;
- the Bereavement Payments;
- the Textile, Clothing and Footwear Special Allowance;

The Bill also proposes:

- to provide for concessional income tax treatment at an effective income tax rate of 10% on profits from offshore banking activities carried on in Australia;
- to clarify the operations of subsection 160M(6) and 160M(7) of the Principal Act in respect of Capital Gains Tax; and
- to reduce the late payment penalty and related penalties from 20% per annum to 16% per annum.

Retrospectivity
Clauses 10, 13 and 20

The Committee notes that, though clause 1 of the Bill provides that it is to commence on receiving the Royal Assent, various provisions of the Bill would give the Bill retrospective operation.

Clause 10 of the Bill provides that the amendments proposed by Division 2 of Part 2 of the Bill are to apply to 'payments derived on or after 1 July 1991'.

Clause 13(1) and (2), respectively, provide that the amendments proposed by clauses 11 and 13 are to apply in relation to payments derived on or after 13 December 1991 and 1 July 1991, respectively.

However, the Explanatory Memorandum makes it clear that the amendments in question are intended to bring relevant provisions of the *Income Tax Assessment Act 1936* into line with the recently re-drafted Social Security and Veterans' Entitlements legislation. The dates from which the proposed amendments in question are to operate relate to the commencement dates of the *Social Security Act 1991* and relevant provisions of the *Veterans' Entitlements Act 1986* (as amended by the *Veterans' Entitlements Amendment Act 1991*). Accordingly, the Committee makes no further comment on the clauses.

Clause 20 of the Bill provides that the amendment proposed by clause 19 is to apply to payments made on or after 26 September 1991. However, as the Explanatory Memorandum makes it clear that these amendments would be beneficial to taxpayers, the Committee makes no further comment on the clause.

TELECOMMUNICATIONS (INTERCEPTION - CARRIERS) ACT 1992

The Bill for this Act was introduced into the Senate on 24 June 1992 by the Minister for Transport and Communications.

The Act is intended to remedy a problem created with respect to the definition of 'carrier' appearing in the *Telecommunications (Interception) Act 1979*. The Act will have the effect of continuing in operation during the relevant period of the definition of 'carrier' and an associated term that were in force immediately prior to the relevant period, and applying the new definition of 'carrier' immediately after the relevant period.

This Bill was passed by the Senate on 24 June 1992 and by the House of Representatives on 25 June 1992. It received the Royal Assent on 9 July 1992.

General comment: Retrospectivity

The Committee notes that, though this Act is expressed to operate from Royal Assent, the various substantive provisions of the Act operate from dates as early as 30 June 1991. The Explanatory Memorandum indicated that the provisions in question relate to a drafting problem and are intended to ensure the continued legality of warrants for the interception of telecommunications. While the Committee has no reason to question what is contained in the Explanatory Memorandum, the Committee is concerned about the issues which this situation raises.

The interception of personal communications represents a serious invasion of personal privacy. A warrant to intercept such communications gives permission to interfere with that privacy. In the Committee's view, a warrant should only be given

when the proper procedures have been complied with and after the seriousness of the alleged suspected offence has been weighed against the need to protect the individual's right to privacy.

In relation to the amendments in question, the Committee is concerned that (as the Attorney-General's Second Reading speech states) warrants appear to have been issued and executed in circumstances where there are doubts about their validity. While the Committee notes that, according to the Attorney-General's Second Reading speech, this is merely a 'technical' defect, the Committee is concerned that the use of this terminology glosses over the fact that warrants which have authorised the invasion of privacy may have been invalidly issued.

SCRUTINY OF BILLS ALERT DIGEST

NO. 11 OF 1992

9 SEPTEMBER 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

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 such 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.

The Committee has considered the following Bills:

Abortion Funding Abolition Bill 1992

Appropriation Bill (No. 1) 1992-93

Appropriation Bill (No. 2) 1992-93

Appropriation (Parliamentary Departments) Bill 1992-93

Australian Centre for International Agricultural Research Amendment Bill 1992

* Australian Wine and Brandy Corporation Amendment Bill 1992

* Development Allowance Authority Amendment Bill 1992

Income Tax Assessment (Isolated Area Zone Extension) Amendment Bill 1992

Loan Bill 1992

* Migration Laws Amendment Bill 1992

National Road Transport Commission Amendment Bill 1992

* Occupational Superannuation Standards Regulations Application Bill 1992

Social Security Amendment Bill 1992

Supply Bill (No. 3) 1992-93

Supply Bill (No. 4) 1992-93

Swimming Pools Tax Refund Bill 1992

* The Committee has commented on these Bills

NOTE: This Digest is circulated to all Honourable Senators. Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

AD11/92

ABORTION FUNDING ABOLITION BILL 1992

This Bill was introduced into the House of Representatives on 20 August 1992 by Mr Webster as a Private Member's Bill.

The Bill proposes to remove the current entitlement to payment of a medicare benefit under the *Health Insurance Act 1973* in respect of certain medical services which result in an abortion. The Bill recognises, however, two situations where the entitlement to medicare benefit should be preserved. The first instance is where the procedure resulting in an abortion has been carried out to avert the death of the pregnant person concerned. The second instance is where the procedure resulting in the abortion has been carried out for a different purpose entirely and the medical practitioner does not know, and has no reasonable expectation, that an abortion would occur.

The Committee has no comment on this Bill.

APPROPRIATION BILL (NO. 1) 1992-93

This Bill was introduced into the House of Representatives on 18 August 1992 by the Treasurer.

The Bill proposes to appropriate amounts required for expenditure in 1992-93 from the Consolidated Revenue Fund for the ordinary annual services of the Government.

The Committee has no comment on this Bill.

APPROPRIATION BILL (NO. 2) 1992-93

This Bill was introduced into the House of Representatives on 18 August 1992 by the Minister for Finance.

The Bill proposes to appropriate amounts required for expenditure in 1992-93 from the Consolidated Revenue Fund for proposed expenditure on the construction of public works and buildings, the acquisition of sites and buildings, certain advances and loans, items of plant and capital. Provision is also made for grants to the States under section 96 of the Constitution and for payments to the Northern Territory and the Australian Capital Territory.

The Committee has no comment on this Bill.

APPROPRIATION (PARLIAMENTARY DEPARTMENTS) BILL 1992-93

This Bill was introduced into the House of Representatives on 18 August 1992 by the Minister for Finance.

The Bill proposes to appropriate certain sums out of the Consolidated Revenue Fund for certain expenditure in relation to the Parliamentary Departments in respect of the year ending on 30 June 1993.

The Committee has no comment on this Bill.

AD11/92

AUSTRALIAN CENTRE FOR INTERNATIONAL AGRICULTURAL RESEARCH AMENDMENT BILL 1992

This Bill was introduced into the Senate on 19 August 1992 by the Minister for Foreign Affairs and Trade.

The Bill proposes to amend the *Australian Centre for International Agricultural Research Act 1982*. The amendments will give effect to the government's decision to extend the life of the Australian Centre for International Agricultural Research, to broaden its mandate, to change the constitution and membership of its governing bodies and to address four administrative issues, which will further increase its efficiency.

The Committee has no comment on this Bill.

AUSTRALIAN WINE AND BRANDY CORPORATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 19 August 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the *Australian Wine and Brandy Corporation Act 1980,* to remove uncertainties about the enforcement of laws concerning truth in labelling of wine.

The Bill proposes to rectify some technical difficulties (relating to requirements for manufacturers to keep records to support labelling claims of the vintage and region of wine), which are likely to impair the enforcement of the legislation.

General comment

The Committee notes with approval that proposed new subparagraph 39ZG(1)(c)(ii) and proposed new paragraph 39ZF(4)(d) of the *Australian Wine and Brandy Corporation Act 1980* (to be inserted by clause 5 and the Schedule to the Bill, respectively) are made in response to comments made by the Committee in *Alert Digest* No 15 of 1989 and in pursuance of commitments given by the (then) Minister for Primary Industries and Energy which were referred to in the Committee's *Nineteenth Report of 1989.*

In the case of proposed new subparagraph 39ZG(1)(c)(ii), the amendment would allow a person who has documents seized under section 39ZG of the Australian Wine and Brandy Corporation Act to make copies of the documents. This is in keeping with the Committee's observation that, in some circumstances, the documents seized may be vital to a person's on-going business operations.

In the case of proposed new paragraph 39ZF(4)(d), the amendment would decrease the period during which an offence-related warrant issued pursuant to section 39ZF of the Australian Wine and Brandy Corporation Act would be valid from one month to 7 days. This is in keeping with the Committee's observation that, given the potential that such warrants provide for intrusion into personal privacy, their life-span should be limited.

The Committee thanks the Minister for proposing these amendments.

AD11/92

DEVELOPMENT ALLOWANCE AUTHORITY AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 20 August 1992 by the Parliamentary Secretary to the Prime Minister.

The Bill proposes to amend the *Development Allowance Authority Act 1992*, to increase the flexibility of the legislation to ensure that a more consistent approach is available to the various types of prospective applicant for the development allowance. The amendments provide flexibility for claiming the development allowance authority and, in particular, in passing the $50 million threshold.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that, with the exceptions of clauses 1, 2 and 37, the Bill is to commence 'immediately after the commencement of the *Development Allowance Authority Act 1992*'. That Act (which is the Principal Act in this instance) commenced on 30 June 1992.

While the Bill, if enacted, would have a retrospective operation, the Committee notes that, clearly, the degree of retrospectivity would be relatively slight. Further, the Committee notes that the Minister's Second Reading speech on the Bill indicates that the amendments are either beneficial to individuals or 'neutral' in character. However, the Committee also notes that the Principal Act is being amended within 4 months of being passed. The Committee would, therefore, appreciate the Minister's advice as to why amendments are required so soon after passage of the Principal Act.

AD11/92

INCOME TAX ASSESSMENT (ISOLATED AREA ZONE EXTENSION) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 20 August 1992 by Mr Filing as a Private Member's Bill.

The Bill proposes to provide for Zones A and B of the *Income Tax Assessment Act 1936* to be extended to include adjacent waters as defined in the *Petroleum (Submerged Lands) Act 1967.*

The Committee has no comment on this Bill.

LOAN BILL 1992

This Bill was introduced into the House of Representatives on 18 August 1992 by the Minister for Finance.

The Bill proposes to make provision for the financing of a prospective deficit in the Consolidated Revenue Fund.

Legally payments from the Consolidated Revenue Fund cannot exceed moneys available to that Fund. In order to meet any prospective deficit in the Consolidated Revenue Fund, it is customary to seek legislative authority to charge defence expenditure and other Consolidated Revenue Funds expenditure to, or reimburse the Consolidated Revenue Fund from, the Loan Fund.

The Committee has no comment on this Bill.

MIGRATION LAWS AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 19 August 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to establish a legislative scheme to enhance the delivery of annual migration programs. The proposed scheme will provide the Minister with a flexible power to publish in the *Gazette* an upper limit or cap on the number of visas in a specified class. The Bill will provide that certain classes in the Preferential Family category will not be affected.

The Bill also corrects a minor technical error in the *Migration Amendment Act (No. 2) 1991*

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that Part 3 of the Bill is to commence 'immediately after the commencement of the *Migration Amendment Act (No. 2) 1992*'. That Act commenced on 15 January 1992. While the clause would, therefore, give the amendment proposed by Part 3 a degree of retrospective operation, the Committee notes that it is merely intended to correct a drafting error. Accordingly, the Committee makes no further comment on the provisions.

Ministerial determinations not subject to parliamentary scrutiny
Clause 6 - proposed new section 28A of the *Migration Act 1958*

Clause 6 of the Bill proposes to insert a new Subdivision AA into Division 2 of Part 2 of the *Migration Act 1958*. That proposed new subdivision includes a

proposed new section 28A, which provides:

> **Limit on visas**
> 28A. The Minister may, by notice in the *Gazette*, determine the maximum number of:
> (a) the visas of a specified class; or
> (b) the visas of specified classes;
> that may be granted in a specified financial year.

The Committee notes that there would be no requirement to table a determination pursuant to this proposed new section in the Parliament and that, further, there would be no scope for the Parliament to scrutinise such a determination. In the circumstances, it may be considered that determinations under the proposed new section should be subject to tabling in and disallowance by each House of the Parliament.

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.

AD11/92

NATIONAL ROAD TRANSPORT COMMISSION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 19 August 1992 by the Minister for Land Transport.

The Bill proposes to amend the *National Road Transport Commission Act 1991*, to give effect to the Light Vehicles Agreement formulated at the Heads of Government meeting on 11 May 1992. The agreement involves a regime for vehicles weighing 4.5 tonnes or less, their drivers, other road users and related matters. This regime will expand the powers and functions of the National Road Transport Commission to include regulation of all motorised vehicles and not just those vehicles weighing more than 4.5 tonnes. In addition, the Commission will exercise responsibility for the development of policies in relation to light vehicles, excluding the determination of charges.

The Committee has no comment on this Bill.

OCCUPATIONAL SUPERANNUATION STANDARDS REGULATIONS APPLICATION BILL 1992

This Bill was introduced into the House of Representatives on 19 August 1992 by the Minister for Small Business, Construction and Customs.

The Bill proposes to effect a commencement date for the Occupational Superannuation Standards Regulations (Amendments) Statutory Rules 1992 No. 223 of 1 July 1992.

Due to the introduction by the Government of the superannuation guarantee arrangements, it was necessary to make arrangements to the Occupational Superannuation Standards Regulations. These amendments were gazetted on 1 July 1992, to reflect the Superannuation Guarantee arrangements.

Retrospectivity
Clause 3

The Committee notes that, although the Bill is not expressed to commence until it receives the Royal Assent, clause 3 of the Bill provides:

> Effect of certain regulations made under the *Occupational Superannuation Standards Act 1987*
> 3. Regulations made under the *Occupational Superannuation Standards Act 1987* on 30 June 1992 (Statutory Rules 1992 No. 223):
> (a) have the same effect; and
> (b) are taken always to have had the same effect;
> as they would have had if the *Superannuation Guarantee (Administration) Act 1992* had received the Royal Assent before those regulations were made.

The Committee notes that the effect of this clause, if enacted, would be to give those regulations a slight degree of retrospective effect. The Committee also notes that, by way of explanation for the proposed amendment, the Explanatory Memorandum to the Bill states:

> Due to a clerical error in the Department of the Senate the Superannuation Guarantee (Administration) Bill was not passed by both Houses of Parliament in identical form and, as a result of this, Royal Assent to the Bill was not sought.
>
> On 30 June 1992, consideration was given as to whether the amendments to the Regulations to reflect the superannuation guarantee arrangements could proceed and legal advice, at the time, was that they could.
>
> Subsequent legal advice, after the Regulations had been signed and gazetted, raised doubts as to the validity of the Regulations.

While the Committee believes that this appears to be a reasonable explanation, the Committee would, nevertheless, appreciate the Minister's advice as to whether any person or persons other than the Commonwealth are likely to be prejudicially affected by the proposed amendment being given retrospective effect.

AD11/92

SOCIAL SECURITY AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 20 August 1992 by the Minister for Social Security.

The Bill proposes to amend the *Social Security Act 1991,* to give effect to a number of measures announced in the 1992-93 Budget concerning the education-leavers waiting period.

The Committee has no comment on this Bill.

SUPPLY BILL (NO. 3) 1992-93

This Bill was introduced into the House of Representatives on 18 August 1992 by the Minister for Finance.

The Bill proposes to make interim provision for the appropriation of money out of the Consolidated Revenue Fund, additional to the money appropriated by the *Supply Act (No. 1) 1992-93,* for certain expenditure in respect of the year ending on 30 June 1993, and for related purposes.

The Committee has no comment on this Bill.

SUPPLY BILL (NO. 4) 1992-93

This Bill was introduced into the House of Representatives on 18 August 1992 by the Minister for Finance.

The Bill proposes to make interim provision for the appropriation of money out of the Consolidated Revenue Fund, additional to the money appropriated by the *Supply Act (No. 2) 1992-93,* for certain expenditure in respect of the year ending on 30 June 1993, and for related purposes.

The Committee has no comment on this Bill.

AD11/92

SWIMMING POOLS TAX REFUND BILL 1992

This Bill was introduced into the House of Representatives on 18 August 1992 by the Minister for Finance.

The Bill proposes to ensure that, following the decision in the High Court in *Mutual Pool & Staff Pty Ltd v Federal Commission for Taxation* ((1992) 104 ALR 545), any refund of amounts paid to the Commonwealth as sales tax on swimming pools constructed *in situ* are passed on to pool purchasers.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 12 OF 1992

16 SEPTEMBER 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

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 such 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.

The Committee has considered the following Bills:

Australian Industry Development Corporation Amendment Bill 1992

Census and Statistics (Alcohol and Tobacco Statistics) Amendment Bill 1992

Pipeline Authority Amendment Bill 1992

Reserve Bank Amendment Bill 1992

* Service and Execution of Process Bill 1992

Service and Execution of Process (Transitional Provisions and Consequential Amendments) Bill 1992

Social Security Amendment Bill (No. 2) 1992

* The Committee has commented on this Bill

AD12/92

AUSTRALIAN INDUSTRY DEVELOPMENT CORPORATION AMENDMENT BILL 1992

This Bill was introduced into the Senate on 10 September 1992 by the Minister for Industry, Technology and Commerce.

The Bill proposes to amend the *Australian Industry Development Corporation Act 1970*, to extend the Commonwealth Guarantee until 30 June 1998, to clarify issues relating to the Australian Industry Development Corporation's (AIDC's) trading powers and to reduce the size of the AIDC Board. These changes will facilitate the smooth operations of the AIDC in the financial markets, and will reflect the diminished level of activity conducted by the AIDC since the transfer of the bulk of the AIDC's business to its subsidiary, AIDC Ltd, on 1 July 1989.

The Committee has no comment on this Bill.

AD12/92

CENSUS AND STATISTICS (ALCOHOL AND TOBACCO STATISTICS) AMENDMENT BILL 1992

This Bill was tabled in the Senate on 10 September 1992 by Senator Bell as a Private Senator's Bill.

The Bill proposes to amend the *Census and Statistics Act 1905,* to exclude tobacco and alcohol from the basket of goods used to calculate the Consumer Price Index (CPI). It is intended that, as a result, the Government would not be discouraged from increasing the excise on alcohol and tobacco in order to divert funds into improving community health because of the inflationary consequences of any increase in excise.

The Committee has no comment on this Bill.

PIPELINE AUTHORITY AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 9 September 1992 by the Minister for Resources.

The Bill proposes the amend the *Pipeline Authority Act 1973,* to enable the re-organisation of the business of the Pipeline Authority. The re-organisation will take effect on a particular day when part of the business of the Pipeline Authority, and related assets (principally the Canberra and Oberon gas pipelines) are transferred to a nominated wholly-owned subsidiary of the Pipeline Authority. The subsidiary will then own and operate those pipelines and undertake other pipeline related functions on a commercial basis, leaving the Pipeline Authority to own and operate the Moomba-Sydney pipeline system.

The Committee has no comment on this Bill.

AD12/92

RESERVE BANK AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 10 September 1992 by Mr Scholes as a Private Member's Bill.

The Bill proposes to change the arrangement by which the final determination of the design of the Australian note issue is approved. The effect of this Bill would be to allow either House of the Parliament to disallow a note design with which that House disagreed. However, it leaves the initiative and the responsibility for the production of design with the Reserve Bank.

The Committee has no comment on this Bill.

SERVICE AND EXECUTION OF PROCESS BILL 1992

This Bill was introduced into the Senate on 10 September 1992 by the Minister for Justice.

The Bill proposes to replace the *Service and Execution of Process Act 1901* (SEPA), which is to be repealed by the Service and Execution of Process (Transitional Provisions and Consequential Amendments) Bill 1992.

The SEPA currently provides for interstate service of court process, the enforcement of court judgments and the execution of warrants. The Bill proposes to alter the existing regime to take account of legal and technological developments.

The Bill is largely based on recommendations of the Australian Law Reform Commission, in its report entitled *Service and Execution of Process*. It provides for:

- interstate service of process of courts and of tribunals exercising adjudicative functions;
- interstate service of subpoenas issued by courts and tribunals;
- interstate enforcement of civil judgments of courts and of tribunals exercising adjudicative functions; and
- interstate execution of warrants.

The Bill is similar to a Bill of the same name introduced into the House of Representatives on 5 March 1992 (and dealt with by the Committee in Alert Digest No. 3 of 1992). That Bill has been the subject of comments from State and Territory agencies and from other persons and bodies. Those comments have resulted in a decision to amend the original Bill. In turn, it has been decided that

it is simpler to introduce a new Bill, incorporating the amendments, than to amend the original Bill.

Clause 100
Strict liability offence / reversal of the onus of proof

Clause 103 of the Bill provides:

> **Disobedience of suppression orders**
> 103.(1) A person must not fail or refuse to comply with a suppression order.
> Penalty: Imprisonment for 12 months.
>
> (2) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that:
> (a) he or she did not know of the existence of the suppression order; and
> (b) he or she had made all reasonable inquiries in the circumstances regarding the existence of a suppression order.
>
> (3) A publishing organisation, or an employee or agent of a publishing organisation, is taken not to have made all reasonable inquiries regarding the existence of a suppression order if the organisation, or the employee or agent, as the case requires, has not made inquiries of the magistrate or Court in which the relevant proceedings are being, or were, heard as to whether a suppression order has been made in relation to the proceedings.

The Committee notes that this clause is identical to clause 103 of the original Bill, about which the Committee made the following comment in Alert Digest No. 3 of 1992:

> This provision, in effect, creates a strict liability offence, the defence to which is also set out in the provision. The onus of proving that defence would lie with the person charged.

This may be regarded as a reversal of the onus of proof, as it would ordinarily be incumbent on the prosecution to prove all the elements of an offence. However, the Committee accepts that in the situation dealt with by the provision, the matters to be proved in establishing the defence would be peculiarly within the knowledge of the defendant. Accordingly, the Committee makes no further comment on the provision.

The Committee makes no further comment on the clause.

General comment

Clause 83 of the Bill deals with the procedures that are to be followed after a person has been apprehended. It provides:

> **Procedures after apprehension**
> 83.(1) As soon as practicable after being apprehended, the person is to be taken before a magistrate of the State in which the person was apprehended.
>
> (2) The warrant or a copy of the warrant must be produced to the magistrate if it is available.
>
> (3) If the warrant or a copy of the warrant is not produced, the magistrate may:
> (a) order that the person be released; or
> (b) adjourn the proceeding for such reasonable time as the magistrate specifies and remand the person on bail or in such custody as the magistrate specifies.
>
> (4) If the warrant or a copy of the warrant is not produced when the proceeding resumes, the magistrate may:
> (a) order that the person be released; or
> (b) if reasonable cause is shown, adjourn the proceeding for such further reasonable time as the magistrate specifies and remand the person on bail

or in such custody as the magistrate specifies.

(5) The total time of the adjournments referred to in paragraphs (3)(b) and (4)(b) must not exceed 5 days.

(6) The magistrate may resume the proceeding at any time before the end of a period of adjournment if the warrant or a copy of the warrant becomes available.

(7) If the warrant or a copy of the warrant is not produced when the proceeding resumes after the further adjournment, the magistrate must order that the person be released.

(8) Subject to subsections (10) and (14) and section 84, if the warrant or a copy of the warrant is produced, the magistrate must order:

(a) that the person be remanded on bail on condition that the person appear at such time and place in the place of issue of the warrant as the magistrate specifies; or

(b) that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant.

(9) The order may be subject to other specified conditions.

(10) The magistrate must order that the person be released if the magistrate is satisfied that the warrant is invalid.

(11) The magistrate may suspend an order made under paragraph (8)(b) for a specified period.

(12) On suspending the order, the magistrate must order that the person be remanded:

(a) on bail; or

(b) in such custody as the magistrate specified;

until the end of that period.

(13) An order of a magistrate under this section may be executed according to its tenor.

(14) For the purposes of a proceeding under this section:

(a) the magistrate may adjourn the proceeding and remand the person on bail, or in such custody as the magistrate specifies, for the adjournment; and

(b) the magistrate is not bound by the rules of evidence; and

(c) it is not necessary that a magistrate before whom the proceeding was previously conducted continue to conduct the proceeding.

(15) Nothing in this section affects the operation of Part IC of the *Crimes Act 1914.*

The Committee notes that this clause is similar to section 19Z of the *Service and Execution of Process Act 1901,* which was inserted by section 5 of the *Service and Execution of Process Amendment Act 1991.* The Committee dealt with the Bill for the latter Act in Alert Digest No. 9 of 1991, in which it commented on the provision in question. In particular, the Committee commented on the possibility of a person being held in custody for up to (in that case) 7 days without the relevant warrant being produced. The Committee suggested that 7 days might be considered an excessive period of time for a person to be held in such circumstances.

In its Eleventh Report of 1991, the Committee noted that it had received a response from the Attorney-General on the Bill. In that response, the Attorney-General agreed to consult with the States and Territories to see whether a shorter period might be practical. The Committee is, therefore, pleased to note that in the Bill now before the Parliament, a limit of 5 days is prescribed.

The Committee makes no further comment on the Bill.

AD12/92

SERVICE AND EXECUTION OF PROCESS (TRANSITIONAL PROVISION AND CONSEQUENTIAL AMENDMENTS) BILL 1992

This Bill was introduced into the Senate on 10 September 1992 by the Minister for Justice.

The Bill proposes:

- to repeal the *Service and Execution of Process Act 1901* (SEPA);
- to continue the application of relevant provisions of SEPA, where action has been taken under SEPA before the commencement of the Bill; and
- amends a number of acts in consequence of the repeal of SEPA.

The Committee has no comment on this Bill.

AD12/92

SOCIAL SECURITY AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 9 September 1992 by the Minister for Family Support.

The Bill proposes to amend the *Social Security Act 1991*, to give effect to a measure announced in the 1992-93 Budget.

Under the amendments proposed by the Bill, from 1 January 1993, a person may choose to claim a portion of his or her family payment (currently known as family allowance) as a lump sum advance for up to six months. This amount will consist of half the amount of the base rate of family payment (known as the first child maximum basic rate). The remainder of the person's family payment would continue to be paid in fortnightly instalments.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 13 OF 1992

7 OCTOBER 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

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 such 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.

The Committee has considered the following Bills:

* *Coal Industry Legislation Amendment Bill 1992*

Crimes Legislation Amendment Bill 1992

Health and Community Services Legislation Amendment Bill (No. 2) 1992

Income Tax (International Agreements) Amendment Bill 1992

* *National Crime Authority Amendment Bill (No. 2) 1992*

Parliamentary Privileges Amendment Bill 1992

Regulation of Video Material Bill 1992

Taxation Laws Amendment (Fringe Benefits Tax Measures) Bill 1992

Tax Legislation Amendment Bill 1992

* The Committee has commented on these Bills

COAL INDUSTRY LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the Senate on 17 September by the Minister for Industrial Relations.

The Bill, together with complementary legislation to be introduced in the New South Wales Parliament, will enable the rationalisation of arrangements for providing administrative support to the Coal Industry Tribunal and Local Coal Authorities established by the Tribunal. The Bill also proposes to amend the *Coal Industry Act 1946* and the *Industrial Relations Act 1988,* to transfer the function of providing administrative support for the Coal Industry Tribunal and Local Coal Authorities from the Joint Coal Board to the Industry Registry.

Commencement by Proclamation
Clause 2

Clause 2 of the Bill provides:

> *Commencement*
> 2.(1) Sections 1 and 2 commence on the day on which this Act receives the Royal Assent.
>
> (2) Subject to subsection (3), section 3 commences on a day to be fixed by Proclamation.
>
> (3) If section 3 does not commence within the period of 12 months beginning on the day on which this Act receives the Royal Assent, section 3 is repealed on the first day after the end of that period.
>
> (4) Subject to subsection (5), section 4 commences on a day to be fixed by Proclamation.

> (5) If section 4 does not commence within the period of 12 months beginning on the day on which this Act receives the Royal Assent, section 4 is repealed on the first day after the end of that period.

Clause 3 of the Bill (if enacted) gives effect to the substantive amendments set out in Schedule 1 of the Bill. Clause 4 (if enacted) gives effect to the substantive amendments set out in Schedule 2 of the Bill.

The Committee notes that, while the commencement by Proclamation arrangements set out in subclauses 2(2) and (4) are expressly limited by subclauses 2(3) and (5), respectively, the time period set is longer than the period prescribed as a 'general rule' in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. However, the Committee notes that the Explanatory Memorandum to the Bill states:

> Clause 3, which provides for the transfer of the administrative support function from the Joint Coal Board to the Industrial Registry, cannot come into effect until complementary legislation has been enacted by the New South Wales Parliament. Subclause 2(3) provides that if clause 3 has not been proclaimed within 12 months of the date of Royal Assent, the section is automatically repealed on the first day after the end of that 12 month period.
>
> Those provisions dealing with changes to the audit and reporting requirements that must be met by Joint Coal Board are also dependent on the passage of complementary State legislation. Subclause 2(4) provides that clause 4 is to come into effect, if at all, on a date to be set by proclamation. If clause 4 has not been proclaimed within 12 months of the Act receiving Royal Assent, the section is automatically repealed on the first day after the end of that 12 month period.

The Committee notes with approval that both the inclusion and the substance of this explanation is in accordance with Office of Parliamentary Counsel Drafting

Instruction No. 2 of 1989. In addition, the Committee notes that this is a good example of the usefulness of a properly-drafted Explanatory Memorandum as a means of explaining matters which might otherwise cause the Committee concern. The Committee makes no further comment on the clause.

AD13/92

CRIMES LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the Senate on 16 September 1992 by the Minister for Justice.

The Bill proposes to amend certain Acts in relation to criminal and law enforcement matters, and for related purposes. The major amendments are:

- amendments to the *Cash Transaction Reports Act 1988*, to clarify the definition of 'account' in the Act and to streamline the processes of identity verification, as recommended by the Ministerial Advisory Committee;
- amendments to the *Crimes Act 1914*, to provide a penalty system, as recommended by the Review of Commonwealth Criminal Law (the Gibbs Committee), to allow penalties to reflect variations in current money values by a single legislative amendment to the Crimes Act;
- the creation (in Part 3 of the Bill) of an offence of piracy and related offences;
- amendments to the *Proceeds of Crimes Act 1987*, to extend the definition of 'proceeds of crime' to pick up profits from foreign offences which are not narcotics offences, such as security offences or the proceeds of kidnapping;
- amendments to the *Australian Federal Police Act 1979*, to enable charges under Australian Capital Territory law to be laid where an Australian Federal Police member is obstructed or assaulted when engaged in community policing in the ACT. There are other minor amendments to this Act.

There are also a number of minor amendments to the following Acts:

- *Crimes (Aviation) Act 1991;*
- *Crimes (Biological Weapons) Act 1976;*
- *Crimes (Superannuation Benefits) Act 1989;*
- *Customs Act 1901;*
- *Director of Public Prosecutions Act 1983;* and
- *Public Order (Protection of Persons and Property) Act 1971.*

The Committee has no comment on this Bill.

AD13/92

HEALTH AND COMMUNITY SERVICES LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 16 September by the Minister for Higher Education and Employment for the Minister for Aged, Family and Health Services.

The Bill proposes to amend a number of Acts, namely:

- the *Aged and Disabled Persons Care Act 1954*, to increase equity with regard to hostel subsidies by providing higher subsidies for financially disadvantaged persons;
- the *Health Insurance Act 1973*, to close a loophole which would enable a child, in respect of whom family allowance is not being paid because of the income or assets test, to be declared a disadvantaged person and thus be issued with a Health Care Card and receive pharmaceutical benefits at the concessional rate of patient contribution;
- the *National Health Act 1953*, to introduce a system of Approvals in Principle for recurrent funding when a nursing home is built or rebuilt. The aim is to improve the quality of nursing home buildings, and hence to improve the quality of care. There are also a number of other amendments to this Act.

The Committee has no comment on this Bill.

AD13/92

INCOME TAX (INTERNATIONAL AGREEMENTS) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 16 September 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the *Income Tax (International Agreements) Act 1953*, to give the force of law in Australia to three comprehensive agreements for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. The respective agreements cover the various forms of income flows between Australia and Indonesia, Australia and Vietnam and Australia and Spain.

The Committee has no comment on this Bill.

NATIONAL CRIME AUTHORITY AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 16 September 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to amend the *National Crime Authority Act 1984* to:

- establish an office of Inspector-General of the National Crime Authority (NCA) to investigate complaints against the NCA or its staff;
- provide a review process in relation to a decision by the NCA that particular information should not be made available to the Parliamentary Joint Committee (PJC) on the NCA by reasons of its sensitivity;
- provide the PJC with access to all information held by the NCA which is not sensitive;
- repeal subsections 12(4) and (5) of the National Crime Authority Act; and
- provide that a prohibition on disclosure relating to NCA process under section 29A (while it remains in force) overrides any contrary requirement under the *Privacy Act 1988.*

Abrogation of the privilege against self-incrimination
Clause 10 - proposed new section 55AR of the *National Crime Authority Act 1984*

Clause 10 of the Bill proposes to insert a new Part IIIA into the *National Crime Authority Act 1984.* That proposed new Part, if enacted, would establish the office of Inspector-General of the National Crime Authority. It includes a proposed new section 55A, which provides:

Liability under another law in relation to the giving of information etc.

55AR.(1) A person is not excused from giving any information or producing a document under section 55AN, or answering a question under section 55AO, on the ground that the giving of the information, the production of the document or the answering of the question:

(a) would contravene a law of the Commonwealth or a State; or

(b) would be contrary to the public interest; or

(c) might tend to incriminate the person; or

(d) *might make the person liable to a* penalty; or

(e) would disclose legal advice given to a Minister, a Department or an authority of the Commonwealth.

(2) In spite of subsection (1):

(a) the giving of the information, the production of the document, or the answering of the question; or

(b) any information, document or thing *obtained as a direct or indirect* consequence of doing the things mentioned in paragraph (a);

is not admissible in evidence against the person in any criminal proceedings other than proceedings under, or arising out of, subsection 55AQ(4).

(3) A person is not liable to any penalty under any law of the Commonwealth or a State only because the person has given information, produced a document or answered a question when required to do *so under section 55AN or 55AO.*

The Committee notes that proposed new subsection 55AR(1) is what it would generally consider to be an abrogation of the privilege against self-incrimination. However, the Committee also notes that, with the inclusion of proposed new subsection 55AR(2), which would limit the use of information obtained pursuant

to proposed new subsection 55AR(1), the provision is in a form which the Committee has previously been prepared to accept.

The Committee makes no further comment on the clause.

General comment

The Committee has a general concern about the scope of the powers which are to be given to the Inspector-General of the National Crime Authority under this Bill. It is the Committee's perception that the sorts of powers in question are being given to an increasing number of persons and bodies.

New section 55AN, if enacted, would allow the Inspector-General to require 'a person' to give information or produce documents if the Inspector-General 'has reasonable ground for believing that [the] person has the possession or control of any information or document ... that are relevant to a matter being inquired into by the Inspector-General'. Similarly, new section 55AO, if enacted, would allow the Inspector-General to require a person to attend before him or her to answer questions if the Inspector-General has reasonable ground for believing that the person has information relevant to an inquiry.

While the Committee accepts that, under proposed new section 55AD, these 'inquiries' would be limited to either complaints against the National Crime Authority, its members and its staff (proposed new paragraph 55AD(1)(a)) or inquiries into whether or not information is 'sensitive information' (paragraph 55AD(1)(b)), the Committee is, nevertheless, concerned that the powers of the Inspector-General are not otherwise limited. In particular, the Committee notes that what information is 'relevant' to an inquiry and who might 'reasonably' hold it is a matter entirely within the discretion of the Inspector-General. The Committee would appreciate the Attorney-General's views on the need for these wide powers and on whether or not they might be further limited.

AD13/92

PARLIAMENTARY PRIVILEGES AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 17 September 1992 by Mr Kerr as a Private Member's Bill.

The Bill proposes to amend section 16 of the *Parliamentary Privileges Act 1987* in relation to the examination of witnesses in court or other proceedings. The amendment would apply where a person gives evidence against another person in a court or in another tribunal. If the person giving the evidence has previously made a statement in evidence to a House of the Parliament or to a Parliamentary committee and the statement is not consistent with the person's evidence to the court or tribunal, the person's credibility may be tested by questioning in the court or tribunal as to the statement he or she made to the House or committee.

The Committee has no comment on this Bill.

AD13/92

REGULATION OF VIDEO MATERIAL BILL 1992

This Draft Bill was tabled in the Senate on 17 September 1992 by Senator Walters as a Private Senator's Bill.

The purpose of the Bill is twofold. It is:

1. to reduce the violence in "M" and "R" rated videos;

2. to prohibit the importation, sale or hire of "X" rated videos.

The Committee has no comment on this Draft Bill.

AD13/92

TAXATION LAWS AMENDMENT (FRINGE BENEFITS TAX MEASURES) BILL 1992

This Bill was introduced into the House of Representatives on 16 September 1992 by the Treasurer.

The Bill proposes to amend the *Fringe Benefits Tax Assessment Act 1986,* to provide for the calculation of Fringe Benefits Tax payable by using a tax-inclusive value of the fringe benefits (known as the 'grouping up method'). The Bill also proposes to amend the *Income Tax Assessment Act 1936,* to allow Fringe Benefits Tax to be deductible for income tax purposes and to implement associated measures.

The Committee has no comment on this Bill.

AD13/92

TAX LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 16 September 1992 by the Treasurer.

The Bill proposes to amend the *Income Tax Rates Act 1986,* to set the rates of tax payable by both residents and non residents for the 1994/95 and subsequent income years.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 14 OF 1992

14 OCTOBER 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

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 such 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.

The Committee has considered the following Bills:

* Customs Tariff Amendment Bill (No. 2) 1992

Overseas Students Charge Amendment Bill 1992

States Grants (General Purposes) Bill 1992

* Student Assistance Amendment Bill 1992

World Heritage Properties Conservation (Protection of Exit Cave, Tasmania) Amendment Bill 1992

* The Committee has commented on these Bills

NOTE: This Digest is circulated to all Honourable Senators. Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

CUSTOMS TARIFF AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 7 October 1992 by the Minister for Small Business, Construction and Customs.

The Bill proposes to enact a range of amendments to the *Customs Tariff Act 1987*, including:

- an amendment to section 26 of the Act, to allow Consumer Price Index adjustments to be applied to beer, certain spirituous liquors and tobacco and petroleum products;
- an amendment to correct anomalies created upon Australia's accession to the Harmonized Tariff (which refers to the legislative adoption by Australia [through the *Customs Tariff Act 1987*] of the International Convention on the Harmonized Commodity Description and Coding System, approved by the Customs Cooperation Council in Brussels on 14 June 1983. It establishes a nomenclature in relation to all commodities for all persons and is intended to both facilitate international trade and the collection, comparison and analysis of international trade statistics.) The amendment would provide a free rate of duty for aquarium aerators, transmission shafts and cranks for outboard motors and master recording blanks;
- an amendment to correct an anomaly caused by the implementation of the concessional tariff provisions of the Florence Agreement on 1 July 1991. The change would provide a free rate of duty in relation to instructional books for certain games;
- an amendment to reduce the customs duty on aviation gasoline by 1 cent per litre. The decrease in duty begins the phasing out of the collection of that part of the duty on aviation gasoline

attributable to the aerodrome cost recovery program;

- amendments which put in place Government initiatives to assist footwear manufacturers. The changes remove quota restrictions from certain parts of footwear and introduce a new 10% duty for the subject goods. These changes are accompanied by the accelerated phasing-out of preference for goods from Hong Kong, the Republic of Korea, Singapore and Taiwan Province;
- amendments which extend the quota restrictions on certain types of cheese. Administrative changes have been made to the duty free importation of pick-ups and utilities in excess of 30 years of age and to components for passenger motor vehicles;
- amendments intended to assist food packaging and food processing industries. The proposed changes will provide new duty free concessions to allow processors to import the latest overseas technology for use in these industries;
- amendments to increase the duty on certain tobacco products by $5.00 per kilogram, as announced by the Treasurer in his Budget Speech. The duty on aviation gasoline is also further reduced by 1.1 cents per litre. This results from the phasing out of the collection of that part of the customs duty attributable to the aerodrome cost recovery program and reductions in Civil Aviation Authority costs of providing rescue and fire fighting services at airports;
- amendments to abolish quota arrangements for textile, clothing and footwear goods from 1 March 1993. Goods previously subject to quota will be subject to *ad valorem* rates of duty. Concessional treatment of industrial crafts will also be abolished from 1 March 1993;
- an amendment to give effect to the Government's Overseas Assembly Provisions Scheme. This scheme will allow designated manufacturers to export Australian-made textile parts and to re-import the exported parts duty free in made-up articles;

- an amendment to redefine the rate of duty applicable to certain spirituous liquors from Hong Kong, the Republic of Korea, Singapore and Taiwan Province;
- an amendment to revoke the customs component of duty on imported beer. In future, imported beer will attract the same rate of duty as does locally brewed beer; and
- other amendments of an administrative nature.

Retrospectivity
Subclauses 2(3) to (7)

Clause 2 of the Bill deals with the commencement of the various substantive provisions of the Bill. It provides:

> *Commencement*
> 2.(1) Sections 1 and 2 commence on the day on which this Act receives the Royal Assent.
> (2) Subsection 3(1) and section 11 commence 14 days after the day on which this Act receives the Royal Assent.
> (3) Section 4 is taken to have commenced on 1 January 1988.
> (4) Section 5 is taken to have commenced on 1 July 1991.
> (5) Section 6 is taken to have commenced on 7 May 1992.
> (6) Section 7 is taken to have commenced on 1 July 1992.
> (7) Section 8 is taken to have commenced on 19 August 1992.
> (8) Section 9 commences on 1 March 1993.
> (9) Subsection 3(2) and section 10 commence on 1 July 1993.

Clearly, subclauses 2(3) to (7), if enacted, would give the substantive provisions concerned varying degrees of retrospective operation. However, the Committee notes that, in the case of subsections 2(5) to (7), the degree of retrospectivity is relatively slight and relates to the date that the proposed changed in question were announced. In the case of subsections 2(3) and (4), the Committee notes

that, while the degree of retrospectivity is more significant, the provisions in question actually reduce levels of customs tariff. Accordingly, the Committee makes no further comment on the clauses.

AD14/92

OVERSEAS STUDENTS CHARGE AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 October 1992 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the *Overseas Students Charge Act 1979,* to fix the charges payable under the Act for the 1993 academic year.

The Committee has no comment on this Bill.

AD14/92

STATES GRANTS (GENERAL PURPOSES) BILL 1992

This Bill was introduced into the House of Representatives on 7 October 1992 by the Minister for Higher Education and Employment Services.

The Bill proposes to give effect to the arrangements agreed at the Premiers' Conference and the Loan Council meeting of 12 June 1992 which are to apply in 1992-93 for the provision of general purpose assistance to the States and the Northern Territory. In large part, the provisions of the Bill parallel those of the *States Grants (General Purposes) Act 1992.*

The Committee has no comment on this Bill.

STUDENT ASSISTANCE AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 7 October 1992 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the *Student Assistance Act 1973,* to introduce an AUSTUDY/ABSTUDY Financial Supplement (the financial supplement) from 1 January 1993, and to give legislative effect to the annual indexation of certain parameters to the AUSTUDY scheme. The Bill also amends the *Data-matching Program (Assistance and Tax) Act 1990,* the *Income Tax Assessment Act 1936* and the *Taxation (Interest on Overpayments) Act 1983,* to provide for repayments of the financial supplement through the taxation system.

Inappropriate delegation of legislative power
Subclause 4(3)

Subclause 4(3) of the Bill proposes to insert a series of new definitions into section 3 of the *Student Assistance Act 1973.* They include:

> . . .
>
> 'adjusted parental income', for the purposes of Part 4A, has the meaning given by the regulations;
>
> . . .
>
> 'prescribed benefit', for the purposes of Part 4A, in relation to the AUSTUDY scheme or the ABSTUDY scheme, means a benefit under the scheme concerned that is declared by the regulations to be a prescribed benefit for the purposes of that Part;
>
> . . .

The Committee notes that the definitions in question appear to be central to the determination of which students are eligible to participate in the financial supplement scheme which, in turn, is the primary subject of the Bill. This being the case, it may be considered inappropriate to leave such an important matter to the regulations which, while they would be subject to disallowance by either House of the Parliament, would be placed beyond the Parliament's capacity to amend the subject matter dealt with.

The Committee draws attention to the provisions, as they may be considered to involve an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

AD14/92

WORLD HERITAGE PROPERTIES CONSERVATION (PROTECTION OF EXIT CAVE, TASMANIA) AMENDMENT BILL 1992

This Bill was introduced into the Senate on 8 October 1992 by Senator Bell as a Private Senator's Bill.

The Bill proposes to afford special and permanent protection to Exit Cave, Tasmania.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 15 OF 1992

4 NOVEMBER 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

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 such 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.

The Committee has considered the following Bills:

Aboriginal Education (Supplementary Assistance) Amendment Bill 1992

* Antarctic (Environment Protection) Legislation Amendment Bill 1992

* Banking Legislation Amendment Bill 1992

Bounty (Computers) Amendment Bill 1992

Commonwealth Superannuation Schemes Amendment Bill 1992

Electoral and Referendum Amendment Bill 1992

Income Tax (Dividends and Interest Withholding Tax) Amendment Bill 1992

* Industrial Chemicals (Notification and Assessment) Amendment Bill (No. 2) 1992

* Industrial Relations Legislation Amendment Bill (No. 2) 1992

* *Law and Justice Legislation Amendment Bill (No. 4) 1992*

Medicare Levy Amendment Bill 1992

* Seafarers Rehabilitation and Compensation Bill 1992

* Seafarers Rehabilitation and Compensation Levy Bill 1992

* Seafarers Rehabilitation and Compensation Levy Collection Bill 1992

Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Bill 1992

* Social Security Legislation Amendment Bill (No. 2) 1992

* Taxation Laws Amendment Bill (No. 5) 1992

Wheat Marketing Amendment Bill 1992

* The Committee has commented on these Bills

AD15/92

ABORIGINAL EDUCATION (SUPPLEMENTARY ASSISTANCE) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Minister for Aboriginal and Torres Strait Islander Affairs.

The Bill proposes to amend the *Aboriginal Education (Supplementary Assistance) Act 1989*, which provides grants of financial assistance to the State and Territory governments, non-government school systems, Aboriginal education institutions and Aboriginal education consultative bodies.

The current Act provides funding for the 1990-92 Triennium. The Bill provides funding for Aboriginal education initiatives for the 1993-95 Triennium.

The Committee has no comment on this Bill.

ANTARCTIC (ENVIRONMENT PROTECTION) LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Minister for the Arts, Sport, the Environment and Territories.

The Bill proposes to amend the *Antarctic Treaty (Environment Protection) Act 1980*, to give the force of law in Australia to obligations arising from the Protocol on Environmental Protection (the Madrid Protocol) to the Antarctic Treaty. Australia adopted the Madrid Protocol on 4 October 1991. The Protocol provides for comprehensive protection of the Antarctic environment and includes a prohibition on mining. The Bill also makes a number of minor amendments.

Reversal of the onus of proof
Clause 20 - proposed new subsection 21A(4) of the *Antarctic Treaty (Environment Protection) Act 1980*

Clause 20 of the Bill proposes to insert a new section 21A into the *Antarctic Treaty (Environment Protection) Act 1980*. That proposed new section provides:

> Unauthorised activities
>
> 21A.(1) In this section:
>
> 'activity' means an activity to which Part 3 applies.
>
> (2) If a person knowingly or recklessly carries on an activity in the Antarctic without an authorisation of the Minister under Part 3, the person is guilty of an offence punishable on conviction by a fine not exceeding $100,000.
>
> (3) If:
>
> (a) the Minister authorised under Part 3 the carrying on of an activity in the Antarctic subject to a condition being complied with; and

(b) a person knowingly or recklessly carries on the activity without the condition being complied with;

the person is guilty of an offence punishable on conviction by a fine not exceeding $100,000.

(4) In a prosecution of a person for an offence against subsection (1) or (2), it is a defence if the person proves:

(a) that the activity was carried on in an emergency:

(i) to save a person from death or serious injury; or

(ii) to secure the safety of a ship or aircraft or the safety of equipment or facilities of high value; or

(iii) to protect the environment; or

(b) that the person was authorised to carry on the activity under a law of a contracting party.

(5) An offence against subsection (1) or (2) is an indictable offence.

(6) Despite subsection (5), a court of summary jurisdiction, may hear and determine proceedings in respect of an offence against subsection (1) or (2) if satisfied that it is proper to do so and the defendant and the prosecutor consent.

(7) If, under subsection (6), a court of summary jurisdiction convicts a person of an offence against subsection (1) or (2), the penalty that the court may impose is a fine not exceeding:

(a) in the case of an individual–$10,000; or

(b) in the case of a body corporate–$50,000.

Proposed new subsection 21A(4) may be considered a reversal of the onus of proof. Under the proposed new subsection, if the defence to an alleged breach of the section is that the relevant activity was carried on in an emergency or with the authority of a law of one of the parties to the Madrid Protocol, it would be up to the person raising that defence to prove those matters. This may be considered a reversal of the onus of proof because it is ordinarily incumbent upon the prosecution to prove all the elements of an offence. Applying this principle to the present case, it would ordinarily be incumbent on the prosecution to prove that

the activity in question was not carried on in circumstances recognised as a defence to an alleged offence under the legislation.

In making this comment, the Committee notes that it has previously been prepared to accept similar clauses in situations where the defences provided for are, necessarily, peculiarly within the knowledge of the defendant. This acceptance has generally been made largely on the basis that, in those circumstances, it is not practicable to require that the prosecution prove matters which can more easily be attested to by the defendant. The Committee is not convinced that this is the case here.

Further, the Committee is curious to know what is contemplated by proposed new paragraph 21A(4)(b). In particular, the Committee seeks the Minister's advice as to the sorts of circumstances where a person might need to avail him or herself of the defence provided by the paragraph.

Accordingly, 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.

General comment

The Committee suggests that the reference in proposed new subsections 21A(4) to (7) (inclusive) to 'an offence against subsection (1) or (2)' should, in fact, refer to 'an offence against subsection (2) or (3)'.

BANKING LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 15 October 1992 by the Minister Assisting the Treasurer.

The Bill is consistent with, and partly gives effect to, the Government's decision (announced in its One Nation statement), to liberalise foreign bank entry and allow foreign banks to apply to establish authorised branch operations in Australia. Under the proposed amendments, foreign banks will not be permitted to accept retail deposits. Foreign banks wishing to accept retail deposits will be required to establish a subsidiary.

Commencement by Proclamation
Subclauses 2(4) and (5)

Clause 2 of the Bill deals with the commencement of the various parts of the Bill. It provides:

> **Commencement**
>
> 2.(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
>
> (2) Subsections 4(2) and 5(1) and sections 16, 17 and 34 commence on a day to be fixed by Proclamation, being a day not earlier than the day on which the State Act commences.
>
> (3) If the provisions referred to in subsection (2) do not commence under that subsection within the period of 6 months beginning on the day on which the State Act commences, they commence on the first day after the end of that period.
>
> (4) Subsections 4(3) and 5(2) commence on a day to be fixed by Proclamation.

(5) Part 3 commences on a day to be fixed by Proclamation.

(6) In this section:
'State Act' means an Act of New South Wales that refers to the Parliament the matter of State banking in so far as it applies to State Bank of New South Wales Limited.

The Committee notes that (unlike subclause 2(2)) subclauses 2(4) and (5), if enacted, would give the Executive Government an open-ended discretion regarding the proclamation (and, therefore, the commencement) of the relevant substantive provisions. This is contrary to the 'general rule' provided for by Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

In making this comment, the Committee notes that the Explanatory Memorandum to the Bill is of limited assistance in explaining why it is necessary for the provisions in question to be expressed in terms contrary to the 'general rule'. Under the heading 'Clause 5 - Application of Act', it offers the following information in relation to the proposed amendments to which subclause 2(4) relates:

> 6. Subclause 5(1) inserts in the [*Banking Act 1959*] a new subsection 6(1A) which provides that Part II (other than Division 1), Part V, and sections 61, 62, 64, 65, 68 and 69 of the Act apply to State Bank Limited. The subclause is to come into force as set out in subclauses 2(2) and 2(4). The new subsection 6(1A) is so drafted because the Commonwealth will have no legislative power to apply Division 1 of Part II of the Act to State Bank Limited for so long as subsection 6(1) of the proposed State Act referring State banking powers to the Commonwealth remains in force.
>
> 7. Subclause 5(2) amends subsection 6(1A) of the Act to provide that all of Part II and section 63 of the Act are to apply to State Bank Limited. This subclause is expressed to come into force (see subclause 2(4)) on a day to be fixed by Proclamation. For lack of power, the subclause may not, however, come into force before subsection 6(1A) of the proposed State Act ceases

> to have effect; but, as the proposed State Act has not yet been enacted, it is not possible in subclause 2(4) to relate the Proclamation date to the date on which subsection 6(1) of the proposed State Act will cease to have effect.

Paragraph 7 above appears to be suggesting that the commencement of the provisions to which subclause 2(4) of the Bill relates is dependent on the passage of a State Act and the subsequent ceasing to have effect of a provision of that Act. Such a situation seems irrational. If there is logic to the proposition, the Explanatory Memorandum has not assisted the Committee in divining it.

No explanation is offered in relation to the open-ended commencement of Part 3 of the Bill, to which subclause 2(5) relates.

The Committee maintains an 'in principle' objection to open-ended commencement provisions, as they involve the Parliament leaving the commencement (or non-commencement) of legislation properly passed by the Parliament to the discretion of the Executive Government. In the Committee's view, Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 sets out a proper and reasonable scheme governing the use of such provisions. The 'general rule' provided by that scheme has not been adhered to in this case.

The Committee draws Senators' attention to the provisions, as they may be considered to be an inappropriate delegation of legislative powers in breach of principle 1(a)(iv) of the Committee's terms of reference.

AD15/92

BOUNTY (COMPUTERS) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Minister for Small Business.

The Bill proposes a number of amendments to the *Bounty (Computers) Act 1984*, which are designed primarily to tighten the definitions, and therefore bounty eligibility, of two bountiable factory costs, as well as strengthen the ability of the Australian Customs Service to substantiate claims made under the scheme.

In particular, the amendments:

- introduce a definition of 'research and development', to clarify which factory costs are to be included under this phrase and to require that the object of any such research and development must be the manufacture of bountiable equipment within the bounty period (ie by 31 December 1995);
- introduce a modified definition of 'operating software', to exclude previously eligible software for Local Area Network (LAN) systems and microprocessor-based equipment;
- remake the existing record-keeping obligation in section 21 of the Principal Act to assist with the substantiation of the various elements which are included in a claim for bounty, including the introduction of a pecuniary penalty for the failure to keep such records; and
- propose an administrative reform to the scheme, by removing the requirement that the claim for bounty be lodged with the Australian Customs Service in the State or Territory of manufacture, which will allow interstate manufacturing operations to lodge consolidated claims.

The Committee has no comment on this Bill.

AD15/92

COMMONWEALTH SUPERANNUATION SCHEMES AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to make amendments to superannuation legislation to remove discrimination on the ground of marital status.

The amendments to be made by the Bill will define 'spouse' for the purposes of superannuation benefits payable under the amended legislation in a way which does not discriminate between legally-married and *de facto* spouses.

The Bill will also amend a number of provisions which discriminate between nuptial and ex-nuptial children. It will also amend the *Judges' Pensions Act 1968*, to define the eligibility of children to pensions under the Act so that children who will be eligible for a pension under the Act will be the children of a judge or retired judge or children who are in a dependent relationship with a judge or retired judge.

The Committee has no comment on this Bill.

AD15/92

ELECTORAL AND REFERENDUM AMENDMENT BILL 1992

This Bill was introduced into the Senate on 15 October 1992 by the Minister for Administrative Services.

The Bill proposes to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984*. The major provisions of the Bill are designed to:

- repeal the requirement that documents containing information about each Senate and House of Representative candidate be delivered to all households prior to the next election;
- provide that the Australian Electoral Officer for the State or Territory that includes the relevant Division may direct an indicative distribution of second and later preference votes at a House of Representatives election for that Division on polling night;
- confer on the Australian Electoral Commission the explicit function of providing assistance to authorities of foreign countries or to foreign organisation in the conduct of elections and referendums in cases where the provision of such assistance is approved by the Minister for Foreign Affairs and Trade (This amendment was recommended by the Senate Standing Committee on Foreign Affairs, Defence and Trade at paragraph 5.33 of its May 1991 report entitled *United Nations Peacekeeping and Australia.)*;
- empower the Australian Electoral Commission, in a manner not inconsistent with the performance of its primary functions, to perform functions derived from its primary functions to make available goods and services to members of the public and organisations;

- empower the Australia Electoral Commission to impose charges for the provision of goods and services, except where those goods and services are provided in pursuance of an explicit legal obligation to do so without charge.
- provide for a new system of automatic enrolment of new citizens, so that persons applying for citizenship may make a provisional claim for electoral enrolment, which would be activated upon the granting of citizenship;
- require the Australian Electoral Commission to include in a report to the Minister, to be tabled in the Parliament, on the operation of the Election Funding and Financial Disclosure provisions in relation to an election, a list of the names of those persons who, in the opinion of the Commission, are or may be required to furnish a return showing donations to candidates or political parties;
- provide for the employment under the *Commonwealth Electoral Act 1918* of temporary staff to be involved in electoral education and information programs;
- eliminate the need to advise electors individually of transfer to a new Division after a redistribution and instead provide that such notice may be sent to households;
- provide for the regular provision of information in computer format on changes to the Electoral Roll to registered political parties, Senators and Members of the House of Representatives and other persons or organisations as the Australian Electoral Commission determines are appropriate. Provision of such information is to be free of charge to Senators, Members and those registered political parties which have Parliamentary representation;
- provide a mechanism for review of the cancellation of 'silent' elector status;

- eliminate the need for the Australian Electoral Commission to advertise the receipt of an application for the registration of a political party in cases where the Commission in its initial consideration of the application concludes that it is required to refuse the application, and the applicant declines to vary the application to remedy its defects;
- provide that if a registered political party has never endorsed a candidate it may be deregistered if a period of 4 years has elapsed since registration;
- ensure that where a voter with 'silent' enrolment has nominated as a candidate, his or her address will not be required to be shown on the relevant nomination form and therefore will not be made publicly available;
- ensure that only one registered party affiliation may be shown next to a candidate's name on a ballot paper;
- eliminate the restriction on the Electoral Commission appointing any deputy presiding officers for a polling place at which there will be fewer than 6 issuing points at any time during the hours of polling on polling day;
- eliminate the need to send a non-voter's notice to an elector who has already shown that he or she had a valid and sufficient reason for failing to vote;
- provide that where a person has been named on electoral material that fact can be used as *prima facie* evidence in proceedings against that person for an offence against the *Commonwealth Electoral Act 1918;*
- provide that the service of court processes can be made by mail delivery instead of by direct service as required by some State and Territory legislation;
- extend the protection afforded to officers of the Australian Electoral Commission by the *Commonwealth Electoral Act 1918* against the obligation to produce enrolment claim cards in court

to enable such officers to refuse to supply enrolment claim cards in response to a warrant issued under the *Crimes Act 1914.*

The Committee has no comment on this Bill.

AD15/92

INCOME TAX (DIVIDENDS AND INTEREST WITHHOLDING TAX) AMENDMENT BILL 1992

This Bill was introduced into the Senate on 15 October 1992 by the Minister Assisting the Treasurer.

The Bill will give effect to the 1992-93 Budget announcement to introduce a final withholding tax on royalties paid or credited to non-residents. The Bill will amend the *Income Tax (Dividends and Interest Withholding Tax) Act 1974*, to apply the provisions of that Act to royalties and will formally impose a final withholding tax of 30 per cent on royalties derived by non-residents.

The Committee has no comment on this Bill.

INDUSTRIAL CHEMICALS (NOTIFICATION AND ASSESSMENT) AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the Senate on 15 October 1992 by the Minister for Industrial Relations.

The Bill proposes to amend the *Industrial Chemicals (Notification and Assessment) Act 1989,* to implement the main recommendations of a report made this year, following a review by consultants into the regulatory impact of the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) on industry. The major theme of the recommendations and the Bill is to reduce the regulatory burden to industry of NICNAS.

Inappropriate delegation of legislative power
Clause 8 - proposed new section 20B of the *Industrial Chemicals (Notification and Assessment) Act 1989*

Clause 8 of the Bill proposes to insert a new Division 4 into the *Industrial Chemicals (Notification and Assessment) Act 1989.* That proposed new Division, if enacted, would provide for an amnesty period in relation to the inclusion of certain 'eligible chemicals' on the Australian Inventory of Chemical Substances.

Proposed new section 20B sets out the parameters of the amnesty period. It provides:

> For the purposes of this Division, the amnesty period is the period beginning at the commencement of this Division and ending on such day as is prescribed in the regulations.

Given the importance of the closing date of the amnesty to the operation of the scheme, this may be considered to be a matter which is not appropriately left to

the regulations. Indeed, the date on which the amnesty period is to cease may be considered to be a matter which is properly the subject of primary legislation, in which form it would be open to substantive amendment by either House of the Parliament. As the Bill stands, it would be open for the Executive Government not to prescribe an end to the amnesty at all, leaving the amnesty open-ended and, in so doing, defeating one of the objects of the Principal Act. The Committee regards this as unsatisfactory.

The Committee draws Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the Senate on 15 October 1992 by the Minister for Industrial Relations.

The Bill proposes to amend the following 10 Acts:

- the *Industrial Relations Act 1988,* to improve (and widen the effect of) an existing provision which is designed to overcome difficulties that can occur when a Federal union and a State union have substantially shared membership. That Act is also amended to give the Australian Industrial Relations Commission the protection of the law relating to contempt of court;
- the *Long Service Leave (Commonwealth Employees) Act 1976* and the *Maternity Leave (Commonwealth Employees) Act 1973,* to transfer powers from the Public Service Commissioner to the Secretary of the Department of Industrial Relations;
- the *National Occupational Health and Safety Commission Act 1985,* to streamline the publication of the standards and codes made by the Commission and to provide for the recreation leave entitlement of the Commission's Chief Executive Officer to be determined by the Remuneration Tribunal;
- the *Public Service Act 1922,* to allow more flexibility in managing the Senior Executive Service (SES) and to ensure that delegations by the Public Service Commissioner will apply, where appropriate, in respect of newly-created statutory authorities. There are three changes for the SES. First, transfer from a specialist office to another SES office that is not a specialist office, without a full merit selection process, will be made possible in certain limited circumstances. Second, the provisions

relating to applications to decline transfer will no longer apply to the SES. Third, the procedure for redeployment or retirement of SES officers is to be altered, to require an officer to provide views within 14 days;

- the *Remuneration Tribunal Act 1972*, to broaden eligibility for membership of the Tribunal;
- the *Industrial Relations Legislation Amendment Act 1992*, the *Stevedoring Industry Finance Committee Act 1977*, the *Stevedoring Industry Legislation Amendment Act 1990* and the *Stevedoring Industry Levy Collection Act 1977*, to make formal changes correcting minor oversights.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that Parts 9, 10 and 11 of the Bill are to be taken to have commenced on 18 February 1991, thereby giving the substantive amendments in question a retrospective effect. However, as the Explanatory Memorandum to the Bill indicates that the amendments in question are technical in nature, involving the correction of drafting errors, the Committee makes no further comment on the provision.

AD15/92

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 4) 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to make amendments of a minor policy nature to legislation within the Attorney-General's portfolio, to make minor amendments to a related Act and also to make some minor technical amendments to legislation.

The Bill will:

- amend the *Bankruptcy Act 1966*, to
  - require registered trustees to notify the Official Receiver of the trustee's opinion as to whether a bankrupt is eligible for early discharge from bankruptcy; and
  - correct drafting errors, by substituting references to provisions which were repealed by the *Bankruptcy Amendment Act 1991* with references to new provisions inserted by that Act;

- amend the *Complaints (Australian Federal Police) Act 1981*, to
  - alter references to the Act, the *Freedom of Information Act 1982* and the *Ombudsman Act 1976* to conform with amendments previously made to the *Freedom of Information Act 1982;*

- amend the *Family Law Act 1975*, to
  - provide for the day on which a resignation in writing to the Governor-General is to take effect;
  - ensure the continuity of appointment of Judges of the Family Court who are reappointed to age 70; and

- require a Registrar to take an oath or affirmation of office before the Chief Justice or a Judge of the Family Court of Australia before commencing duty as a Registrar;

- amend the *Federal Court of Australia Act 1976*, to
  - require a Registrar to take an oath or affirmation of office before the Chief Justice or a Judge of the Federal Court of Australia before commencing duty as a Registrar; and
  - make it clear that, except in special circumstances, costs cannot be awarded against a person represented in a representative proceeding under Part IVA of the Act or in a proceeding of a representative character authorised by another Act;

- amend the *Freedom of Information Act 1982*, to
  - continue the exemption for documents of the National Companies and Securities Commission after the abolition of the Commission;
  - remove the requirement that the Administrative Appeals Tribunal first receive a request from the appellant before exercising its discretion to extend a hearing to a review of the decision actually made where the decision has been delayed; and
  - alter the provisions setting out the powers of the Administrative Appeals Tribunal to review decisions and those requiring the Tribunal to hold all or part of certain proceedings in private (to reflect amendments made to the Act in 1991);

- amend the *Judges (Long Leave Payments) Act 1979*, to preserve judges' long leave payment entitlements upon resignation or retirement and reappointment in circumstances such as those under the amended provisions of the *Family Law Act 1975;*

- amend the *Judges' Pensions Act 1968,* to preserve judges' pension entitlements upon resignation or retirement and reappointment in circumstances such as those under the amended provisions of the *Family Law Act 1975;* and

- amend the *Privacy Act 1988,* to
  - ensure that financial arrangements known as securitisation arrangements may operate in conformity with the Privacy Act;
  - permit mortgage insurers to obtain credit-related information about guarantors in order to assess the risk of insuring a loan;
  - clarify that a credit report relating to an individual provided for the purpose of assessing an application for commercial credit may be used where the applicant for commercial credit is a corporation or another individual;
  - permit credit providers to use credit reports for the purpose of the collection of overdue payments relating to commercial credit;
  - permit persons who are permitted to use another person's account to have access to some information concerning the status of that account;
  - permit credit providers to provide information about borrowers to guarantors with the consent of the borrower;
  - permit credit providers to disclose to collection agencies (debt collectors) some publicly available information (ie court orders and bankruptcy information);
  - permit first and second mortgagees to exchange information where the borrower is 60 days overdue in making payments under one at least of the mortgages;
  - remove some unintended restrictions on the use of certain types of credit information; and

- make some consequential amendments to permit records of disclosures made under the amended provisions to be recorded on credit information files.

Retrospectivity
Subclause 2(3)

Subclause 2(3) of the Bill provides that various of the substantive amendments provided for by the Bill are to be taken to have commenced on 1 November 1991, thereby giving the relevant amendments a degree of retrospective operation. However, as the Explanatory Memorandum indicates that the amendments in question are technical in nature and/or are beneficial to persons other than the Commonwealth, the Committee makes no further comment on the provision.

MEDICARE LEVY AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 15 October 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the *Medicare Levy Act 1986*, to vary (as from 1 July 1992) the taxable income levels below which persons are exempt from the levy.

The Committee has no comment on this Bill.

SEAFARERS REHABILITATION AND COMPENSATION BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Parliamentary Secretary to the Minister for Employment, Education and Training.

The Bill proposes to replace the *Seamen's Compensation Act 1911* and establish a new system of compensation for seafarers who are injured in the course of their employment in the maritime industry.

The proposed *Seafarers Rehabilitation and Compensation Act 1992* implements the Government's decision to reform seafarers compensation along the lines of the *Commonwealth Employees' Rehabilitation and Compensation Act 1988.*

Abrogation of individuals' right to sue in relation to employment-related injuries
Clause 54

Clause 54 of the Bill provides:

> **Employee not to have right to bring action for damages against employer etc. in certain cases**
>
> 54.(1) Subject to section 55, a person does not have a right to bring an action or other proceedings against his or her employer, or an employee of the employer in respect of:
>
> (a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the employer would, apart from this subsection, be liable (whether vicariously or otherwise) for damages; or
>
> (b) the loss of, or damage to, property used by an employee resulting from such an injury.

(2) Subsection (1) applies whether that injury, loss or damage occurred before or after the commencement of this section.

(3) Subsection (1) does not apply in relation to an action or proceeding instituted before the commencement of this section.

Clause 55 provides:

Actions for damages–election by employees

55.(1) If:

(a) compensation is payable under section 39, 40 or 41 in respect of an injury to an employee; and

(b) the employee's employer or another employee would, apart from subsection 54(1), be liable for damages for any non-economic loss suffered by the employee because of the injury;

the employee may make an election in accordance with subsection (2) to institute an action or proceeding against the employer or other employee for damages for that non-economic loss.

(2) An election:

(a) must be made before an amount of compensation is paid to an employee under section 39, 40 or 41 in respect of the injury; and

(b) must be given to the employer in respect of the injury; and

(c) must be in writing.

(3) An election is irrevocable.

(4) If an employee makes an election:

(a) subsection 54(1) does not apply in relation to an action or other proceeding subsequently instituted by the employee against the employer or another employee for damages for the non-economic loss to which the election relates; and

(b) compensation is not payable after the date of the election under section 39, 40 or 41 in respect of the injury.

(5) In any action or proceeding instituted because of an election made by an employee, the court is not to award the employee damages of an amount exceeding $138,570.52 for any non-economic loss suffered by the employee.

The Committee notes that the effect of clause 54, if enacted, would be to take away the right of an employee (as defined by clause 4 of the Bill) to sue his or her employer in relation to certain employment-related injuries. It would apply to such injuries whether they were suffered before or after the commencement of the legislation. In that sense, the Bill not only takes away rights but has the capacity to do so retrospectively.

On its face, this would appear to be a serious trespass on the rights of persons affected by the Bill. It takes away long-standing common law rights. In making this comment, the Committee notes that the stated intention of the Bill is to replace employees' existing rights to compensation with a new statutory scheme, along similar lines to that available to Commonwealth employees under the *Commonwealth Employees' Rehabilitation and Compensation Act 1988.* It is implicit that the proposed new scheme is intended to be beneficial to employees. Whether or not this is, in fact, the case is not appropriately a matter for judgement by the Committee.

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.

SEAFARERS REHABILITATION AND COMPENSATION LEVY BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Parliamentary Secretary to the Minister for Employment, Education and Training.

The Bill proposes to introduce a levy, the purpose of which is to enable the Commonwealth to recover the costs incurred by the Seafarers Rehabilitation and Compensation Authority in providing rehabilitation and compensation benefits to injured employees who would not otherwise be able to obtain entitlements under the proposed *Seafarers Rehabilitation and Compensation Act 1992.*

Setting of rate of levy by regulation
Clause 5

Clause 5 of the Bill provides:

> The rate of levy imposed on each seafarer berth [which is defined in clause 3 of the Seafarers Rehabilitation and Compensation Bill 1992] is such amount as is prescribed [in the regulations].

The Committee has consistently drawn attention to provisions which allow a levy to be set in this way, principally on the basis that a 'levy' could be set at such a level that it may properly be regarded as a tax, which makes it a matter more appropriately dealt with in primary legislation. In the past, the Committee has indicated that if it is necessary for the Government to be able to set the rate of levy by regulation in order to maintain a degree of flexibility, then the primary legislation should provide for either a maximum rate of levy or a method of calculating such a maximum rate.

In the present case, however, such a course of action may be considered impractical. It is clear from the Explanatory Memorandum to the Bill that a levy will only be imposed in this instance if the Minister is unable to establish a 'Fund' (which is, in turn, to be indemnified by an authorised insurer) to meet the insurance requirements of the Seafarers Rehabilitation and Compensation Bill 1992. In that case, the Seafarers Rehabilitation and Compensation Authority (to be established by clause 103 of the Seafarers Rehabilitation and Compensation Bill) would be responsible for such insurance, thereby requiring the levy to be imposed in order to meet the ensuing liabilities.

It is clear from this scenario that the levy provided for in the Bill is in the nature of a safety-net. It is also fairly clear that, until such time as the need to impose a levy actually arises, the Minister will have difficulty in nominating a logical amount as the maximum rate of levy. In these circumstances, of course, it would remain open to either House of the Parliament to disallow a regulation which set a rate of levy at an unacceptably high level.

While the Committee notes the reasoning put forward in support of the provision being drafted in its current form, the Committee remains concerned that the Bill, if enacted, would give an open-ended power to impose a levy on employers. The Committee suggests that, at the very least, the Bill might be amended to include a provision limiting the rate of the levy to 'an amount no more than that required to meet the payments to be made out of the Fund and the cost of administering the Fund'.

The Committee draws Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

AD15/92

SEAFARERS REHABILITATION AND COMPENSATION LEVY COLLECTION BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Parliamentary Secretary to the Minister for Employment, Education and Training.

The Bill proposes to provide for the administration of the levy imposed by the proposed *Seafarers Rehabilitation and Compensation Levy Act 1992.*

Abrogation of privilege against self-incrimination
Subclause 7(3)

Clause 6 of the Bill, if enacted, would require an employer of seafarers to provide a return, giving various details which are, in turn, relevant to the imposition of the levy to be imposed by the Seafarers Rehabilitation and Compensation Levy Bill 1992.

Clause 7 of the Bill provides:

> Offences relating to returns
>
> 7.(1) A person must not, without reasonable excuse, knowingly refuse or fail to give a return that he or she is required to give under section 6.
> Penalty: 5 penalty units.
>
> (2) A person must not, without reasonable excuse:
> (a) knowingly give a return that does not contain all or any of the information required by section 6 to be included in the return; or
> (b) give, for the purposes of this Act, a return that contains a statement that the person knows to be false or misleading in a material particular.
>
> Penalty: 20 penalty units.

> (3) A person is not excused from giving a return on the ground that the return might tend to incriminate the person, but any return given, and any information or thing (including any document) obtained as a direct or indirect consequence of the giving of the return, is not admissible in evidence against the person in criminal proceedings, other than proceedings for an offence against subsection (2).

Subclause 7(3) is an abrogation of the privilege against self-incrimination, which ordinarily operates to prevent a person from being required to give evidence or provide other information which might tend to incriminate him or herself. However, the Committee notes that the provision expressly limits the use (either direct or indirect) to which such information may be put. In particular, use of the information is limited to proceedings related to the clause in question. As such, the provision is in a form which the Committee has previously been prepared to accept.

The Committee makes no further comment on the Bill.

AD15/92

SEAFARERS REHABILITATION AND COMPENSATION (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Parliamentary Secretary to the Minister for Employment, Education and Training.

The Bill proposes to provide transitional arrangements in relation to the transition from the *Seamen's Compensation Act 1911* to the proposed *Seafarers Rehabilitation and Compensation Act 1992.* It makes provision for seafarers who are injured prior to the commencement of the proposed *Seafarers Rehabilitation and Compensation Act 1992* and for the dependants of seafarers who are killed before the commencement of that Act.

The Bill also effects consequential amendments to the *Navigation Act 1912,* the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* and the *Social Security Act 1991.* The consequential amendments to the *Navigation Act 1912* are necessary to harmonise similar provisions, while the consequential amendments to the other Acts are necessary to ensure reference is made to the proposed Seafarers Rehabilitation and Compensation Act.

The Committee has no comment on this Bill.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 15 October 1992 by the Minister for Social Security.

The Bill is a portfolio Bill which will introduce a number of policy changes and effect other technical and minor amendments.

The Bill will amend the following Acts:

- *Social Security Act 1991;*
- *Family Law Act 1975;*
- *Social Security (Family Payment) Amendment Act 1992;*
- *Data-matching Program (Assistance and Tax) Act 1990;*
- *Social Security and Repatriation (Budget Measures and Assets Test) Act 1984;*
- *Social Security (Job Search and Newstart) Amendment Act 1991;*
- *Health Insurance Act 1973;*
- *Social Security (Disability and Sickness Support) Amendment Act 1991;*
- *Social Security Legislation Amendment Act (No. 3) 1991;*
- *Social Security Legislation Amendment Act (No. 4) 1992;* and
- *Social Security Legislation Amendment Act 1992.*

Retrospectivity
Subclauses 2(2) to (19)

Subclauses 2(2) to (19) provide that various substantive amendments proposed by the Bill are to have effect from various dated (the earliest of which is 25 June 1991) prior to the commencement of the Bill. However, the Explanatory Memorandum to the Bill indicates that, in each case, the retrospectivity is either

technical and formal (principally relating to the correction of drafting errors) or is beneficial to persons other than the Commonwealth. Accordingly, the Committee makes no further comment on the provisions.

Requirement to provide tax file number
Clauses 117 to 125

Division 12 of part 2 of the Bill (clauses 117 to 125) contains a series of amendments relating to the provision of beneficiaries' tax file numbers in relation to certain benefits. The Explanatory Memorandum (at p 38) offers the following 'Background' to the proposed amendments:

> In the *Social Security (Rewrite) Amendment Act 1991*, section 1308 of the Principal Act was repealed. Section 1308 enabled the Secretary to ask a person to quote his or her TFN for the purposes of determining whether unemployment benefit, job search allowance or sickness benefit was payable to the person. It was intended, in line with the modular approach taken in the Principal Act, to insert a provision equivalent to section 1308 into each relevant module.
>
> At the same time, unemployment benefit, job search allowance and sickness benefit were being replaced by newstart allowance, a new job search allowance and sickness allowance. Included in these new payment modules were provisions indicating that these allowances were not payable to a person if the person had not given the Secretary his or her TFN (see sections 527, 609 and 678 of the Principal Act). However, there were no provisions enabling the Secretary (as part of the claim procedure) to require a person to provide his or her TFN or provisions requiring a recipient of job search allowance, newstart allowance or sickness allowance (as part of notification obligations) to give the Secretary a written statement of the recipient's TFN.
>
> Each other payment module in the Principal Act contains such TFN provisions.

The Principal Act will be amended, therefore, to enable the Secretary to require a claimant or recipient of job search allowance, newstart allowance or sickness allowance to provide the Secretary with his or her TFN.

The Committee makes no further comment on the provisions.

TAXATION LAWS AMENDMENT BILL (NO. 5) 1992

This Bill was introduced into the House of Representatives on 15 October 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend various taxing Acts to give effect to a number of changes announced in the 1992-93 Budget.

Retrospectivity
Subclause 2(3), clause 24, subclause 32(2), clauses 34, 38, 40, 56 and 85

Subclause 2(3) of the Bill, if enacted, would give Part 5 of the Bill retrospective effect, from 1 July 1991. However, the Committee notes that the Minister's Second Reading speech on the Bill makes it clear that the provisions of Part 5 are beneficial to taxpayers.

The Committee notes that, while Part 2 of the Bill is to commence on Royal Assent, various Divisions in Part 2, if enacted, would apply to transactions that occurred prior to Royal Assent. The relevant Divisions, dates and specific clauses are as follows:

Division 7:	19 August 1992 (see clause 24)
Division 9:	19 August 1992 (see sub-clause 32(2))
Division 10:	19 August 1992 (see clause 34)
Division 12:	26 February 1992 (see clause 38)
Division 13:	26 February 1992 (see clause 40)
Division 16:	19 December 1991 (see clause 56)
Division 18:	3 June 1990 (see clause 85)

However, the Committee notes that the relevant provisions which would have retrospective application are either beneficial to taxpayers or are measures which were announced in the Budget (in which case, the retrospective operation relates to the date of the Budget). Accordingly, the Committee makes no further comment on the provisions.

AD15/92

WHEAT MARKETING AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 14 October 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the *Wheat Marketing Act 1989,* to extend the functions of the Australian Wheat Board (AWB) to include gain related value adding activities, and to vary and extend the Commonwealth's underwriting of those AWB borrowings which are used to make advance and related payments for wheat delivered to a pool and to meet associated operational expenses.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 16 OF 1992

11 NOVEMBER 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

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 such 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.

The Committee has considered the following Bills:

* Aboriginal Councils and Associations Amendment Bill 1992

Affirmative Action (Equal Employment Opportunity for Women) Amendment Bill 1992

Agricultural and Veterinary Chemicals (Administration) Bill 1992

Agricultural and Veterinary Chemicals Amendment Bill 1992

Australian National Training Authority Bill 1992

* Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992

* Child Support Legislation Amendment Bill (No. 2) 1992

Commonwealth Employees' Rehabilitation and Compensation Amendment Bill 1992

* Corporate Law Reform Bill 1992

* Customs Legislation Amendment Bill 1992

* Customs Legislation (Anti-Dumping Amendments) Bill 1992

Customs Tariff (Anti-Dumping) Amendment Bill (No. 2) 1992

Data-matching Program (Assistance and Tax) Amendment Bill 1992

* Endangered Species Protection Bill 1992

Endangered Species Protection (Consequential Amendments) Bill 1992

* Export Market Development Grants Amendment Bill 1992

Farm Household Support Bill 1992

* The Committee has commented on these Bills

NOTE: This Digest is circulated to all Honourable Senators. Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Health and Community Services Legislation Amendment Bill (No. 3) 1992

Health Insurance (Quality Assurance Confidentiality) Amendment Bill 1992

Higher Education Funding Amendment Bill (No. 2) 1992

Housing Assistance Amendment Bill 1992

Human Rights and Equal Opportunity Legislation Amendment Bill (No. 2) 1992

Immigration (Education) Charge Bill 1992

* Income Equalisation Deposits Laws Amendment Bill 1992

Income Tax Assessment Amendment (Foreign Investment) Bill 1992

Medicare Agreements Bill 1992

Medicare Levy Amendment Bill (No. 2) 1992

Migration (Delayed Visa Applications) Tax Bill 1992

* Migration Laws Amendment Bill (No. 2) 1992

* Migration Reform Bill 1992

* Mutual Recognition Bill 1992

National Health Amendment Bill 1992

National Residue Survey Administration Bill 1992

National Residue Survey (Consequential Provisions) Bill 1992

National Residue Survey (Aquatic Animal Export) Levy Bill 1992

National Residue Survey (Cattle Transactions) Levy Bill 1992

* The Committee has commented on these Bills

National Residue Survey (Coarse Grains) Levy Bill 1992

National Residue Survey (Dairy Produce) Levy Bill 1992

National Residue Survey (Dried Fruits) Levy Bill 1992

National Residue Survey (Game Animals) Levy Bill 1992

National Residue Survey (Grain Legumes) Levy Bill 1992

National Residue Survey (Honey) Levy Bill 1992

National Residue Survey (Honey Export) Levy Bill 1992

National Residue Survey (Horse Slaughter) Levy Bill 1992

National Residue Survey (Horticultural Products) Levy Bill 1992

National Residue Survey (Horticultural Products Export) Levy Bill 1992

National Residue Survey (Laying Chicken) Levy Bill 1992

National Residue Survey (Livestock Slaughter) Levy Bill 1992

National Residue Survey (Meat Chicken) Levy Bill 1992

National Residue Survey (Oilseeds) Levy Bill 1992

National Residue Survey (Wheat) Levy Bill 1992

Natural Resources Management (Financial Assistance) Bill 1992

* Qantas Sale Bill 1992

Rural Adjustment Bill 1992

Sales Tax Imposition (*In Situ* Pools) Bill 1992

Sales Tax Laws Amendment Bill (No. 2) 1992

Sex Discrimination and other Legislation Amendment Bill 1992

* The Committee has commented on these Bills

* Social Security Legislation Amendment Bill (No. 3) 1992

States Grants (Primary and Secondary Education Assistance) Bill 1992

States Grants (Rural Adjustment) Bill 1992

States Grants (Schools Assistance) Amendment Bill (No. 2) 1992

* Superannuation Legislation Amendment Bill 1992

* Taxation Laws Amendment Bill (No. 6) 1992

Taxation Laws Amendment (Car Parking) Bill 1992

* Taxation Laws Amendment (Superannuation) Bill 1992

Trade Practices Legislation Amendment Bill 1992

* Veterans' Affairs Legislation Amendment Bill (No. 2) 1992

* Veterans' Entitlements Amendment Bill 1992

* Vocational Education and Training Funding Bill 1992

* The Committee has commented on these Bills

ABORIGINAL COUNCILS AND ASSOCIATIONS AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Aboriginal and Torres Strait Islander Affairs.

The Bill proposes to amend the *Aboriginal Councils and Associations Act 1976*, to provide a mechanism whereby Aboriginal and Torres Strait Islander groups may incorporate as Councils or Associations in a relatively uncomplicated and inexpensive manner. Associations can be formed for a wide variety of purposes including business enterprises. No Councils have been incorporated to date, however, the Councils provisions are intended to provide for community services for Aboriginals and Torres Strait Islanders living within specific Council areas. As incorporated bodies, these groups are eligible for funding from the Aboriginal and Torres Strait Islander Commission and from other Government agencies.

Since the Act came into operation in 1978 there has been considerable non compliance with the accountability provisions of the Act. The proposed amendments are directed at increasing the level of accountability and facilitating oversight of the affairs of incorporated bodies.

Delegation of power to 'a person'
Clause 4 - proposed amendment to section 9 of the *Aboriginal Councils and Associations Act 1976*

Clause 4 of the Bill proposes to amend section 9 of the *Aboriginal Councils and Associations Act 1976*. That section currently provides:

> Delegation by Registrar
>
> 9.(1) The Registrar may, either generally or as otherwise provided by the instrument of delegation, by writing signed by him, delegate to a Deputy Registrar any of his powers under this Act, other than this power of delegation.

> (2) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Registrar.
>
> (3) A delegation under this section does not prevent the exercise of a power by the Registrar.

A Deputy Registrar, like a Registrar, is a person appointed by the Minister under section 4 of the Act.

Clause 4 of the Bill proposes to delete the reference to 'Deputy Registrar' in subsection 9(1) and replace it with 'person'. If enacted, this would allow the Registrar to delegate his or her powers under the Act to 'a person'. The Committee has consistently drawn attention to such provisions, on the basis that the authority to delegate powers in this way should be limited to, say, the holders of a particular office (as they are in the original section).

By way of explanation for the proposed amendment, the Explanatory Memorandum to the Bill simply states:

> The reason for this extension is because of the remote geographical location of many Aboriginal locations.

Of itself, this explanation would not appear to be a compelling reason for amending the relevant provision of the Act. Presumably, the remoteness of the locations was a factor taken into account when the original provision was passed. Further, if experience has shown the original provision to be impractical, it is not the answer simply to amend the Act to allow the Registrar to delegate any or all of his or her powers under the Act to 'a person'. In making this comment, the Committee presumes that the Minister has some idea of the sorts of persons to whom the power is likely to be delegated and suggests, therefore, that (if the amendment is necessary) there should be some attempt to identify the relevant classes of persons in the legislation.

The Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Reversal of the onus of proof
Clauses 5 and 14 - proposed new subsections 38(7) and (8) and 59(7) and (8) of the *Aboriginal Councils and Associations Act 1976*

Clause 5 of the Bill proposes to amend section 38 of the Aboriginal Councils and Associations Act. That section provides for the keeping of records and the preparation of balance sheets and income and expenditure statements in relation to Aboriginal Councils.

Clause 5 of the Bill proposes to omit subsections 38(2), (3) and (4) and to replace them with a series of new subsections which, if enacted, would impose a more onerous reporting regime on Councils. Proposed new subsection 38(7) provides:

> If the Council fails, without reasonable excuse, to comply with a provision of this section, each councillor is guilty of an offence punishable, on conviction, by a fine not exceeding $200.

Proposed new subsection (8) then provides:

> In a prosecution of a person for an offence against subsection (7) arising out of a contravention of a provision of this section, it is a defence if the person proves that he or she:
>
> (a) did not aid, abet, counsel or procure the contravention; and
>
> (b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention.

Proposed new subsection (8) involves what the Committee would generally consider to be a reversal of the onus of proof. It would ordinarily be incumbent on the prosecution to prove that each individual member of a Council was knowingly involved in the commission of an offence against the Act. However, pursuant to proposed new subsection 38(8), it would be incumbent on a member of a Council in relation to which a charge pursuant to the proposed new section 38 has been laid to prove that they were not in any way involved with the commission of the offence. Consequently, this involves a reversal of the onus of proof.

Similarly, section 59 of the Aboriginal Councils and Associations Act sets out certain reporting obligations in relation to Incorporated Aboriginal Associations. Clause 14 of the Bill proposes to make a series of amendments to those obligations, including the insertion of proposed new subsections 59(7) and (8), which provide:

> (7) If the Governing Committee fails, without reasonable excuse, to comply with a provision of this section, each member of the Committee is guilty of an offence punishable, on conviction, by a fine not exceeding $200.
>
> (8) In a prosecution of a person for an offence against subsection (7) arising out of a contravention of a provision of this section, it is a defence if the person proves that the person:
>
> (a) did not aid, abet, counsel or procure the contravention; and
>
> (b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention.

As with proposed new subsection 38(8) above, proposed new subsection 59(8) contains what the Committee would generally consider to be a reversal of the onus of proof.

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.

Abrogation of the privilege against self-incrimination
Clauses 5, 16, 21 - proposed new subsections 39(7), 60(7) and 68(3) of the *Aboriginal Councils and Associations Act 1976*

Clause 5 of the Bill proposes to repeal section 39 of the Aboriginal Councils and Associations Act and to replace it with a proposed new section 39. The existing section 39 sets out the Registrar's powers in relation to the audit of the records and balance sheets of Aboriginal Councils. The proposed new section 39 sets out a more general power to examine the 'documents' of an Aboriginal Council. Proposed new subsection 39(4), if enacted, would allow a person authorised by the Registrar to

> require any person to answer such questions, and produce such documents in the possession of the person, or to which the person has access, as the authorised person considers necessary for the purposes of this section.

Proposed new subsection 39(5) provides for a fine of up to $200 for failing to comply with a requirement under proposed new subsection (4). Proposed new subsection (6) provides for a fine of up to $1 500 for making a false or misleading statement in relation to a requirement to answer questions, etc under proposed new subsection (4).

Proposed new subsection 39(7) provides:

> A person is not excused from answering a question or producing a document when required to do so under subsection (4) on the ground that the answer to the question, or the production of the document, might tend to incriminate the person or make the person liable to

> a penalty, but the answer, the production of the document, or anything obtained as a direct or indirect consequence of the answer or the production, is not admissible in evidence against the person in any proceedings, other than proceedings for an offence against this section.

This proposed new subsection contains an abrogation of the privilege against self-incrimination. However, as the use (direct or indirect) of any information obtained in this manner would be limited to proceedings under the provision in question, the proposed new subsection is in a form which the Committee has previously been prepared to accept.

Clause 16 of the Bill proposes to repeal and replace section 60 of the Aboriginal Councils and Associations Act. Proposed new section 60, if enacted, would impose similar obligations in relation to the examination of documents of Incorporated Aboriginal Associations. Proposed new subsection 60(7) would, similarly, abrogate the privilege against self-incrimination in relation to a requirement that a person answer questions or produce documents. However, as with proposed new subsection 39(7), it is in a form which the Committee has previously been prepared to accept.

Clause 21 of the Bill, if enacted, would repeal and replace section 68 of the Aboriginal Councils and Associations Act. Both the existing section and the proposed new section deal with investigations of Aboriginal Corporations by the Registrar. Proposed new subsection 68(2) provides:

> For the purposes of [an] investigation, the Registrar may, by notice in writing given to a person whom the Registrar believes to have some knowledge of the affairs of the corporation, require that person to attend before the Registrar at a time and place specified in the notice and there to answer such questions, and produce such documents in the possession of the person, or to which the person has access, as the Registrar considers necessary.

Proposed new subsection 68(3) then provides:

> A person is not excused from answering a question or producing a document when required to do so under subsection (4) on the ground that the answer to the question, or the production of the document, might tend to incriminate the person or make the person liable to a penalty, but the answer, the production of the document, or anything obtained as a direct or indirect consequence of the answer or the production, is not admissible in evidence against the person in any proceedings, other than proceedings for an offence against subsection 69(2).

The Committee notes that there is no subsection (4) and that, presumably, the proposed new subsection is actually referring to subsection (1). That being the case, the Committee notes that, while proposed new subsection 68(3) involves an abrogation of the privilege against self-incrimination, it is in a form which the Committee has previously been prepared to accept. Accordingly, the Committee makes no further comment on proposed new subsections 39(7), 60(7) and 68(3).

AD16/92

AFFIRMATIVE ACTION (EQUAL EMPLOYMENT OPPORTUNITY FOR WOMEN) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Finance.

The Bill proposes to amend the *Affirmative Action (Equal Opportunity for Women) Act 1986*, to:

- ensure that elected union officials and trainees employed by Group Training Schemes are employees for the purposes of the Act;
- require voluntary bodies with more than 100 employees to comply with the reporting requirements under the Act;
- establish the Affirmative Action Agency as a statutory body with functions and powers defined in the Act; and
- allow the Affirmative Action Agency a discretion to waive the reporting requirements under the Act in situations where compliance with the Act has been demonstrated.

The Committee has no comment on this Bill.

AD16/92

AGRICULTURAL AND VETERINARY CHEMICALS (ADMINISTRATION) BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to establish the National Registration Authority for Agricultural and Veterinary Chemicals.

In July 1991, the Commonwealth, State and Territory Governments announced the establishment of a National Registration Scheme for agricultural and veterinary chemicals. In June 1992, the Commonwealth Government announced that it would establish a statutory authority to undertake its responsibilities for the registration of agricultural and veterinary chemical products.

The Bill will give effect to the Commonwealth's decisions by establishing the National Registration Authority for Agricultural and Veterinary Chemicals. Initially, it will take over the powers and functions of the Australian Agricultural and Veterinary Chemicals Council, until such time as the new national registration legislation is considered in the Autumn Sittings in 1993.

One of the existing functions of the Council will be amended to widen its scope and two additional functions will be given to the NRA, as agreed by the States and Northern Territory.

The Committee has no comment on this Bill.

AD16/92

AGRICULTURAL AND VETERINARY CHEMICALS AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to make certain incidental changes in relation to the introduction of the Agricultural and Veterinary Chemicals (Administration) Bill 1992.

The Committee has no comment on this Bill.

AD16/92

AUSTRALIAN NATIONAL TRAINING AUTHORITY BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Employment, Education and Training.

The Bill proposes to establish the Australian National Training Authority. In July 1992, the heads of the Governments of the Commonwealth, the States and the Territories agreed to the establishment of the Authority as part of a National Vocational Education and Training System. The matters agreed by heads of Government are reflected in the statement entitled 'A National Vocational Education and Training System'. A copy of that Statement is included as a schedule to the legislation.

The Bill proposes to set in place the framework under which the Authority will operate. The Authority will be established by Commonwealth legislation as an independent statutory authority responsible to a Ministerial Council, in accordance with the arrangements described in the Statement.

The Committee has no comment on this Bill.

AD16/92

BROADCASTING SERVICES (SUBSCRIPTION TELEVISION BROADCASTING) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Transport and Communications.

The Bill proposes to implement the Government's decisions on subscription television broadcasting ('Pay TV'), following consideration of the recommendations of the Senate Select Committee on Subscription Television Broadcasting's recommendations. This is to be achieved by amending the *Broadcasting Services Act 1992*, to include the new Part 7 provided for in the Bill.

The Bill is part of the process of reform commenced in the Broadcasting Services Act and it should be read in the context of the reforms of that Act. It:

- provides a licensing and regulatory regime for the provision of subscription television broadcasting services that can be delivered using any technology (for example cable, microwave or satellite);

- provides for the licensing of individual subscription television broadcasting services;

- puts in place a regime for services delivered by a 'subscription television broadcasting satellite', ie a satellite operated by AUSSAT Pty Ltd under its telecommunications carrier licence (AUSSAT is a subsidiary of OPTUS Communications Ltd), by providing for:

    - the allocation by a price-based allocation process of two licences ('licence A' and 'licence B') each to provide up to four subscription television broadcasting services;

- the allocation of a licence ('licence C') to a subsidiary of the Australian Broadcasting Corporation that allows the provision of up to two subscription television broadcasting services;

- an ownership and control regime that applies until 1 July 1997 and imposes limits on the ownership and control of licence A; and

- introduces measures that will provide consumer protection including:

  - mandating the use of digital technology for the delivery of satellite services to, in part, avoid consumer confusion, and the cost and risk caused by competing or superseded technologies;

  - requiring access by any satellite operator to customer reception equipment, so that customers will only need one set of reception equipment to be able to receive any or all services.

Non-reviewable decisions
Clause 3 - proposed new Part 7 of the *Broadcasting Services Act 1992*

Clause 3 of the Bill proposes to insert a new Part 7 into the *Broadcasting Services Act 1992*, which currently does not contain a Part 7. The proposed new Part 7 deals with the allocation of subscription television broadcasting licences and the conditions to be applicable to such licences. It also sets out 'rules' in relation to ownership and control of media outlets.

Proposed new Part 7, if enacted, would give the Minister the power to allocate licences and to impose conditions on those licences (proposed section 93). It would give the Australian Broadcasting Authority the power to allocate licences after 1997 (proposed section 96). It contains provisions relating to a company's suitability to be allocated a licence (proposed section 98). Other provisions relate to the conditions applicable to subscription television broadcasting licences

(proposed sections 99 - 103). Clearly, decisions under various of the sections have the capacity to have a significant impact on the persons or corporations affected by them and might be considered to be appropriately the subject of independent review.

Section 204 of the Broadcasting Services Act currently provides that various nominated sections of the Act are open to review by the Administrative Appeals Tribunal. The nominated provisions include subsections 98(1), 99(2), 100(2), 105(2) and 105(3).

In its present form, the Act does not contain subsections with those numbers. This would appear to be an error which has arisen as a result of the excision of Part 7 from the original version of the Broadcasting Services Bill 1992. However, in addition, the Committee notes that the relevant provisions of the proposed new Part 7 do not appear to correspond with those which appeared in the original version of the Broadcasting Services Bill. Consequently, the provisions which would be open to review pursuant to section 204 of the Broadcasting Services Act are not, in fact, the provisions which (arguably) should be open to review.

The Committee assumes that this is essentially a drafting error and would, therefore, appreciate the Minister's advice as to whether or not it is the case. Clearly, if the Committee's assumption is correct, the Bill will have to be amended in order to ensure that the relevant provisions of the proposed new Part 7 are reviewable by the Administrative Appeals Tribunal.

AD16/92

CHILD SUPPORT LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the following 3 Acts as set out below:

- the *Administrative Decisions (Judicial Review) Act 1977:*
  - Schedule 1 to the Act will be amended to include decisions under Part 6A of the *Child Support (Assessment) Act 1989* as decisions to which the Act does not apply.
- the *Child Support (Assessment) Act 1989:*
  - the child support formula will be amended to incorporate the concept of 'substantial access' to a child;
  - the definition of an 'approved form' will be amended;
  - the application of the Act will be extended to include Queensland;
  - amendments will allow the Child Support Registrar a degree of flexibility to choose a taxable income that is considered appropriate for use in the child support formula when one is not available;
  - provisions setting out the effect of income estimates and the revocation of estimates will be removed from the Act. Regulations will be able to be promulgated for that purpose.

Other changes to improve the operation of income estimates are also included;

- a penalty will be imposed where an estimate or estimates of income are less than the actual income returned;

- the grounds for departure will be extended to include high costs of access to a child or another person who is not part of the child support assessment;

- the Registrar will be allowed to disclose to a law enforcement officer that a threat has been made against a person if there is reason to believe the threat is evidence that an offence has been or may be committed; and

- a number of minor errors and omissions in amendments in the *Child Support Legislation Amendment Act 1992* are to be corrected.

- the *Child Support (Registration and Collection) Act 1988:*

  - the definition of an 'approved form' will be amended;

  - the Child Support Registrar will be allowed to disclose to a law enforcement officer that a threat has been made against a person if there is reason to believe that the threat is evidence that an offence has been or may be committed;

  - new claimants for additional family payment will be allowed to opt for private collection of maintenance;

  - the penalty imposition will be modified, by removing the flat penalty amount and substituting a *pro rata* per annum amount

on the total amount outstanding at the end of each month;

- the ownership of all child support overpayments will be changed from the Secretary of the Department of Social Security to the Child Support Registrar;

- the grounds of objection against a decision of the Child Support Registrar will be extended to credit an amount of maintenance against a liability;

- a statement or averment will be allowed as *prima facie* evidence of a matter in a prosecution;

- the regulation-making power will be amended to allow Regulations to be made specifying how payments received may be applied by the Child Support Registrar.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that clauses 36 and 39 of the Bill are to be taken to have commenced on 1 June 1988. Those provisions to propose to amend the *Child Support (Registration and Collection) Act 1988.* The date nominated for commencement of the proposed amendments is the date on which that Act commenced.

The Explanatory Memorandum to the Bill indicates that the changes proposed by the amendments are technical in nature and that the retrospectivity will have 'no impact on clients' (paragraph 15.9). Accordingly, the Committee makes no further comment on the provision.

Delegation of power to 'a person'
Clause 28 - proposed new subsection 149(1A) of the *Child Support (Assessment) Act 1989*

Clause 28 of the Bill proposes to insert a new subsection (1A) into section 149 of the *Child Support (Assessment) Act 1989*. Section 149 deals with delegation of the powers of the Child Support Registrar. It provides:

> Delegation
>
> 149.(1) The Registrar may, in writing, delegate all or any of the Registrar's powers or functions under this Act to:
>
> (a) a Deputy Registrar; or
>
> (b) the Secretary to the Department of Social Security; or
>
> (c) an officer or employee of:
>
> (i) the branch of the Australian Public Service under the direct control of the Registrar (whether as Registrar or Commissioner); or
>
> (ii) the Department of Social Security.
>
> (2) A delegation under subsection (1) may be made subject to a power of review and alteration by the Registrar, within a period specified in the delegation, of acts done under the delegation.
>
> (3) A delegation under subsection (1) continues in force even though there has been a change in the occupancy of, or there is a vacancy in, the office of Registrar, but, for the purposes of the application of subsection 33(3) of the *Acts Interpretation Act 1901* in relation to such a delegation, nothing in any law is to be taken to preclude the revocation or variation of the delegation by the same or a subsequent holder of the office.

Proposed new subsection 149(1A) provides:

> (1A) [W]ithout limiting the generality of subsection (1), the Registrar may also, in writing, delegate all or any of the Registrar's powers or functions to a person engaged by the Registrar for the purposes of Part 6A.

In relation to this proposed amendment, the Explanatory Memorandum states:

> Section 149 is amended to allow the Registrar to delegate all or any of his powers under the Act to a person who is not an employee of the Australian Public Service and is engaged for the purposes of Part 6A.

The Explanatory Memorandum also indicates (by implication) that this amendment is either a 'correction' or a 'necessary consequential' amendment arising out of the *Child Support Legislation Amendment Act 1992.*

On the basis of the material which the Committee has examined, it is not immediately clear how the need for this amendment arises. Given the Committee's general opposition to provisions which allow for the delegation of powers to 'a person', the Committee would appreciate the Minister's advice as to which of the Child Support Registrar's powers under part 6A of the Child Support (Assessment) Act are to be delegated and also why it is considered necessary to be able to delegate those powers in this way.

Evidence by averment
Clause 38 - proposed new section 111A of the *Child Support (Registration and Collection) Act 1988*

Clause 38 of the Bill proposes to insert a new section 111A into the *Child Support (Registration and Collection) Act 1988.* It provides:

Averments

111A.(1) In a prosecution for an offence against this Act, a statement or averment contained in the information, claim or complaint in *prima facie* evidence of the matter so stated or averred.

(2) This section applies in relation to any matter so stated or averred:

(a) even if evidence is given in support or rebuttal of the matter stated or averred; and

(b) even if the matter averred is a mixed question of law and fact, but, in that case, the statement or averment is *prima facie* evidence of the fact only.

(3) Any evidence given in support or rebuttal of a matter so stated or averred must be considered on its merits, and the credibility and probative value of such evidence is neither increased nor diminished because of this section.

(4) This section:

(a) does not apply to a statement or averment of the intent of a defendant; and

(b) does not lessen or affect any burden of proof otherwise falling on a defendant.

The issue of averments was dealt with by the Senate Standing Committee on Constitutional and Legal Affairs (as it then was) in its 1982 report, entitled *The burden of proof in criminal proceedings* (Parliamentary paper no. 319 of 1982). In that report, the Constitutional and Legal Affairs Committee offered the following definition of an averment:

> An averment is a provision in a statute providing that where the prosecutor alleges certain facts the allegation is *prima facie* evidence of the matter averred, or that those facts should be taken to be proved unless the accused calls evidence to the contrary. The effect of an averment provision is to place the onus of proof with

> regard to the matter averred on the defendant, and in the case of *Baxter v Ah Way* (1909) 10 CLR 212, Higgins J declared that the word 'averment' covers the essential part of the offence, and not merely technical averments preliminary or final. (at page 65 of the report)

After some discussion of the use of averments in legislation, the Legal and Constitutional Affairs Committee made the following recommendations concerning their continued use. Those recommendations were that:

(a) As a matter of legislative policy averment provisions should be kept to a minimum.

(b) The Parliament should enact legislation to ensure that existing and future averment provisions are only resorted to by prosecutors in the following circumstances:
   (i) where the matter which the prosecution is required to prove is formal only and does not in itself relate to any conduct on the part of the defendant; or
   (ii) where the matter in question relates to conduct of the defendant alleged to constitute an ingredient in the offence charged and is peculiarly within the defendant's knowledge.

(c) When seeking to rely upon averment provisions, prosecutors should have regard to the following criteria:
   (i) averments should be so stated that they are sufficient in law to constitute the charge;
   (ii) the facts and circumstances constituting the offence should be stated fully and with precision;
   (iii) the Crown should not aver matters of law or matters of mixed fact and law;

(iv) averments should not amend or alter the rules of pleading or those regulating the statement of the offence;

(v) averments should be restricted to the ingredients of the charge and information should not contain evidentiary material. (at pages 73-4 of the report)

Applying these considerations to the present case, it is not clear that the sorts of matters which are to be averred will be either formal only or else peculiarly within the knowledge of the defendant, as contemplated by paragraph (b) above. Similarly, it is not clear that the matters which would be capable of being proved by averment would be restricted to the ingredients of the charge, as contemplated by subparagraph (c)(v) above.

In the light of the Constitutional and Legal Affairs Committee's recommendations, and given this Committee's long-standing and 'in principle' objection to the use of averment provisions, the Committee draws Senators' attention to the provision, as it may be considered to trespass on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

COMMONWEALTH EMPLOYEES' REHABILITATION AND COMPENSATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Finance.

The Bill proposes to amend the *Commonwealth Employees' Rehabilitation and Compensation Act 1988*, which will be renamed the *Safety, Rehabilitation and Compensation Act 1988.*

The main amendments proposed by the Bill will allow the option of coverage for workers' compensation under the Act to be made available to certain corporations. The amendments would result in access to a nationally-based workers' compensation scheme for the corporations covered.

The corporations potentially able to be covered are:

- privatised former Government business enterprises (GBEs); and
- private sector corporations operating in the same industry as a GBE or a privatised former GBE;

which are, in addition, foreign, trading or financial corporations, or corporations incorporated in a Territory.

The Committee has no comment on this Bill.

CORPORATE LAW REFORM BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Attorney-General.

The Bill proposes to amend Corporations Law as it relates to directors' duties, related party transactions, corporate insolvency, stock exchange settlement procedures and miscellaneous other provisions.

Among other things, the Bill implements a number of recommendations contained in the report of the Senate Standing Committee on Legal and Constitutional Affairs, entitled 'Company Directors' Duties', the report of the Australian Law Reform Commission, entitled 'General Insolvency Inquiry' and the report of the Companies and Securities Advisory Committee, entitled 'Corporate Financial Transactions'.

Reversal of the onus of proof
Clause 27 - proposed new subsection 243ZE(6) of the Corporations Law

Clause 27 of the Bill proposes to insert a new part 3.2A into the Corporations Law. That proposed new Part includes a proposed new section 243ZE, which would make it an offence for a related party of a public company (as defined by proposed new subsection 243F) to receive a benefit from the public company or a child entity of the public company (as defined by proposed new subsection 243D).

Subsection 243ZE(6) then provides:

> In a proceeding against a person for:
> (a) a contravention of subsection (2); or
> (b) a contravention of subsection (2) because of section 243ZG, 1317DB, 1317DC or

> 1317DD [which, respectively, deem a) offences by non-legal persons, b) involvement in the commission of an offence, c) offences committed partly within and partly outside the jurisdiction and d) offences in other jurisdictions to be offences for the purposes of proposed Part 9.4B of the Corporations Law];
>
> it is a defence if it is proved that the person was unaware of a fact or circumstance essential to the contravention of subsection 243H(1) or (2), as the case requires.

This is what the Committee would generally regard as a reversal of the onus of proof, as it would ordinarily be incumbent on the prosecution to prove that a person charged was aware of the circumstances essential to the contravention of the relevant subsections.

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.

Retrospectivity
Clause 185 - proposed new section 1372 of the Corporations Law

Clause 185 of the Bill proposes to insert a new Division 5 in Part 9.11 of the Corporations Law. Included in that proposed new Division is a proposed new section 1372, which provides that proposed new subsection 6(4) of the Corporations Law (which is to be inserted by clause 182 of this Bill) is to be taken to have commenced on 27 June 1991. It is apparent that this is merely a technical amendment. Its intention is to give full effect to proposed new subsection 6(4) which, in turn, provides for the continued application of certain repealed provisions. Accordingly, the Committee makes no further comment on the provision.

CUSTOMS LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Small Business, Construction and Customs.

The Bill is an omnibus measure, proposing amendments to the *Customs Act 1901* and the *Customs Administration Act 1985.*

The main proposals contained in the Bill relate to:

. amendments to the *Customs Act 1901* and the *Customs Administration Act 1985,* to provide the legislative framework for the electronic transmission to the Australian Customs Service (ACS) of information relating to the reporting, screening and clearance of imported cargo, and to permit limited on-line computer access to such information by other agencies.

  The proposed cargo automation scheme is the third leg of the improvement and updating of entry facilities for imports and exports and is modelled on the two earlier initiatives known as EXIT (in respect of exported goods, which was provided for in the *Customs and Excise Legislation Amendment Act 1990)* and COMPILE (in respect of imported goods, which was provided for in the *Customs and Excise Legislation Amendment Act 1992).* The amendments include the insertion of a new Division 3A into the Act to provide for the electronic/computer option for cargo reporting.

  The main features of the new regime are:

  . the introduction of an electronic/computer option for the communication to ACS of information relating to the reporting,

screening and clearance of imported cargo, to complement the existing documentary/manual reporting facilities;

- that where the electronic option is selected, computer transmission of information must be via the Sea Cargo Automation System or the Air Cargo Automation system, access to which will be conditional on registration as a registered user and the entry into an agreement with ACS setting out the terms and conditions of computer communication with ACS;

- that a registered user who enters into a computer user agreement with ACS will be allocated a unique identifying code for use in any transmission to ACS, which will effectively serve as evidence that the transmission was made by the person in whose name the identifying code has been issued;

- that the Australian Quarantine and Inspection Service and port authorities have been granted on-line access to the cargo information system as a means of further strengthening import controls over prohibited or risk goods;

- amendments to the *Customs Act 1901*, to improve waterfront security in accordance with recommendations by the Joint Review Committee which examined the report of the National Crime Authority on Port Security, in particular, to increase control over ships' crew and other individuals in waterfront areas. The Act is to be amended to:

  - extend the present powers of ACS officers to search certain vehicles; and

  - oblige persons in 'Customs areas' to produce satisfactory identification upon request by an ACS officer;

- amendments to the *Customs Act 1901*, to extend eligibility for the diesel fuel rebate scheme to vessels servicing oil and gas operations in the North West Shelf and Timor Gap exploration areas when those vessels travel to or from Australian ship repair yards for refits or repairs;

- amendments to the *Customs Act 1901*, to effect minor technical changes consequential on the introduction of the electronic lodgement reforms to the import entry regime provided for in the *Customs and Excise Legislation Amendment Act 1992*.

Retrospectivity
Subclauses 2(4) and (5)

Subclauses 2(4) and (5) of the Bill provide:

> (4) Section 21 is taken to have commenced on 18 August 1992.
>
> (5) Paragraph 4(a) and sections 11, 12, 19, 20 and 22 are taken to have commenced on 1 September 1992.

The Explanatory Memorandum to the Bill indicates that the amendment to which subclause 2(4) relates is beneficial to eligible persons. In relation to subclause 2(5), the Explanatory Memorandum indicates that the amendments in question are technical in nature. Accordingly, the Committee makes no further comments on the provisions.

AD16/92

CUSTOMS LEGISLATION (ANTI-DUMPING AMENDMENTS) BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Small Business, Construction and Customs.

The Bill proposes to amend Part XVB of the *Customs Act 1901* and the *Anti-Dumping Authority Act 1988*, as part of the legislative package announced by the Government in December 1991. That legislative package is intended to provide a new system for the imposition and collection of dumping and countervailing duties.

This Bill provides that mechanism for the determination of interim and final duties, as well as introducing the two means by which subsequent adjustments of duty liability can be effected, while the other Bill in the package (the Customs Tariff (Anti-Dumping) Amendment Bill (No. 2) 1992) introduces the new taxing regime for the imposition and collection of both interim and final dumping and countervailing duties.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides:

> Section 8 is taken to have commenced on 10 July 1992.

However, as the Explanatory Memorandum to the Bill indicates that the amendments to be effected by clause 8 are technical in nature, the Committee makes no further comment on the provision.

AD16/92

CUSTOMS TARIFF (ANTI-DUMPING) AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Small Business, Construction and Customs.

The Bill proposes to amend the *Customs Tariff (Anti-Dumping) Act 1975* as part of the legislative package announced by the Government in December 1991. That legislative package is intended to provide a new system for the imposition and collection of dumping and countervailing duties.

This Bill introduces the new taxing regime for the imposition and collection of both interim and final dumping and countervailing duties, while the other Bill in the package (the Customs Legislation (Anti-Dumping Amendments) Bill 1992) amends the *Customs Act 1901* and the *Anti-Dumping Authority Act 1988* to provide the mechanism for the determination of interim and final duties.

This Bill also provides for 2 means by which subsequent adjustments of duty liability can be effected.

The Committee has no comment on this Bill.

AD16/92

DATA-MATCHING PROGRAM (ASSISTANCE AND TAX) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Social Security.

The Bill provides for three amendments to the *Data-matching Program (Assistance and Tax) Act 1990.* They are:

- the repeal of the sunset clause (section 21), to allow the data-matching program to continue beyond 22 January 1993;

- the extension of the time allowed for step 5 of a data-matching cycle, to permit refinement of matching algorithms and so produce more accurate results; and

- the modification of the requirement in section 11 of the Act that a source agency must delay action consequent on a discrepancy found in a data-matching cycle until the affected person has had up to 28 days in which to query the result. The amendment will allow an assistance agency to take immediate action, with written notice of action to the affected party, where the detected discrepancy results solely from the agency's administrative error.

The Committee has no comment on this Bill.

AD16/92

ENDANGERED SPECIES PROTECTION BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Arts, Sport, the Environment and Territories.

The Bill proposes to provide a framework for the protection of endangered and vulnerable species and ecological communities by:

- promoting the recovery of species and ecological communities that are endangered or vulnerable;
- preventing other species and ecological communities from becoming endangered;
- reducing conflict in land management, through readily understood mechanisms relating to the conservation of species and ecological communities that are endangered;
- providing for public involvement in, and promoting understanding of, the conservation of such species and ecological communities; and
- encouraging cooperative management for the conservation of such species and ecological communities.

Commencement by Proclamation
Clause 2

Clause 2 of the Bill provides:

> **Commencement**
> 2.(1) This Act commences on a day to be fixed by Proclamation.

> (2) If this Act does not commence under subsection (1) within the period of 9 months commencing on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

The Committee notes that, while the period within which the legislation is to be proclaimed (and, therefore, is to commence) is explicitly limited by subclause 2(2), the period specified (ie 9 months) is longer than the 6 month 'general rule' provided for in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Committee also notes that the Explanatory Memorandum gives no indication as to why a longer period has been chosen in this instance.

The Committee would appreciate the Minister's advice as to why a 9 month period has been specified for commencement in this instance.

AD16/92

ENDANGERED SPECIES PROTECTION (CONSEQUENTIAL AMENDMENTS) BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Arts, Sport, the Environment and Territories.

The Bill contains provisions which are intended to ensure that endangered species matters are considered within the impact assessment procedures provided for by the *Environment Protection (Impact of Proposals) Act 1974.* It also contains provisions to amend the *National Parks and Wildlife Act 1975,* to enable the Director of the Australian National Parks and Wildlife Service to carry out certain duties specified in the Bill.

The Committee has no comment on this Bill.

AD16/92

EXPORT MARKET DEVELOPMENT GRANTS AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Parliamentary Secretary to the Minister for Foreign Affairs and Trade.

The Bill proposes to amend the *Export Market Development Grants Act 1974* (EMDG), in order to assist Australian exporters promotional efforts in penetrating 'new markets'.

Generally, Australian exporters are eligible to receive a maximum of 8 grants under the EMDG Scheme. This proposed amendment will make an exception to this general rule if an exporter can demonstrate initiatives in pursuing 'new markets', by providing limited access to the Scheme beyond 8 grants. 'New market' initiatives may only be pursued by exporters who have previously received 8 grants under EMDG.

Retrospectivity
Clause 2

Clause 2 of the Bill provides that the legislation is to be taken to have commenced on 1 July 1992. However, as the Explanatory Memorandum to the Bill indicates that the substantive provisions of the Bill are beneficial to persons other than the Commonwealth, the Committee makes no further comment on the provision.

AD16/92

FARM HOUSEHOLD SUPPORT BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to introduce a new scheme to replace Part C of the old Rural Adjustment Scheme (RAS). The new scheme is targeted at farmers who are unable to access commercial finance as a means of meeting the daily requirements of the family.

The scheme essentially involves a loan to farmers at commercial rates for up to 2 years while they consider their options. The scheme contains incentives to encourage those without a productive future in farming to leave the farming sector, by converting a portion of the farm household support loan into a grant for those who leave farming.

The scheme provides assistance to farmers who are often excluded from standard welfare schemes because of their asset levels. Farmers who qualify for both farm household support and job search allowance will have a choice between the two schemes. Farmers on the former Part C of RAS will automatically transfer to farm household support payments.

The Committee has no comment on this Bill.

AD16/92

HEALTH AND COMMUNITY SERVICES LEGISLATION AMENDMENT BILL (NO. 3) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Aged, Family and Health Services.

The Bill proposes amendments to the *Aged or Disabled Persons Care Act 1954,* to allow for the introduction of sanctions against hostels which fail to comply with standards of care and quality of life for residents. It also provides for the establishment of Hostel Standards Review Panels.

The Bill also proposes to amend the *National Health Act 1953,* to implement a 1992-93 Budget initiative providing funding to upgrade nursing homes.

The Bill also proposes amendments to the *Health Insurance Act 1973,* to rectify an anomaly in the legislation that prejudices pathology practices which merge.

The Committee has no comment on this Bill.

AD16/92

HEALTH INSURANCE (QUALITY ASSURANCE CONFIDENTIALITY) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Health, Housing and Community Services.

The Bill proposes to promote the undertaking of a range of quality assurance activities in relation to the provision of health services, relating to certain funding or payments by the Commonwealth under the *Health Insurance Act 1973* and the *National Health Act 1953*. This will be done by providing for statutory confidentiality and immunity protection in respect of quality assurance activities declared by the Minister by a disallowable instrument, in accordance with specified criteria, as declared quality assurance activities for the purposes of the Bill.

The Bill will amend the *Health Insurance Act 1973*, by including of a new Part VC in relation to quality assurance activities in connection with the provision of applicable health services.

The Bill would prohibit the disclosure of information known solely as a result of declared quality assurance activities to another person and also the disclosure of such information or the production of relevant documents to a court. However, the Bill would permit the Minister to authorise disclosure of information about conduct that may constitute a serious criminal offence. The Bill will not preclude the disclosure of information which does not identify (either expressly or by implication) a particular individual or individuals.

The Bill will provide statutory immunity from civil proceedings to members of committees carrying out declared quality assurance activities. Statutory immunity will only attach to persons who engage in good faith in declared quality assurance activities in circumstances where the rights or interests of other people who

provide health services are adversely affected. A committee will be obliged to act within the law of procedural fairness, as the only action which will lie against committee members is an action for breach of the rules.

The Committee has no comment on this Bill.

AD16/92

HIGHER EDUCATION FUNDING AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the *Higher Education Funding Act 1988,* which provides grants of financial assistance to the States, the Northern Territory and higher education institutions for higher education purposes.

The Bill reflects Government decisions on higher education arising out of the 1990-91 review of Commonwealth-State relations. On the basis of agreements variously reached between the Commonwealth, the States and Territories and higher education institutions, the Bill provides for Commonwealth grants for higher education to be made direct to higher education institutions from 1993. It also provides for higher education institutions to have the choice of adopting (in 1993) simplified financial reporting practices under streamlined financial reporting arrangements that become mandatory in 1994.

The Bill provides for the Government's decision to incorporate higher education capital grants into higher education institutions' general operating grants from 1994. The purpose of this measure is to provide flexibility in higher education capital planning, to enable higher education institutions to achieve, over time, a well-maintained and efficient capital stock.

The Committee has no comment on this Bill.

AD16/92

HOUSING ASSISTANCE AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Health, Housing and Community Services.

The Bill proposes to amend the *Housing Assistance Act 1989*, under which the States, with financial assistance from the Commonwealth, deliver housing assistance for rental housing and home purchase in accordance with the terms of the 1989 Commonwealth/State Housing Agreement (CSHA). That Agreement appears as Schedule 1 to the *Housing Assistance Act 1989*.

The Bill extends the period of guaranteed funding under the CSHA from 1 July 1993 to 30 June 1996. It also appropriates total additional funding of $3.2 billion as part of a package of measures negotiated with the States for reform of the CSHA.

Consistent with new cash management arrangements being introduced in 1992-93, the Bill also allows for funds that have been allocated to a State in respect of a grant year but not fully paid out in that year to be carried over between grant years.

The Committee has no comment on this Bill.

AD16/92

HUMAN RIGHTS AND EQUAL OPPORTUNITY LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Attorney-General.

The Bill proposes to amend the Commonwealth's human rights legislation to create the office of Aboriginal and Torres Strait Islander Social Justice Commissioner, as part of the Human Rights and Equal Opportunity Commission, and to prohibit the dismissal of a worker on the grounds of his or her family responsibilities.

The Committee has no comment on this Bill.

AD16/92

IMMIGRATION (EDUCATION) CHARGE BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill (in conjunction with the Migration Laws Amendment Bill (No. 2) 1992) proposes to establish a scheme to provide for cost recovery for the provision of English language training through the Adult Migrant English Program. The scheme will apply to persons applying for migrant visas or permanent entry permits on or after 1 January 1993, whose applications are granted on or after 1 March 1993, who are over 18 and do not have functional English. These persons will be required to pay the English Education Charge unless they have applied for an exempt visa or exempt entry permit. The charge is characterised as a tax and, to comply with the requirements of section 55 of the *Constitution*, is imposed by this Bill.

The Committee has no comment on this Bill.

AD16/92

INCOME EQUALISATION DEPOSITS LAWS AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to give effect to changes in the provisions of the Income Equalisation Deposit Scheme which are intended to encourage farmers to increase their Income Equalisation Deposits (IED). These amendments were announced in the 1992-93 Budget and in media releases by the Minister for Primary Industries and Energy on 20 August 1992.

Retrospectivity
Clause 2

Clause 2 of the Bill provides that the substantive provisions of the Bill are to be taken to have commenced on 19 August 1992. The Committee notes that this is the date of the Budget and that, according to the Explanatory Memorandum to the Bill, the amendments in question were announced in the Budget. Accordingly, the Committee makes no further comment on the provision.

AD16/92

INCOME TAX ASSESSMENT AMENDMENT (FOREIGN INVESTMENT) BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister Assisting the Treasurer.

The Bill proposes to implement the Government's 1992-92 Budget announcement in relation to the reform of the provisions for the taxation of foreign source income. The Bill contains the necessary new provisions for inclusion in the *Income Tax Assessment Act 1936* to give effect to the Government's approach in relation to the taxation of Foreign Investment Funds. The Foreign Investment Fund measures contained in this Bill will take effect from 1 January 1993.

The Committee has no comment on this Bill.

AD16/92

MEDICARE AGREEMENTS BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Health, Housing and Community Services.

The Bill proposes to amend section 23E and section 23F of Part III ('Payments for Hospital Services') and section 125 of Part VI ('Finance') of the *Health Insurance Act 1973.*

The amendments to the Act will allow the Commonwealth to enter into Agreements with the States for the provision of hospital and other health services, to appropriate funds for the period of the Medicare Agreement from 1 July 1993, to define the fundamental principles of Medicare and to establish the broad conditions for the payment of funds to the States. These conditions will include the various States enshrining the principles in complementary legislation and that they agree to develop a Public Patients' Hospital Charter.

The amendments would create a new Schedule 2A to the Principal Act, which provides the form and content for the Medicare Agreements that will be reached between the Commonwealth and each State.

The Committee has no comment on this Bill.

AD16/92

MEDICARE LEVY AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the *Medicare Levy Act 1986*, to raise the rate of Medicare levy from 1.25 per cent to 1.4 per cent.

The Committee has no comment on this Bill.

AD16/92

MIGRATION (DELAYED VISA APPLICATIONS) TAX BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to impose a tax on an application for the grant of a visa or entry permit to a non-citizen who has been unlawfully in Australia for 12 months or more. The tax must be paid before that person may be granted a visa or entry permit. The tax is payable by the applicant. The amount of the tax will be $3000 for each completed year of unlawful status.

The Bill also provides for indexation of this amount for years following 1992-93. Unlawful non-citizens who are granted refugee status will be exempt from the tax.

The Bill also provides for the Minister to exclude the tax where the Minister determines the payment of the tax would cause an applicant extreme hardship.

The Committee has no comment on this Bill.

MIGRATION LAWS AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill (in conjunction with the Immigration (Education) Charge Bill 1992) proposes to establish a scheme to provide for cost recovery for the provision of English language training through the Adult Migrant English Program. The scheme will apply to persons applying for migrant visas or permanent entry permits on or after 1 January 1993, whose applications are granted on or after 1 March 1993, who are over 18 and do not have functional English. These persons will be required to pay the English Education Charge unless they have applied for an exempt visa or exempt entry permit.

Retrospectivity
Clause 16

Clause 16 of the Bill provides:

> Absorbees never prohibited non-citizens
>
> 16. Subsection 8(2) of the *Migration Amendment Act 1983* does not apply, and never has applied, to a person who:
>
> (a) on the commencement of that Act, was in Australia; and
>
> (b) before that commencement, had ceased to be an immigrant; and
>
> (c) since that commencement, has not left Australia.

Subsection 8(2) of the *Migration Amendment Act 1983* provides:

> (2) Where a person who, upon the commencement of this Act-
>
> (a) is a non-citizen within the meaning of the *[Migration Act 1958]* as amended by this Act; and
>
> (b) is not the holder of an entry permit (not being a temporary entry permit),
>
> had, at a time before that commencement, ceased to be a prohibited immigrant within the meaning of the *[Migration Act 1958]* by virtue of the operation of sub-section 7(4) of that Act, that person becomes, upon that commencement, a prohibited non-citizen for the purposes of the *[Migration Act 1958]* as amended by this Act.

The Explanatory Memorandum to the Bill indicates that clause 16 is intended to correct a recently-discovered anomaly in the legislation which, if not corrected, could operate to withdraw the lawful status of certain persons who have been 'absorbed' into the Australian community. Accordingly, the Committee makes no further comment on the provision.

MIGRATION REFORM BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes major changes to the *Migration Act 1958*. The changes will replace the existing legislative framework which regulates entry to, and stay in, Australia, as well as the detention and removal of non-citizens who are in Australia unlawfully. It proposes to provide a new and greatly-extended basis for merits review of immigration decisions and to provide, for the first time, independent determinative merits review of refugee-related decisions.

Denial of access to the courts
Clause 33 - proposed new subsection 166LB(2) and proposed new section 166LK of the *Migration Act 1958*

Clause 33 of the Bill proposes to insert a new Part 4B into the *Migration Act 1958*. That new Part, if enacted, would provide for the review of certain decisions by the Federal Court. In particular, proposed new subsection 166LB(1) of the Migration Act sets out a series of 'judicially-reviewable decisions' which are open to an application for review by the Federal Court. Proposed new subsection 166LB(2) then provides:

> (2) The following are not grounds upon which an application may be made under subsection (1):
> (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
> (b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

In addition, proposed new section 166LK provides:

> **Federal Court does not have any other jurisdiction in relation to judicially-reviewable decisions**
>
> *166LK.*(1) *In spite of any other law, including* section 39B of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in respect of judicially-reviewable decisions or decisions covered by subsection 166LA(2), other than the jurisdiction provided by this Part or by section 44 of the *Judiciary Act 1903*.
>
> (2) Subsection (1) does not affect the jurisdiction of the Federal Court in relation to appeals under section 44 of the *Administrative Appeals Tribunal Act 1975*.
>
> (3) If a matter relating to a judicially-reviewable decision is remitted to the Federal Court under section 44 of the *Judiciary Act 1903*, the Federal Court does not have any powers in relation to that matter other than the powers it would have had if the matter had been as a result of an application made under this Part.

It is evident that the effect of proposed new subclause 166LB(2) and proposed new section 166LK is to make certain decisions non-reviewable, which may, therefore, operate to make rights, liberties or obligations unduly dependent on non-reviewable decisions, as contemplated by principle 1(a)(iii) of the Committee's terms of reference.

On the question of the exclusion of the jurisdiction of the Federal Court in relation to certain aspects of the relevant decisions, the Explanatory Memorandum to the Bill states (at page 82):

> The Scheme of decision-making under the amendments made in this Bill will set out with greater certainty the procedural requirements to be followed to ensure that applicants are provided with the protection necessary to receive a fair consideration when decisions are made

> affecting their right to enter or remain in Australia. The procedural requirements under the existing regime have been governed by the common law rules of natural justice and these rules have not provided the certainty needed for effective administration of the migration program. Accordingly, these common law rules will be replaced by a codified set of procedures which will afford the same level [of] protection to individuals but will have the additional advantage of greater certainty in the decision-making process.

This is obviously a complex and complicated matter. On the one hand, (according to the Explanatory Memorandum) the Bill will bring much-needed certainty to the area of refugee-related decisions. However, on the other hand, the Bill does so by explicitly removing existing grounds of review and replacing them with a catalogue of specific grounds. While the Explanatory Memorandum indicates that the Bill gives the same scope for review as currently exists, it is nevertheless clear that some existing grounds are being taken away.

The decision as to whether or not the measures proposed by the Bill are appropriate clearly has a high public policy element. As such, it is properly a matter for the Senate to decide. However, in making this decision, Senators should bear in mind the points which the Committee has raised above.

Delegation of power to 'a person'
Clause 35 - proposed new subsection 176(3) of the *Migration Act 1958*

Clause 35 of the Bill proposes to add 2 new subsections to section 176 of the Migration Act. Section 176 currently provides:

> Delegation
>
> 176.(1) The Minister may, by writing signed by him or her, delegate to a person any of the Minister's powers under this Act.
>
> (2) The Secretary may, by writing signed by him or her, delegate to a person any of the Secretary's

powers under this Act.

Proposed new subsections 176(3) and (4) provide:

> (3) If an application for a visa that has a health criterion is made, the Minister may:
>
> (a) delegate to a person the power to consider and decide whether that criterion is satisfied; and
>
> (b) consider and decide, or delegate to another person the power to consider and decide, all other aspects of the application.
>
> (4) To avoid doubt, if there is a delegation described in paragraph (3)(a) in relation to an application for a visa:
>
> (a) Subdivision AB of Division 2 of Part 2 has effect accordingly; and
>
> (b) for the purposes of subsection 26ZF(1), the Minister is satisfied or not satisfied that the health criterion for the visa has been satisfied if the delegate who was given that delegation is so satisfied or not so satisfied, as the case may be.

The Committee has consistently drawn attention to provisions which allow power to be delegated to 'a person'. It is the Committee's view that such powers, particularly when they have the capacity to affect personal rights and liberties, should either be exercised by the person to whom they are given or, if they have to be delegated, by members of an ascertainable class of persons. That class of persons should be defined either by reference to the holders of a particular office or to the qualifications or attributes of the persons to whom the power is to be delegated.

The Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

AD16/92

MUTUAL RECOGNITION BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister Assisting the Prime Minister.

The Bill proposes to enable the enactment of uniform legislation for the mutual recognition by the States and Territories of each other's differing regulatory standards regarding goods and occupations. The Bill forms part of a legislative scheme that involves the enactment of legislation by the States and Territories and then by the Commonwealth.

Commencement by Proclamation
Clause 2

Clause 2 of the Bill provides that the provisions of the Bill are to commence on a day or days to be fixed by Proclamation. Contrary to the 'general rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, there is no time limit fixed, within which such a Proclamation must be issued. While it is clear from the Explanatory Memorandum that the operation of the Bill depends on the enactment of State and Territory legislation (an issue which is relevant in the context of Drafting Instruction No. 2), the Explanatory Memorandum does not give this as the reason for the open-ended Proclamation clause. If this is the reason for the provision, it would be of assistance to the Parliament if the Explanatory Memorandum made it clear.

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

AD16/92

NATIONAL HEALTH AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Aged, Family and Health Services.

The Bill proposes to amend the *National Health Act 1953.* It comprises two distinct elements: a fundamental revision of the nursing home benefit payments scheme and a legislative mechanism designed to protect the rights of the Commonwealth and of prospective purchasers of approved nursing homes.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY ADMINISTRATION BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey (NRS).

This Bill provides for the establishment of a Trust Account in which money collected from NRS levies or penalties, relevant Parliamentary appropriations, gifts or contributions to the NRS and income from money invested will be held. Payments will be made from this Account for the purposes of conducting surveys and to reimburse the Commonwealth for expenses incurred on behalf of the NRS.

The Bill also sets the initial levy rates for commodities to be surveyed and the maximum rates that can be set by regulation.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (CONSEQUENTIAL PROVISIONS) BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey (NRS).

This Bill provides for the transfer of NRS funds into the NRS Trust Account and also amends the *Cattle Transaction Levy Act 1990,* to ensure that the imposition of the NRS levy under that legislation ceases on 1 July 1993, when the NRS legislation comes into effect.

The Bill also amends the *Primary Industries Levies and Charges Collection Act 1991,* to provide for the inclusion of aquatic animal export levies, game meat levies and horse slaughter levies as levies that will be collected under the provisions of that Act.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (AQUATIC ANIMAL EXPORT) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (CATTLE TRANSACTIONS) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (COARSE GRAINS) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (DAIRY PRODUCE) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (DRIED FRUITS) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (GAME ANIMALS) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (GRAIN LEGUMES) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (HONEY) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (HONEY EXPORT) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (HORSE SLAUGHTER) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (HORTICULTURAL PRODUCTS) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (HORTICULTURAL PRODUCTS EXPORT) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (LAYING CHICKEN) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (LIVESTOCK SLAUGHTER) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (MEAT CHICKEN) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (OILSEEDS) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATIONAL RESIDUE SURVEY (WHEAT) LEVY BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill is one of a package of 19 Bills, the purpose of which is to make provision for recovering the costs of the scientific monitoring of the contaminant status of animal and plant food products produced in Australia or exported from Australia.

The 17 Levy Bills each impose a levy on producers of various animal and plant food products for the purpose of funding the National Residue Survey.

The Committee has no comment on this Bill.

AD16/92

NATURAL RESOURCES MANAGEMENT (FINANCIAL ASSISTANCE) BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to authorise arrangements through which the Commonwealth can contribute financial assistance to the States, Territories, institutions and individuals for natural resource management projects. Such assistance, which is to be administered by the Department of Primary Industries and Energy, will form part of the National Landcare Program. A second purpose of the Bill is to establish a National Landcare Advisory Committee.

The Committee has no comment on this Bill.

QANTAS SALE BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Finance.

The Bill proposes to put in place the necessary legislative and administrative framework for the sale of Qantas Airways Limited by the Commonwealth.

The Bill has four main purposes:

- to ensure that, post-sale, Qantas and its subsidiaries (including Australian Airlines and its subsidiaries) are, as far as practicable, subject to legislation, consistent with other private sector companies;

- to ensure that, despite the change of ownership, employee entitlements already accrued under Commonwealth legislation in respect of pre-sale service are retained post-sale;

- to provide the basis for necessary debt and capital reconstruction of Qantas in connection with the sale of Qantas, including the assumption by the Commonwealth of Commonwealth-guaranteed debt issued by Qantas prior to the sale of Qantas; and

- to provide legislative backing for the incorporation of national interest safeguards in Qantas' articles of association.

Commencement by Proclamation
Subclause 2(2)

Clause 2 of the Bill provides for the commencement of the substantive provisions contained in the Bill. It states:

(1) Sections 1, 2, 3, 24, 28, 40 and 41 and Parts 2, 3 and 4 commence on the day on which this Act receives the Royal Assent.

(2) Subject to subsection (3), the remaining provisions of this Act commence on a day or days to be fixed by Proclamation.

(3) A Proclamation may fix a day that is earlier than the day on which the Proclamation is published in the *Gazette* but only if:

(a) in the case of sections 30, 31, 35, 37, 39, 43 and 50 and Parts 1 and 2 of the Schedule–the day is not earlier than the substantial minority sale day; and

(b) in the case of sections 22, 23, 26, 27, 29, 32, 33, 34, 42, 45, 46, 47, 48 and 49 and Parts 3 and 4 of the Schedule–the day is not earlier than the 50% sale day; and

(c) in the case of sections 25, 36, 38, 44 and 51 and Parts 5, 6 and 7 of the Schedule–the day is not earlier than the 100% sale day.

(4) If, on the 100% sale day, sections 35, 37, 43 and 50 and Part 1 of the Schedule have not commenced, then, on the day on which Part 7 of the Schedule commences, sections 35, 36, 37, 38, 43, 44, 50 and 51 and Parts 1 and 5 of the Schedule are taken to have been repealed.

(5) If, on the 100% sale day, Part 3 of the Schedule has not commenced, then, on the day on which Part 7 of the Schedule commences, Parts 3 and 6 of the Schedule are taken to have been repealed.

(6) If a provision of this Act has not commenced before 31 December 1993, the provision is taken to have been repealed on that day.

The Committee notes that the need for the commencement of various provisions of the Bill by Proclamation is both explained in the Explanatory Memorandum

and also limited by subclause 2(6). While the period provided by subclause 2(6) is in excess of the 'general rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, the Committee acknowledges that the peculiar circumstances of the Bill are set out in detail in the Explanatory Memorandum and the Minister's Second Reading speech. Accordingly, the Committee makes no further comment on the Bill.

AD16/92

RURAL ADJUSTMENT BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to give effect to major changes to the Rural Adjustment Scheme (RAS). The changes are the result of a review, undertaken on behalf of the Commonwealth Government, and following extensive consultations with the State governments and with rural industries. The new scheme is focussed on the development of a more sustainable and profitable farm sector, which is to operate competitively in a deregulated financial and market environment. To this end, the provisions of the new Scheme will provide support to farmers to achieve productivity growth and more effective management of the farm business.

In order to provide strategic focus to the RAS and improve accountability, the Bill also provides for the establishment of the Rural Adjustment Scheme Advisory Council, which will advise the Minister on future directions for the Scheme and on matters related to its operation.

The Bill establishes the administrative arrangements, including the terms and conditions of appointment of members, the establishment of specialist committees, staffing and meetings of the Council.

The Committee has no comment on this Bill.

AD16/92

SALES TAX IMPOSITION (*IN SITU* POOLS) BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister Assisting the Treasurer.

The Bill (in conjunction with the Sales Tax Laws Amendment Bill (No. 2) 1992) proposes to re-impose sales tax on swimming pool, spa pool and hot tub shells constructed *in situ*, to bring their treatment for sales tax purposes into line with other swimming pools, spa pools and hot tubs that are already subject to tax.

The Committee has no comment on this Bill.

AD16/92

SALES TAX LAWS AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister Assisting the Treasurer.

The proposed amendments to be made by this Bill (and the related Sales Tax Imposition (*In Situ* Pools) Bill 1992) fall into 3 categories. In particular, this Bill proposes to:

- re-impose sales tax at the rate of 20 per cent on swimming pool, spa pool and hot tub shells constructed *in situ;*
- extend the period during which an exemption from tax will be available for certain UHF television transmitters; and
- make miscellaneous amendments to ensure that the new sales tax law operates as intended.

The Committee has no comment on this Bill.

AD16/92

SEX DISCRIMINATION AND OTHER LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Prime Minister.

The Bill proposes to make a number of amendments to the *Sex Discrimination Act 1984* and to the Commonwealth's other human rights legislation, namely the *Racial Discrimination Act 1975*, the *Human Rights and Equal Opportunity Commission Act 1986* and the *Disability Discrimination Act 1992*. The Bill also makes amendments to the *Industrial Relations Act 1988* relating to sex discrimination and industrial awards.

The Committee has no comment on this Bill.

AD16/92

SOCIAL SECURITY LEGISLATION AMENDMENT BILL (NO. 3) 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Social Security.

The Bill proposes to give effect to measures announced in the 1992-93 Budget and to make some minor and technical amendments. In particular, the Bill will amend the following Acts:

- the *Social Security Act 1991;*
- the *Social Security (Family Payment) Amendment Act 1992;*
- the *Health Insurance Act 1973;* and
- the *National Health Act 1953.*

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that Part 1 of Schedule 1 of the Bill is to be taken to have commenced on 26 June 1992. However, the Explanatory Memorandum indicates that the amendments in question are technical and that, if enacted, they will benefit persons other than the Commonwealth. Accordingly, the Committee makes no further comment on the provision.

AD16/92

STATES GRANTS (PRIMARY AND SECONDARY EDUCATION ASSISTANCE) BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Employment, Education and Training.

The Bill proposes to provide financial assistance to the States, the Australian Capital Territory and the Northern Territory for government and non-government schools and for related matters for the years 1993 to 1996.

The Bill supersedes the *States Grants (Schools Assistance) Act 1988* which provided financial assistance for the years 1989 to 1992. It continues the Government's undertaking to provide security in funding arrangements for the succeeding 4 year period. The Bill also gives effect to a number of measures announced in the context of, and subsequent to, the 1992-93 Budget.

The Committee has no comment on this Bill.

AD16/92

STATES GRANTS (RURAL ADJUSTMENT) BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to give effect to changes to the Rural Adjustment Scheme (RAS), which were introduced to provide special assistance measures to farmers suffering from extreme drought conditions. The measures were announced by the Minister for Primary Industries and Energy as part of the 1992-93 Budget.

The Committee has no comment on this Bill.

AD16/92

STATES GRANTS (SCHOOLS ASSISTANCE) AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Employment, Education and Training.

The Bill proposes to amend the *States Grants (Schools Assistance) Act 1988*, to provide for supplementation of funds appropriated for schools programs for 1992.

The Bill extends eligibility for the English as a Second Language Program to dependants of certain categories of temporary entry permit holders who are in Australia on visas rather than on temporary entry permits.

The Bill provides for additional funds under the Award Restructuring Assistance Program in 1992, to meet the Commonwealth's share of additional costs associated with the increase in the salary benchmark for 4 year-trained teachers to $38,000 per year and with the introduction of Advanced Skills Teacher positions.

The Committee has no comment on this Bill.

AD16/92

SUPERANNUATION LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Finance.

The Bill proposes to amend 4 Acts covering superannuation for Commonwealth sector civilian employees, namely the *Superannuation Act 1922,* the *Superannuation Act 1976,* the *Superannuation Act 1990* and the *Superannuation (Productivity Benefit) Act 1988.*

The amendments to these Acts are either changes to provide for additional benefits in certain limited circumstances that are required as a result of the *Superannuation Guarantee (Administration) Act 1992,* changes to bring the Commonwealth superannuation schemes into line with the requirements and spirit of the Occupational Superannuation Standards, corrections of certain unintended effects, or changes of a technical nature, including changes to clarify certain aspects of the invalidity retirement procedures in the schemes.

Retrospectivity
Subclauses 2(2) to (6)

Clause 2 of the Bill provides for the commencement of the various substantive provisions of the Bill. Subclauses 2(2) to (6) provide:

> (2) Paragraph 34(b) is taken to have commenced on 1 July 1990.
>
> (3) Sections 67 and 68 are taken to have commenced on 1 July 1990.
>
> (4) Section 14 and paragraph 25(e) are taken to have commenced on 1 July 1991.

(5) Section 55 is taken to have commenced on 1 October 1991.

(6) Sections 25, 26 (other than paragraph (e)), 31, 32, 37 and 46 are taken to have commenced on 1 July 1992.

The Explanatory Memorandum to the Bill indicates that the substantive provisions in question are either beneficial to persons other than the Commonwealth, intended to correct the unintended effects of the legislation or are technical amendments which are required by changes to other legislation. Accordingly, the Committee makes no further comment on the provisions.

AD16/92

TAXATION LAWS AMENDMENT BILL (NO. 6) 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the taxation laws in a number of ways. The amendments will:

- deny a tax deduction for expenses incurred by employees in relation to a non-compulsory uniform or wardrobe;

- reflect a change of name for the College of Pathologists of Australia, which is listed in the income tax gift provisions;

- enable resident companies to take into account dividends that will be paid under international dividend streaming arrangements when determining the required franking amount for a related dividend;

- subject limited partnerships to taxation as companies and treat them as companies for the purposes of the income tax law, with corresponding treatment of partners in such partnerships;

- exempt from income tax the Family Payment Advance made under Part 2.17 of the *Social Security Act 1991*;

- simplify the administration of the Prescribed Payments System, by replacing the current monthly reporting arrangements for payers of prescribed payments with annual reporting and modifying the current arrangements for deduction variation certificates, deduction exemption certificates and approvals to quote reporting exemption numbers.

Retrospectivity
Subclause 2(2), clause 6

Subclause 2(2) of the Bill provides that the substantive amendments proposed by Division 5 of Part 2 of the Bill commences on 19 August 1992. The date in question is the date of the Budget. The Explanatory Memorandum indicates that the amendments in question were announced in the Budget. Accordingly, the Committee makes no further comment on the provision.

Clause 6 of the Bill provides that the substantive amendment proposed by clause 5 of the Bill is to apply to gifts made on or after 16 January 1980. However, as the Explanatory Memorandum indicates that the amendment in question is technical in nature, the Committee makes no further comment on the provision.

AD16/92

TAXATION LAWS AMENDMENT (CAR PARKING) BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend the *Fringe Benefits Tax Assessment Act 1986*, to impose fringe benefits tax on the provision of certain car parking benefits to employees. It also proposed to amend the *Income Tax Assessment Act 1936*, to deny the income tax deductibility of certain car parking expenses of employees.

The Committee has no comment on this Bill.

AD16/92

TAXATION LAWS AMENDMENT (SUPERANNUATION) BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Minister Assisting the Treasurer.

The Bill proposes to amend various taxation laws to implement the measures outlined in the Treasurer's 'Security in Retirement - Planning for Tomorrow Today' statement of 30 June 1992. The major provisions of the Bill are designed to:

- limit the amount of the deductions available to an employer or self-employed person for contributions to a superannuation fund;
- replace the existing deduction and rebate arrangements for employees who have employer superannuation support with a new rebate;
- extend the concept of a substantially self-employed person;
- clarify the circumstances in which a person is an 'eligible' person and, therefore, entitled to a tax deduction for personal superannuation contributions;
- ensure that a payment of superannuation guarantee charge counts as employer superannuation support in the year for which it is payable;
- introduce a new 15 per cent rebate on superannuation pensions paid from taxed superannuation funds and on annuities purchased wholly with rolled-over eligible termination payments (ETPs) to replace the existing rebate arrangements. (The rebate will apply to all such superannuation pensions and roll-over annuities payable to taxpayers

who are aged 55 or more, regardless of when the pension or annuity commenced to be payable.);

- limit the undeducted purchase price (UPP) for rebatable ETP annuities to the post-June 1983 undeducted contributions;

- include in the definition of an ETP the unused undeducted purchase price (UUPP) of a commuted superannuation pension or roll-over annuity and of the residual capital value of a superannuation pension or roll-over annuity so that UUPP can be rolled-over;

- extend the meaning of pensions and annuities, to ensure that appropriate tax treatment is given to allocated pensions and allocated annuities;

- remove the ability of taxpayers to choose which part of an eligible termination payment is rolled-over (except undeducted contributions and concessional component).

- remove the current 90 day roll-over period so that eligible termination payments must be rolled-over directly from the source of the payment to a complying superannuation fund, a complying approved deposit fund, a deferred annuity or an immediate annuity;

- provide a limit on the concessionally-taxed amount of *bona fide* redundancy payments and approved early retirement scheme payments;

- exempt amounts within that limit from tax;

- prevent *bona fide* redundancy payments and approved early retirement scheme payments being paid from a superannuation fund;

- modify the meaning of invalidity payment and require verification of the recipient's disability by two legally-qualified medical practitioners;

- create a new ETP component, comprising invalidity payments made on or after 1 July 1994 (the post-June 1994 invalidity component);

- exempt the post-June 1994 invalidity component from tax.

The Bill will also amend the *Superannuation Guarantee (Administration) Act 1992* to:

- ensure that, if an employer's superannuation contribution under an industrial award in place prior to 21 August 1991 is based on the earnings of a standard employee, then the earnings of the standard employee can be the employee's 'notional earnings base';

- extend this measure to apply where superannuation contributions, based on the earnings of a standard employee, are made under a law in place prior to 21 August 1992. In that case the earnings of the standard employee can also be the employee's 'notional earnings base';

- exclude payments of salary or wages which are prescribed in the Regulations from the calculation of the superannuation guarantee charge. A complementary Regulation will be made to prescribe certain payments of salary or wages which are alternatives to social security payments;

- make it clear that a superannuation guarantee obligation arises when salary or wages of $450 or more is paid to an employee in a month;

- ensure that, in calculating the shortfall, the amount of the employee's salary or wages cannot exceed the maximum contribution base;

- extend the time for an employer to obtain a statement from a fund, so that contributions to it are deemed to be made to a complying superannuation fund. The extended time will be 30 days after the date of introduction of this amendment;

- exclude any period of unpaid leave from the calculation of the reduced charge percentage in defined benefit scheme cases; and

- correct an error in the indexation calculations in section 15, by replacing the reference to the year '1992-93' with '1993-94'.

Retrospectivity
Clauses 47 and 81

Clause 46 of the Bill provides that the substantive amendments to the *Income Tax Assessment Act 1936* which are proposed by Division 8 of Part 2 of the Bill are to apply from 1 July 1992. While the Committee notes that the provisions in question would impose new obligations on taxpayers, the Committee also notes that the amendments in question were announced by the Government on 30 June 1992 and that, in accordance with the Senate's resolution of 8 November 1988 (*Journals of the Senate*, No 109, 8 November 1988, pp 1104-5) this Bill has been introduced within 6 months of that announcement. Accordingly, the Committee makes no further comment on the provisions.

Clause 81 of the Bill provides that the substantive amendments to the *Superannuation Guarantee (Administration) Act 1992* which are proposed by clauses 78, 29 and 80 of the Bill are to have effect as if they had commenced on 1 July 1992, immediately after the commencement of that Act. However, the Explanatory Memorandum indicates that the amendments in question are intended to clarify various matters. Accordingly, the Committee makes no further comment on the provision.

AD16/92

TRADE PRACTICES LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 3 November 1992 by the Attorney-General.

The Bill proposes to provide for a number of amendments to the *Trade Practices Act 1974,* to enhance its operation and improve the efficiency and fairness of Australian business practices.

Sections 50 and 50A, which deal with anti-competitive acquisitions and mergers, are to be amended. The new test for the application of these provisions will be whether the relevant merger or acquisition would result in a substantial lessening of competition.

Interpretation of the new merger provisions will be assisted by the inclusion of a non-exhaustive list of relevant matters to be considered in assessing whether a particular merger is likely to substantially lessen competition. The list includes such matters as the level of import competition in the market and the height of barriers to entry to the market.

The Committee has no comment on this Bill.

AD16/92

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL (NO. 2) 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Veterans' Affairs.

The Bill is a portfolio Bill which proposes a number of changes to veterans' affairs legislation arising out of that part of the 1992 Budget announcement relating to veterans. It also contains a number of minor non-Budget policy changes and minor and technical amendments to veterans' affairs legislation.

Retrospectivity
Subclauses 2(2) and (3)

Clause 2 of the Bill provides for the commencement of the various substantive amendments contained in the Bill. Subclauses 2(2) and (3) provide:

> (2) Part 2 of Schedule 2 is taken to have commenced on 1 July 1991.
>
> (3) Part 3 of Schedule 2 is taken to have commenced on 1 July 1991, immediately after the commencement of the *Veterans' Entitlements Amendment Act 1991.*

The Explanatory Memorandum to the Bill indicates that the amendments in question are technical in nature. Accordingly, the Committee makes no further comment on the provisions.

AD16/92

VETERANS' ENTITLEMENTS AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Veterans' Affairs.

The Bill proposes to set out, in a detailed and structured way, the manner of determining and the steps preparatory to, and included in, determining whether or not an injury, disease or death is war-caused or defence-caused under the *Veterans' Affairs Entitlements Act 1986,* where the claim for pension relates to operational service, peacekeeping service or hazardous service.

If enacted, the amendments will also set out the standard of proof to be used in the determination of the 'causation issue', ie whether or not an injury, disease or death is war-caused or defence-caused.

The purpose of the amendments will be to overturn the effect of the decision of the High Court of Australia in *Bushell v Repatriation Commission,* which was delivered by the Court on 7 October 1992. However, they will go no further than what was intended to be the position following the introduction of the Veterans' Entitlements Act in 1986, and the practice that was believed to have been endorsed, in effect, by the majority of the Full Bench of the Federal Court in *Repatriation Commission v Bushell* ([1991] 23 ALD 13).

Retrospectivity
Clause 3

Clause 3 of the Bill provides:

> **Application**
> 3.(1) The amendments made by this Act apply to all determinations and decisions made under the Principal Act after the commencement of this Act.

> (2) Subsection (1) applies to a determination or decision even if the claim, application for review or appeal to which it relates was initiated before the commencement of this Act.

This may be considered to give the substantive amendments proposed by the Bill a degree of retrospective operation, as they would apply to a determination made by the Repatriation Commission prior to the commencement of the legislation but appealed to the Federal Court after the commencement of the legislation. In particular, the effect of the provision may be to reverse what would otherwise be the outcome of such an appeal.

However, in making this observation, the Committee also notes that a similar result would eventuate in relation to a High Court decision to the same effect. That is, if the High Court were to hand down a decision which gave a particular interpretation to the provisions of the existing legislation, that interpretation would apply in relation to any determinations appealed to the Federal Court after the decision.

The Committee notes that the Explanatory Memorandum to the Bill sets out quite explicitly the Bill's intention to reverse the effect of the decision of the High Court in *Bushell,* which gave to the legislation an interpretation contrary to that which the Government originally intended. Accordingly, the Committee makes no further comment on the Bill.

VOCATIONAL EDUCATION AND TRAINING FUNDING BILL 1992

This Bill was introduced into the House of Representatives on 4 November 1992 by the Minister for Employment, Education and Training.

The Bill proposes to provide funds for expenditure on technical and further education/vocational education and training in respect of the 1993-95 triennium.

Commencement by Proclamation
Subclauses 2(2) and (3)

Clause 2 of the Bill provides for the commencement of the Bill. It provides:

> (1) This Act, except for Part 3, commences on the day on which it receives the Royal Assent.
>
> (2) Subject to subsection (3), Part 3 commences on a day to be fixed by Proclamation, being a day not earlier than the day on which the *Australian National Training Authority Act 1992* commences and not later than 31 December 1993.
>
> (3) If the commencement of Part 3 is not fixed by a Proclamation published in the *Gazette* before 31 December 1993, Part 3 is repealed on that day.

The Committee notes that, in accordance with the 'general rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, what would otherwise be an open-ended proclamation provision in subclause 2(2) is restricted by subclause 2(3). However, the Committee also notes that the relevant time period is in excess of the 6 month period specified by Drafting Instruction No. 2 and that, in addition, the Explanatory Memorandum gives no indication as to the need for the longer period. The Committee would, therefore, appreciate the Minister's advice as to why the longer period is necessary.

The Committee draws Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

SCRUTINY OF BILLS ALERT DIGEST

NO. 17 OF 1992

25 NOVEMBER 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

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 such 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.

The Committee has considered the following Bills:

Defence (Conscientious Objection) Bill 1992

International Labour Organisation (Compliance with Conventions) Bill 1992

* Migration (Offences and Undesirable Persons) Amendment Bill 1992

* Petroleum (Submerged Lands) Amendment Bill 1992

Primary Industries Legislation Amendment Bill 1992

* Radiocommunications Bill 1992

* Radiocommunications (Receiver Licence Tax) Amendment Bill 1992

Radiocommunications Taxes Collection Amendment Bill 1992

* Radiocommunications (Test Permit Tax) Amendment Bill 1992

* Radiocommunications (Transmitter Licence Tax) Amendment Bill 1992

Radiocommunications (Transitional Provisions and Consequential Amendments) Bill 1992

Regulation of Video Material Bill 1992

* Transport and Communications Legislation Amendment Bill (No. 3) 1992

*** The Committee has commented on these Bills**

AD17/92

DEFENCE (CONSCIENTIOUS OBJECTION) BILL 1992

This Bill was introduced into the Senate on 9 November 1992 by Senator Chamarette as a Private Senator's Bill.

The Bill proposes to allow for recognition of conscientious objector status for members of the Australian Armed Forces who refuse to serve in a particular conflict, on the grounds of conscience, without incurring a charge of breach of discipline.

The Committee has no comment on this Bill.

AD17/92

INTERNATIONAL LABOUR ORGANISATION (COMPLIANCE WITH CONVENTIONS) BILL 1992

This Bill was introduced into the Senate on 11 November 1992 by the Manager of Government Business at the request of the Minister for Industrial Relations.

The Bill proposes to:

- amend sections 71 to 75 and 111 of the *Migration Act 1958,* to enable Australia to demonstrate compliance with the International Labour Organisation (ILO) Convention No. 108, Seafarers' Identity Documents, 1958. In particular, the amendments give effect to provisions of the Convention which deal with the production, to appropriate authorities, of seafarers' identity documents on arrival and departure from a country where the Convention is in force, by allowing those documents to remain in the custody of the seafarer rather than in the custody of the Master of the vessel;

- amend sections 117 and 118 of the *Navigation Act 1912,* to enable Australia to demonstrate compliance with Article 5 of ILO Convention No. 68, Food and Catering (Ships' Crews), 1946. These amendments, in turn, enable Australia to ratify ILO Convention No. 147, Merchant Shipping (Minimum Standards), 1976, the purpose of which is to ensure that a voyage is not undertaken unless the ship is carrying suitable quantity and quality of food and that the ship is equipped with suitable catering facilities; and

- insert a new section 134 into the *Navigation Act 1912,* to provide for regulations to be made which will, in turn, enable the ratification of ILO Convention No. 73, Medical Examination (Seafarers), 1946.

The Committee has no comment on this Bill.

MIGRATION (OFFENCES AND UNDESIRABLE PERSONS) AMENDMENT BILL 1992

This Bill was introduced into the Senate on 12 November 1992 by the Minister for Defence at the request of the Minister for Justice.

The Bill proposes to amend the *Migration Act 1958*, to:

- provide for a visa fraud offence where a person uses a visa or entry permit which has been granted to someone else or is in possession of such a visa or entry permit without reasonable excuse;

- provide the Minister with the power refuse an application from or cancel a visa or entry permit held by a person who would be likely to incite discord or represent a danger to the community or a segment of it or is likely to engage in criminal conduct in Australia;

- set, by regulations, the period during which a person is to be excluded from Australia; and

- provide a right of review to the Administrative Appeals Tribunal (AAT) of a decision to exclude a person from Australia, unless the Minister, acting personally, decides that it is in the national interest that a certificate be issued, declaring that a person is an excluded person, in which case AAT review is not possible.

Non-reviewable decisions
Clause 5 - proposed new section 180B of the *Migration Act 1958*

Clause 5 of the Bill proposes to insert a series of new sections into the *Migration Act 1958*. Proposed new section 180A, if enacted, would allow the Minister to

refuse to grant a visa or entry permit to a person or to cancel an existing visa or entry permit if the person is 'not of good character' or if the person is likely to engage in criminal conduct, 'incite discord', etc. Proposed new section 180B then provides:

> **Minister may decide in the national interest that certain persons are to be excluded persons**
>
> 180B.(1) If:
>
> (a) the Minister, acting personally, intends to make a decision under section 55 [which deals with the deportation of certain people who have committed crimes] or 180A in relation to a person; and
>
> (b) the Minister decides that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared to be an excluded person;
>
> the Minister may, as part of the decision, include a certificate declaring the person to be an excluded person.
>
> (2) A decision under subsection (1) must be taken by the Minister personally.
>
> (3) If the Minister makes a decision under subsection (1), the Minister must cause notice of the making of the decision to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the decision was made.

Clause 4 of the Bill proposes to amend section 180 of the Migration Act to make it clear that a certificate issued pursuant to proposed new section 180B would operate to exclude review of the relevant decision by the Administrative Appeals Tribunal.

On its face, these amendments might be considered to be in breach of principle 1(a)(iii) of the Committee's terms of reference, as they may be considered to

make personal rights, liberties or obligations unduly dependent on non-reviewable decisions. However, the Committee notes that the decisions in question are to be made by the Minister personally and that, in addition, such decisions are open to scrutiny by the Parliament, by virtue of their being required to be reported to the Parliament.

General comment

The Committee notes that clauses 6 and 7 of the Bill propose to amend 'sections' 180B and 180C of the Migration Act, respectively. Those 'sections' are to be inserted by clause 5 of the same Bill. While this would appear to be something of a nonsense, the Committee notes that, pursuant to subclause 2(2) of the Bill, clauses 6 and 7 (and subclause 4(2), which contains a related amendment) are not to commence until 1 November 1993. By way of explanation, the Explanatory Memorandum states:

> Clause 6 Minister may decide in the national interest that certain persons are to be excluded persons
>
> This clause, which commences on 1 November 1993, amends proposed section 180B by replacing paragraph (1)(a) of that provision with new paragraph (1)(a) to take into account the changes to the Migration Act [ie those proposed by the Migration Reform Bill 1992] to commence on that day. The replacement paragraph updates the reference to the criminal deportation power, and includes decisions to refuse or cancel protection visas as decisions in respect of which certificates can be issued.
>
> Clause 7 Exclusion of certain persons from Australia
>
> This clause, to commence on 1 November 1993, amends proposed section 180C to include a reference to the amended criminal deportation power. The amended provisions also includes within its scope persons excluded from Australia because of a decision to refuse or cancel a protection visa.

The Committee makes no further comment on the Bill.

PETROLEUM (SUBMERGED LANDS) AMENDMENT BILL 1992

This Bill was introduced into the Senate on 11 November 1992 by the Minister for Foreign Affairs and Trade at the request of the Minister for Industrial Relations.

The Bill proposes to insert a new Schedule 7 into the *Petroleum (Submerged Lands) Act 1967,* to ensure that all persons working in the offshore petroleum industry in Commonwealth waters are protected by occupational health and safety legislation.

The Bill will cover persons working in the industry offshore Western Australia and Queensland (who are not currently covered by State legislation) until such time as these States have extended the coverage of their occupational health and safety legislation to persons in the industry.

The imposition of a general duty of care and safety on employers and employees is to be imposed by:

- clause 4, which applies to employers' responsibility to maintain workplaces, plant, systems of work and means of the access to and egress from workplaces, employees who work with plant substances and to develop (with any involved unions) an occupational health and safety policy and provide, in appropriate languages, training and supervision necessary to enable employees to work within that policy;

- clauses 6 and 7, which apply to manufacturers of plant or substances the responsibility in relation to plant design and construction and manufacture of substances, and require that the supplier provide information to employers on the condition of the plant or the substances;

- clause 8, which relates to the persons who erect or install a plant in a workplace; and

- clause 9, which relates to employees co-operation and participation.

Part 3 of the Schedule provides arrangements for the selection of employee health and safety representatives and the establishment of health and safety committees with employer and employee representation.

The Bill also makes provision for standards on specific hazards to be included in regulations and for the publication of codes of practice approved by the Designated Authority.

Reversal of the onus of proof
Clause 6 - subclause 48(2) and clause 52 of proposed new Schedule 7 of the *Petroleum (Submerged Lands) Act 1967*

Clause 6 of the Bill proposes to add a new Schedule 7 to the *Petroleum (Submerged Lands) Act 1967*. That proposed new Schedule deals with occupational health and safety. Clause 48 of the Schedule provides:

> **Employer not to dismiss etc. employees on certain grounds**
>
> 48.(1) An employer must not:
>
> (a) dismiss an employee; or
>
> (b) injure an employee in his or her employment; or
>
> (c) prejudicially alter the employee's position (whether by deducting or withholding remuneration or by any other means); or
>
> (d) threaten to do any of those things;
>
> because the employee:
>
> (e) has complained or proposes to complain about a matter concerning the health, safety or welfare of employees at work; or
>
> (f) has assisted or proposes to assist, by giving information or otherwise, the conduct of an

investigation; or

(g) has ceased, or proposes to cease, to perform work, in accordance with a direction by a health and safety representative under paragraph 26(1)(b), not being a cessation or proposed cessation that continues after:

(i) the health and safety representative has agreed with a person supervising the work that the cessation or proposed cessation was not, or is no longer, necessary; or

(ii) an investigator has, under subclause 26(4), made a decision that has the effect that the employee should perform the work.

Penalty: $25,000.

(2) In proceedings for an offence against subclause (1), if all the relevant facts and circumstances, other than the reason for an action alleged in the charge, are proved, it lies upon the defendant to establish that the action was not taken for that reason.

Subclause 48(2) above involves what the Committee would generally consider to be a reversal of the onus of proof, as it is ordinarily incumbent on the prosecution to prove all the elements of an offence, including the 'reason' for an action, as this may be relevant to the issue of intent. However, in the present case the Committee is prepared to accept that if the 'reason' for a dismissal is other than one which would make the dismissal an offence, then the true 'reason' is a matter peculiarly within the knowledge of the person alleged to have committed the offence. Accordingly, the Committee is prepared to accept the shifting of the onus in this instance.

Similarly, clause 52 of proposed new Schedule 7 provides:

> **Circumstances preventing compliance with Schedule may be defence to prosecution**
>
> 52. It is a defence to a prosecution for refusing or failing to do anything required by this Act or the regulations if the defendant proves that it was not practicable to do it because of an emergency prevailing at the relevant time.

This clause also involves what the Committee would generally consider to be a reversal of the onus of proof. However, for the same reasons discussed above, the Committee is prepared to accept the reversal in this case, as it relates to matters which would be peculiarly within the knowledge of the person alleged to have committed the offence.

The Committee makes no further comment on the Bill.

AD17/92

PRIMARY INDUSTRIES LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 10 November 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to amend:

- the *Pig Industry Act 1986,* to transfer certain functions of the Australian Pork Producers' Federation to the Pork Council of Australia and to abolish the Australian Pig Industry Policy Council (APIPC);

- the *Primary Industry Councils Act 1991,* a) to provide for the Chairman of the Food Committee of the Grocery Manufacturers of Australia to replace the Chairman of the Grocery Manufacturers of Australia as representative on the Grains Industry Council; b) to establish the Australian Pig Industry Council (and its administration), to replace the APIPC; c) to provide transitional arrangements required for the changeover; and d) to require the preparation and submission of the final annual report of the APIPC to Parliament; and

- the *Australian Meat and Live-stock Corporation Act 1977* and the *Meat Research Corporation Act 1985,* to change the proportion of votes required for passing levy and no confidence motions at annual general meetings of the Corporations.

The Committee has no comment on this Bill.

RADIOCOMMUNICATIONS BILL 1992

This Bill was introduced into the Senate on 12 November 1992 by the Minister for Defence at the request of the Minister for Transport and Communications.

The Bill proposes to replace the *Radiocommunications Act 1983* and to reform the management of the radiofrequency spectrum, taking into account recommendations of the House of Representatives Standing Committee on Transport, Communications and Infrastructure, in its report entitled *Management of the Radio Frequency Spectrum.*

The reform strategy consists of:

- the introduction of a market system of spectrum management through a new form of spectrum access (called a spectrum licence), defined in terms of frequency and geographic boundaries;

- improvements to the current administrative system in relation to a system of accreditation for persons and organisations authorised to issue certificates, a technical standards regime, conciliation of interference disputes, a class licence system for low power devices, an increase in apparatus licence periods to 5 years and inquiries conducted into matters related to spectrum management; and

- the establishment of the Spectrum Management Agency (SMA), to plan, operate and regulate functions required for spectrum management.

The SMA will operate independently, on a cost recovery basis, within the Transport and Communications portfolio and will be subject to direction (with respect to the performance of its functions and the exercise of its powers) from

the Minister, under clause 235 of the Bill. It will be headed by a statutory officer, appointed by the Governor-General, with the powers of a Departmental Secretary and staff will be appointed under the *Public Service Act 1922*.

Reversal of the onus of proof
Clauses 49, 177 and 196

Clause 46 of the Bill provides:

> **Unlicensed operation of radiocommunications devices**
>
> 46. Subject to section 49, a person must not, without reasonable excuse, knowingly or recklessly operate a radiocommunications device otherwise than as authorised by:
>
> (a) a spectrum licence; or
> (b) an apparatus licence; or
> (c) a class licence.
>
> Penalty:
>
> (a) if the radiocommunications device is a radiocommunications transmitter:
> (i) if the offender is an individual - imprisonment for 2 years; or
> (ii) otherwise - $150,000; or
> (b) if the radiocommunications device is not a radiocommunications transmitter - $2,000.

Clause 47 makes similar provision in relation to the unlawful possession of radiocommunications devices.

Clause 49 provides:

> **Emergency operation etc. of radiocommunications devices**
>
> 49.(1) A person does not contravene section 46 or 47 by operating a radiocommunications device, or having a radiocommunications device in his or her possession, in the reasonable belief that the operation or possession was necessary for the purpose of:

(a) securing the safety of a vessel or aircraft that was in danger; or
(b) dealing with an emergency involving a serious threat to the environment; or
(c) dealing with an emergency involving risk of death of, or injury to, persons; or
(d) dealing with an emergency involving risk of substantial loss of, or substantial damage to, property.

(2) In proceedings for an offence against section 46 or 47, the burden of proving any of the matters referred to in subsection (1) lies on the defendant.

(3) Nothing in this section limits the scope of the expression 'reasonable excuse' in section 46 or 47.

Clauses 157 and 158 of the Bill, respectively, prohibit emissions from and possession of a 'non-standard transmitter' (as defined by subclause 9(3) of the Bill). However, clause 172 then provides:

Emergency transmissions etc.

172. A person does not contravene section 157 or 158 by causing a radio transmission to be made by a non-standard transmitter, or having a non-standard transmitter in his or her possession, in the reasonable belief that the emission or possession was necessary for the purpose of:

(a) securing the safety of a vessel or aircraft that was in danger; or
(b) dealing with an emergency involving a serious threat to the environment; or
(c) dealing with an emergency involving risk of death of, or injury to, persons; or
(d) dealing with an emergency involving risk of substantial loss of, or damage to, property.

Clause 177 then provides:

> Burden of proof
>
> 177.(1) In proceedings for an offence against section 157 or 158, the burden of proving any of the matters referred to in section 172 lies on the defendant.
>
> (2) In proceedings for an offence against section 158 or 160 [which would make it an offence to supply a 'non-standard device'], the burden of proving the absence of any of the matters referred to in section 173, 174, 175 or 176 lies on the prosecution.

Clauses 173 to 176, respectively, provide for the possession or use of non-standard transmitters and devices for use solely outside Australia, the supply of non-standard devices with the written permission of the Spectrum Management Agency, the supply of non-standard devices for the purposes of modification or alteration and the supply of non-standard devices for re-export. Possession or supply of transmitters or devices in such circumstances would not be an offence under the relevant provisions.

Clauses 192, 193, 194 and 195, if enacted, would make it an offence (punishable by fines up to $500 000 or imprisonment for up to 2 years) to, respectively, interfere with radiocommunications in circumstances where the interference is likely to prejudice the safe operation of aircraft or vessels, interfere with certain other radiocommunications (relating to rescue service, etc), to interfere with radiocommunications where the interference is likely to endanger safety or cause loss of damage or make certain transmissions from a foreign vessel or aircraft.

Clause 196 then provides:

> Emergency transmissions etc.
>
> 196.(1) A person does not contravene section 192, 193, 194 or 195 by doing anything that the person reasonably believes was necessary for the purpose of:

(a) securing the safety of a vessel or aircraft that was in danger; or
(b) dealing with an emergency involving a serious threat to the environment; or
(c) dealing with an emergency involving risk of death of, or injury to, persons; or
(d) dealing with an emergency involving risk of substantial loss of, or substantial damage to, property.

(2) In proceedings for an offence against section 192, 193, 194 or 195, the burden of proving any of the matters referred to in subsection (1) lies on the defendant.

Clauses 49, 177 and 196 all involve what the Committee would generally regard as a reversal of the onus of proof.

The Committee notes with approval that, under subclause 177(2), the burden of proving the *absence* of certain matters is explicitly imposed on the prosecution. Nevertheless, the Committee is concerned about the reversal of the onus in relation to the other matters. In making this comment, the Committee indicates that it is also generally concerned by what it perceives to be an increasing tendency in Commonwealth legislation to require the defendant to prove various matters.

The Committee would appreciate the Minister's advice as to why it is believed to be necessary to reverse the onus of proof in the provisions referred to. 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.

Criminal liability for careless failure to be aware of relevant facts
Clauses 188 and 200

Clause 182 of the Bill, if enacted, would authorise the Spectrum Monitoring

Agency to require that certain labels be affixed to certain devices covered by the legislation. Clause 187 then provides:

> **Affixing labels without compliance certificates**
>
> 187. If a person knows that he or she is required under subsection 182(4) to be issued with a compliance certificate for a class of devices before affixing a particular label to a device included in the class, the person must not, without reasonable excuse, affix:
>
> (a) the label; or
>
> (b) a label that purports to be such a label;
>
> before he or she is issued with the compliance certificate.
>
> Penalty: $10,000.

Clause 188 then provides:

> **Imputed knowledge**
>
> 188. For the purposes of establishing a contravention of section 186 or 187, if, having regard to:
>
> (a) a person's abilities, experience, qualifications and other attributes; and
>
> (b) all the circumstances surrounding the alleged contravention;
>
> the person ought reasonably to have known that he or she was subject to the requirement in question, the person is taken to have known that he or she was subject to the requirement.

Similarly, clause 200 of the Bill provides:

> **Imputed knowledge**
>
> 200. For the purposes of establishing a contravention of section 192, 193 or 194, paragraph 195(1)(b) or section 199, if, having regard to:
>
> (a) a person's abilities, experience, qualifications and other attributes; and
>
> (b) all the circumstances surrounding the alleged contravention;

> the person ought reasonably to have known that using the transmitter in question, or doing the act or thing in question, was a contravention of that provision, the person is taken to have known that using the transmitter, or doing the act or thing, was such a contravention.

Clauses 192, 193 and 194, paragraph 195(1)(b) and clause 199, if enacted, would create offences in relation to certain interferences with radiocommunications and certain transmissions. Such offences would carry penalties of fines of up to $500 000 and imprisonment of up to 5 years.

The Committee notes that clauses 188 and 200, if enacted, would create an offence of *careless* failure to be aware of certain facts. This would appear to impose a somewhat stricter duty on persons affected by the provisions than that which would apply under the criminal law and also to increase the possibility that such persons could, by their actions, be found to be criminally liable. In particular, the provisions would appear to impose a higher standard than that ordinarily applicable under the criminal law, pursuant to which liability attaches only for actions done **knowingly** or **recklessly**.

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.

RADIOCOMMUNICATIONS (RECEIVER LICENCE TAX) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 10 November 1992 by the Minister for Small Business, Construction and Customs.

The Bill proposes to amend the *Radiocommunications (Receiver Licence Tax) Act 1983*, to provide for the amount of tax under that Act to be determined by the proposed Spectrum Management Agency (to be established under the proposed Radiocommunications Bill 1992).

Setting of fees by regulation
Clause 7 - proposed new section 7 of the *Radiocommunications (Receiver Licence Tax) Act 1983*

Clause 7 of the Bill, if enacted, would repeal sections 7 and 8 of the *Radiocommunications (Receiver Licence Tax) Act 1983* and replace them with a new section 7. The existing section 7 provides:

> Amount of tax
>
> 7.(1) The amount of tax in respect of the grant of a receiver licence is such amount as is ascertained in accordance with the regulations.
>
> (2) For the purposes of sub-section (1), different amounts of tax may be prescribed in respect of receiver licences included in different classes of receiver licences or in respect of persons included in different classes of persons, or both.

The existing section 8 is a transitional provision and is no longer relevant.

Proposed new section 7 provides:

> Amount of tax
>
> 7.(1) The amount of tax in respect of the issue of a receiver licence is the amount determined by the SMA [Spectrum Management Agency].
>
> (2) A determination may, among other things, provide for amounts of tax in relation to:
>
> (a) specified periods; or
>
> (b) specified classes of licences; or
>
> (c) specified classes of persons.
>
> (3) In making a determination, the SMA is to take into account such matters as are specified in the regulations.
>
> (4) A determination is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901.*
>
> (2) Until the SMA makes a determination under section 7 of the Principal Act as amended by this Act, the regulations made under section 9 of the Principal Act that were in force immediately before the commencement of this Act continue in force as if they were determinations made by the SMA.

If enacted, proposed new section 7 would allow the rate of the tax to be set by regulation. The Committee has consistently drawn attention to such provisions, on the basis that the imposition of a tax (including the setting of its level) is appropriately a matter for primary legislation and not delegated legislation. If it is necessary, for reasons of flexibility, to be able to vary a rate of tax by regulation then, as the Committee has previously indicated, it is appropriate that either a maximum rate of tax or a method of calculating that maximum rate be set out in the primary legislation. This has not been done in the present case.

Two further points should be made in relation to the present amendments. The

first is that when the Committee dealt with the Radiocommunications (Receiver Licence Tax) Amendment Bill 1983, it commented adversely on the provision which the proposed new section 7 is to replace (see the Committee's Eleventh Report of 1983, pp 12-3), on the same basis as it now comments on the proposed new provisions. Clearly, those comments were not taken up by the Parliament at that time.

Second, it is significant that the present provisions would allow for the rate of the tax to be set by the Spectrum Management Agency. While the Committee accepts that a determination by the SMA setting such a rate would be disallowable by either House of the Parliament (under proposed new subsection 7(4)), it is nevertheless concerned that the provision would allow the imposition of a tax (or, at least, a rate of tax) to be imposed by a body other than the Parliament or the Governor-General-in-Council.

The Committee draws Senators' attention to the provision, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

AD17/92

RADIOCOMMUNICATIONS TAXES COLLECTION AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 10 November 1992 by the Minister for Business, Construction and Customs.

The Bill proposes to amend the *Radiocommunications Taxes Collection Act 1983*, to ensure that the tax payable on the grant of a licence or permit which is issued for a period of longer than 12 months is payable in annual instalments.

The Committee has no comment on this Bill.

RADIOCOMMUNICATIONS (TEST PERMIT TAX) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 10 November 1992 by the Minister for Business, Construction and Customs.

The Bill proposes to amend the *Radiocommunications (Test Permit Tax) Act 1983*, to provide for the amount of tax under that Act to be determined by the proposed Spectrum Management Agency (to be established under the proposed Radiocommunications Bill 1992) and to replace 'test permit' with 'permit' in the short title.

Setting of fees by regulation
Clause 7 - proposed new section 7 of the *Radiocommunications (Test Permit Tax) Act 1983*

Clause 7 of the Bill, if enacted, would repeal sections 7 and 8 of the *Radiocommunications (Test Permit Tax) Act 1983* and replace them with a new section 7. The existing section 7 provides:

> Amount of tax
>
> 7.(1) The amount of tax in respect of the grant of a test permit is such amount as is ascertained in accordance with the regulations.
>
> (2) For the purposes of sub-section (1), different amounts of tax may be prescribed in respect of test permits included in different classes of test permits or in respect of persons included in different classes of persons, or both.

The existing section 8 is a transitional provision and is no longer relevant.

Proposed new section 7 provides:

> **Amount of tax**
>
> 7.(1) The amount of tax in respect of the issue of a permit is the amount determined by the SMA [Spectrum Management Agency].
>
> (2) A determination may, among other things, provide for amounts of tax in relation to:
>
> (a) specified periods; or
>
> (b) specified classes of permits; or
>
> (c) specified classes of persons.
>
> (3) In making a determination, the SMA is to take into account such matters as are specified in the regulations.
>
> (4) A determination is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901.*
>
> (2) Until the SMA makes a determination under section 7 of the Principal Act as amended by this Act, the regulations made under section 9 of the Principal Act that were in force immediately before the commencement of this Act continue in force as if they were determinations made by the SMA.

If enacted, proposed new section 7 would allow the rate of the tax to be set by regulation. The Committee has consistently drawn attention to such provisions, on the basis that the imposition of a tax (including the setting of its level) is appropriately a matter for primary legislation and not delegated legislation. If it is necessary, for reasons of flexibility, to be able to vary a rate of tax by regulation, then, as the Committee has previously indicated, it is appropriate that either a maximum rate of tax or a method of calculating that maximum rate be set out in the primary legislation. This has not been done in the present case.

Two further points should be made in relation to the present amendments. The

first is that when the Committee dealt with the Radiocommunications (Test Permit Tax) Bill 1983, it commented adversely on the provision which the proposed new section 7 is to replace (see the Committee's Eleventh Report of 1983, pp 12-3), on the same basis as it now comments on the proposed new provisions. Clearly, those comments were not taken up by the Parliament at that time.

Second, it is significant that the present provisions would allow for the rate of the tax to be set by the Spectrum Management Agency. While the Committee accepts that a determination by the SMA setting such a rate would be disallowable by either House of the Parliament (under proposed new subsection 7(4)), it is nevertheless concerned that the provision would allow the imposition of a tax (or, at least, a rate of tax) to be imposed by a body other than the Parliament or the Governor-General-in-Council.

The Committee draws Senators' attention to the provision, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

AD17/92

RADIOCOMMUNICATIONS (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1992

This Bill was introduced into the Senate on 12 November 1992 by the Minister for Defence, at the request of the Minister for Transport and Communications.

The Bill proposes to:

- repeal the *Radiocommunications Act 1983*, the *Radiocommunications (Frequency Reservation Certificate Tax) Act 1983* and the *Radiocommunications (Temporary Permit Tax) Act 1983*;

- make transitional arrangements as a result of the enactment of the proposed *Radiocommunications Act 1992*, to ensure that a large number of instruments made and consultation procedures which have been undertaken under the *Radiocommunications Act 1983* will be taken to have been made and undertaken under the new Act; and

- make consequential amendments to other Commonwealth legislation upon the enactment of the new Act.

The Committee has no comment on this Bill.

AD17/92

RADIOCOMMUNICATIONS (TRANSMITTER LICENCE TAX) AMENDMENT BILL 1992

This Bill was introduced into the House of Representatives on 10 November 1992 by the Minister for Business, Construction and Customs.

The Bill proposes to amend the *Radiocommunications (Transmitter Licence Tax) Act 1983*, to provide for the amount of tax under that Act to be determined by the proposed Spectrum Management Agency (to be established under the proposed Radiocommunications Bill 1992).

Setting of fees by regulation
Clause 7 - proposed new section 7 of the *Radiocommunications (Transmitter Licence Tax) Act 1983*

Clause 7 of the Bill, if enacted, would repeal sections 7 and 8 of the *Radiocommunications (Transmitter Licence Tax) Act 1983* and replace them with a new section 7. The existing section 7 provides:

> Amount of tax
>
> 7.(1) The amount of tax in respect of the grant of a transmitter licence is such amount as is ascertained in accordance with the regulations.
>
> (2) For the purposes of sub-section (1), different amounts of tax may be prescribed in respect of transmitter licences included in different classes of transmitter licences or in respect of persons included in different classes of persons, or both.

The existing section 8 is a transitional provision and is no longer relevant.

Proposed new section 7 provides:

> **Amount of tax**
>
> 7.(1) The amount of tax in respect of the issue of a transmitter licence is the amount determined by the SMA [Spectrum Management Agency].
>
> (2) A determination may, among other things, provide for amounts of tax in relation to:
>
> (a) specified periods; or
>
> (b) specified classes of licences; or
>
> (c) specified classes of persons.
>
> (3) In making a determination, the SMA is to take into account such matters as are specified in the regulations.
>
> (4) A determination is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901.*
>
> (2) Until the SMA makes a determination under section 7 of the Principal Act as amended by this Act, the regulations made under section 9 of the Principal Act that were in force immediately before the commencement of this Act continue in force as if they were determinations made by the SMA.

If enacted, proposed new section 7 would allow the rate of the tax to be set by regulation. The Committee has consistently drawn attention to such provisions, on the basis that the imposition of a tax (including the setting of its level) is appropriately a matter for primary legislation and not delegated legislation. If it is necessary, for reasons of flexibility, to be able to vary a rate of tax by regulation, then, as the Committee has previously indicated, it is appropriate that either a maximum rate of tax or a method of calculating that maximum rate be set out in the primary legislation. This has not been done in the present case.

Two further points should be made in relation to the present amendments. The

first is that when the Committee dealt with the Radiocommunications (Transmitter Licence Tax) Bill 1983, it commented adversely on the provision which the proposed new section 7 is to replace (see the Committee's Eleventh Report of 1983, pp 12-3), on the same basis as it now comments on the proposed new provisions. Clearly, those comments were not taken up by the Parliament at that time.

Second, it is significant that the present provisions would allow for the rate of the tax to be set by the Spectrum Management Agency. While the Committee accepts that a determination by the SMA setting such a rate would be disallowable by either House of the Parliament (under proposed new subsection 7(4)), it is nevertheless concerned that the provision would allow the imposition of a tax (or, at least, a rate of tax) to be imposed by a body other than the Parliament or the Governor-General-in-Council.

The Committee draws Senators' attention to the provision, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

AD17/92

REGULATION OF VIDEO MATERIAL BILL 1992

This Bill was introduced into the Senate on 12 November 1992 by Senator Walters as a Private Senator's Bill.

The Bill proposes to reduce the violence in 'M' and 'R' rated videos and prohibit the importation, sale or hire of 'X' rated videos.

The Committee has no comment on this Bill.

AD17/92

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL (NO. 3) 1992

This Bill was introduced into the Senate on 12 November 1992 by the Minister for Defence, at the request of the Minister for Transport and Communications.

The Bill proposes to amend the following Acts administered within the Transport and Communications portfolio:

- the *Australian Broadcasting Corporation Act 1983,* to allow for the Australian Broadcasting Corporation to carry corporate sponsorship, which it proposes to provide on its new international satellite service to South-East Asian countries;

- the *Broadcasting Services Act 1992,* to make it a reasonable excuse for a journalist, at an Australian Broadcasting Authority investigation or hearing, to refuse to answer a question or produce a document if to do so would disclose a confidential source of material used in a broadcast program;

- the *Civil Aviation Act 1988;*

- the *Federal Airports Corporation Act 1986;*

- the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983;*

- the *Radiocommunications Act 1983;*

- the *Telecommunications Act 1991;* and

. the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1991.*

Retrospectivity
Subclauses 2(2), (3), (4) and (6)

Subclauses 2(2), (3), (4) and (6) of the Bill provide that several of the substantive amendments to be made by the Bill are to commence prior to the Bill being passed. The retrospectivity relates to dates as early as 1 July 1988. However, the Explanatory Memorandum indicates that the retrospectivity, in each case, is either beneficial to persons other than the Commonwealth or relates to amendments which are technical in nature. Accordingly, the Committee makes no further comment on the provisions.

Commencement by Proclamation
Subclauses 2(5) and (7)

Subclause 2(5) of the Bill provides:

> Subject to subsection (7), Part 6 commences on a day to be fixed by Proclamation.

Subclause 2(7) provides:

> If the commencement of Part 6 is not fixed by Proclamation published in the *Gazette* before 1 August 1993, Part 6 is repealed on that day.

The Committee notes that the limiting of the time within which the Part must be proclaimed is in accordance with the 'general rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. However, the Committee also notes that (assuming that the Bill is passed during the current Parliamentary session) the time period specified will be longer than the 6 months provided for by the Drafting Instruction. By way of explanation for this longer

period, the Explanatory Memorandum for the Bill states:

> The purpose of [Part 6] of the Bill is to amend the *Protection of the Sea (Prevention of Pollution From Ships) Act 1983* (the Pollution Act) to implement resolutions of 6 March 1992 of the Marine Environment Protection Committee of the International Maritime Organization to amend Annex I (Regulations for the Prevention of Pollution by Oil) to the International Convention for the Prevention of Pollution from Ships. Those amendments place more stringent controls on the discharge into the sea of oil or oily mixtures from ships.
>
> In accordance with the resolutions of the Marine Environment Protection Committee, the amendments to Annex I will enter into force on 6 July 1993 unless, prior to 6 January 1993, "one third or more of the Parties, or the Parties the combined merchant fleets of which constitute fifty per cent or more of the gross tonnage of the world's merchant fleet, have communicated to the Organization their objections to the amendments". The amendments to the Pollution Act are therefore expressed to commence on a date to be proclaimed. If there are no objections as referred to above, the proclamation date will be 6 July 1993. If the commencement date for the amendments is not fixed by proclamation prior to 1 August 1993, the amendments will be repealed on that day by clause 2(7).

In the light of this explanation, the Committee makes no further comment on the provisions.

General comment

The Committee notes with approval that clause 9 of the Bill proposes to amend section 204 of the *Broadcasting Service Act 1992*, to correct certain errors which the Committee identified in Alert Digest No. 16 of 1992, (in the context of the Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992.

Election 'black-out'
Proposed Government amendments to the Bill - proposed new clause 3A of Schedule 2 of the *Broadcasting Services Act 1992* and proposed new section 70C of the *Special Broadcasting Service Act 1991*

The Committee notes that the Government has circulated various proposed amendments to the Bill. Those amendments include a proposed new clause 3A to be inserted in Schedule 2 of the *Broadcasting Services Act 1992* and a proposed new section 70C of the *Special Broadcasting Service Act 1991*. Those provisions, if enacted, would impose a 'black-out' on the broadcast of electoral material in the 3 days prior to a Commonwealth, State or Territory election.

The Committee notes that the imposition of such a 'black-out' is an interference with the so-called freedom of expression. In making this comment, the Committee refers to its earlier comments on the Political Broadcasts and Political Disclosures Bill 1991 (Alert Digest No. 8 of 1991), which were made on the same basis. In addition, the Committee refers to the High Court decision in *Australian Capital Television Pty Limited and Others v The Commonwealth of Australia* ((1992) 66 ALJR 695), in which the Court ruled that the interference with the freedom of expression in that legislation was invalid.

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.

AUSTRALIAN BUREAU OF STATISTICS ACT 1975 - section 6(3)

PROPOSAL NO. 31 OF 1992
BY
AUSTRALIAN BUREAU OF STATISTICS

SURVEY OF RETAIL UNITS

The Australian Bureau of Statistics (ABS) proposes to conduct a one-off Survey of Retail Units in March 1993 to update the ABS register of businesses, which provides the framework for the various economic censuses and surveys conducted by the ABS. The purpose of the survey is to validate the status of approximately 40,000 businesses currently classified to the retail industry on the business register.

Information will be collected, by mail and telephone, on employment size and main activity and will assist in implementing the recently developed Australian and New Zealand Standard Industrial Classification.

The required information is generally available and not of a detailed nature. No adverse reaction to the survey by respondents is expected.

Richard Madden
ACTING AUSTRALIAN STATISTICIAN

November 1992

SCRUTINY OF BILLS ALERT DIGEST

NO. 18 OF 1992

2 DECEMBER 1992

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator R Crowley
Senator N Sherry
Senator J Tierney

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 such 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.

The Committee has considered the following Bills:

Constitution Alteration (Qualifications and Disqualifications of Members of the Parliament) Bill 1992

* Corporate Law Reform Bill (No. 2) 1992

* Imported Food Control Bill 1992

* Murray-Darling Basin Bill 1992

Radioactive Waste (Regulation of Exports and Imports) Bill 1992

Referendum (Goods and Services Tax) Bill 1992

Territories Legislation Amendment Bill 1992

* Tobacco Advertising Prohibition Bill 1992

*** The Committee has commented on these Bills**

AD18/92

CONSTITUTION ALTERATION (QUALIFICATIONS AND DISQUALIFICATIONS OF MEMBERS OF THE PARLIAMENT) BILL 1992

This Bill was introduced into the Senate on 24 November 1992 by Senator Kernot as a Private Senator's Bill.

The Bill proposes to amend sections 16, 34, 44, 45 and 45A of the Constitution in relation to the qualifications for members of the Parliament and disqualifications of members of Parliament.

The Committee has no comment on this Bill.

CORPORATE LAW REFORM BILL (NO. 2) 1992

This Bill was introduced into the Senate on 26 November 1992 by the Minister for Administrative Services, at the request of the Minister for Justice.

The Bill proposes to amend the Corporations Law to:

- implement continuous disclosure obligations and create an offence for the breach of the obligations;

- require disclosing entities to provide half-yearly reports and in the case of non-companies, annual financial statements as well;

  provide for accounting standards to be made by the Australian Accounting Standards Board;

- allow, subject to certain conditions, the incorporation of certain materials by reference into a prospectus;

- provide a new scheme dealing with insurance and indemnification of company officers and auditors; and

- facilitate the use of documents prepared from the Australian Securities Commission database in court proceedings.

Inappropriate delegation of legislative power
Clause 5 - proposed new section 22H of the Corporations Law

Clause 5 of the Bill proposes to insert a new Division 3A into Part 1.2 of the Corporations Law. The proposed new Division deals with 'enhanced disclosure

securities', which are referred to in the Bill as 'ED securities'. The concept of 'ED securities' is defined in the proposed new Division.

Proposed new section 22H provides:

> **Regulations may declare securities not to be ED securities**
>
> 22H.(1) The regulations may declare specified securities of bodies not to be ED securities.
>
> (2) Regulations in force for the purposes of subsection (1) have effect accordingly, despite anything else in this Division.

If enacted, this provision would allow the making of regulations to exclude certain types of securities from the definition of 'ED securities'. As such, if would permit, in effect, the amendment of the definition, by the exclusion of certain securities which would otherwise be covered. Given the importance of this definition to the operation of the proposed new Division, this may be considered to be a matter which is more appropriately dealt with in primary rather than subordinate legislation.

The Committee draws Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Inappropriate delegation of legislative power
Clause 52 - proposed new sections 1084J and 1084K of the Corporations Law

Clause 52 of the Bill proposes to insert a new Part 7.12A into the Corporations Law. The proposed new Part deals with 'continuous disclosure', which is a system of enhanced statutory disclosure that is to be applied to corporations covered by the Corporations Law.

Proposed new section 1084J provides:

> Exemption by regulations
>
> 1084J.(1) The regulations may exempt specified persons from all or specified enhanced disclosure provisions:
>
> (a) either generally or as otherwise specified; and
>
> (b) either unconditionally or subject to specified conditions.
>
> (2) Without limiting subsection (1), an exemption under this section may relate to specified securities.

If enacted, this provision would allow the Governor-General (acting on the advice of the Federal Executive Council) to make regulations to exclude 'specified persons' from any or all of the requirements of the proposed new Part. This may be considered to be an inappropriate delegation of legislative power, as it would allow the Executive to alter (and, perhaps, overturn) the effect of the primary legislation.

Similarly, proposed new section 1084K provides:

> Exemption by the Commission
>
> 1084K.(1) The Commission may by writing exempt specified persons from all or specified enhanced disclosure provisions:
>
> (a) either generally or as otherwise specified; and
>
> (b) either unconditionally or subject to specified conditions.
>
> (2) Without limiting subsection (1), an exemption under this section may relate to specified securities.
>
> (3) In exercising a power under this section, the Commission may have regard to any of the following:
>
> (a) the desirability of efficient and effective disclosure to investors in securities and to securities markets;

(b) the need to balance the benefits of disclosure against the costs of complying with disclosure requirements;
(c) the desirability of facilitating, subject to appropriate safeguards, dealings in Australia in securities of foreign companies.

(4) Subsection (3) does not limit the matters to which the commission may have regard.

(5) The Commission must cause a copy of an exemption under this section to be published in the *Gazette.*

If enacted, this clause would, similarly, give the Australian Securities Commission the power to exempt 'specified' persons from any or all of the requirements of the proposed new Part. This may also be considered to be an inappropriate delegation of legislative power.

The Committee draws Senators' attention to the provisions, as they may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

AD18/92

IMPORTED FOOD CONTROL BILL 1992

This Bill was introduced into the Senate on 25 November 1992 by the Minister for Justice, at the request of the Minister for Industrial Relations.

The Bill proposes to make all imported food intended for domestic sale in Australia liable to inspection on importation and subject to monitoring both for their safety (from a consumer health perspective) and for compliance with the provisions of the Australian Food Code.

The Bill:

- creates offences and penalties for persons who knowingly import food which does not meet applicable standards or poses a risk to human health;

- allows for recognition of quality assurance certificated issued by overseas government authorities where the Australian Quarantine and Inspection Service is satisfied that they operate equivalent production control arrangements to those of Australian producers; and

- provides for cost recovery of the system through a fee for service on importers.

Criminal liability for careless or inadvertent act
Subclauses 8(2) and 9(3)

Subclause 8(1) of the Bill, if enacted, would create an offence to import certain food into Australia, knowing that it does not meet 'applicable standards' or that

it poses a risk to human health. If proved, an offence under the provision would carry a penalty of imprisonment for 10 years.

Subclause 8(2) provides:

> For the purposes of establishing a contravention of subsection (1), if, having regard to:
>
> (a) a person's abilities, experience, qualifications and other attributes; and
>
> (b) all the circumstances surrounding the alleged contravention of that subsection;
>
> the person ought reasonably to have known that the food did not meet applicable standards or posed a risk to human health, the person is taken to have known that the food did not meet those standards or posed that risk.

If enacted, this provision would create an offence of *careless* or *inadvertent* failure to be aware of the 'applicable standards'. Such an offence would place a more onerous obligation on persons affected by the provision than that which would ordinarily apply under the criminal law. Ordinarily, such an offence would require that a person actually knew about the 'applicable standards' or that they were reckless in their failure to be aware of those standards.

Similarly, subclauses 9(1) and (2) of the Bill, if enacted, would create certain offences in relation to dealing with food that does not meet the 'applicable standards' or that poses a risk to human health. The offence carries, in each case, a penalty of 10 years imprisonment. Subclause 9(3) is in identical terms to subclause 8(2) above and the Committee's comments on that subclause are equally applicable.

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.

Privilege against self-incrimination
Subclauses 30(5) and 32(3)

Clause 30 of the Bill provides:

> (1) If an authorised officer [as defined by subclause 3(1)] is on or in premises because the occupier of the premises consented to the officer's entry–the officer may ask the occupier to:
>
> (a) answer any questions put by the authorised officer; and
>
> (b) produce any books, records or documents requested by the authorised officer.
>
> (2) An authorised officer who is on or in premises that he or she has entered under a warrant may require any person on or in the premises:
>
> (a) to answer any questions put by the authorised officer; and
>
> (b) to provide any books, records or documents requested by the authorised officer.
>
> (3) The Secretary may, by written notice, require any person whom he or she believes, on reasonable grounds, to be capable of giving information relevant to the operation of this Act to attend before an authorised officer specified in the notice, at a time and place specified in the notice:
>
> (a) to answer any questions put by the specified officer; and
>
> (b) to produce to the specified officer such documents as are referred to in the notice.
>
> (4) A person must not, without reasonable excuse, fail to comply with a requirement under subsection (2) or (3).
> Penalty: Imprisonment for 6 months.

Subclause 30(5) then provides:

> It is a reasonable excuse for a person to refuse or fail to answer a question or produce a book, record or document on the ground that to do so would tend to incriminate the person.
>
> [Subclause 30(6) is not relevant to this comment.]

The Committee notes with approval that subclause 30(5) expressly recognises the common law right of a person to decline to answer a question or produce a document on the ground that it may tend to incriminate them. However, the Committee also notes that many persons would not be aware of the existence of that right.

Similarly, clause 32 of the Bill provides:

> (1) An authorised officer may request the occupier of any premises entered:
> (a) by the officer under section 23 or 25; or
> (b) under a warrant under section 24 or 26;
> to provide reasonable assistance to the officer, at any time while the officer is entitled to remain on the premises, for the purpose of the exercise of the officer's powers under those sections in relation to the premises.
>
> (2) A person mentioned in subsection (1) must not, without reasonable excuse, fail to comply with an authorised officer's request.
> Penalty: $3,000.

Subclause 32(3) then provides:

> (3) It is a reasonable excuse for a person whose premises are being searched under a warrant issued under section 26 to refuse to assist an authorised officer on the ground that to do so would tend to incriminate the person.

The Committee notes that, as with subclause 30(5), while subclause 32(3) above recognises the common law privilege against self incrimination, many persons would not be aware of the existence of that privilege. The Committee would, therefore, appreciate the Minister's advice as to what steps (if any) an 'authorised officer' would be required to take to ensure that a person whose assistance is being sought under the relevant provisions is aware of their right not to provide such assistance.

AD18/92

MURRAY-DARLING BASIN BILL 1992

This Bill was introduced into the House of Representatives on 26 November 1992 by the Minister for Primary Industries and Energy.

The Bill proposes to repeal and replace the *Murray-Darling Basin Act 1983* and to give effect to a revised Murray-Darling Basin Agreement between the Commonwealth, New South Wales, Victoria and South Australia. The Agreement relates to the management of the land, water and environmental resources of the Murray-Darling Basin.

The revised Agreement will provide for:

- a Salinity and Drainage Strategy to address the problems of salinity, waterlogging and land salinisation in the Murray River;
- the Murray-Darling Basin Ministerial Council (comprising of three Ministers from each contracting government with the principal responsibility for land, water and the environment) to approve certain Schedules to the Agreement;
- water allocation through a system of continuous water accounting;
- an independent President for the Murray-Darling Basin Commission; and
- revised administrative procedures relating to the Commission's financial management.

Commencement by Proclamation
Clause 2

Clause 2 of the Bill provides:

> This Act commences on a day to be fixed by Proclamation.

Contrary to the 'general rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, there is no requirement that the Act be proclaimed within a fixed time of Royal Assent (that time usually being 6 months). By way of explanation for the absence of such a time limit, the Explanatory Memorandum states:

> [Clause 2 provides] that the Act will come into effect on a date to be proclaimed. Complementary legislation to give effect to the new Murray-Darling Basin Agreement has also been prepared by the three States concerned and it is the intention that the Commonwealth Act and the three State Acts should come into operation on the same day.
>
> No provision has been made for an operation date six months after royal assent to guard against the possibility of the complementary State Acts not being passed in the same parliamentary session. If the Commonwealth Act were to come into effect before the State Acts it will give rise to the anomaly of two different Murray-Darling Basin Agreements being in effect.

The Committee notes that the circumstances described above come within the exceptions provided for in paragraph 6 of Drafting Instruction No. 2. However, the Committee would appreciate the Minister's advice as to whether it would be possible to achieve the same result by specifying that if the Act has not been proclaimed after a period of, say, 12 months after Royal Assent, then the Act is to be repealed.

AD18/92

RADIOACTIVE WASTE (REGULATION OF EXPORTS AND IMPORTS) BILL 1992

This Bill was introduced into the Senate on 25 November 1992 by Senator Sowada as a Private Senator's Bill.

The Bill proposes to prohibit (and create offences and penalties for) the importation and export of radioactive waste into and out of Australia.

The Committee has no comment on this Bill.

AD18/92

REFERENDUM (GOODS AND SERVICES TAX) BILL 1992

This Bill was introduced into the Senate on 24 November 1992 by Senator Coulter as a Private Senator's Bill.

The Bill proposes to provide for a referendum to be held at the next Federal election to ask voters-

> Do you agree to the introduction in Australia of a goods and services tax?

The Committee has no comment on this Bill.

AD18/92

TERRITORIES LEGISLATION AMENDMENT BILL 1992

This Bill was introduced into the Senate on 25 November 1992 by the Minister for Justice, at the request of the Minister for Transport and Communications.

The Bill proposes to make technical amendments to the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1955*, to allow for appropriate intergovernmental arrangements as a result of the introduction of the Indian Ocean Territories (Administration of Lands) Bill 1992 into the Western Australian Parliament, which corresponds to the *Territories Law Reform Act 1992.*

The Committee has no comment on this Bill.

AD18/92

TOBACCO ADVERTISING PROHIBITION BILL 1992

This Bill was introduced into the Senate on 25 November 1992 by the Minister for Justice.

The Bill proposes to repeal the *Smoking and Tobacco Products Advertising (Prohibition) Act 1989* and to establish a complete ban on tobacco advertising to be phased in over the period 1 July 1993 to 31 December 1995.

The Bill creates an offence for the publication (which includes display) or broadcast of the following forms of advertising for cigarettes and other tobacco products:

- sponsorship of sporting and cultural events (covering both naming of the event and publicity at the event);
- outside billboards or illuminated signs; and
- use of tobacco brand names, logos etc. on non-tobacco products.

Certain forms of advertising will be granted exceptions including;

- words etc. on products, packaging and business documents and on premises of tobacco products' manufacturers;
- anti-smoking campaign messages;
- communications of information within the tobacco industry; and

- ordinary activities of public libraries, tertiary educational institution libraries and libraries of Commonwealth, State or Territory authorities.

Tobacco advertising in imported periodicals will be exempt.

Commencement by Proclamation
Subclause 2(2)

Subclause 2(2) of the Bill provides:

> Subsections 17(2) to (5) (inclusive) and Division 3 of Part 3 commence on a day to be fixed by Proclamation.

Subclause 17(1) of the Bill, if enacted, would exempt periodicals published outside Australia from the ban on tobacco advertising to be imposed by the Bill. Subclauses 17(2) to (5) provide for the exclusion of periodicals from the exemption provided by subclause 17(1).

Division 3 of Part 3 relates to the knowing or reckless import of periodicals to which a notice of exclusion under subclauses 17(2) to (5) applies.

The Committee notes that, contrary to the 'general rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, the period within which a Proclamation under subclause 2(2) must be issued is not in any way limited. However, the Committee notes that the Explanatory Memorandum states that

> [t]hese provisions [ie those relating to foreign periodicals] will be proclaimed if it appears that the exception permitting tobacco advertising in imported periodicals is being exploited to avoid the objective of the Act.

In the light of this explanation, the Committee makes no further comment on the provision.

Reversal of the onus of proof
Subclauses 2(1) and 22(1), clauses 24 and 25 and subclause 31(3)

Clause 15 of the Bill, if enacted, would prohibit the publication of tobacco advertisements in Australia (subject to certain exceptions) on or after 1 July 1993. The penalty for failing to comply with this prohibition is a $12 000 fine.

Subclause 21(1) provides:

> It is a defence to a prosecution of a person for an offence against subsection 15(1), (2) or (3) in respect of the publication of a tobacco advertisement if the person proves that:
>
> (a) the publication was under a contract or arrangement entered into before 1 April 1992 for the sponsorship of an event, activity or service; and
>
> (b) if the terms of the contract or arrangement, in so far as they relate to things other than the period to which it applies, were varied on or after 1 April 1992 and before the publication–if the contract or arrangement had not been so varied, the publication could still be said to have been under the contract or arrangement; and
>
> Note: Even if the period to which the contract or arrangement applies has been varied, paragraphs (c) and (d) must still be satisfied.
>
> (c) if the advertisement was published in connection with a cricket match, or a series of cricket matches–the advertisement was published before 1 May 1996; and
>
> (d) if paragraph (c) does not apply–the advertisement was published before 1 January 1996; and

(e) before the publication of the advertisement, each of the parties to the contract or arrangement notified the Minister, in writing, of:

(i) the date on which the contract or arrangement was entered into; and

(ii) particulars of the contract or arrangement in so far as it relates to the publication of tobacco advertisements, including the circumstances of publication of the advertisements and the nature of the advertisements.

This may be considered to involve a reversal of the onus of proof, as the onus would be on a person charged with an offence to prove that they are not guilty, by reason of one of the defences provided for in paragraphs 21(1)(a) to (e).

Subclause 22(2) provides:

It is a defence to a prosecution of a person for an offence against subsection 15(1), (2) or (3) in respect of the display of a tobacco advertising sign if the person proves that:

(a) the sign was displayed under a contract or arrangement entered into before 1 April 1992; and

(b) if the terms of the contract or arrangement were varied on or after 1 April 1992–if the contract or arrangement had not been so varied, the display of the sign could still be said to have been under the contract or arrangement; and

(c) the display of the sign was permitted by regulations made for the purposes of subsection (2).

This may also be regarded as a reversal of the onus of proof.

As noted above, clause 23 of the Bill, if enacted, would create an offence of knowingly or recklessly importing into Australia a publication which has been excluded from the exemption provided by subclause 17(1). Clause 24 then provides:

> It is a defence to a prosecution of a person for an offence against section 23 in respect of the importation of a periodical if the person proves that the periodical was imported for the person's private use.

Similarly, this may be regarded as a reversal of the onus of proof.

Clause 25 provides:

> It is a defence to a prosecution of a person for an offence against section 23 in respect of the importation of a periodical if the person proves that the periodical was imported for the purpose of its inclusion in the collection of an exempt library.

This also may be regarded as a reversal of the onus of proof.

Finally, clause 31 provides:

> (1) If a partnership that is a regulated corporation commits an offence against this Act, that offence is taken to have been committed by each of the partners.
>
> (2) If an unincorporated body that is a regulated corporation commits an offence against this Act, that offence is taken to have been committed by the controlling officer or controlling officers of the body.

Subclause 31(3) then provides:

> In a prosecution for an offence a partner or controlling officer is so taken to have committed, it is a defence if the partner or controlling officer proves that the partner or controlling officer:
>
> (a) did not aid, abet, counsel or procure the act or omission constituting the offence; and
>
> (b) was not in any way (whether directly or indirectly or by act or omission) knowingly concerned in, or party to, the act or omission constituting the offence.

Subclause 31(4) provides:

> In this section:
>
> **"controlling officer"**, in relation to an unincorporated body, means a person who has authority to determine, or who has control over:
>
> (a) the general conduct of the affairs of the body; or
>
> (b) the conduct of that part of the affairs of the body in relation to which the act or omission constituting the offence occurred.

Subclause 31(3) above may be regarded as a reversal of the onus of proof.

In the past, the Committee has been prepared to accept the reversing of the onus of proof in this way, on the basis that the matters which constitute the defence are peculiarly within the knowledge of the person charged and that, in all the circumstances of the case, the prosecution could not reasonably be expected to disprove their existence. The Committee is not convinced that this is so in relation to each of the provisions referred to above.

In making this comment, the Committee acknowledges that, in relation to clause 31, the Explanatory Memorandum states:

> This clause provides for the imputing of *mens rea* to partnerships and unincorporated bodies in relation to offences against the Bill. Each partner (or controlling officer of the unincorporated body) is held responsible for offences committed by the partnership (or unincorporated body) unless the partner (or controlling officer) is able to prove that he or she was not *knowingly involved, or a party to, the act or omission* constituting the offence.
>
> The provisions of this clause are a statement of the liability of partners or controlling officers of unincorporated bodies. It is necessary, therefore, to provide a defence for the 'innocent' partner or controlling officer in order to avoid them being held responsible for something outside their control. The matters to be proved would be peculiarly within the knowledge of the defendant and it would be extremely difficult for the prosecution to prove the partner or controlling officer claiming to be 'innocent' was knowingly involved. Therefore, the onus of proof has been placed on the partner or controlling officer.

Nevertheless, the Committee draws attention to the fact that the clause involves a reversal of the onus of proof.

The Committee draws Senators' attention to subclauses 21(1) and 22(1), clauses 24 and 25 and subclause 31(3), 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.

General comment

The Committee notes that subclause 31(2) refers to offences by 'an unincorporated body that is a regulated corporation'. The Committee would appreciate the Minister's further advice as to the types of bodies that would come within this definition.