SCRUTINY OF BILLS ALERT DIGEST

NO. 1 OF 1993

20 MAY 1993

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator The Hon M Tate (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
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 and Torres Strait Islander Commission Amendment Bill 1993

Aboriginal Land Rights (Northern Territory) Amendment Bill 1993

Administrative Appeals Tribunal Amendment Bill 1992

Appropriation Bill (No. 5) 1992-93

Appropriation Bill (No. 6) 1992-93

Appropriation (Parliamentary Departments) Bill (No. 2) 1992-93

Australian Broadcasting Corporation Amendment Bill 1992

Australian Citizenship Amendment Bill 1993

Australian National Training Authority Amendment Bill 1993

Australian National University Amendment (Autonomy) Bill 1993

Australian Wool Realisation Commission Amendment Bill 1993

Bankruptcy Amendment Bill 1993

* Broadcasting Services Amendment Bill 1993

Broadcasting Services Amendment Bill (No. 2) 1993

Charter of the United Nations Amendment Bill 1993

* Corporate Law Reform Bill (No. 2) 1992

Dairy Produce Amendment Bill 1993

Employment, Education and Training Amendment Bill 1993

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

* Excise Tariff Amendment Bill 1993

* Great Barrier Reef Marine Park Amendment Bill 1993

Great Barrier Reef Marine Park (Environmental Management Charge-Excise) Bill 1993

Great Barrier Reef Marine Park (Environmental Management Charge-General) Bill 1993

Health Insurance Commission Amendment Bill 1993

Industrial Relations (Resolution of Boycotts) Amendment Bill 1992 [1993]

International Development Association (Further Payment) Bill 1993

* Murray-Darling Basin Bill 1993

National Health Amendment Bill 1993

Nuclear Power, Uranium Enrichment and Reprocessing (Prohibition) Bill 1993

Parliamentary Proceedings Broadcasting Amendment Bill 1993

Primary Industries Legislation Amendment Bill 1993

Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund-Customs) Bill 1993

Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund-Excise) Bill 1993

Protection of the Sea (Imposition of Contributions to Oil Pollution Compensation Fund) Bill 1993

* Protection of the Sea (Oil Pollution Compensation Fund) Bill 1993

Road Transport Charges (Australian Capital Territory) Bill 1993

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

Social Security Amendment Bill 1993

Social Security Amendment (Listed Securities) Bill 1993

Social Security Legislation (Shares and Securities) Bill 1993

Supply Bill (No. 1) 1993-94

Supply Bill (No. 2) 1993-94

Supply (Parliamentary Departments) Bill 1993-94

* Taxation Laws Amendment Bill 1993

* Taxation Laws Amendment Bill (No. 2) 1993

* Taxation Laws Amendment (Superannuation) Bill 1993

Telecommunications Amendment Bill 1993

* Veterans' Affairs Legislation Amendment Bill 1993

Veterans' Entitlements Amendment (Listed Securities) Bill 1993

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

Bills restored to the Notice Paper

On 5 May 1993, a number of Bills which had been introduced into the Senate in previous sessions were restored to the Notice Paper pursuant to resolutions of the Senate. The effect of the resolutions was to allow consideration of the Bill in each case to resume at the stage reached in the previous session of Parliament.

The Committee has previously made certain comments about the following two Bills and those comments have been reproduced in this *Alert Digest* for the information of Senators:

> Acts Interpretation (Delegated Legislation) Amendment Bill 1992
>
> Australian Centennial National Rail Transport Development Bill 1990

The Committee has previously dealt with these Bills and made no comment:

> Commission of Inquiry (Bank Practices) Bill 1991
>
> Commonwealth Electoral (Printing, Publishing and Distribution of Electoral Matters) Amendment Bill 1990
>
> Constitution Alteration (Appropriations for the Ordinary Annual Services of the Government) Bill 1987 [1990]
>
> Constitution Alteration (Electors' Initiative) Bill 1989 [1990]
>
> Constitution Alteration (Fixed Term Parliaments) Bill 1987 [1990]
>
> Constitution Alteration (Parliament) Bill 1987 [1990]
>
> Constitution Alteration (Qualifications and Disqualifications of Members of the Parliament) Bill 1992
>
> Defence Amendment Bill 1988 [1990]
>
> Delegated Legislation Review Bill 1988 [1990]
>
> Federal Court (Grouped Proceedings) Bill 1989 [1990]
>
> Income Tax Assessment (Housing Loan Interest) Amendment Bill 1989 [No. 2] [1990]

Income Tax Assessment (Savings Accounts Interest) Amendment Bill 1989 [No. 2] [1990]

Industrial Relations (Right to Strike) Amendment Bill 1989 [1990]

Legislative Initiative Bill 1989 [1990]

Motor Vehicle Standards (Emission Quotas) Amendment Bill 1990

Nuclear Non-Proliferation (Exports) Bill 1988 [1990]

Radioactive Waste (Regulation of Exports and Imports) Bill 1992

World Heritage Properties Conservation (Protection of Exit Cave, Tasmania) Amendment Bill 1992

The following four Bills were introduced shortly before the Senate rose for its Summer recess and, as a result, had not been dealt with by the Committee before they lapsed when the Parliament was prorogued on 8 February 1993:

Administrative Appeals Tribunal Amendment Bill 1992

Australian Broadcasting Corporation Amendment Bill 1992

Corporate Law Reform Bill (No. 2) 1992

Industrial Relations (Resolution of Boycotts) Amendment Bill 1992 [1993]

They are dealt with in this *Alert Digest*.

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for Aboriginal and Torres Strait Islander Affairs.

The Bill proposes to:

. reduce the number of Regional Councils from 60 to 36;

. remove the Minister's power to choose the Commission's Chairperson and two non-elected Commissioners; and

. provide that all Commissioners and Regional Council Chairpersons hold office on a full-time basis.

The Committee has no comment on this Bill.

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for Aboriginal and Torres Strait Islander Affairs.

The Bill proposes to grant three areas of traditional land to Aboriginal Land Trusts to hold title on behalf of Aboriginal people: 'Catfish Dreaming', 'Eva Valley Station' and 'Kanturppa-Kanttaji'.

The Committee has no comment on this Bill.

ACTS INTERPRETATION (DELEGATED LEGISLATION) AMENDMENT BILL 1991

This Bill was introduced into the Senate on 20 June 1991 by Senator Harradine as a Private Senator's Bill.

The Bill proposes to provide for the:

. publication of draft delegated legislation before it is made;
. removal of the possibility of retrospective operation of regulations; and
. disallowance of parts of provisions in delegated legislation.

General comment

In *Alert Digest* No 12 of 1991 the Committee noted that in his Second Reading speech on this Bill, Senator Harradine drew attention to the fact that the Bill proposed to put into effect reforms which have been recommended at various times by the Senate Standing Committee on Regulations and Ordinances.

AD1/93

ADMINISTRATIVE APPEALS TRIBUNAL AMENDMENT BILL 1992

This Bill was originally introduced into the Senate on 17 December 1992 by the Manager of Government Business at the request of the Minister for Justice. However, it had not been dealt with when the Senate rose for its Summer recess and subsequently lapsed when the Parliament was prorogued on 8 February 1993. It was restored to the Notice Paper by a resolution of the Senate on 5 May 1993.

The Bill proposes to amend the *Administrative Appeals Tribunal Act 1975* to enact certain recommendations of the Report of the Review on the Administrative Appeals Tribunal. These amendments provide:

. clarification of the President's role and functions;

. two additional methods by which the Tribunal may be constituted;

. that applications are not validly lodged without payment of the prescribed fee;

. formal recognition for directions hearings;

. discretion as to whether or not a conference should be held;

. discretion to decline to make a decision in terms of the parties' agreement;

. for the use of electronic communication to participate in proceedings, including video conferences and electronic lodgement of documents;

. the power to dismiss applications for delay or where the application is frivolous or vexatious; and

. for the use of mediation as a means of dispute resolution.

The Committee has no comment on this Bill.

APPROPRIATION BILL (NO. 5) 1992-93

This Bill was introduced into the House of Representatives on 4 May 1993 by the Minister for Finance.

The Bill proposes to appropriate certain sums out of the Consolidated Revenue Fund, additional to the sums appropriated by the *Appropriation Act (No. 1) 1992-93* and the *Appropriation Act (No. 3) 1992-93*, for the service of the year ending on 30 June 1993, and for related purposes.

The Committee has no comment on this Bill.

APPROPRIATION BILL (NO. 6) 1992-93

This Bill was introduced into the House of Representatives on 4 May 1993 by the Minister for Finance.

The Bill proposes to appropriate a sum out of the Consolidated Revenue Fund, additional to the sums appropriated by the *Appropriation Act (No. 2) 1992-93* and the *Appropriation Act (No. 4) 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.

APPROPRIATION (PARLIAMENTARY DEPARTMENTS) BILL (NO. 2) 1992-93

This Bill was introduced into the House of Representatives on 4 May 1993 by the Minister for Finance.

The Bill proposes to appropriate a sum out of the Consolidated Revenue Fund, additional to the sums appropriated by the *Appropriation (Parliamentary Departments) Act 1992-93*, 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.

AUSTRALIAN BROADCASTING CORPORATION AMENDMENT BILL 1992

This Bill was introduced into the Senate on 17 December 1992 by the Manager of Government Business at the request of the Minister for Transport and Communications. However, it had not been dealt with when the Senate rose for its Summer recess and subsequently lapsed when the Parliament was prorogued on 8 February 1993. It was restored to the Notice Paper by a resolution of the Senate on 5 May 1993.

The Bill proposes to amend the *Australian Broadcasting Corporation Act 1983* to:

. apply corporate planning and annual reporting requirements to the Australian Broadcasting Corporation;

. transfer more routine administrative responsibilities from the Board to officers of the Corporation;

. place determination of recreation leave entitlements of the Managing Director with the Remuneration Tribunal;

. simplify and update the arrangements for provision of transmission facilities; and

. update the terminology in the Act.

The Committee has no comment on this Bill.

AUSTRALIAN CENTENNIAL NATIONAL RAIL TRANSPORT DEVELOPMENT BILL 1990

This Bill was introduced into the Senate on 31 May 1990 by Senator Bell as a Private Senator's Bill.

The Bill proposes to establish a trust fund for the purpose of the grant of financial assistance for development and maintenance of a national standard gauge rail transport system. The fund would attract money away from the Australian Centennial Road Development Program which has been raised through fuel excises paid to the Federal government by state and federal rail systems.

Declarations by the Minister
Clauses 4 and 5

In Alert Digest No 4 of 1990, the Committee noted that clause 4 of the Bill, if enacted, would allow the Minister to declare, by instrument in writing, that a railway or a proposed railway is a 'national railway' for the purposes of the Bill. Similarly, clause 5 would allow the Minister to declare, by instrument in writing, an authority that provides or proposes to provide railway services over a national railway to be an 'approved railway authority' for the purposes of the Bill.

Clause 6 provides that copies of any such declarations shall be provided to the appropriate State Minister and to the appropriate approved railway authority. In addition, it requires that such declarations shall be published in the Gazette. However, there is no requirement for them to be tabled in the Parliament. As a result, there is no suggestion that they are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.

The Committee has previously indicated that, in certain circumstances, it is appropriate that ministerial determinations be tabled in the Parliament. In some circumstances, it is appropriate that such instruments be disallowable. The Committee has, therefore, sought the Honourable Senator's guidance as to why these procedures are not appropriate in this instance.

AUSTRALIAN CITIZENSHIP AMENDMENT BILL 1993

This Bill was introduced into the Senate on 6 May 1993 by the Minister for Immigration and Ethnic Affairs.

The Bill proposes to amend the *Australian Citizenship Act 1948* to:

. insert a preamble which gives recognition to the significance of Australian citizenship;

. replace the current oath and affirmation of allegiance with a 'pledge of commitment as a citizen of the Commonwealth of Australia'; and

. make consequential minor technical amendments.

The Committee has no comment on this Bill.

AUSTRALIAN NATIONAL TRAINING AUTHORITY AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for Schools, Vocational Education and Training.

The Bill proposes to allow for:

. the Chief Executive Officer of the Australian National Training Authority to be seconded from a Commonwealth, State or Territory public service or authority; and

. the secondment arrangements for all other staff of the Authority to be extended to State and Territory authorities.

The Committee has no comment on this Bill.

AUSTRALIAN NATIONAL UNIVERSITY AMENDMENT (AUTONOMY) BILL 1993

This Bill was introduced into the Senate on 6 May 1993 by Senator Tierney as a Private Senator's Bill.

The Bill proposes to re-insert a section into the *Australian National University Act 1991* which was repealed by the *Higher Education Funding Amendment Act (No. 2) 1992*. The section seeks to clarify responsibility for the application of money appropriated by the Parliament for the university's purposes.

The Committee has no comment on this Bill.

AUSTRALIAN WOOL REALISATION COMMISSION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for Primary Industries and Energy.

The Bill proposes that the period for repayment of the accumulated debt held by the Australian Wool Realisation Commission be extended by one year from seven to eight years.

The Committee has no comment on this Bill.

AD1/93

BANKRUPTCY AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for Justice.

The Bill proposes to preserve the operation of enforcement provisions associated with the compulsory income contribution provided for by subsections 139ZG(3), (4) and (5) of the *Bankruptcy Act 1966*. There are proceedings currently under way in the High Court challenging the validity of these subsections. In anticipation of that challenge being upheld - on the basis of the provisions' trespassing on the judicial power of the Commonwealth under Chapter III of the *Constitution* - this Bill proposes to amend the enforcement provisions in such a way as to remove the points of concern.

The Committee has no comment on this Bill.

BROADCASTING SERVICES AMENDMENT BILL 1993

This Bill was introduced into the Senate on 6 May 1993 by the Minister for Transport and Communications.

The Bill proposes to amend the *Broadcasting Services Act 1992*, to delay the allocation of licences for subscription television broadcasting services which use MDS as, or as part of, their means of transmission until:

. subscription television broadcasting licences A and B (using satellite delivery) are allocated and a transmission system standard is declared under section 94 of the Act; or

. a licence is allocated under subsection 96(1) for a service (using cable) and is in a position to operate nationally;

whichever is the earlier.

Retrospectivity
Clause 4

Clause 4 of the Bill proposes to insert new subsections (3A) and (3B) into section 96 of the *Broadcasting Services Act 1992*. If enacted, these proposed new subsections would impose certain additional conditions in relation to the allocation of subscription television broadcasting licences.

The Committee notes that, pursuant to clause 2 of the Bill, the amendments proposed would not operate until the Bill receives Royal Assent. However, the Committee also notes that proposed new subsection (3A) explicitly provides that it is to apply to applications made before as well as after the commencement of that new subsection. In that sense, the proposed new section would have a retrospective operation, as it would apply to existing applications, which would have been made on the basis of the conditions applying before the enactment of the proposed amendments.

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.

AD1/93

BROADCASTING SERVICES AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 6 May 1993 by the Minister for Communications.

The Bill proposes to amend the *Broadcasting Services Act 1992*, to modify some aspects of the procedure for allocating satellite subscription television broadcasting licences A and B. Currently the tender process could potentially be protracted if applicants prove unable to take up the licences. The amendments propose to:

. ensure that if the highest tenderers for Licence A or B are unsuccessful, the tenderer who thereby has the opportunity to be assessed as a potential licensee would be required to provide a deposit of 5 per cent of the amount bid by that tenderer within 3 days of being given that opportunity;

. avoid any unnecessary delay in finalising allocation of licences;

. provide for the refund of deposits in certain circumstances, the withdrawal of tenders without penalty and the payment of compensation if the amendments would result in the acquisition of property on other than just terms.

The Committee has no comment on this Bill.

CHARTER OF THE UNITED NATIONS AMENDMENT BILL 1993

This Bill was introduced into the Senate on 6 May 1993 by the Minister for Foreign Affairs.

The Bill proposes to amend the *Charter of the United Nations Act 1945*, to allow the Governor-General-in-Council to make regulations implementing Australia's obligations under the United Nations Charter, to provide for the imposition of fines for breaking the regulations and to allow the Attorney-General to seek injunctions to restrain such a breach.

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. However, it had not been dealt with when the Senate rose for its Summer recess and subsequently lapsed when the Parliament was prorogued on 8 February 1993. It was restored to the Notice Paper by a resolution of the Senate on 5 May 1993.

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.

The Committee dealt with the Bill in *Alert Digest* No. 18 of 1992, in which it made several comments on the Bill. Those comments are reproduced below.

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.

AD1/93

DAIRY PRODUCE AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the *Dairy Produce Act 1986*. The amendments will provide greater commercial flexibility to the Australian Dairy Corporation, allowing it to save on costs and to implement a risk management program, enhanced by specific reference to its capacity to undertake hedging operations through banks.

The Committee has no comment on this Bill.

AD1/93

EMPLOYMENT, EDUCATION AND TRAINING AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for Employment, Education and Training.

The Bill proposes to provide for an extension of the time for review of the National Board of Employment, Education and Training, the Board's Councils and the consultative Committee from 1 July 1993 to 1 July 1994.

The Committee has no comment on this Bill.

EXCISE TARIFF AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Parliamentary Secretary to the Minister for Industry, Technology and Regional Development.

The Bill proposes to decrease the excise duty payable on Avgas (2.1 cents per litre) and increase the excise duty payable on tobacco and tobacco products ($5.00 per kilogram).

Retrospectivity
Clause 2

Clause 2 of the Bill provides

> Commencement
>
> **2.(1)** Sections 1, 2, 3 and 4 commence on the day on which this Act receives the Royal Assent.
>
> (2) Section 5 is taken to have commenced on 7 May 1992.
>
> (3) Section 6 is taken to have commenced on 19 August 1992.
>
> (4) Section 7 is taken to have commenced on 2 February 1993.

Subclauses 2(2), (3) and (4) provide that clauses 5, 6 and 7 are to be taken to have effect from 7 May 1992, 19 August 1992 and 2 February 1993, respectively, thereby giving various provisions of the Bill a degree of retrospective operation. However, the Committee notes that, according to the Explanatory Memorandum, this retrospective operation is necessary to validate duty collections pursuant to excise tariff proposals which lapsed as a result of the dissolution of the House of Representatives on 8 February 1993 and to incorporate Excise Tariff Proposal No. 1 of 1993 into the Act. The Committee notes that such retrospectivity is standard in relation to changes in rates of excise duty. In the light of this explanation, the Committee makes no further comment on the Bill.

GREAT BARRIER REEF MARINE PARK AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for the Environment, Sport and Territories.

The Bill proposes to amend the *Great Barrier Reef Marine Park Act 1975* to provide for the collection of charges imposed by the Great Barrier Reef (Environmental Management Charge-General) Bill 1993 and the Great Barrier Reef (Environmental Management Charge-Excise) Bill 1993.

The main features of these Bills are:

. the Bills are based on the principle that persons benefiting from the continued protection and management of the Great Barrier Reef should contribute to the cost of its protection and management;

. the charge will be applicable to all commercial operators within the Great Barrier Reef Marine Park who presently need a permit from the Authority;

. the revenue collected will be used by the Authority for management, including research and education, to ensure the continued conservation of the Great Barrier Reef.

Imposition of charges by regulation
Clause 5 - proposed new section 39C of the *Great Barrier Reef Marine Park Act 1975*

Clause 5 of the Bill proposes to insert a new Part VA into the *Great Barrier Reef Marine Park Act 1975*. That proposed new Part deals with the imposition and collection of the proposed 'environmental management charge' in relation to commercial uses of the Great Barrier Reef Marine Park.

Proposed new section 39B imposes liability for the charge. It provides:

> **Liability to charge**
> **[Liability]**
> 39B.(1) If a chargeable permission is granted or transferred to a person, the person is liable to pay a charge on the grant or transfer.
>
> **[Grants or transfers before commencement date]**
> (2) A reference in subsection (1) to the grant or transfer

> of a chargeable permission to a person includes a reference to a grant or transfer that occurs before the date of commencement of this section, where the chargeable permission is in force and held by the person on or after that date.

'Chargeable permission' is defined in a proposed amendment to section 3 of the Great Barrier Reef Marine Park Act as

> a permission granted under the regulations, where the permission is of a kind declared by the regulations to be a chargeable permission for the purposes of this Act ...

Proposed new section 39C deals with the level of the proposed new charge. It provides:

> Amount of charge
>
> **39C.(1)** The amount of charge is the amount ascertained in accordance with the regulations.
>
> (2) Without limiting subsection (1), the regulations may provide that the amount of the charge imposed on the grant or transfer of a chargeable permission may be calculated wholly or partly by reference to things which happen during the period:
>
> (a) beginning on the later of the following days:
>
> (i) the date of commencement of this section;
>
> (ii) the date of the grant or transfer of the chargeable permission;
>
> (b) ending on the day on which the chargeable permission ceases to be in force.

The effect of proposed new section 39C, if enacted, would be to allow the Governor-General, acting on the advice of the Federal Executive Council, to pass regulations which will govern the amount of the charge to be imposed by the proposed amendments.

The Committee has consistently drawn attention to provisions which allow for the rate of a charge or 'levy' to be set by regulation, largely on the basis that a rate of levy could be set which amounted to a tax (and which, therefore, should be set by primary rather than subordinate legislation). Further, the Committee has generally taken the view that, if there is a need for flexibility in the setting of the levy, then the primary legislation should prescribe either a maximum rate of levy or a method of calculating such a maximum rate.

In the present Bill, no such maximum levy (or method of calculation thereof) is

prescribed. By way of explanation for the provision, the Explanatory Memorandum states:

> The amount of charge will vary greatly according to the nature and size of the business. For this reason the Bill does not deal with the amount of charge in detail. The regulations will be subject to tabling and disallowance in both Houses of Parliament (section 48, *Acts Interpretation Act 1901*).

While the Committee accepts that the regulations would be disallowable by either House of the Parliament, it should also be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the level of the charge.

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.

Abrogation of the privilege against self-incrimination
Clause 5 - proposed new subsection 39P(4) of the *Great Barrier Reef Marine Park Act 1975*

Division 5 of proposed new Part VA of the Great Barrier Reef Marine Park Act (which is also to be inserted by clause 5 of the Bill) sets out certain matters in relation to the keeping of records by persons to whom the proposed new environmental management charge will apply. Those provisions also relate to the production of relevant documents to the Great Barrier Reef Marine Park Authority or to an inspector under the Great Barrier Reef Marine Park Act.

Proposed new subsection 39P(4) provides:

> A person is not excused from giving information or a return or producing a document or a copy of a document under regulations made for the purposes of this Division on the ground that the information or return or the production of the document or copy might tend to incriminate the person or expose the person to a penalty.

This is an abrogation of the common law privilege against self-incrimination. However the provision proceeds to say:

> However:
> (a) giving the information or return or producing the document

or copy; or

(b) any information, document or thing obtained as a direct or indirect consequence of giving the information or return or producing the document or copy;

is not admissible in evidence against the person in:

(c) criminal proceedings other than proceedings under, or arising out of, section 39Q or 39R; or

(d) proceedings for recovery of an amount of late payment penalty.

This latter part of the proposed new subsection provides an indemnity against the use or the derivative use of information which comes to light as a result of a person being required to give information or produce documents under the new subsection. As a result, the provision is in a form which the Committee has previously been prepared to accept. Consequently, the Committee makes no further comment on the provision.

GREAT BARRIER REEF MARINE PARK (ENVIRONMENTAL MANAGEMENT CHARGE-EXCISE) BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for the Environment, Sport and Territories.

The Bill proposes to introduce a charge on commercial operators in the Great Barrier Reef Marine Park to:

. meet current and projected management demands from tourism;

. ensure protection of World Heritage characteristics of the Park and of its tourism and fishing resource base.

The Bill is one of a package of 3 Bills. Certain amendments in the Great Barrier Reef Marine Park Amendment Bill 1993 include provisions with respect to liability to, and collection of charge imposed by, the Charge Bills.

The Committee has no comment on this Bill.

GREAT BARRIER REEF MARINE PARK (ENVIRONMENTAL MANAGEMENT CHARGE-GENERAL) BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for the Environment, Sport and Recreation.

The Bill proposes to introduce a charge on commercial operation in the Great Barrier Reef Marine Park to cover all chargeable commercial activities where the charge is not classified as a duty of excise, to:

. meet current and projected management demands from tourism;

. ensure protection of World Heritage Area characteristics of the park and of its tourism and fishing resource base.

The Bill is one of a package of 3 Bills. Certain amendments in the Great Barrier Reef Marine Park Amendment Bill 1993 include provisions with respect to liability to, and collection of charge imposed by, the Charge Bills.

The Committee has no comment on this Bill.

HEALTH INSURANCE COMMISSION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 6 May 1993 by the Minister for Family Services.

The Bill proposes to amend the *Health Insurance Commission Act 1973*, to allow the Health Insurance Commission to:

. plan and establish a system whereby rebates can be paid for costs associated with child care;

. administer the child care rebate scheme.

The Committee has no comment on this Bill.

AD1/93

INDUSTRIAL RELATIONS (RESOLUTION OF BOYCOTTS) AMENDMENT BILL 1992

This Bill was originally introduced into the Senate on 17 December 1992 by Senator Powell as a Private Senator's Bill. However, it had not been dealt with when the Senate rose for its Summer recess and subsequently lapsed when the Parliament was prorogued on 8 February 1993. It was restored to the Notice paper by a resolution of the Senate on 5 May 1993.

The Bill proposes to amend the *Trade Practices Act 1974*, to repeal sections 45D and 45E, which prohibit secondary boycotts and agreements giving effect to secondary boycotts.

The Committee has no comment on this Bill.

AD1/93

INTERNATIONAL DEVELOPMENT ASSOCIATION (FURTHER PAYMENT) BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister for Development Cooperation and Pacific Island Affairs.

The Bill proposes authorisation of a contribution of $350 million to the Tenth replenishment of the International Development Association (IDA). The IDA is the concessional lending arm of the World Bank.

The Committee has no comment on this Bill.

MURRAY-DARLING BASIN BILL 1993

This Bill was introduced into the House of Representatives on 11 May 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to give effect to a revised Murray-Darling Basin Agreement between the Commonwealth, New South Wales, Victoria and South Australia for the improved management of the land, water and environmental resources of the Murray-Darling Basin. The Agreement is set out in the Schedule to the Bill.

The Bill is in substantially the same form as the Bill of the same name introduced into the House of Representatives on 26 November 1992.

The Committee dealt with that Bill in Alert Digest No 18 of 1992 in which it made certain comments (reproduced below) and requested advice of the Minister. The Minister for Primary Industries and Energy responded to those comments in a letter received 11 February 1993. Relevant parts of the response are discussed below.

In Alert Digest No 18 of 1992, the Committee noted:

> **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.

The Minister has responded as follows:

> The Bill provides for repeal of the existing Act and will replace the existing Agreement with the revised Agreement. Due to its co-operative intergovernmental nature, the Agreement should not be allowed to come into effect until it has been passed by all Parliaments of the partners to the Agreement.
>
> At present the necessary legislation has been passed by the New South Wales Parliament, has been presented to the Commonwealth and South Australian Parliaments and is yet to be scheduled for consideration by the Victorian Parliament. A proclamation within a fixed time of Royal Assent, whether six or twelve months, could result in the Commonwealth Act coming into effect prior to that of South Australia and Victoria and implement an Agreement which does not have the legislative backing of all of its co-operative partners. Such a situation could cause particular difficulty in appropriating the funds necessary for the Commission's operation.
>
> There is every reason to believe that all legislation will be passed and the complementing Acts proclaimed on a date within six months and certainly within twelve months of Royal Assent. However, the Commonwealth does not have any control or influence over the State legislative programs and could not ensure that all complementary Acts are passed within a fixed time period.

> In answer to your Committee's request I would therefore advise that an extension of the final time limit provision from six months to twelve months would not remove the possibility of the Commonwealth Act being proclaimed n isolation of any of the complementing State Acts.

The Committee thanks the Minister for this response.

In the light of this explanation, the Committee makes no comment on the Murray-Darling Basin Bill 1993.

AD1/93

NATIONAL HEALTH AMENDMENT BILL 1993

This Bill was introduced into the Senate on 6 May 1993 by the Minister for Family Services.

The Bill proposes to repeal and replace section 135AA of the *National Health Act 1953* and certain sections of the *Privacy Act 1988*, in order to clarify interpretation in relation to the issue of guidelines by the Privacy Commissioner relating to information obtained under the Medicare Benefits Program and Pharmaceutical Benefits Program. Difficulties created by section 135AA for these programs were identified by the Privacy Commissioner in his report to the Parliament of 28 May 1992.

The Committee has no comment on this Bill.

NUCLEAR POWER, URANIUM ENRICHMENT AND REPROCESSING (PROHIBITION) BILL 1993

This Bill was introduced into the Senate on 13 May 1993 by Senator Coulter as a Private Senator's Bill.

The Bill proposes to prohibit:

. uranium enrichment;

. nuclear power production;

, reprocessing of spent nuclear fuel in Australia.

The Committee has no comment on this Bill.

AD1/93

PARLIAMENTARY PROCEEDINGS BROADCASTING AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 4 May 1993 by the Prime Minister.

The Bill proposes to amend the *Parliamentary Proceedings Broadcasting Act 1946*, in relation to the following issues:

. resignations and vacancies;

. titles;

. quorum and procedure at meetings;

. recording of parliamentary proceedings.

The Committee has no comment on this Bill.

PRIMARY INDUSTRIES LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 11 May 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the *Pig Industry Act 1986*, the *Primary Industries Councils Act 1991*, the *Australian Meat and Livestock Corporation Act 1977* and the *Meat Research Corporation Act 1985* to:

. substitute the Pork Council of Australia for the Australian Pork Producers' Federation as the eligible industry body for the purpose of consultation with the Australian Pork Corporation and for nomination of members to the Australian Pork Corporation Selection Committee;

. terminate the Australian Pig Industry Policy Council and create the Australian Pig Industry Council with enhanced functions and Commonwealth funding.

The Committee has no comment on this Bill.

AD1/93

PROTECTION OF THE SEA (IMPOSITION OF CONTRIBUTIONS TO OIL POLLUTION COMPENSATION FUND-CUSTOMS) BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill is one of a package of 4 Bills. It proposes to impose the contributions required to be made by the Protection of the Sea (Oil Pollution Compensation Fund) Bill 1993.

The Committee has no comment on this Bill.

AD1/93

PROTECTION OF THE SEA (IMPOSITION OF CONTRIBUTIONS TO OIL POLLUTION COMPENSATION FUND-EXCISE) BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill is one of a package of 4 Bills. It proposes to impose the contributions required to be made by the protection of the Sea (Oil Pollution Compensation Fund) Bill 1993.

The Committee has no comment on this Bill.

AD1/93

PROTECTION OF THE SEA (IMPOSITION OF CONTRIBUTIONS TO OIL POLLUTION COMPENSATION FUND-GENERAL) BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by Parliamentary Secretary to the Minister for Transport and Communications.

The Bill is one of a package of 4 Bills. The Bill proposes to impose the contributions required to be made by the Protection of the Sea (Oil Pollution Compensation Fund) Bill 1993.

The Committee has no comment on this Bill.

PROTECTION OF THE SEA (OIL POLLUTION COMPENSATION FUND) BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill is one of a package of 4 Bills whose purpose is to give effect to the International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (the Fund Convention) and to the Protocols of 1976 and 1992 amending the Fund Convention. The purpose of the Bill is to:

. allow for the collection of funds from persons receiving more than 150,000 tons of crude or fuel oil from Australian or Australian territory seas per calendar year;

. pay compensation from the 1971 and 1992 Fund for pollution damage;

. indemnify shipowners through the 1971 Fund for a part of their liability to pay compensation for air pollution damage.

Commencement by Proclamation
Clause 2

Clause 2 of the Bill provides:

> Commencement
>
> 2.(1) Chapters 1, 2 and 4 commence on a day to be fixed by Proclamation. the day must not be earlier than the day on which the 1971 Convention enters into force for Australia.
>
> (2) Part 3.1 commences on a day to be fixed by Proclamation. The day must not be earlier than the day on which Australia's denunciation of the 1971 Convention takes effect.
>
> (3) Chapter 3 (other than Part 3.1) commences on a day to be fixed by Proclamation. The day must not be earlier than the day on which the 1992 Protocol enters into force for Australia.

Clause 2 enables a spread of three dates on which the various provisions will commence by proclamation in order to:

- apply the 1971 Convention in Australia;

- allow the 1992 Convention to be phased in and operate concurrently with the 1971 Convention; and

- repeal the application of the 1971 Convention in due course.

The Committee notes that, contrary to the 'general rule' set out in the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, the period within which the Proclamations must be issued is not in any way limited.

The 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).

However, the Committee notes that clause 2 appears to satisfy the exception provided by paragraph 6 of the Drafting Instruction ('where commencement depends on an event whose timing is uncertain'), in that commencement is dependent on certain international conventions entering into force. Accordingly, the Committee makes no further comment upon the clause.

Inappropriate delegation of legislation
Clause 13 - Regulations to give effect to Article 8 of the 1971 Convention
Clause 34 - Regulations to give effect to Article 8 of the 1992 Convention

If enacted, these clauses would enable regulations to be made to give effect to Article 8 of the 1971 and 1992 Conventions, respectively. As the Explanatory Memorandum notes at pages 8 and 15, Article 8 in each Convention provides that where judgment is given against the respective Fund, that judgment shall be recognised in each Contracting State when reversal on appeal in no longer possible. A scheme to accomplish this will necessarily encompass court actions. Clauses 13 and 34 include in the regulation-making power specific reference to investing federal jurisdiction in Supreme Courts.

At first glance, these clauses may appear inappropriately to delegate legislative power. The vesting of federal jurisdiction would seem to be a matter more appropriate for primary legislation.

Section 77 (iii) of the Constitution provides:

> With respect to any matter mentioned in the last two sections [these establish the parameters of federal jurisdiction] the Parliament may make laws-
>
> (i) ...
> (ii) ...
> (iii) ...Investing any court of a State with federal jurisdiction.

Whether federal jurisdiction can be conferred only by primary legislation was considered by the High Court in *Peacock v Newtown Marrickville and General Co-operative Building Society No. 4 Limited* ((1943) 67 CLR 25). One of the issues of the case was the validity of regulations made under the *National Security Act 1939-40* to enable contracts to be adjusted where performance was affected by war time conditions.

The respondent argued on the basis of an earlier case (*Le Mesurier v Connor* (1929) 42 CLR 481) that, though the Parliament might invest State courts with federal

jurisdiction, it could not authorise this to be done by means of a regulation.

Chief Justice Latham could see no reason to doubt 'that the Commonwealth Parliament could effectively authorise the making of regulations under which federal jurisdiction could be conferred upon State courts' (at page 40). However, he went on to rule that it was 'necessary for Parliament to express such an intention clearly' (also at page 40).

The question, therefore, is not whether the Parliament can delegate the vesting of federal jurisdiction in a State court by regulation. Indeed, in order to do so there must be express words - hence the specific inclusion of the authorisation in clauses 8 and 13. The question rather, within the Committee's terms of reference, is whether the delegation of this legislative power is appropriate in the context of these international conventions.

Chief Justice Latham adverted to the distinction drawn in *Le Mesurier v Connor* (at page 496) between the general legislative powers of the Parliament, such as that contained in section 51, and the specific power in section 77(iii), which does not confer a general power to legislate on the subject of state court jurisdiction but is limited to conferring federal jurisdiction on State courts. The Committee notes that the *Protection of the Sea (Civil Liability) Act 1981*, by which the International Convention on Civil Liability for Oil Pollution Damage was applied in Australia, did not use subordinate legislation to invest the State courts with the necessary federal jurisdiction. Section 9 of that Act provides for the vesting of federal jurisdiction in the State courts directly and not by authorising regulations.

In the light of this past practice, the Committee would appreciate the Minister's advice whether it would not be possible to authorise the vesting by primary legislation rather than by regulation.

Abrogation of the privilege against self-incrimination
Clauses 23 and 44

Both Chapter 2, in respect of the 1971 Convention, and Chapter 3, in respect of the 1992 Convention, provide for record keeping and returns of information to be made to the Australian Maritime Safety Authority with regard to ascertaining liability to make contributions to the respective Funds. They also relate to the production of relevant documents.

Subclause 23(4) provides :

> (4) A person is not excused from giving information or a return or producing a document or a copy of a document under regulations made for the purposes of this Division on the ground that the information or return or the production of the document or copy might tend to incriminate the person or

expose the person to a penalty. However:

(a) giving the information or return or producing the document or copy; or

(b) any information, document or thing obtained as a direct or indirect consequence of giving the information or return or producing the document or copy;

is not admissible in evidence against the person in:

(c) criminal proceedings other than proceedings under, or arising out of, section 24 or 25; or

(d) proceedings for recovery of an amount of late payment penalty.

Subclause 44(4) makes similar provision in relation to the giving of information or production of documents under the 1992 Convention.

The Committee notes that the effect of proposed new subsections 23(4) and 44(4) is what it would generally consider to be an abrogation of the privilege against self-incrimination. However, the Committee notes that, as they limit the use of the information to proceedings in connection with which the information is sought, the provisions are in a form which the Committee has previously been prepared to accept. Accordingly, the Committee makes no further comment upon the clauses.

AD1/93

ROAD TRANSPORT CHARGES (AUSTRALIAN CAPITAL TERRITORY) BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Minister Representing the Minister for Transport and Communications.

The Bill requires the Government of the ACT to fix annual registration charges for vehicles rated above 4.5 tonnes and also permit charges for vehicles operating above 125 tonnes. This will give effect to the National Road Transport Commission's first determination.

The Committee has no comment on this Bill.

SOCIAL SECURITY AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes to amend the *Social Security Act 1991*, to provide for:

. the introduction of an additional free area of $30 a fortnight for earned income for single recipients of job search allowance, newstart allowance and sickness allowance and to increase the free area applicable to such a partnered allowance from $30 to $50 a fortnight for earned income;

. the replacement of certain provisions for exemption from the ordinary waiting period for these allowances with one simple provision;

. the adjustment of the pensions assets test to reduce pensions by $19.50 (rather than $26) for every $250 of excess assets;

. minor technical amendments to ensure consistency in terminology between the Act and Migration Regulations following amendments to those Regulations.

The Committee has no comment on this Bill.

SOCIAL SECURITY AMENDMENT (LISTED SECURITIES) BILL 1993

This Bill was introduced into the Senate on 6 May 1993 by Senator Patterson as a Private Senator's Bill.

The Bill proposes to ensure that certain provisions of the *Social Security Legislation Amendment Act (No. 3) 1992* concerning the treatment of shares and other listed investments do not come into operation. The proposed amendments:

. leave in place the amendments inserted by Division 16 of the 1992 Act;

. ensure that the extension to shares and other listed securities proposed by Division 18 of the 1992 Act does not occur.

The Committee has no comment on this Bill.

SOCIAL SECURITY LEGISLATION (SHARES AND SECURITIES) BILL 1993

This Bill was introduced into the Senate on 6 May 1993 by Senators Bell and Lees as a Private Senators Bill.

The Bill proposes to repeal Division 18 of the *Social Security Legislation Amendment (No 3) Act 1992*, reversing the treatment given to unrealised capital gains on listed shares as income for the purposes of obtaining a pension proposed by that Act.

The Committee has no comment on this Bill.

SUPPLY BILL (NO. 1) 1993-94

This Bill was introduced into the House of Representatives on 4 May 1993 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 1994, and for related purposes.

The Committee has no comment on this Bill.

SUPPLY BILL (NO. 2) 1993-94

This Bill was introduced into the House of Representatives on 4 May 1993 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 1994, and for related purposes.

The Committee has no comment on this Bill.

SUPPLY (PARLIAMENTARY DEPARTMENTS) BILL 1993-94

This Bill was introduced into the House of Representatives on 4 May 1993 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 1994, and for related purposes.

The Committee has no comment on this Bill.

TAXATION LAWS AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Assistant Treasurer.

The Bill proposes to:

- provide for assessability and deductibility of payments made between employers in industries where employees regularly transfer from one employer to another;

- provide a general anti-avoidance measure in relation to the transfer of assets within company groups to which a capital gains tax roll-over applies;

- further amend capital gains tax provisions relating to disposals of interests in plant installed on Crown leases of land;

- make five technical amendments to provisions dealing with deductions for the capital cost of income-producing property;

- make two changes to depreciation cost-price limit rules for motor cars;

- amend the dividend streaming provisions;

- amend PAYE provisions regarding the definition of salary or wages and variations of PAYE tax instalment deductions;

- allow (for a limited period) income tax deductions for gifts made to the Shrine of Remembrance Restoration and Development Trust;

- correct a technical error in the *Fringe Benefits Tax Assessment Act 1986* and reflect a change of name for the Commonwealth Savings Bank of Australia (now the Commonwealth Bank of Australia);

- amend the definition of 'law enforcement agency' to include the Queensland Criminal Justice Commission, for the purpose of obtaining access to taxation information.

Retrospectivity
Subclauses 2(2) and (3)

Clause 2 of the Bill provides:

> (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
>
> (2) Part 4 is taken to have commenced immediately after the commencement of the *Sales Tax Amendment (Transitional) Act 1992*.
>
> (3) Part 6 is taken to have commenced immediately after the commencement of section 38 of the *Taxation Laws Amendment Act (No. 3) 1992*.

If enacted, this clause would give the relevant substantive amendments a degree of retrospective operation. In the case of the amendments affected by subclause (2), the retrospectivity goes to 28 October 1992. In the case of those amendments affected by subclause (3), the retrospectivity goes to 30 June 1992. However, as the amendments in question are either technical or intended to correct drafting oversights, the Committee makes no further comment on the clauses.

Retrospective operation
Clauses 14, 22, 32, 34, 35, subclauses 43(1) and 45(5), clauses 47, 49, 51, 56 and 58

The Committee notes that although most of the provisions in the Bill (ie those not affected by subclauses 2(2) or (3)) will commence on Royal Assent, several of them are expressed to *apply* from dates prior to the commencement of the Bill. Those clauses are discussed below.

Clause 14 provides that the amendments proposed by clauses 9 to 13, which would 'amend the capital gains tax provisions to ensure that they treat disposals of interests in plant installed on Crown leases of land consistently with their treatment under the depreciation Crown lease provisions' (Explanatory Memorandum, page 29), are to apply in relation to disposals of units of property after 26 February 1992. The Explanatory Memorandum to the Bill (at page 37) offers the following further explanation:

> These amendments were foreshadowed in the Explanatory Memorandum to Taxation Laws Amendment Bill (No. 3) 1992, which inserted section 54AA, and apply from the same time as the depreciation Crown lease provisions; that is, to disposals of assets, constituting an interest in plant to which section 54AA has applied, that occur after 26 February 1992.

The Committee notes that the purpose of the amendments appears to be to correct what would otherwise be anomalies. However, the Committee is unable to determine whether the effect is beneficial or detrimental to taxpayers. Accordingly, the Committee draws Senators' attention to the provisions as they be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Clause 22 provides:

> Subsections 3(2) and (3) of the *Income Tax Assessment Amendment Act (No. 3) 1978* have, and are taken to have had, effect as if the amendments made by this Division [ie Division 5 of Part 2 of the Bill] had been made by subsection 3(1) of that Act.

By way of explanation, the Explanatory Memorandum to the Bill states (at page 52):

> This provision means that the amendments will have effect as if they had been enacted at the time subsection 51(3) was enacted originally and will have effect from the date upon which subsection 51(3) commenced operation.
>
> The retrospective application of these amendments will not disadvantage any taxpayers, because the amendments give effect to the interpretation of the law which the Commissioner of Taxation has applied from the commencement of subsection 51(3) until 24 August 1989 when, as a result of the decision of the Federal Court of Australia in the *TNT Skypak* case, the Commissioner changed his earlier interpretation.Since then, affected taxpayers have sought to return to this treatment.

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

Several clauses in the Bill would, if enacted, operate from the date of the introduction of the Taxation Laws Amendments Bill (No. 7) 1992 (ie 16 December 1992) rather than Royal Assent and would, therefore, have a degree of retrospective operation. Those clauses are as follows:

> Clause 32 - applies to the amendments relating to the financing of property proposed by Division 7 of Part 2 of the Bill;
> Subclause 43(1) - applies to the amendments relating to the motor vehicle depreciation limit proposed by Division 11 of Part 2 of the Bill;
> Subclause 42(5) - applies to the amendments relating to the

depreciation of vehicles for transporting disabled persons proposed by Division 12 of Part 2 of the Bill;
Clause 51 - applies to the amendments relating to capital gains tax and the transfer of losses within a company group proposed by Division 15 of Part 2 of the bill; and
Clause 56 - applies to the amendments relating to capital gains tax and roll-overs involving company groups proposed by Division 16 of Part 2 of the Bill.

The Committee notes that the Explanatory Memorandum to this Bill indicates that the measures were 'not previously announced'. However, the Committee assumes that the proposed retrospective operation is on the basis of the measures being 'announced' by their inclusion in the 1992 Bill.

It appears from the Explanatory Memorandum to the Bill that while clauses 34, 35 and 58 (which, respectively, relate to the amendments relating to roll-over relief where deductions have been allowed for petroleum expenditure, disposals within wholly-owned company groups where an election for roll-over relief has been made and the application of the capital gains tax to the principal residence) will operate from, respectively, 19 December 1991, 6 December 1990 and 19 September 1985, the retrospectivity is, in each case, beneficial to taxpayers. Accordingly, the Committee makes no further comment on the clauses.

Clause 47 provides that the amendments proposed by Division 13 of Part 2 of the Bill are to apply in relation to disposals of assets created after 25 June 1992. The substantive amendments are intended to ensure that the capital gains tax provision will not apply in such a way as to tax an amount which is already concessionally taxed under another provision of the *Income Tax Act 1936*. It is not clear from the Explanatory Memorandum whether or not the provisions in question would be beneficial to taxpayers, if enacted. Further, it is not clear why 25 June 1992 has been nominated as the date from which the amendments are to operate. The Committee would, therefore, appreciate the Treasurer's advice as to whether or not the amendments in question would be beneficial to taxpayers and also as to the significance of the commencement date nominated.

Clause 49 provides that the amendments proposed by Division 14 of Part 2 of the Bill are to apply in relation to the disposal of assets after 15 August 1989. The substantive amendments are intended to ensure that the deemed market value rules contained in section 160ZD of the Income Tax Assessment Act do not apply in relation to the cancellation of a statutory licence where no consideration is received in relation to that cancellation. It is not clear from the Explanatory Memorandum whether or not the provisions in question would be beneficial to taxpayers, if enacted. Further, it is not clear why 15 August 1989 has been nominated as the date from which the amendments are to operate. The Committee would, therefore, appreciate the Treasurer's advice as to whether or not the amendments in question would be beneficial to taxpayers and also as to the significance of the

commencement date nominated.

TAXATION LAWS AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Assistant Treasurer.

The Bill proposes to:

. introduce the general investment allowance;

. reduce the rate of company tax from 39 to 33 per cent and the rate of tax for Pooled Development Funds from 30 to 25 per cent;

. revise the company tax instalment system;

. extend the exemption currently available to priority of access payments to eligible child care centres to Family Day Care, Outside Schools Hours Care and Vacation Care;

. vary the taxation of foreign investment funds;

. exempt from income tax AD members serving in Somalia; the UN peacekeeping force in the areas formerly known as Yugoslavia and AFP members serving with the UN Transitional Authority in Cambodia;

. amend secrecy provisions to allow the Commissioner of Taxation to provide information to the Secretary of the Department of Immigration and Ethnic Affairs for the purpose of locating persons unlawfully in Australia; and

. improve the readability of section 7 (concerning gift provisions) to improve accessibility and readability.

Retrospectivity
Subclause 2(2)

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) Divisions 1 and 6 of Part 3, and Part 4, are taken to have commenced immediately after the commencement of the *Income Tax Assessment Amendment (Foreign Investment) Act 1992.*

This provision, if enacted, would give the substantive provisions with respect to the taxation of Foreign Investment Funds a retrospective effect to 1 January 1993. It is not clear from the Explanatory Memorandum whether those clauses will increase or decrease potential liability to income tax. The Explanatory Memorandum merely notes (at page 6) that the measures will have a 'minimal' effect on revenue. It appears that some amendments may benefit the taxpayer and others not. The Explanatory Memorandum (at page 54) notes that some amendments were announced by the Treasurer in a press release of 9 October 1992. The Explanatory Memorandum also indicates (at page 54) that the amendments are required to 'fine-tune' the Foreign Investment Fund measures that came into effect on 1 January 1993 and bed them properly with existing provisions.

The Committee notes that, for practical reasons, the Senate has previously been prepared to accept a degree of retrospectivity 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).

However, that resolution accepted retrospectivity on the basis that a Bill would be introduced, or a draft Bill circulated, within 6 calendar months of the press release. The Committee notes that it is more than six months since the Treasurer's press release. Further, the Committee notes that the retrospective effect is intended to commence not on the date of the press release but from 1 January 1993. Accordingly, the Committee makes no further comment on the clause.

TAXATION LAWS AMENDMENT (SUPERANNUATION) BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Assistant Treasurer.

The Bill proposes to:

- implement amendments to assess lump sum superannuation benefits received by a person, on the death of another person, against the deceased person's reasonable benefit limits;
- change the taxation treatment of death benefit eligible termination payments (ETPs);
- ensure the excessive component of an ETP is taxed at the top marginal rate of tax plus Medicare levy;
- amend notice requirements relating to the tax treatment of personal superannuation contributions;
- enable approved deposit funds (ADFs) to take into account profits from the disposal of securities to determine whether they qualify as continuously-complying fixed interest ADFs;
- ensure income derived by an annuity provider in respect of allocated annuity policies is tax-exempt and that allocated annuities are not qualifying securities for Division 16E purposes;
- make several amendments to the *Occupational Superannuation Standards Act 1987*; and
- modify the current definition of defined benefit superannuation scheme in the *Superannuation Guarantee (Administration) Act 1992*.

Retrospectivity
Subclause 2(6)

Subclause 2(6) of the Bill provides that the substantive amendments proposed by Divisions 1 and 2 of Part 6 of the Bill will have effect from 22 December 1992. It appears that the amendments in question are merely technical in nature. However, as neither the Explanatory Memorandum to the Bill nor the Assistant Treasurer's Second Reading speech appear to address this issue, the Committee would appreciate

the Treasurer's confirmation that this is the case.

Retrospective application
Clauses 5, 11, 33 and 55

The Committee notes that while most of the substantive provisions of the Bill are expressed to commence on Royal Assent, some clauses provide for a degree of retrospective operation by virtue of their application to certain activities occurring prior to that assent being given. Clauses 5, 11, 33 and 55 (which, respectively, relate to amendments of the definition of 'fixed interest complying ADF', amendments relating to the notification requirements for superannuation contributions, amendments to extend the meaning of annuities and amendments relating to notification arrangements for ETP payers), if enacted, would make the relevant substantive amendments operate from 1 July 1988, 1 July 1992, 22 December 1992 and 24 December 1991, respectively. However, as the substantive amendments are, in each case, beneficial to taxpayers, the Committee makes no further comment on the clauses.

AD1/93

TELECOMMUNICATIONS AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill proposes to:

. extend land access powers to the three public mobile carriers;

. allow for a Land Access Code to regulate all carriers' powers to enter land;

. allow AUSTEL to enforce carriers' obligations under the Land Access Code.

The Committee has no comment on this Bill.

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 5 May 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes:

. to increase the amount of assets a person may hold and still qualify for payment of some service pension;

. to extend the operational service area of Cambodia to include areas in Thailand and Laos that are not more than fifty kilometres from the border of Cambodia;

. to extend certain benefits under Veterans' Affairs legislation to members of the Australian Defence Force serving with United Nations peacekeeping forces in Somalia and the area comprising former Yugoslavia;

. consequential amendments to the *Income Assessment Act 1936* and the *Public Service Act 1922*, to ensure recognition of the newly proposed operational areas for the purpose of benefits available under those acts.

Retrospectivity
Clauses 2 and 3

Clause 2 of the Bill provides:

> Commencement
>
> 2.(1) Subject to subsections (2), (3), (4) and (5), this Act commences on the day on which it receives the Royal Assent.
>
> (2) Division 2 of Part 2 commences on 20 September 1993.
>
> (3) Division 3 of Part 2 is taken to have commenced on 20 October 1991.
>
> (4) Division 4 of Part 2 and subsection 19(1) are taken to have commenced on 12 January 1992.
>
> (5) Division 5 of Part 2 and subsection 19(2) are taken to have commenced on 20 October 1992.

Clause 3 provides

> **Application**
>
> 3.(1) The amendments made by section 17, to the extent to which they relate to service in the former Yugoslavia, apply to any compensation for an incapacity, impairment or death resulting from an occurrence if the occurrence happened or happens on or after 12 January 1992.
>
> (2) The amendments made by section 17, to the extent to which they relate to service in Somalia, apply to any compensation for an incapacity, impairment or death resulting from an occurrence if the occurrence happened or happens on or after 20 October 1992.
>
> (3) Subsections (1) and (2) apply regardless of when the compensation is received.

If enacted, subclause 2(3) would give clause 9 retrospective effect. Clause 9 is intended to ensure that any Australian Defence Force personnel who, since 20 October 1991, have crossed the Cambodian border into Laos or Thailand as part of their service with the United Nations in Cambodia, will be regarded as having been on operational service for the purpose of the *Veterans' Entitlements Act 1986*.

Subclauses 2(4) and (5), if enacted, would give clauses 10-12 and clauses 13-15 retrospective effect. Those clauses are intended to enable the former Yugoslavia and Somalia to be designated as operational areas with effect from 12 January 1992 and 20 October 1992, respectively.

The Committee notes that clause 3 provides that the amendments to the *Income Tax Assessment Act 1936* proposed by clauses 16 and 17 will have a retrospective application. Those clauses provide for the flow-on of certain tax concessions for those serving in the former Yugoslavia and Somalia with the same dates of effect.

Subclauses 2(3), (4) and (5) and clause 3 propose to give the relevant substantive amendments retrospective effect. However, in each case, the retrospectivity is beneficial to the persons affected. Accordingly, the Committee makes no further comment on the clauses.

VETERANS' ENTITLEMENTS AMENDMENT (LISTED SECURITIES) BILL 1993

This Bill was introduced into the Senate on 10 May 1993 by Senator MacGibbon as a Private Senator's Bill.

The Bill proposes to amend the *Veterans' Entitlements Act 1986*, to exclude certain shares and securities from consideration in determining pensions and benefits.

The Bill is a companion Bill to the Social Security Amendment Bill 1993.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 2 OF 1993

26 MAY 1993

SCRUTINY OF BILLS ALERT DIGEST

NO. 2 OF 1993

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ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator The Hon M Tate (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
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:

* Insolvency (Tax Priorities) Legislation Amendment Bill 1993

* Toxic Chemicals (Community Right to Know) Bill 1993

* The Committee has commented on these Bills

INSOLVENCY (TAX PRIORITIES) LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 19 May 1993 by the Minister for the Arts and Administrative Services.

The Bill proposes to amend various Acts including the *Income Tax Assessment Act 1936*, the *Bankruptcy Act 1966*, the *Crown Debts (Priority) Act 1981* and the Corporations Law to:

. abolish the existing priority of the Commissioner of Taxation for debts in relation to certain unremitted amounts which become payable after 30 June 1993;

. provide measures to enable the Commissioner to recover the unremitted amounts more quickly through an estimation process;

. allow for the imposition of a penalty on company directors equal to their company's unremitted or estimated amounts.

Retrospectivity
Clause 2

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)** If this Act receives the Royal Assent after 1 June 1993, sections 6, 7, 9, 11, 13 and 15 and Part 5 are taken to have commenced on that day.
>
> **(3)** If this Act receives the Royal Assent before 1 July 1993, Part 4 commences on that day.

If enacted, subclause 2(2) would give the relevant substantive amendments a degree of retrospective operation, if Royal Assent is received after 1 June 1993.

As the Explanatory Memorandum notes, at page 13, the provisions affected by

subclause 2(2) are designed to remove the Commissioner's priority in respect of certain debts over all other debts of a person or company in a bankruptcy or an insolvency. By virtues of these amendments, if enacted, the Commissioner would no longer have priority in respect of those debts where the unremitted amount becomes payable after 30 June 1993.

The amounts to be remitted to the Commissioner on 1 July 1993, for example, need to be deducted from employees wages prior to that date. Hence some retrospectivity is needed so that the scheme can come into effect from that date.

Retrospectivity is normally seen as potentially breaching principle 1(a)(i) of the Committee's terms of reference, in that it may unduly trespass on personal rights and liberties. However, these amendments would remove a 'privilege' of the Commonwealth. Where a provision can be regarded as beneficial to persons other than the Commonwealth, the Committee has been prepared to accept retrospectivity. Accordingly, the Committee makes no further comment upon the Bill.

TOXIC CHEMICALS (COMMUNITY RIGHT TO KNOW) BILL 1993

This Bill was introduced into the Senate on 19 May 1993 by Senator Powell, as a Private Senator's Bill.

The Bill proposes to give legislative power to a Registrar to obtain from industries using toxic chemicals information pertaining to their use, storage, handling, transportation, recycling and manufacture.

Inappropriate delegation of legislative power
Clause 23 - Duty to notify Registrar of use or production of toxic chemicals

Clause 23 of the Bill provides:

> Duty to notify Registrar of use or production of toxic chemicals
>
> **23.(1)** A person who, at the commencement of this Act, is producing or using toxic chemicals at levels that exceed the prescribed safety levels for those chemicals must give to the Registrar within 4 weeks after tha commencement the prescribed details of that production or use.
>
> **(2)** A person who, after the commencement of this Act, commences to produce or use toxic chemicals at levels that exceed the prescribed safety levels for those chemicals must give to the Registrar within 4 weeks after that commencement the prescribed details of that production or use.
>
> **(3)** A person referred to in subsection (1) or (2) must, at the end of each anniversary after the initial notification, notify the Registrar of the person's current production and use of toxic chemicals, as prescribed.
>
> **(4)** The details must be provided in accordance with the prescribed form.
>
> **(5)** A person who fails to comply with this section is guilty of an offence.
> Penalty: 2,000 penalty units.

Clause 23, if enacted, would both impose a duty to notify and create an offence of failing to comply with that duty. The duty rests on those whose use or production of toxic chemicals exceeds prescribed safety levels. They must comply on a prescribed form with respect to prescribed details.

The Bill leaves the determination of the safety levels and the details to be provided to be set by regulation. There is no mention in the Bill of the way in which safety levels might be established.

Given the importance of the notification process within the scheme of the legislation, these matters may be considered as more appropriately dealt with in primary rather than subordinate legislation.

On the issue of importance, the Committee notes the difference between the penalty for a breach of the notification provision and that which attaches to a breach of the other major purpose of the Bill - the establishment of codes of practice. A notification offence would carry a penalty of 2000 units. In contrast, 500 penalty units is set for a breach of the code of practice for which clause 10 sets out an elaborate process of consultation by publishing a draft code in the Gazette and inviting comments. The size of the penalty is an indicator of the importance of the notification scheme within the Bill.

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.

Non-reviewable decisions
Subclause 26(3) - Exemption for information that is commercial-in-confidence
Subclause 27(3) - Exemption on the grounds of military security

Clause 26 of this Bill provides:

> **Exemption for information that is commercial-in-confidence**
>
> **26.(1)** A person may apply to the Registrar for an exemption from compliance with this Act on the grounds that the identity of a chemical is commercial-in-confidence information where all of the following conditions are met:
>
> (a) that the identity of the chemical has never previously been disclosed to an employee of the applicant not bound by a confidentiality agreement;

(b) that no person to whom this Act applies has ever rejected a claim by the applicant that the chemical is a trade secret or that its identity may be treated as commercial-in-confidence information;

(c) that competitors could deduce the use or identity of the chemical from the notification form;

(d) that knowledge of the identity of the chemical could cause 'substantial competitive harm' to the applicant;

(e) that the identity of the chemical could not be discerned by reverse engineering or any other method from the applicant's products or releases;

(f) that the applicant has taken all reasonable measures to protect the identity of the chemical;

(g) that the precise use of the chemical by the applicant is not available in any information source accessible to the public;

(h) that the identity of the chemical need not be disclosed under any other law.

(2) An application shall be in the prescribed form.

(3) The Registrar may grant to the applicant an exemption from compliance if the Registrar is satisfied that the conditions specified in subsection (1) have been met.

Clause 27 of the Bill provides:

Exemption on the grounds of military security

27.(1) A person may apply to the Registrar for an exemption from compliance with this Act on the grounds that the identity of a chemical relates to military security where all of the following conditions are met:

a) that the Registrar has not previously rejected an application for exemption for that chemical by the applicant;

(b) that a foreign power could not deduce the military purpose from information about the chemical provided in the notification form;

(c) that public knowledge of the identity of the

chemical could cause a substantial threat to national security;

(d) that the identity of the chemical could not be discerned by reverse engineering or any other method from the applicant's products or releases;

(e) that the applicant has taken all reasonable measures to protect the identity of the chemical;

(f) that the precise use of the chemical by the applicant is not available in any information source accessible to the public or to a foreign power; and

(g) that the identity of the chemical need not be disclosed under any other law.

(2) An application shall be in the prescribed form.

(3) The Registrar may grant to the applicant an exemption from compliance if the Registrar is satisfied that the conditions specified in subsection (1) have been met.

Clauses 26 and 27, if enacted, would give to the Registrar a discretion to exempt from compliance with the Act where the identity of a chemical either is commercial-in-confidence information or relates to military security and certain conditions are met. However, the Bill does not provide for review on the merits under the *Administrative Appeals Tribunal Act 1975*, where the Registrar refuses the exemption on the grounds that the Registrar is not satisfied that the conditions have been met.

The Committee draws Senators' attention to these provisions as they may be regarded as making rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

General comment

With respect to paragraph 27(1)(b), the Committee wonders whether the condition should be expressed in the affirmative rather than the negative - that is, the 'not' should be omitted. A person would seek an exemption from supplying information on the notification form if a foreign power could deduce the military purpose from the information about the chemical provided on the form. The Registrar would presumably wish to be satisfied before granting the exemption that a foreign power could deduce a military purpose when the notification form is made public. The

Committee presumes that this is essentially a drafting error.

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Tierney

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Extract from **Standing Order 24**

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(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;

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(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 1993

* Bounty (Ships) Amendment Bill 1993

* Customs Tariff Amendment Bill 1993

Development Allowance Authority Amendment Bill 1993

* Food Labelling Bill 1993

* Health and Community Services Legislation Amendment Bill 1993

Nuclear Non-Proliferation (Safeguards) Amendment Bill 1993

Nuclear Safeguards (Producers of Uranium Ore Concentrates) Charge Bill 1993

Occupational Superannuation Standards Amendment Bill 1993

* Social Security Legislation Amendment Bill 1993

Superannuation (Financial Assistance Funding) Levy Bill 1993

* Superannuation Industry (Supervision) Bill 1993

Superannuation Industry (Supervision) Consequential Amendments Bill 1993

* Superannuation (Resolution of Complaints) Bill 1993

* Superannuation (Rolled-Over Benefits) Levy Bill 1993

Superannuation Supervisory Levy Amendment Bill 1993

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

Tax Legislation Amendment (Fiscal Responsibility) Bill 1993

* Transport and Communications Legislation Amendment Bill 1993

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

ARTS, ENVIRONMENT AND TERRITORIES LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 27 May 1993 by the Minister representing the Minister for the Environment, Sport and Territories.

The Bill proposes to make various minor improvements to the Australian Capital Territory self-government legislation as a result of a 1992 review of the legislation, 3 years after self-government, and in particular to:

. amend the ACT self-government legislation to apply the COMCARE system to certain members of ACT Government employees previously not covered;

. ensure that the enforcement provisions of the *World Heritage Properties Conservation Act 1983* provide appropriate immunity from legal action for an 'eligible judge' when exercising the power to issue search warrants.

Retrospectivity
Subclauses 2(2) and (3)

Clause 2 of the Bill provides:

> Commencement
>
> 2.(1) Subject to subsections (2) and (3), this Act commences on the day on which it receives the Royal Assent.
>
> (2) Subsection 4(1) is taken to have commenced on 11 May 1989, immediately after the commencement of section 22 of the *A.C.T. Self-Government (Consequential Provisions) Act 1988*.
>
> (3) Subsection 4(2) is taken to have commenced on 14 November 1989, immediately after the commencement of the *Legislative Assembly (Members' Staff) Act 1989* of the Australian Capital Territory.

If enacted, subclauses 2(2) and (3) would give clause 4 retrospective effect.

As the Explanatory Memorandum notes, Section 22 of the *A.C.T. Self-Government (Consequential Provisions) Act 1988* provides that A.C.T. Government Employees ('Territory Staff') are covered by Comcare. However, the members of the Fire Brigade

were not included in the original legislation, nor was Comcare applied to persons employed under the *Legislative Assembly (Members' Staff) Act 1989* when it commenced on 14 November 1989. Clause 4 will ensure that Comcare covers members of the Fire Brigade and the staff of members of the Legislative Assembly. Subclauses 2(2) and (3) will ensure that the coverage will be retrospective to the commencement of self-government and the commencement of the Members' Staff Act respectively.

In each case the retrospectivity is beneficial to the persons affected. Accordingly, the Committee makes no further comment on the clause.

BOUNTY (SHIPS) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 27 May 1993 by the Minister representing the Minister for Industry, Technology and Regional Development.

The Bill proposes to amend the *Bounty (Ships) Act 1989*, to implement the Government's election commitment of 24 February 1993 to extend the bounty in line with general manufacturing tariffs, so that it is progressively reduced from the current 10% to 5% by July 1996 and, in particular, to:

. extend the period to which the Act applies to 30 June 1997;

. phase down the bounty rate gradually from 10% to 5% over a 4 year period, rather than an immediate drop of a full 5% currently scheduled for 1 July 1993.

Retrospectivity
Subclause 2(2)

Clause 2 of the Bill provides:

> Commencement
> 2.(1) Subject to subsection (2), this Act commences on the day on which it receives the Royal Assent.
>
> (2) Section 5 is taken to have commenced on 1 July 1989.

If enacted, the clause would give clause 5 retrospective effect. Clause 5 provides for increasing the upper tonnage limit for a shipbuilder to be registered for the purposes of the Act from 10,000 gross construction tons to 20,000 gross construction tons.

The Explanatory Memorandum states:

> 7. This is a technical amendment resulting from a drafting oversight in the *Industry, Technology and Commerce (Amendment) Act 1990* (Act No. 10 of 1990). That Act amended the definition of 'bountiable vessel' in subsection 4(1) of the Principal Act to change the upper limit from 10,000 to 20,000 gross construction tons. That amendment took effect from 1 July

1989, the commencement date of the Principal Act.

The Explanatory Memorandum goes on to indicate that this amendment makes the registration criteria consistent with the bounty eligibility criteria. In the light of this explanation, the Committee makes no further comment on the Bill.

CUSTOMS TARIFF AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 26 May 1993 by the Minister for Industry, Technology and Regional Development.

The Bill proposes to amend the *Customs Tariff Act 1987*, to overcome a problem with the construction of item 41A of Schedule 4 of the Act and thereby:

. confirm the Government's policy intent under the Passenger Motor Vehicle Manufacturing Plan, that for an importer to benefit under paragraph 41A(a) that importer must be the owner of a determination under the Export Facilitation Scheme;

. remove any doubt as to the operation of paragraph 41A(a) and the possibility that a non-plan producer could import vehicles duty free and without export credits under the Export Facilitation Scheme.

Retrospectivity
Subclauses 2(2) and (3)

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) Section 3 is taken to have commenced on 1 January 1991.
>
> (3) Section 4 is taken to have commenced on 1 January 1992.

If enacted, this clause would gives sections 3 and 4 retrospective effect.

The Outline of the Explanatory Memorandum suggests that the purpose of the Bill is to confirm the Government's policy intent under the Passenger Motor Vehicle Manufacturing Plan that in order to gain the benefit of importing motor vehicles duty free, an importer must be the owner of a determination under the Export Facilitation Scheme. Doubts, not shared by the Attorney-General's Department, have been expressed that the current paragraph 41A(a) of the Schedule to the *Customs Tariff Act 1987* would not prevent someone outside the Scheme (ie without export credits under the Export Facilitation Scheme) from importing motor vehicles duty

free.

The need for this Bill appears to have arisen because duty free entry of motor vehicles was extended from 1 January 1991. The Explanatory Memorandum of this Bill indicates that the by-law drafted for that extension did not state that it applied only to owners of a determination under the Export Facilitation Scheme.

The Committee would not see the retrospectivity as unduly trespassing on personal rights and liberties if the effect of the Bill is merely declaratory of what the Government and the relevant industry have always believed to be the legal obligation and if they have always acted accordingly.

The Committee has, in the past, been willing to accept retrospectivity where this has been necessary to correct a drafting error, without making further comment on the clause.

However, the issue in this case could be more than a drafting error correction. The Financial Impact Statement in the Explanatory Memorandum states:

> The amendments will remove a potential liability of the Commonwealth to refund duty paid in respect of motor vehicle importations since 1 January 1991. But for the amendments, the extent of that liability could be in the vicinity of $500 million.

This admits the possibility that $500 million may have been collected in duty without due authorisation by law.

The Committee is cognisant of the Minister's concern, expressed in his Second Reading Speech, that uncertainty in the Plan's legislative scheme could undermine the benefits achieved to date. But certainty could be restored by the amendment taking effect from the date of Royal Assent, or even, as in some comparable cases, from the date of the introduction of the Bill into Parliament. Such a move would leave intact the rights of parties as they existed prior to the Bill being introduced or assented to.

It has been suggested to the Committee that an action is presently on foot in which a plaintiff is challenging the way in which the Department has administered the Act to date. Accordingly, the Committee seeks from the Minister advice about the basis for introducing this legislation and information about whether it would defeat an action now being pursued in the courts. The Committee may be concerned that the litigant's rights were being abrogated.

If the claimant had, in the past, behaved in accordance with the interpretation

favoured by Attorney-General's that may indicate that the action is not in the nature of a citizen seeking to protect rights as they were believed to be but rather a claim seeking a windfall resulting from a drafting error. In the past, even where a citizen's rights have been abrogated, the Committee has accepted retrospectivity where that has been in the national interest.

DEVELOPMENT ALLOWANCE AUTHORITY AMENDMENT BILL 1993

This Bill was introduced into the Senate on 27 May 1993 by the Minister representing the Treasurer.

The Bill proposes to amend the *Development Allowance Authority Act 1992*, to:

. extend the development allowance to projects in the motor vehicle industry and the printing production aspects of projects in the print media:

. re-open the application period for projects in these industries; and

. allow proponents to apply for the development allowance for projects in these industries.

The Committee has no comment on this Bill.

FOOD LABELLING BILL 1993

This Bill was introduced into the Senate on 27 May 1993 as a Private Senator's Bill (Senator Lees).

The Bill proposes to provide an effective means for consumers to identify the country of origin of any food product, and, in particular, to identify whether that food is genuinely a product of Australia.

Strict liability offences
Clause 7

Clause 7 provides:

> Improper description of food
>
> 7.(1) A person must not apply a label to a package containing a food, or sell or display for sale a food that is in a package and that has a label that describes the food as being a product of Australia, or that contains a description, symbol or other depiction that indicates the food is a product of Australia, unless:
>
> (a) all of the ingredients of the food are grown or produced in Australia; or
>
> (b) ingredients of the food that make up at least 90% by volume of the food are grown or produced in Australia and the remaining ingredients are commercially unavailable foods;
>
> and all of the steps that have gone into making up the food occurred wholly within Australia.
>
> Penalty: 50 penalty units.
>
> (2) A person must not apply a label to a package containing a food, or sell or display for sale a food that is in a package and that has a label, that describes the food as being made by Australians or made by an Australian company, or that contains a description of a similar kind, unless all of the steps that have gone into making up the food have been done by one or more of the following:
>
> (a) a person who is an Australian citizen;
>
> (b) a partnership all of the partners in which are either Australian citizens or Australian companies;

(c) an Australian company.

Penalty: 40 penalty units.

(3) A person must not apply a label to a package containing a food, or sell or display for sale a food that is in a package and that has a label, that describes the food as being made from Australian ingredients, or that contains a description of a similar kind, unless:

(a) all of the ingredients of the food are grown or produced in Australia; or

(b) ingredients of the food that make up at least 90% by volume of the food are grown or produced in Australia and the remaining ingredients are commercially unavailable foods.

Penalty: 50 penalty units.

A strict liability offence is one where, if a certain fact exists or a certain event occurs, an offence has been committed without the prosecution being required to prove that the defendant had the 'guilty mind' normally required in criminal offences. The offences created by these subclauses may be regarded as strict liability offences, at least in respect of those who sell or display a food. Under these provisions, a person will have committed an offence if the person sells or displays for sale a food that does not comply with the requirements of the clauses. While it may be appropriate to impose on the manufacturer who applies the label to a food an obligation to ensure that the requirements have been met, most, if not all, retailers will have no means of knowing whether that is the case.

The Committee accepts that, as a matter of policy, there are matters which are appropriately dealt with by imposing strict liability. That is because, for example, the health of the community demands that certain standards of hygiene are maintained even if the owner of, say, a restaurant has no personal knowledge of the breach. But strict liability for such statutory offences is normally reserved for those who have the power to establish the required standards.

It would appear to be beyond the capacity of a small retailer, for example, to establish that all the staff of a food manufacturer who had a hand in the production of a labelled food were Australian citizens. Yet the Bill would, if enacted, make the retailer liable to the penalty.

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.

HEALTH AND COMMUNITY SERVICES LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 27 May 1993 by the Minister for Defence at the request of the Minister for Health.

The Bill proposes to:

. amend the *Aged or Disabled Persons Care Act 1954*, relating to offences currently covered by the general provisions of the *Crimes Act 1914;*

. correct drafting errors in the *Health Insurance Act 1973*, following the introduction, respectively, of the *Health and Community Services Legislation Amendment (No. 2) Act 1992* and the *Health, Housing and Community Services Legislation Amendment Act 1992;*

. correct anomalies in the *Health Insurance Act 1973*, following the introduction of the *Health Insurance (Pathology) Amendment Act (No. 2) 1991* and a drafting error following the introduction of the *Health Insurance (Quality Assurance Confidentiality) Amendment Act 1992;*

. remove several redundant provisions in the *National Health Act 1953* and correct anomalies in the Act following the introduction of the *National Health Amendment Act 1992;*

. clarify the length of time records are to be kept by nursing home proprietors that relate to the verification of claims for Commonwealth benefits.

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

Subclauses 2(2) and (3) of the Bill provide that clause 6 and clause 9 are to be taken to have commenced on 26 May 1987 and 30 June 1992 respectively, thereby giving the substantive amendments in question retrospective effect. However, as the Explanatory Memorandum indicates that the amendments merely involve correcting drafting errors, the Committee makes no further comment on those provisions.

Subclause 2(4) provides that the substantive provisions will be retrospective to 1 July 1993. The Explanatory Memorandum indicates that the provisions are largely

housekeeping: for example, renumbering some provisions and removing references to repealed or redundant provisions. The only substantive change is to introduce a seven year time limit on the existing obligation of keeping nursing home records to enable claims for Commonwealth benefit to be verified. This change appears to be beneficial to others than the Commonwealth, as the Explanatory Memorandum indicates that this will place a definite limit on the present open-ended obligation to keep records. Accordingly, the Committee is prepared to accept the retrospectivity and has no further comment on this subclause.

NUCLEAR NON-PROLIFERATION (SAFEGUARDS) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 26 May 1993 by the Minister for Resources.

The Bill proposes to:

. amend the *Nuclear Non-Proliferation (Safeguards) Act 1987*, to set the amount of the charge payable and when it is to be paid;

. provide, together with the Nuclear Non-Proliferation (Safeguards) Amendment Bill 1993, for the costs of certain nuclear safeguards and related activities of the Australian Safeguards office to be recovered from the producers of uranium ore concentrates in Australia by imposing a charge on those producers.

The Committee has no comment on this Bill.

NUCLEAR SAFEGUARDS (PRODUCERS OF URANIUM ORE CONCENTRATES) CHARGE BILL 1993

This Bill was introduced into the House of Representatives on 26 May 1993 by the Minister for Resources.

The Bill proposes to:

. allow for the imposition of a charge on producers of uranium ore concentrates if they produced more than 1 000 kilograms of uranium ore concentrate at a processing facility in the previous year and if at any time uranium ore concentrates have been exported from that processing facility.

. provide, together with the Nuclear Non-Proliferation (Safeguards) Amendment Bill 1993, for the costs of certain nuclear safeguards and related activities of the Australian Safeguards office to be recovered from the producers of uranium ore concentrates in Australia by imposing a charge on those producers.

The Committee has no comment on this Bill.

OCCUPATIONAL SUPERANNUATION STANDARDS AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by the Parliamentary Secretary to the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the new security of superannuation savings and protect the rights of superannuation fund members.

This Bill proposes to:

. amend the *Occupational Superannuation Standards Act 1987*, as a consequence of the commencement of the Superannuation Industry (Supervision) Bill 1993;

. set out provisions for the arrangements for collection of levies to be imposed under the Superannuation (Financial Assistance Funding) Levy Bill 1993 and the Superannuation (Rolled-Over Benefits) Levy Bill 1993; and

. rename the *Occupational Superannuation Standards Act 1987*, to the 'Superannuation Entities (Taxation) Act 1987' since remaining provisions of this Act will all relate to matters concerning taxation arrangements applicable to the superannuation industry.

The Committee has no comment on this Bill.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 26 May 1993 by the Minister for Social Security.

The Bill proposes to give legislative effect to minor technical amendments and policy changes in various programs administered under the *Social Security Act 1991*, the *Social Security Legislation Amendment Act (No. 2) 1992* and the *Social Security Legislation Amendment Act (No. 3) 1992*.

Retrospectivity
Subclauses 2(4) to (19)

These subclauses would allow various provisions in this Bill to have varying degrees of retrospectivity. In each case, the provisions having retrospective effect are either housekeeping, for example, corrections of drafting errors, or are neutral in effect or beneficial to persons other than the Commonwealth. Accordingly, the Committee makes no further comment on the Bill.

SUPERANNUATION (FINANCIAL ASSISTANCE FUNDING) LEVY BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by the Parliamentary Secretary to the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the new security of superannuation savings and protect the rights of superannuation fund members.

This Bill proposes to provide for the imposition of levies on superannuation funds and approved deposit funds for the purpose of funding financial assistance provided pursuant to the provisions of Part 11 of the Superannuation Industry (Supervision) Bill 1993 to any fund, or funds, that have suffered a loss as a result of fraudulent conduct or theft.

The Committee has no comment on this Bill.

SUPERANNUATION INDUSTRY (SUPERVISION) BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the security of superannuation savings and protect the rights of superannuation fund members.

This Bill provides:

. for effective supervisory arrangements for the Insurance and Superannuation Commission regarding funds and trustees;

. for trustees and investment managers to be made subject to legislative sanctions;

. for the proper performance of their fiduciary responsibilities and accountability to members;

. clear delineation of the basic duties and responsibilities of trustees;

. that trustees and investment managers must be suitable to act as fund trustees and to manage fund moneys respectively;

. for financial assistance to be provided to funds that have suffered a loss due to fraudulent conduct or theft;

. mechanisms for dealing with benefits in employer-sponsored funds in respect of members that have left employment or who are lost, and unclaimed benefits;

. for equal member and employer representation;

. certain disclosure obligations in respect of auditors and actuaries of funds; and

. rules relating to invitations and offers to subscribe for interests in, and disclosure by, public offer superannuation funds, approved deposit funds and pooled superannuation trusts.

Retrospectivity
Subclause 2(2)

Subclause 2(2), if enacted, would provide that clause 112 would have retrospective effect from 21 October 1992. On that date the Treasurer issued a statement 'Strengthening Super Security'. Clause 112, if enacted, would provide for the circumstances in which amounts may be paid out of an employer-sponsored fund to an employer-sponsor. It also would provide for civil and criminal penalties which could include 5 years imprisonment. Clause 112 would, then, appear to be an example of 'legislation by press release'.

The statement 'Strengthening Super Security', on page 25, indicates that the rules it sets out for returns of surplus to employers will apply to superannuation funds immediately. However, the Committee is concerned that the statement does not indicate that criminal liability would attach to contravention of those rules - rules which in the Bill are more complex than those in the statement.

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.

Reversal of onus of proof
Subclause 139(2)

Clause 139 provides:

> **Fraudulently inducing a person to engage in a regulated act- criminal liability**
>
> 139.(1) A person must not:
>
> (a) by making, publishing or broadcasting a statement or advertisement that the person knows to be false or misleading; or
>
> (b) by dishonestly concealing or withholding material facts; or
>
> (c) by recording or storing in, or by means of, any mechanical, electronic or other device, information that the person knows to be:

(i) false in a material particular; or
(ii) materially misleading;
intentionally induce another person to engage in a regulated act.
Penalty: Imprisonment for 5 years.

(2) In a prosecution for a contravention of subsection (1) covered by paragraph (1)(c), it is a defence if the defendant proves that, when the information was recorded or stored, the defendant had no reasonable grounds for expecting that the information would be available to the other person referred to in subsection (1).

Proposed new subsection 139(2) may be considered a reversal of the onus of proof in a criminal prosecution. Under this provision, the defence to an alleged breach of the section is that the defendant, when the information was recorded or stored, had no reasonable grounds for expecting that the information would be available to the other person.

Given the nature of the offence, the Committee wonders whether there is any scope for providing a statutory defence and placing any burden of proof on the defendant.

The offence created by proposed subsection 139(1) is committed if a person, by recording or storing certain information, intentionally induces another person to do 'a regulated act'. If those elements are established, it will be unnecessary for the defence to be proved: a person could not, by recording or storing certain information, intentionally induce another to do an act, if the person had no reasonable grounds to expect that the information would be available to that other person. Both sets of facts could not co-exist.

The Committee would appreciate the Treasurer's advice whether there is need for the statutory defence to be provided by the Bill.

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.

Reversal of onus of proof
Subclauses 178(2) and (3)

Clause 178 provides:

Offence of contravening the insider trading rules

178.(1) A person must not, intentionally or recklessly, contravene the insider trading rules.
Penalty: Imprisonment for 5 years.

(2) In a prosecution under this section:
(a) it is not necessary for the prosecution to prove the non-existence of facts or circumstances described in sections 174 to 177; and
(b) it is a defence if the defendant proves that the facts or circumstances existed.

(3) In a prosecution brought against a person for an offence against this section because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the defendant's possession:
(a) it is a defence if the defendant proves that the information came into the defendant's possession solely as a result of the information having been made known in a way that would, or would be likely to, bring it to the attention of persons who commonly invest in superannuation interests of a kind whose price or value might be affected by the information; and
(b) it is a defence if the defendant proves that the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement.

Proposed section 178 creates the offence of contravening insider trading rules. Subsections (2) and (3) provide for a defence if the defendant proves certain matters, for example, that the defendant was within one of the exceptions to insider trading provided by sections 174 to 177. As the onus of proving that defence lies with the defendant, the provision is one which reverses 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 in these provisions, 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 this provision.

Abrogation of the privilege against self-incrimination
Clause 282

Clause 282 provides:

Self-incrimination

Self-incrimination not a reasonable excuse

282.(1) For the purposes of this Part, it is not a reasonable excuse for a person to refuse or fail:

(a) to give information; or

(b) to sign a record; or

(c) to produce a book;

in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

Self-incrimination as grounds for inadmissibility

(2) Subsection (3) applies if:

(a) before:

(i) making an oral statement giving information; or

(ii) signing a record; or

(iii) producing a book;

as required under this Part, a person claims that the statement, signing the record, or production of the book as the case may be, might tend to incriminate the person or make the person liable to a penalty; and

(b) the statement, signing the record, or production of the book, as the case may be, might in fact tend to incriminate the person or make the person liable to a penalty.

Inadmissibility of statements etc.

(3) Subject to subsection (4), none of the following:

(a) the statement;

(b) the fact that the person has signed the record or produced the book, as the case may be;

(c) in the case of the making of a statement or the signing of a record-any information, document or other thing obtained as a direct or indirect consequence of the person making the statement or signing the record, as the case may be;

is admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty.

Exceptions

(4) Subsection (3) does not apply to admissibility in proceedings in respect of:

(a) in the case of the making of a statement-the falsity of the statement; or

(b) in the case of the signing of a record-the falsity of any statement contained in the record.

Clause 282 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 on 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. Accordingly, the Committee makes no further comment on the clause.

Strict liability offences/reversal of onus of proof
Subclauses 297(2) and 298(2)

Clause 297 provides:

False or misleading statements

297.(1) A person who:

(a) makes a statement to an SIS officer that is false or misleading in a material particular; or

(b) omits from a statement made to an SIS officer any matter or thing without which the statement is misleading in a material particular;

is guilty of an offence punishable on conviction by a fine not exceeding 40 penalty units.

(2) In a prosecution of a person for an offence against subsection (1), it is a defence if the person proves that the person:

(a) did not know; and

(b) could not reasonably be expected to have known;

that the statement to which the prosecution relates was false or misleading.

(3) ...

Clause 298 provides:

Incorrectly keeping records etc.

298.(1) Where:

(a) a person who is required under this Act or the regulations to keep any accounts, accounting records or other records keeps them in such a way that they do not correctly record and explain the matters, transactions, acts or operations to which they relate; or

(b) a person who is required under this Act or the regulations to make a record of any matter, transaction, act or operation makes it in such a way that it does not correctly record the matter, transaction, act or operation;

the person is guilty of an offence punishable on conviction by a fine not exceeding 40 penalty units.

(2) In a prosecution of a person for an offence against subsection (1), it is a defence if the person proves that the person:

(a) did not know; and

(b) could not reasonably be expected to have known;

that:

(c) in the case of a prosecution for an offence against subsection (1) by virtue of paragraph (a)-the accounts, accounting records or other records to which the prosecution relates did not correctly record and explain the matters, transactions, acts or operations to which they relate; or

(d) in the case of a prosecution for an offence against subsection (1) by virtue of paragraph (b)-the record to which the prosecution relates did not correctly record the matter, transaction, act or operation to which the record relates.

The offences created by subclauses 297(1) and 298(1) may be regarded as strict liability offences, as they provide that, if the events contemplated occur, an offence is committed without the prosecution being required to prove that the defendant had the 'guilty mind' normally required in criminal offences. The defences created by subclauses 297(2) and 298(2) may be regarded as instances of reversal of the onus of proof as they provide for the defendant to prove ignorance or that knowledge could not reasonably be expected.

The Committee notes that clauses 299, 300 and 301 impose criminal liability for similar activities but only on proof by the prosecution of a criminal intent or recklessness.

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 comply with the obligation imposed. The Committee has also been accustomed to accept a reversal of the onus of proof where the matters to be proved by the defendant are peculiarly within the knowledge of the defendant.

However, the matters to be proved under clauses 297 and 298 do not appear to be matters peculiarly within the knowledge of the defendant to any greater degree than the matters which clauses 299 to 301 require the prosecution to prove: intention or recklessness in respect of the same activities. The Committee therefore suggests that the offences created by clauses 297 and 298 should not be of strict liability but should require that the prosecution prove all the components of the offence.

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
Part 29--EXEMPTIONS AND MODIFICATIONS

Part 29 may be considered an inappropriate delegation of legislative power, as its clauses would allow the Commissioner to modify or exempt the application of specified provisions, both of the primary law and of the regulations, to a particular superannuation entity or class of superannuation entities without reference to, or reporting to, Parliament.

By way of explanation the Explanatory Memorandum states at p 67:

> The Commissioner would exercise this power only when he is satisfied that, if the modification or exemption is given, the particular superannuation entity or class of superannuation entities would still comply with the spirit of the provisions concerned.

The Committee notes that the exemptions or modifications must be published in the *Gazette*, although no period is prescribed within which this must be done. The Committee is concerned that this is a power which allows the Commissioner, in effect, to amend the legislation. The Committee is concerned not only with the wide, virtually unreviewable nature of the power but also at the lack of Parliamentary supervision.

The power is one of wide discretion without any criteria for its use set out in the Bill. There is an air of unreality about the suggestion in the Explanatory Memorandum that the Commissioner would only use it when satisfied about future compliance.

This is especially so when the future compliance is not compliance with the law but merely with the 'spirit of the provisions'.

While technically the Commissioner's decisions to exempt from the law or to modify its application are reviewable, the Committee sees practical difficulties where there are no legislated criteria and no prescribed time within which the decision must be gazetted.

The Committee does not believe that such a power should be given to the Commissioner and seeks the Treasurer's advice on whether it can be more strictly circumscribed. The Committee suggests at least an alternative scheme that would require reference and reporting to Parliament including perhaps the tabling of declarations and exemptions as disallowable instruments.

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.

SUPERANNUATION INDUSTRY (SUPERVISION) CONSEQUENTIAL AMENDMENTS BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by Parliamentary Secretary to the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the new security of superannuation savings and protect the rights of superannuation fund members.

This Bill proposes amendments to the:

Australian Capital Territory (Self-Government) Act 1988
Corporations Law
Income Tax Assessment Act 1936
Insurance and Superannuation Commissioner Act 1987
Military Superannuation and Benefits Act 1991
Superannuation Act 1976
Superannuation Act 1990
Superannuation Benefits (Supervisory Mechanisms) Act 1990
Superannuation (Productivity Benefit) Act 1988
Taxation Administration Act 1953
Taxation Laws Amendment (Superannuation) Act 1992

as a consequence of amendments to be made to the *Occupational Superannuation Standards Act 1987* and the commencement of the Superannuation Industry (Supervision) Bill 1993.

The Committee has no comment on this Bill.

SUPERANNUATION (RESOLUTION OF COMPLAINTS) BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by the Parliamentary Secretary to the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the new security of superannuation savings and protect the rights of superannuation fund members.

This Bill proposes:

. the establishment of a Superannuation Complaints Tribunal to resolve complaints through conciliation and if this is not practicable, to review the decision of the trustees to which the complaint relates;

. the appointment of a Tribunal Chairperson as a full-time statutory officeholder; and

. the appointment of members to the tribunal by the Minister, with two of those persons to be appointed in consultation with the Minister for Consumer Affairs.

This Bill also proposes that the disputes resolution arrangements apply to all superannuation funds and approved deposit funds regulated by the Insurance and Superannuation Commission under the Superannuation Industry (Supervision) Bill 1993.

Commencement by Proclamation
Clause 2

Clause 2 of the Bill provides:

> Commencement
>
> 2.(1) Subject to subsection (2), this Act commences on a day to be fixed by Proclamation.
>
> (2) If this Act does not commence under subsection (1) before 1 July 1994, it commences on that day.

The Committee notes that the proposed Act could commence outside the period of six months from the date of Royal Assent. This would be contrary to the general rule set out in the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

The Committee would prefer that, where there is a deviation from the general rules set out in the Instruction, the reasons for the deviation are set out in the Explanatory Memorandum. However, the Explanatory Memorandum for this Bill gives no such indication. The Committee therefore, seeks the advice of the Treasurer on this matter.

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.

SUPERANNUATION (ROLLED-OVER BENEFITS) LEVY BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by the Parliamentary Secretary to the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the new security of superannuation savings and protect the rights of superannuation fund members.

This Bill proposes to provide for the imposition of levies on certain superannuation funds and approved deposit funds for the purpose of recouping the cost of maintenance by the Insurance and Superannuation Commission of a register of certain rolled-over benefits pursuant to the provisions of Part 12 of the Superannuation Industry (Supervision) Bill 1993.

Imposition of charges by regulation
Clause 6

Clause 6 provides:

> **Regulations may impose levy**
>
> 6.(1) The regulations may impose in respect of the financial year ending on 30 June 1995 or a later financial year, a levy on each eligible rollover fund that, at the end of the financial year concerned, holds money in respect of benefits of a beneficiary in that fund, being benefits in respect of which the beneficiary has rights against the fund under paragraph 246(b) of the *Superannuation Industry (Supervision) Act 1993*.
>
> (2) The amount of the levy imposed on an eligible rollover fund in respect of a financial year is worked out using the formula:
>
> **Applicable rate X Value of assets**
>
> where:
> **"Applicable rate"** means the rate (expressed as a decimal fraction) that, under the regulations, is the rate of the levy applicable to eligible rollover funds in respect of that financial year;

> **"Value of assets"**, in relation to an eligible rollover fund, means the value of the assets of the fund at the end of that financial year.
>
> (3) The regulations must prescribe the same rate of levy in respect of all eligible rollover funds in respect of the same financial year.

The effect of proposed section 6, if enacted, would be to allow the Governor-General, acting on the advice of the Federal Executive Council, to make regulations which will govern the amount of the levy to be imposed by the proposed section.

The Committee has consistently drawn attention to provisions which allow for the rate of a levy to be set by regulation, largely on the basis that a rate of levy could be set which amounted to a tax (and which, therefore, should be set by primary rather than secondary legislation). Further, the Committee has generally taken the view that, if there is a need for flexibility in the setting of a levy, the primary legislation should prescribe either a maximum rate of levy or a method of calculating the maximum rate.

In the present Bill, no such maximum levy (or method of calculation thereof) is prescribed. By way of explanation the Explanatory Memorandum states:

> The Insurance and Superannuation Commission estimates that the additional resources needed to give effect to this package of measures will be $4.831m in 1993-94, $4.591m in 1994-95 and $4.631m in 1995-96.
>
> These additional costs will be recovered through the superannuation supervisory levy and the imposition of a new levy on certain superannuation funds and approved deposit funds as provided for in this Bill.

While the Committee accepts that the regulations would be disallowable by either House of the Parliament, it should also be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the amount of the levy.

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.

SUPERANNUATION SUPERVISORY LEVY AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 27 May 1993 by the Parliamentary Secretary to the Treasurer.

The Bill is one of a package of 7 cognate Bills which give effect to measures to increase the level of prudential protection provided to the superannuation industry, strengthen the new security of superannuation savings and protect the rights of superannuation fund members.

This Bill proposes to make minor amendments to the *Superannuation Supervisory Levy Act 1991*, as a consequence of amendments to be made to the *Occupational Standards Act 1987* and the commencement of the Superannuation Industry (Supervision) Bill 1993.

The Committee has no comment on this Bill.

TAX LEGISLATION AMENDMENT (FISCAL RESPONSIBILITY) BILL 1993

This Bill was introduced into the Senate on 27 May 1993 as a Private Senator's Bill (Senator Kernot).

The Bill proposes to reverse the previous decision of the Senate to pass the Tax Legislation Amendment Bill 1992, which passed into law in December 1992.

The Committee has no comment on this Bill.

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 27 May 1993 by the Minister for Transport and Communications.

The Bill proposes to amend:

. the *Australian Postal Corporation Act 1989*, to allow Australia Post to operate a national change of address scheme;

. the *Motor Vehicle Standards Act 1989*, to rectify some minor drafting errors, to provide a penalty for breaching conditions of approval to import a nonstandard vehicle and to express monetary penalties in terms of penalty units;

. the *Radiocommunications Act 1992*, to correct minor technical errors and inconsistencies; and

. the *Telecommunications Act 1991*, to make it clear that AUSTEL can include conditions relating to law enforcement in a class licence.

Retrospectivity
Subclause 2(2)

Subclause 2(2), if enacted, would allow some of the provisions of this Bill to commence on 1 July 1993 - the date of commencement of the *Radiocommunications Act 1992*. Although this will be prior to the date of Royal Assent, the only provisions affected correct minor technical errors and inconsistencies. Accordingly, the Committee has no further comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 4 OF 1993

1 SEPTEMBER 1993

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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 and Torres Strait Islander Commission Amendment Bill (No. 2) 1993

Appropriation Bill (No. 1) 1993-94

Appropriation Bill (No. 2) 1993-94

Appropriation (Parliamentary Departments) Bill 1993-94

Australian Meat and Live-stock (Quotas) Amendment Bill 1993

Commonwealth Banks Amendment Bill 1993

* Customs Tariff Amendment Bill 1993

* Customs Tariff (Deficit Reduction) Bill 1993

* Excise Tariff (Deficit Reduction) Bill 1993

Loan Bill 1993

Motor Vehicle Standards Amendment Bill 1993

* Road Transport Reform (Vehicles and Traffic) Bill 1993

* Social Security Legislation Amendment Bill (No. 2) 1993

* Taxation (Deficit Reduction) Bill 1993

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

ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on the 18 August 1993 by the Minister for Aboriginal and Torrens Strait Islander Affairs.

The Bill proposes:

- division of the Regional Council regions into a maximum of 5 wards per region;
- election processes for Regional Council elections;
- provisions for Regional Council advisory committee members regarding disclosure of pecuniary interests, payment of remuneration or allowances and resignation; and
- other administrative and accountability provisions in respect of Regional Councils.

Retrospectivity
Clause 34

Clause 34, if enacted, would insert new section 194A into the *Aboriginal and Torres Strait Islander Commission Act 1989*. Proposed subsection 194A(9) would permit the Commission to make retrospective determinations in respect of the period during which the remuneration budget for certain bodies will operate. The Explanatory Memorandum indicates on page 11 that the purpose is to manage more effectively the Commission's finances within the budget allocation.

The Committee notes that it is only the first such determination, in relation to each body, which may be retrospective and the retrospectivity may not extend further back than 19 August 1993, the day after the Bill was introduced into Parliament.

The Committee makes no further comment on the Bill.

APPROPRIATION BILL (NO. 1) 1993-94

This Bill was introduced into the House of Representatives on the 17 August 1993 by the Treasurer.

The Bill proposes to appropriate certain sums out of the Consolidated Revenue Fund for service of the year ending 30 June 1994 and for related purposes.

The Committee has no comment on this Bill.

APPROPRIATION BILL (NO. 2) 1993-94

This Bill was introduced into the House of Representatives on the 17 August 1993 by the Minister for Finance.

The Bill proposes to appropriate certain sums out of the Consolidated Revenue Fund for certain expenditure in respect of the year ending 30 June 1994 and for related purposes.

The Committee has no comment on this Bill.

APPROPRIATION (PARLIAMENTARY DEPARTMENTS) BILL 1993-94

This Bill was introduced into the House of Representatives on the 17 August 1993 by the Minister for Finance.

The Bill proposes to appropriate certain funds out of the Consolidated Revenue Fund for certain expenditure in relation to the Parliamentary Departments in respect of the year ending 30 June 1994, and for related purposes.

The Committee has no comment on this Bill.

AUSTRALIAN MEAT AND LIVE-STOCK (QUOTAS) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on the 18 August 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to extend the operation of the *Australian Meat and Live-stock (Quotas) Act 1990* for a further three years until the 28 December 1996. The *Australian Meat and Live-stock (Quotas) Act 1990* empowers the Australian Meat and Live-stock Corporation to operate quota mechanisms on Australian meat and live sheep in particular circumstances.

The Committee has no comment on this Bill.

COMMONWEALTH BANKS AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on the 18 August 1993 by the Assistant Treasurer.

The Bill proposes to:

- reduce the Commonwealth's shareholding in the Commonwealth Bank from around 70% to 50.1%;
- expand the role of the Commonwealth Development Bank (CDB) by providing a capital injection, continuing subsidy and relaxation of legislative constraints on its lending activity; and
- enable the expansion of the CDB's charter in relation to finance requirements of its borrowers.

The Committee has no comment on this Bill.

CUSTOMS TARIFF AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 26 May 1993 by the Minister for Industry, Technology and Regional Development.

The Bill proposes to amend the *Customs Tariff Act 1987*, to overcome a problem with the construction of item 41A of Schedule 4 of the Act and thereby:

. confirm the Government's policy intent under the Passenger Motor Vehicle Manufacturing Plan, that for an importer to benefit under paragraph 41A(a) that importer must be the owner of a determination under the Export Facilitation Scheme;

. remove any doubt as to the operation of paragraph 41A(a) and the possibility that a non-plan producer could import vehicles duty free and without export credits under the Export Facilitation Scheme.

The Committee dealt with the Bill in Alert Digest No. 3 of 1993, in which it made various comments. The Committee has now received a submission from Trade Management Australia Pty Ltd dated 23 August 1993 relating to this Bill.
The Committee's comments are reproduced below and a copy of the submission is attached to this Digest for the information of Senators.

A copy of the submission has also been forwarded to the Minister. In accordance with its practice, the Committee will deal in a future Report with any response the Minister may care to make both to its comments in Alert Digest No. 3 and to the matters raised by Trade Management Australia.

The main points of the submission appear to be:

. Duty has been paid under protest on a shipment of vehicles.

. Soon after, the by-law under contention was revoked - on 1 March 1993.

. Applications for refunds may only be made in respect of imports made in the preceding twelve months.

. An appeal has been lodged with the Administrative Appeals Tribunal (AAT).

. The proposed legislation would extinguish the right of redress by means of that appeal.

. The Bill could be amended to exclude applications for refunds lodged after 26 May 1993, the day the Bill was introduced into Parliament. If this were done, the potential liability (that is, if the AAT agreed that no duty was payable) would be $M14, not $M500.

In Alert Digest No. 3, the Committee's comments were:

Retrospectivity
Subclauses 2(2) and (3)

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) Section 3 is taken to have commenced on 1 January 1991.

(3) Section 4 is taken to have commenced on 1 January 1992.

If enacted, this clause would gives sections 3 and 4 retrospective effect.

The Outline of the Explanatory Memorandum suggests that the purpose of the Bill is to confirm the Government's policy intent under the Passenger Motor Vehicle Manufacturing Plan that in order to gain the benefit of importing motor vehicles duty free, an importer must be the owner of a determination under the Export Facilitation Scheme. Doubts, not shared by the Attorney-General's Department, have been expressed that the current paragraph 41A(a) of the Schedule to the *Customs Tariff Act 1987* would not prevent someone outside the Scheme (ie without export credits under the Export Facilitation Scheme) from importing motor vehicles duty free.

The need for this Bill appears to have arisen because duty free entry of motor vehicles was extended from 1 January 1991. The Explanatory Memorandum of this Bill indicates that the by-law

drafted for that extension did not state that it applied only to owners of a determination under the Export Facilitation Scheme.

The Committee would not see the retrospectivity as unduly trespassing on personal rights and liberties if the effect of the Bill is merely declaratory of what the Government and the relevant industry have always believed to be the legal obligation and if they have always acted accordingly.

The Committee has, in the past, been willing to accept retrospectivity where this has been necessary to correct a drafting error, without making further comment on the clause.

However, the issue in this case could be more than a drafting error correction. The Financial Impact Statement in the Explanatory Memorandum states:

> The amendments will remove a potential liability of the Commonwealth to refund duty paid in respect of motor vehicle importations since 1 January 1991. But for the amendments, the extent of that liability could be in the vicinity of $500 million.

This admits the possibility that $500 million may have been collected in duty without due authorisation by law.

The Committee is cognisant of the Minister's concern, expressed in his Second Reading Speech, that uncertainty in the Plan's legislative scheme could undermine the benefits achieved to date. But certainty could be restored by the amendment taking effect from the date of Royal Assent, or even, as in some comparable cases, from the date of the introduction of the Bill into Parliament. Such a move would leave intact the rights of parties as they existed prior to the Bill being introduced or assented to.

It has been suggested to the Committee that an action is presently on foot in which a plaintiff is challenging the way in which the Department has administered the Act to date. Accordingly, the Committee seeks from the Minister advice about the basis for introducing this legislation and information about whether it would defeat an action now being pursued in the courts. The Committee may be concerned that the litigant's rights were being abrogated.

If the claimant had, in the past, behaved in accordance with the interpretation favoured by Attorney-General's that may indicate that the action is not in the nature of a citizen seeking to protect rights as they were believed to be but rather a claim seeking a windfall resulting from a drafting error. In the past, even where a citizen's rights have been abrogated, the Committee has accepted retrospectivity where that has been in the national interest.

CUSTOMS TARIFF (DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on the 17 August 1993 by the Parliamentary Secretary to the Minister for Industry, Technology and Regional Development.

The Bill proposes to amend the *Customs Tariff Act 1987* to:

. increase the customs duty payable on tobacco and certain petroleum products effective from 18 August 1993;
. allow for further increases in the customs duty on those products to occur at the same time as corresponding increases in the excise duty.

Retrospectivity
Clause 2

Subclause 2(2), if enacted, would give a degree of retrospective operation to the substantive provision of the Bill. It provides for an increase in customs duty payable on tobacco and petroleum products from 18 August 1993 which, of course, will be before Royal Assent.

The Committee notes that the retrospectivity will date only from the day after the Bill was introduced and gives effect to the announcement of the duty in the Budget.

The Committee has previously indicated that, in relation to retrospectivity, budget measures are something of a special case. In a paper titled *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-1985*, the then Chairman of the Committee, Senator Tate, said:

> It is customary ... for budgetary measures to be made retrospective to the date of their announcement on Budget night and for changes to taxes, levies, fees to be given effect from the date of their introduction into Parliament.

The Committee makes no further comment on the Bill.

EXCISE TARIFF (DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on the 17 August 1993 by the Parliamentary Secretary to the Minister for Industry, Technology and Regional Development.

The Bill proposes to amend the *Excise Tariff Act 1921* to:

. increase the duty payable on tobacco and certain petroleum products effective from 18 August 1993; and
. allow for further increases in the excise duty on those products to occur at the same time as indexation pursuant to section 6A of the Act.

Retrospectivity
Clause 2

Subclause 2(2), if enacted, would give a degree of retrospective operation to the substantive provision of the Bill. It provides for an increase in excise duty payable on tobacco and petroleum products from 18 August 1993 which, of course, will be before Royal Assent.

The Committee notes that the retrospectivity will date only from the day after the Bill was introduced and gives effect to the announcement of the increase in the Budget. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on the Bill.

LOAN BILL 1993

This Bill was introduced into the House of Representatives on the 17 August 1993 by the Minister for Finance.

The Bill proposes to make provision for the financing of a prospective deficit in the Consolidated Revenue Fund (CRF) by enabling certain defence expenditures to be met from the Loan Fund rather than the CRF and to supplement the moneys available to the CRF.

The Committee has no comment on this Bill.

MOTOR VEHICLE STANDARDS AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on the 19 August 1993 by Mr Hawker as a Private Member's Bill.

The Bill proposes to amend the *Motor Vehicle Standards Act 1989* to repeal part of an Australian Design Rule in relation to electrical connections on motor cycles.

The Committee has no comment on this Bill.

ROAD TRANSPORT REFORM (VEHICLES AND TRAFFIC) BILL 1993

This Bill was introduced into the Senate on 18 August 1993 by the Manager of Government Business in the Senate for the Minister for Transport and Communications.

The Bill proposes to enable regulations to be made about specific aspects of motor vehicle and trailer operations and rules of the road for all road users and:

- will apply only in the Australian Capital Territory and the Jervis Bay Territory;
- is part of a legislative scheme for uniform road transport legislation throughout Australia set out in the *National Road Transport Commission Act 1991* and the Inter-Governmental Agreements scheduled to that Act.

Inappropriate delegation of legislative power
Clauses 7 to 11

The General Outline of the Explanatory Memorandum indicates that Inter-Governmental Agreements provide for all governments in Australia to enact legislation to adopt laws made by the Commonwealth under the scheme to provide a uniform national body of road transport law. This Bill covers some, but not all, of the matters envisaged by the Agreements.

The regulation making power in this Bill, if enacted, would permit a wide range of substantive rules relating to road transport to be made by subordinate rather than by primary legislation. Most jurisdictions have until now divided the subject matter of road laws between primary and subordinate legislation - that is, there are Motor Traffic Acts and Motor Traffic Regulations. Traditionally, more substantive matters are set out in primary legislation and subordinate legislation is used to cover the fine detail. Another formulation is that the policy is set out in the primary legislation with the administrative details being filled in by regulations.

However, this Bill proposes merely to outline generally the subject matter to be dealt with by regulation without itself dealing with any of the more important matters. Some matters may be considered of sufficient importance to require that they be dealt with in primary rather than subordinate legislation.
This Bill is an example of uniform legislation which attracted comment and

discussion and resulted in a resolution being passed at the 1993 Conference on Delegated Legislation and on Scrutiny of Bills. It was noted that Councils of Ministers, their advisers and officials were pressuring Parliaments to pass uniform legislation without amendment because of inter-government agreements. On the one hand, this was seen as usurping the function of legislatures to consider and pass legislation; on the other hand, it was readily acknowledged that uniformity in such matters as road transport law was eminently desirable. But the Conference was concerned at the perceived drawbacks of imposing uniform legislation without adequate scrutiny and so passed the following recommendation:

> That the 1993 Conference on Delegated Legislation and on Scrutiny of Bills recommend that, prior to Ministerial Councils agreeing to the introduction of uniform or complementary bills or delegated legislation:
>
> (a) details of the proposals as draft legislation;
>
> (b) supporting discussion papers etc;
>
> (c) the opportunity for comment in response;
>
> be provided to relevant Parliamentary Committees in participating jurisdictions and others, as standard practice.

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

SOCIAL SECURITY LEGISLATION AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 19 August 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes to amend the *Social Security Act 1991*, the *Social Security Legislation Amendment Act (No. 4) 1991*, the *National Health Act 1953* and the *Hearing Services Act 1991* to:

- ensure the income test for family payment, the parental income test for job search allowance and sickness allowance recipients and claimants under 18 take account of certain employer provided fringe benefits;
- introduce a seniors health card;
- ensure that the income test for family payment takes account of foreign income;
- make foreign currency provisions more responsive to market exchange rate fluctuations;
- extend the period for payment of the advance pharmaceutical allowance.

Retrospectivity
Subclause 2(2)

This subclause, if enacted, would allow proposed section 23 to have retrospective effect. The Explanatory Memorandum indicates at page 37 that the amendment will correct a drafting oversight in an earlier Act by including Pension Rate Calculators D and E which are at the end of sections 1066A and 1066B of the *Social Security Act 1991* within the ambit of the application of the foreign currency conversion provisions.

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

Inappropriate delegation of legislative power
Clause 7

Clause 7, if enacted, would insert new Part 3.12A setting out the general provisions relating to both the family payment income test and the parental means test which will take account of certain employer provided fringe benefits.

Within proposed Part 3.12A, new sections 1157M, 1157R and 1157U would give the Minister the power to make a determination fixing an alternative method of valuing the various fringe benefits. Such a determination would replace (effectively suspending) the provisions for valuing those fringe benefits which are included in new sections 1157L, 1157Q and 1157T respectively. The power to make a determination suspending legislative provisions may be considered to be an inappropriate delegation of legislative power.

However, the Committee notes that the Ministerial determinations are to be disallowable instruments and therefore subject to Parliamentary scrutiny. In addition, subsection 3(b) of each of the relevant sections provides that the determination ceases to have effect after 6 months unless it is revoked earlier. Upon the cessation or earlier revocation of the determination the original legislative provision would revive, unless, of course, a further determination is made.

The Committee also notes that the Explanatory Memorandum indicates that the purpose of the determination power is to allow the Minister to react quickly when market circumstances dictate that values different from those specified in the legislation should be used.

Given these factors, the Committee makes no further comment on the Bill.

TAXATION (DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on the 17 August 1993 by the Assistant Treasurer.

The Bill proposes to amend the *Income Tax Assessment Act 1936*, the *Income Tax Rates Act 1986*, the *Fringe Benefits Tax Act 1986*, the *Fringe Benefits Tax Assessment Act 1986*, the *Medicare Levy Act 1986* and the *Sales Tax (Exemptions and Classifications) Act 1992* in relation to:

- personal tax cuts;
- fringe benefits tax;
- low-income rebate;
- unused annual leave and long service leave payments;
- credit unions;
- taxation of friendly societies and other registered organisations;
- medicare levy thresholds;
- sales tax - general rate increases;
- sales tax on wine, cider and other similar beverages; and
- sales tax on luxury motor vehicles.

Commencement by regulation
Subclause 2(3)

Subclause 2(3) provides:

> (3) Division 4 of Part 2 commences at the beginning of the financial year fixed by regulations made by the Governor-General for the purposes of this subsection. The financial year must be later than the financial year beginning on 1 July 1994.

The effect of this provision is that the additional tax cuts provided by Division 4 of Part 2 cannot apply to a financial year earlier than 1995-1996 and may only apply then if enabling regulations are made. This has the same effect as a provision permitting commencement by Proclamation.

The Committee notes that subclause 2(3), in substance, if not in form, is contrary to the 'general rule' set out in the Office of Parliamentary Counsel Drafting Instruction No.2 of 1989 which requires a time limit within which an Act should come into

force.

The Drafting Instruction,in part, provides:

> 3. ... 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.

The Committee has consistently opposed provisions which leave the commencement of a law to be open-ended. Where there is a deviation from the rules set out in the Drafting Instruction, the Committee prefers to see the reasons set out in the Explanatory Memorandum. The Committee notes the absence of such an explanation.

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
Subclause 2(7) and clauses 86 and 97

These provisions, if enacted, would give a degree of retrospective operation to Parts 9 and 10 of the Bill. They provide for an increase in sales taxes from 18 August 1993 which, of course, will be before Royal Assent.

The Committee notes that the retrospectivity will date only from the day after the Bill was introduced and gives effect to the announcement of the increase in the Budget. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on the provisions.

Inappropriate delegation of legislative power

Clauses 16 and 32

Clauses 16 and 32 insert new provisions in the taxation legislation with respect to fringe benefits and income respectively.

Proposed subsection 31A(2) of the *Fringe Benefits Tax Assessment Act 1986* provides:

> *Excess domestic travel allowance benefit*
>
> (2) If:
>
> (a) at a particular time, in respect of the employment of an employee, a person (the **'provider'**) pays a domestic travel allowance to the employee; and
>
> (b) the amount of the allowance exceeds the prescribed limit in relation to the allowance;
>
> the payment of so much of the allowance as exceeds that prescribed limit constitutes a benefit provided by the provider to the employee at that time.

Proposed subsections 51AM(1) and (2) provide:

> **No deduction to employee for excess domestic travel expenses**
>
> *When section applies*
>
> 51AM.(1) This section applies if, apart from this section, one or more deductions (the **'gross deductions'**) are allowable to an employee under this Act for domestic travel expenses in relation to travel undertaken by the employee.
>
> *No deduction for excess domestic travel expenses*
>
> (2) If the total of the gross deductions exceeds the prescribed limit in relation to that travel, so much of that total as is equal to the excess is not allowable to the employee.

Proposed subsections 51AN(1) and (2) are in similar terms in respect of non-employees.

These provisions, if enacted, would leave to regulations the setting of monetary limits on domestic travel beyond which any excess would be subject to fringe benefits tax or not deductible for the purposes of income tax. As the amount of that limit has such a direct effect on taxation liability, the determination of the limit by regulation may be considered to be an inappropriate delegation of legislative power.

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

Retrospectivity
Clauses 48 to 52

These clauses, if enacted, will remove the concessional tax treatment that applies to lump sum payments of unused annual leave and unused long service leave made on termination of employment so that, with two exceptions, such amounts will be included in full in a taxpayer's assessable income. These provisions may be considered to have some retrospective operation in that, although they are expressed to apply only to payments on termination after 18 August 1993, they are or may be payments in respect of leave accrued prior to that date.

The Committee notes that changes have been foreshadowed in the statement of the Prime Minister and the Treasurer on 30 August 1993. These changes would appear to do away with retrospectivity with regard to long service leave accrued prior to 17 August 1993 but not with respect to accrued annual leave. The Committee, therefore, seeks the advice of the Treasurer on this point.

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.

SCRUTINY OF BILLS ALERT DIGEST

NO. 5 OF 1993

29 SEPTEMBER 1993

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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 1993

Australian National Training Authority Amendment Bill (No. 2) 1993

Aviation Fuel Revenues (Special Appropriation) Amendment Bill 1993

Bounty Legislation Amendment Bill 1993

* Customs Legislation Amendment Bill 1993

* Customs Tariff Amendment Bill (No. 2) 1993

* Defence Legislation Amendment Bill 1993

Departure Tax Amendment Bill 1993

* Excise Tariff (Deficit Reduction) Bill 1993

Forest Industries Research Export Charge Bill 1993

* Forest Industries Research Import Charge Bill 1993

* Forest Industries Research Levy Bill 1993

* Health and Community Services Legislation Amendment Bill (No. 2) 1993

* Migration Laws Amendment Bill 1993

Motor Vehicle Standards (Headlights) Amendment Bill 1993

National Health Amendment Bill (No. 2) 1993

National Residue Survey Administration (Cost Sharing) Amendment Bill 1993

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

* Primary Industries and Energy Legislation Amendment Bill 1993

Protection of the Sea (Shipping Levy) Amendment Bill 1993

Qantas Sale Amendment Bill 1993

* Snowy Mountains Engineering Corporation Limited Sale Bill 1993

* Social Security Amendment Bill (No. 2) 1993

States Grants (General Purposes) Bill 1993

Superannuation Guarantee (Administration) (Exemption of Council Allowances) Amendment Bill 1993

* Taxation (Deficit Reduction) Bill 1993

Telecommunications (Interception) Amendment Bill 1993

Therapeutic Goods (Charges) Amendment Bill 1993

* Toxic Chemicals (Community Right to Know) Bill 1993

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

ABORIGINAL EDUCATION (SUPPLEMENTARY ASSISTANCE) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 31 August 1993 by the Minister for Employment, Education and Training.

The Bill proposes to amend the *Aboriginal Education (Supplementary Assistance) Amendment Act 1989* to provide for a continuation of funding to the National Aboriginal and Torres Strait Islander Education Policy (AEP).

The Aboriginal Education Strategic Initiatives Program (AESIP) which underpins the Policy, sets down 21 goals for Aboriginal Education jointly agreed to by all State and Territory governments and the Commonwealth.

The Committee has no comment on this Bill.

AUSTRALIAN NATIONAL TRAINING AUTHORITY AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Minister for Schools, Vocational Education and Training.

The Bill proposes to amend the *Australian National Training Authority Act 1992* to:

. provide for the transfer from the Commonwealth to the Authority of responsibility for agreements in respect of certain Commonwealth programs which will become National Programs of the Authority from 1 January 1994;

. provide for relevant agreements to be declared by the Minister or the Secretary of the Department, as delegate of the Minister. A declaration will not have effect until a copy of it is provided to the other party to the agreement; and

. correct a drafting oversight in the Principal Act regarding the definition of 'year' which deals with the term of the appointment of Authority members.

The Committee has no comment on this Bill.

AVIATION FUEL REVENUES (SPECIAL APPROPRIATION) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Parliamentary Secretary for the Minister for Transport and Communications.

The Bill proposes to appropriate to the Civil Aviation Authority (CAA) customs and excise duty levied on aviation kerosene from 1 September 1993.

The Committee has no comment on this Bill.

BOUNTY LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 31 August 1993 by the Minister for Defence for the Minister for the Arts and Administrative Services.

The Bill proposes amendments to:

. the *Bounty (Books) Act 1986* to continue bounty assistance on Australian book production until 31 December 1997;

. the *Bounty (Computers) Act 1984* to introduce a new definition of 'research and development' to clarify factory costs to be included under this phrase and to strengthen the ability of the Australian Customs Service to substantiate claims made under the scheme; and

. the *Bounty and Capitalisation Grants (Textile Yarns) Act 1981* and the *Bounty (Machine Tools and Robots) Act 1985* to make minor technical amendments.

The Committee has no comment on this Bill.

CUSTOMS LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 31 August 1993 by the Minister for Defence for the Minister for the Arts and Administrative Services.

The Bill proposes amendments to:

- the *Customs Act 1901* to refine the rules of origin as a consequence of the 1992 Closer Economic Relations review;

- the *Customs Act 1901* to substitute a new definition for a 'place outside Australia' to ensure tighter Customs control over people and goods moving between Australia and installations in Area A of the Zone of Co-operation in the Timor Gap;

- the *Customs Act 1901* to allow computer transmission of encoded information in the process of entering and clearing goods;

- the *Customs Act 1901* to clarify that the undeclared possessions of ship's crew are forfeited to the Crown;

- the *Anti-Dumping Authority Act 1988* to enable the Authority to keep its recommendations to the Minister confidential until the Minister has made a decision on those recommendations; and

- the *Customs Act 1901*, the *Customs Legislation (Tariff Concessions and Anti-Dumping) Amendments Act 1992* and the *Customs Legislation (Anti-Dumping Amendments) Act 1992* to effect certain minor technical changes.

Retrospectivity
Subclauses 2(2), (4), (6) and (7)

Subclause 2(2), if enacted, would give clause 8 retrospective operation from 1 September 1992, the date on which the principal Electronic Lodgement amendments came into effect.

The purpose of the proposed amendment, adding a new subsection (6) to section 71F of the *Customs Act 1901*, is to correct a drafting oversight. Paragraphs 22 to 24 of

the Explanatory Memorandum indicate that a mechanism for deeming import entries to be withdrawn in certain circumstances which was contained in subsection 38(3) of the old Act was omitted from the new section 71F on the introduction of Electronic Lodgement. In the light of this explanation the Committee makes no further comment on this provision.

By virtue of subclauses 2(4), (6) and (7), various provisions will have retrospective operation from 1 November 1992, 18 August 1992 and 1 January 1993 respectively. Paragraphs 5, 7 and 8 on page 2 of the Explanatory Memorandum show that the amendments are technical corrections to cross references or citation errors. Given this explanation the Committee makes no further comment on these subclauses.

Inappropriate delegation of legislative power and insufficient parliamentary scrutiny

Clause 10 - Insertion of New Division 1A in Part VIII of the *Customs Act 1901*

Clause 10, if enacted, would provide under proposed new paragraphs 153J(3)(b) and 153L(4)(b) for the Comptroller to make a determination which would effectively amend paragraphs 153J(3)(b) and 153L(4)(b) respectively. The determination would provide for a lesser percentage of the total factory costs of certain goods than the statutory 50% in order that those goods be included in the preference arrangements for goods manufactured in New Zealand and/or Papua New Guinea or a Forum Island country.

The Committee notes

. the determination is to be gazetted;

. the determination is not disallowable;

. the discretion to allow a lesser percentage is completely unfettered; and

. the marked contrast with proposed new section 153K, which provides that the 50% rule may be taken to be 48% if the Comptroller is satisfied of certain carefully described criteria.

The Committee, therefore, seeks the Minister's advice on whether the very wide discretion in paragraph 153J(3)(b) makes the carefully circumscribed discretion in 153K otiose.

As the paragraphs give the Comptroller a power to amend the legislation at will and there is no provision for such amendment to be tabled or subject to disallowance, the

paragraphs may be considered both to delegate legislative power inappropriately and insufficiently to subject this exercise of legislative power to parliamentary scrutiny.

The Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference and may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Non-reviewable decision
Proposed section 153K

The Committee notes that proposed new section 153K would give the Comptroller the discretion to determine whether the allowable factory costs of goods claimed to originate in New Zealand comes within a 2% margin of tolerance. Section 273GA makes many of the discretions throughout the Act reviewable by appeal to the Administrative Appeals Tribunal. However, it does not appear that the discretion in the proposed section 153K will be included in section 273GA. It may be, however, that an action brought under section 167 to resolve a dispute on the correct rate of duty to be paid would effectively review a section 153K decision. The Committee, accordingly, would appreciate the Minister's advice on this issue.

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.

Insufficient parliamentary scrutiny
Proposed section 153R

Subsection 153 would provide:

> **Are goods commercially manufactured in Australia?**
> *Comptroller may determine that goods are, or are not, commercially manufactured in Australia*
> **153R.(1)** For the purposes of sections 153P and 153Q, the Comptroller may, by *Gazette* notice, determine that goods of a specified kind are, or are not, commercially manufactured in Australia.

This subsection would allow the Comptroller, by a notice in the Gazette, to make a determination the effect of which would be to provide a definition of the term 'goods

commercially manufactured in Australia' for the purposes of proposed new sections 153P and 153Q. Defining a term is an exercise of power that is legislative in character. As there is no provision for the notice in the *Gazette* to be a disallowable instrument it may be considered that there is insufficient opportunity for review by the Parliament. Accordingly, the Committee seeks the Minister's views on this matter.

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

CUSTOMS TARIFF AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Parliamentary Secretary to the Minister for Industry, Technology and Regional Development.

The Bill proposes a number of amendments to the *Customs Tariff Act 1987* to:

. accommodate proposed changes to the rules of origin;

. reduce the coverage of Australian System of Tariff Preferences (ASTP);

. provide for the continued duty free importation of certain handkerchiefs and needlecraft kits;

. phase out the Canadian margin of preference on certain carpets;

. phase out the Developing Country margin of preference for certain goods;

. change the concessional arrangements for textiles, clothing and footwear;

. accord concessional tariff treatment to the Czech Republic and Slovak Republic;

. change the duty treatment of passenger motor vehicles components and replacement components;

. apply the February 1993 CPI adjustments to certain spirits and spirituous liquors;

. reduce customs duty on aviation gasoline; and

. make certain other minor amendments.

Retrospectivity
Subclause 2(5) and subclauses 2(4) and 2(6) to (11)

Subclause 2(5), if enacted, would give retrospective operation to clause 18 and the amendments in Schedule 1.

Retrospectivity is normally seen as potentially breaching principle 1(a)(i) of the Committee's terms of reference, in that it may unduly trespass on personal rights and liberties. However the amendments made by Schedule 1 are beneficial to importers. Where a provision is beneficial to persons other than the Commonwealth, the Committee has been prepared to accept retrospectivity. Accordingly, the Committee makes no further comment upon this provision.

Subclauses 2(4) and 2(6) to (11), if enacted, would provide for substantive provisions of the Bill to operate retrospectively for periods of up to 17 or 18 months, depending on the date of Royal Assent.

The Committee notes from the Explanatory Memorandum and the second reading speech that the amendments are either technical or give effect to Customs Tariff Proposals which have been tabled. The Committee further notes that such retrospectivity is standard in relation to changes in rates of duty.

The Committee makes no further comment on this Bill.

DEFENCE LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 1 September 1993 by the Parliamentary Secretary to the Minister for Defence.

The Bill proposes amendments to the *Defence Act 1903*, the *Defence Force (Home Loans Assistance) Act 1990*, the *Military Superannuation and Benefits Act 1991*, the *Royal Australian Air Force Veterans' Residences Act 1953* and the *Services Trust Funds Act 1947* to:

- modify a provision covering superannuation determinations to reflect the fact that they are no longer 'interim';
- modify the right of appeal from Conscientious Objection Tribunals to reflect more accurately the role of the Administrative Appeals Tribunal;
- streamline procedures covering command and discipline where forces of Australia and other countries are serving together;
- provide a special home loans benefit for members of the Defence Force allotted for warlike service;
- remove an unintended double benefit for a small number of members of the Defence Force who have transferred to the new Military Superannuation and Benefits Scheme; and
- enable trustees of four welfare funds to be appointed by a Minister rather than by the Governor-General.

Retrospectivity
Subclause 5(2), clauses 12 and 18

Subclause 5(2), if enacted, would give retrospective operation to clause 4 and paragraph 5(1)(a) of the Bill.

As the amendments made by these provisions are technical and they will operate beneficially for the members of the Defence Forces, the Committee is prepared to accept the retrospectivity.

By virtue of clause 12, the proposed new section 3C of the *Defence Force (Home*

Loans Assistance) Act 1990 would allow the Minister to make retrospective declarations that particular duties are warlike services. As such retrospectivity would be beneficial to those who had undertaken such duties, the Committee is prepared to accept the retrospectivity.

Clause 18, if enacted, would enable Part 4 of the Bill to give effect, retrospective to 1 October 1991, to an Instrument made in 1993 under the *Military Superannuation and Benefits Act 1991*. The Committee notes the reasons for the retrospectivity given at pp 9 to 11 of the Explanatory Memorandum:

. a new military superannuation and benefits (MSB) scheme came into operation on 1 October 1991;

. operation of the MSB scheme revealed unintended double benefits which came about by too wide a definition of 'previous contributions';

. an earlier amendment of the definition was operative from 27 May 1992 to 8 September 1992 when the amending Instrument was disallowed by the Senate on 9 September. The Explanatory Memorandum states:

> It is noted that Instrument No. 2 of 1992 was disallowed because it contained a further amendment to the definition of 'previous contributions' relating to bought back service. That further amendment has now been dropped. The Senate's concern in relation to the amendment now proposed was that the MSB Board of Trustees be formally consulted. The Board has now been consulted and has agreed to the amendment.

. proposed new subsections 51A(3) and (4) will enable the Commonwealth to recover amounts paid before the amendments were made.

Passage of these provisions will disadvantage those who were paid their entitlements under the law, but who received an unintended double benefit; however, non-passage of these provisions will disadvantage those who were paid during the period the earlier amendment was in operation.

The Committee would appreciate further explanation from the Minister on this issue.

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.

DEPARTURE TAX AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 31 August 1993 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill proposes to amend the *Departure Tax Act 1978* to increase the rate of departure tax from $20 to $25 with effect from 1 January 1994.

The Committee has no comment on this Bill.

EXCISE TARIFF (DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on the 17 August 1993 by the Parliamentary Secretary to the Minister for Industry, Technology and Regional Development.

The Bill proposes to amend the *Excise Tariff Act 1921* to:

. increase the duty payable on tobacco and certain petroleum products effective from 18 August 1993; and

. allow for further increases in the excise duty on those products to occur at the same time as indexation pursuant to section 6A of the Act.

The Committee dealt with this Bill in Alert Digest No. 4 of 1993 (1 September 1993). Certain amendments have now been made to the Bill in the House of Representatives which do not affect the provision upon which the Committee made its comment, which is reproduced below.

Retrospectivity
Clause 2

Subclause 2(2), if enacted, would give a degree of retrospective operation to the substantive provision of the Bill. It provides for an increase in excise duty payable on tobacco and petroleum products from 18 August 1993 which, of course, will be before Royal Assent.

The Committee notes that the retrospectivity will date only from the day after the Bill was introduced and gives effect to the announcement of the increase in the Budget. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on the Bill.

The Committee has no further comment on this Bill.

FOREST INDUSTRIES RESEARCH EXPORT CHARGE BILL 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Minister for Resources.

The Bill proposes to provide for the imposition of a charge on unprocessed wood produced in Australia and exported, in order to raise funds for a Forest and Wood Products Research and Development Corporation. It enables changes to the operative rate of charge and for changes to the classes of unprocessed wood to which charges apply to be set by regulation.

The Committee has no comment on this Bill.

FOREST INDUSTRIES RESEARCH IMPORT CHARGE BILL 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Minister for Resources.

The Bill proposes to provide for the imposition of a charge on the import of unprocessed wood and certain classes of primary processed wood into Australia, in order to raise funds for a Forest and Wood Products Research and Development Corporation. It enables changes to the operative rate of charge and for changes to the classes of unprocessed wood to which charges apply to be set by regulation.

Imposition of charges by regulation
Clause 6 - Rate of levy

Proposed subsection 6(1) provides:

> Rate of charge
>
> **6.(1)** The rate of charge is:
>
> (a) if the forest products are logs-the rate of levy (if any) that would have been payable under the Levy Act if the logs had been produced in Australia and delivered to a mill in Australia; or
>
> (b) otherwise-a rate worked out by multiplying:
>
> (i) the rate of levy (if any) that would have been payable under the Levy Act in respect of logs of the same class that were used to produce the forest products if the logs had been produced in Australia and delivered to a mill in Australia; and
>
> (ii) the conversion factor determined by the Minister to apply to forest products of the class in question.

The Committee notes that a conversion factor which is determined by the Minister is needed in some circumstances to calculate the rate of the levy.

The Committee has consistently drawn attention to provisions which allow for the rate of a levy to be set by regulation, largely on the basis that a rate of levy could be set which amounted to a tax (and which, therefore, should be set by primary rather than secondary legislation). Further, the Committee has generally taken the view that, if there is a need for flexibility in the setting of a levy, the primary legislation

should prescribe either a maximum rate of levy or a method of calculating the maximum rate. In respect of proposed paragraph 6(1)(b), no such maximum levy is prescribed. However, subclauses 6(2), (3) and (4) provide:

> **(2)** The Minister may determine in writing, for a class of forest products, a conversion factor that, in the Minister's opinion, reasonably approximates (but does not exceed) the average proportionality between:
>
> (a) volumes of logs that are used, in accordance with normal wood processing practices in Australia, to produce such volumes of those forest products; and
>
> (b) volumes of forest products in that class.
>
> **(3)** Before making a determination, the Minister must take into consideration any relevant recommendation made to him or her by an industry body.
>
> **(4)** Such determinations are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.

These provisions may not, in themselves, set out a method of calculating exactly the maximum rate but they circumscribe the steps to be taken and prescribe sufficient control in the primary legislation. Accordingly, the Committee makes no further comment on this Bill.

FOREST INDUSTRIES RESEARCH LEVY BILL 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Minister for Resources.

This Bill forms part of a package of legislation to establish and fund a Forest and Wood Products Research and Development Corporation. The Bill proposes to provide for the imposition of a levy on wood produced in Australia which is delivered to a mill for processing in order to fund the Corporation established by regulation under the *Primary Industries and Energy Research and Development Act 1989* and to become operative from 1 January 1994.

Imposition of charges by regulation
Clause 6 - Rate of levy

Subclauses 6(1) and (4) provide:

> **Rate of levy**
>
> **6.(1)** The rate of levy is the rate prescribed in the regulations.
>
> ...
>
> **(4)** The rate of levy must not exceed:
>
> (a) if the regulations specify different rates of levy for different classes of logs-0.5% of the average value of that class of logs; or
>
> (b) otherwise-0.5% of the average value of logs that are produced in Australia.

The Committee notes that the maximum rate of the levy is provided in subclause (4). As the Committee takes the view that where a charge is set by regulation the primary legislation should prescribe either the maximum rate or the method of calculating the maximum rate, the Committee makes no further comment on the Bill.

HEALTH AND COMMUNITY SERVICES LEGISLATION AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Parliamentary Secretary to the Minister for Housing, Local Government and Community Services.

The Bill proposes to amend the *Therapeutic Goods Act 1989* to:

. facilitate the introduction of complementary State and Territory legislation that will support regulatory framework set up under the Commonwealth's therapeutic goods legislation; and

. make minor amendments to the *Disability Services Act 1986*, the *Health Insurance Act 1973*, the *Hearing Services Act 1991*, the *National Health and Medical Research Council Act 1992*, the *Nursing Homes and Hostels Legislation Amendment Act 1986*.

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

Subclauses 2(2) and (3) of the Bill provides:

> Commencement
>
> **2.(2)** Paragraph 29(h) and sections 30, 31 and 32 commence on a day to be fixed by Proclamation.
>
> **(3)** Paragraphs 29(i), 37(b) and 38(b), section 47 and paragraph 50(d) commence on a day to be fixed by Proclamation.

The Committee notes that by virtue of these subclauses various provisions of the Bill could commence outside the period of six months from the date of Royal Assent. This would be contrary to the general rule set out in the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Committee prefers that, where there is a deviation from the general rules set out in the Instruction, the reasons for the deviation are set out in the Explanatory Memorandum.

The Explanatory Memorandum points out with respect to the provision of a commencement date by proclamation in subclause (2) that the substantive

provisions await the enactment of complementary State laws. With respect to subclause (3) the Committee notes that the substantive provisions amending the *Therapeutic Goods Act 1989* must await the International Convention for the Mutual Recognition of Inspections entering into force in relation to Australia.

In these circumstances the commencement by proclamation comes within the exceptions provided for in paragraph 6 of Drafting Instruction No. 2 which states:

> 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).

Accordingly, the Committee makes no further comment on these provisions.

Retrospectivity
Clauses 20 and 21

These clauses, if enacted, would have a retrospective operation. The Minister's second reading speech discloses that a number of pharmacies were in the past relocated without obtaining the necessary approval under the *National Health Act 1953*. The retrospective operation is necessary to deem as properly approved those relocations which took place without approval before December 1990 when the pharmacy restructuring legislation came into force.

The Committee notes that the relevant provisions had not been rigorously enforced and there is no desire to penalise unapproved relocations occurring before December 1990.

As the retrospectivity disadvantages no one, the Committee makes no further comment on this Bill.

MIGRATION LAWS AMENDMENT BILL 1993

This Bill was introduced into the Senate on 31 August 1993 by the Minister for Defence for the Minister for the Arts and Administrative Services.

The Bill proposes to assure the smooth implementation of the *Migration Reform Act 1992* by the deferral of the commencement of certain provisions contained in it and other migration legislation until 1 September 1994. The *Migration Reform Act 1992* amends the *Migration Act 1958* to:

. simplify the legal basis for administration of entry to and stay in Australia;

. expand merits review by the Migration Internal Review Office of the Immigration Review Tribunal;

. establish the Refugee Review Tribunal and modify appeal rights to the courts; and

. establish a detailed code of procedures in relation to the processing of visa applications and cancellations.

Retrospectivity
Subclause 2(3)

Subclause 2(3), if enacted, would provide for the retrospective operation of a number of substantive provisions in the Bill from 1 July 1993. However, the Explanatory Memorandum makes it clear that they are technical corrections designed to ensure the smooth and effective operation of the Refugee Review Tribunal which commenced on that date. All other parts of the migration reform package contained in the *Migration Reform Act 1992* have been deferred to 1 September 1994. As the retrospective operation of the technical corrections disadvantages no one, the Committee makes no further comment on this Bill.

MOTOR VEHICLE STANDARDS (HEADLIGHTS) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 7 September 1993 by Senator Panizza as a Private Senator's Bill.

The Bill proposes to amend the Motor Vehicle Standards Act 1993 to repeal part of an Australian Design Rule in relation to electrical connections on motor cycles.

The Committee has no comment on this Bill.

NATIONAL HEALTH AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the Senate on 7 September 1993 by the Parliamentary Secretary to the Minister for Primary Industries and Energy.

The Bill proposes to amend the safety net arrangements which apply to general patients under the Pharmaceutical Benefits scheme to allow for:

. the eligibility of general patients for a safety net concession card when the total of the amounts charged for supplies of pharmaceutical benefits made to the patient and to members of his or her family during an entitlement period is $400;

. further supplies of pharmaceutical benefits made during this entitlement period to be at the concessional rate of patient contribution; and

. the removal of the eligibility of general patients for a pharmaceutical benefits entitlement card and free pharmaceutical benefits.

The Committee has no comment on this Bill.

NATIONAL RESIDUE SURVEY ADMINISTRATION (COST SHARING) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 30 August 1993 by Senator Bell as a Private Senator's Bill.

The Bill proposes to amend the *National Residue Survey Administration Act 1992* to allow for:

. a levy on the sale of agricultural chemicals; and

. a reduction in the Residue Survey levy on farmers.

The Committee has no comment on this Bill.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Minister for Resources for the Minister for Primary Industries and Energy.

The Bill proposes amendments to the following Acts to reflect changes relating to administrative, commercial, and environmental management in various industries:

- *Agricultural and Veterinary Chemicals Act 1988*
- *Agricultural and Veterinary Chemicals (Administration) Act 1992*
- *Australian Horticultural Corporation Act 1987*
- *Australian Meat and Live-stock Industry Selection Committee Act 1984*
- *Horticultural Research and Development Corporation Act 1987*
- *Meat Research Corporation Act 1985*
- *Primary Industries and Energy Research and Development Act 1989*
- *Primary Industries Levies and Charges Collection Act 1991*
- *Dairy Produce Act 1986*
- *Fisheries Legislation (Consequential Provisions) Act 1991*
- *Snowy Mountains Hydro-Electric Power Act 1949*
- *Wheat Marketing Act 1989*

Retrospectivity
Subclause 2(2)

Subclause 2(2), if enacted, would enable proposed paragraph 68(1)(b) to operate retrospectively from 1 July 1989. The paragraph substitutes 'grain, or grain products of any kind' for the word 'wheat' in the description of the functions of the Australian Wheat Board.

The Minister's second reading speech explains that since that date the States have purported to confer powers on the Board to allow it to conduct intra-state trade in grain and grain products other than wheat. The retrospective amendment is to ensure that the Wheat Board has had the necessary power to conduct such trade since the revised wheat marketing arrangements came into force on 1 July 1989.

As the retrospectivity will not prejudice individuals but merely validates what has already been done under the legislation of the various States, the Committee makes no further comment on this provision.

Retrospectivity

Clause 21

Under clause 21, if enacted, a definition of 'relevant year' would be inserted in the *Dairy Produce Act 1986*, which would give retrospective operation to the proposed new section 94A of that Act.

The Committee is concerned that exporters will be required retrospectively to pay a charge which may not have been legally payable at the time they imported the relevant dairy produce. It appears that the doubt as to the proper imposition of the charge has been so great that the Corporation appears not to have collected it. Accordingly, the Committee seeks the Minister's advice on the legal basis on which the scheme was administered and the charge imposed.

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 32 - insertion of new subsection 165(1A) in the *Fisheries Management Act 1991*

Subsection (1A) excludes review by the Administrative Appeals Tribunal of 'the first decision' made in the allocation of fishing rights in the Northern Prawn and Southern Bluefin fisheries. However, the Explanatory Memorandum states:

> These [first] decisions will effect a transfer of management arrangements from Plans made under the *Fisheries Act 1952* to Plans under the *Fisheries Management Act 1991* with no significant change in effect of those rights.

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

PROTECTION OF THE SEA (SHIPPING LEVY) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 7 September 1993 by the Parliamentary Secretary to the Minister for Primary Industries and Energy.

The Bill proposes to amend the *Protection of the Sea (Shipping Levy) Act 1981* to raise the maximum rate of oil pollution levy which can be applied to commercial shipping using Australian ports.

The Committee has no comment on this Bill.

QANTAS SALE AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 1 September 1993 by the Minister for Finance.

The Bill proposes to amend the *Qantas Sale Act 1992* to:

. take account of legislative requirements arising because of the deferral of the proposed public share offering of the Commonwealth's remaining equity interest in Qantas Airways Limited by changing the date of automatic repeal of the unproclaimed sections from 31 December 1993 to 30 June 1995; and

. make a minor amendment to section 37 to remove any doubt about its intended operation and assure the preservation of the legislative coverage of existing employees under various Commonwealth employee-related Acts.

The Committee has no comment on this Bill.

SNOWY MOUNTAINS ENGINEERING CORPORATION LIMITED SALE BILL 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Minister for Finance.

The Bill proposes to ensure that:

- existing Commonwealth legislation applying to the Snowy Mountains Engineering Corporation (SMEC) because of its status as a Commonwealth owned entity will not apply to SMEC from the sale day and that post-sale SMEC is, as far as practicable, not subject to Commonwealth legislation which does not also govern the activities of other private sector companies;

- despite the change of ownership, employee entitlements already accrued under Commonwealth legislation in respect of pre-sale employment are retained;

- the post-sale service of specific categories of employees is recognised as public employment for the purposes of qualifying for certain rights and benefits;

- there are saving provisions which allow for certain pre-sale rights or obligations to continue post-sale in respect of matters which occurred during the pre-sale period;

- certain parts of the *Snowy Mountains Engineering Corporation Limited Act 1970* are retained including those which preserve the basis of incorporation of SMEC; and

- certain consequential amendments to various Commonwealth Acts and Regulations are made.

Commencement by gazettal
Subclauses 2(2) and (5)

Subclause 2(2), if enacted, would provide for most of the substantive provisions of the Bill to commence on 'the sale day' which clause 4(1) provides to be declared by the Minister for Finance by notice in the *Gazette.*

However, clause 2(5), if enacted, would ensure the automatic repeal of any provision of the Bill that has not commenced within 2 years of Royal Assent.

The Minister's second reading speech indicates that the employees of the Corporation are being given the first offer of purchase through a company, Tinbury Limited, which they have formed to effect the purchase. Further the Committee notes that all staff will be given a further opportunity to purchase shares in Tinbury Limited before a sale is completed.

The period is longer than the six months suggested as the maximum period for an Act not to be brought into operation in the Office of Parliamentary Counsel's Drafting Instruction No. 2 of 1989. However, the Committee believes that, in the circumstances, a period of 2 years is not unwarranted to carry out the arrangements contemplated for the sale.

The Committee makes no further comment on the Bill.

SOCIAL SECURITY AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 31 August 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes to amend the *Social Security Act 1991* to:

. increase the rate of payment for certain Newstart allowees;

. apply the family payment income and assets tests to student parents;

. reduce the income ceiling and assets test limit for basic family payment; and

. limit arrears of family payment.

Statutory exclusion of general principle of law
Clause 18 - Certain determinations not to be revived

Clause 18, if enacted, would insert proposed section 1243A into the *Social Security Act 1991*. This new section may be regarded as trespassing on personal rights in that it would exclude a general principle of administrative law that, if a statutory decision is set aside ab initio, the parties are placed in the same position they would have occupied if the decision had never been made. This principle means that, in certain circumstances, the original decision to grant a social security payment revives where a subsequent decision to cancel it has been overturned on appeal.

The effect of the proposed section would be to oust this general proposition of administrative law, by providing that the original decision would not revive and by requiring a new decision to be made to regrant payment from the date on which the appeal was made, (where that appeal was made more than 13 weeks after notice was given to cancel or reduce payment).

The new section is aimed at closing a gap in the Government's policy of limiting arrears payments. The Explanatory Memorandum indicates that the Federal Court had identified the effect of the general principle of law and that it could be excluded by an express statutory provision.

The Explanatory Memorandum further states on page 14 in respect of the Government's policy:

> The policy is to grant full arrears when a decision is given in favour of a client provided that the client has sought review of the adverse decision within three months of being given a notice of that decision. If the client delays beyond the three months, arrears are payable only from the date on which the client sought the review.

However, the Committee notes that the proposed amendment would diminish rights preserved by the general principle of law.

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.

STATES GRANTS (GENERAL PURPOSES) BILL 1993

This Bill was introduced into the House of Representatives on 1 September 1993 by the Assistant Treasurer.

The Bill proposes to give effect to the arrangements agreed to at the Premiers' Conference and Loan Council meeting of 5 July 1993 to apply in 1993-94 for the provision of general purpose assistance to the States and Territories. 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.

AD5/93

SUPERANNUATION GUARANTEE (ADMINISTRATION) (EXEMPTION OF COUNCIL ALLOWANCES) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 1 September 1993 by Senator Ian MacDonald as a Private Senator's Bill.

The Bill proposes amendments to the *Superannuation Guarantee (Administration) Amendment Bill 1993* to exclude councillors from the superannuation guarantee net when those councillors, under current legislation, would be worse off through loss of tax deductibility of their own superannuation contributions.

The Committee has no comment on this Bill.

TAXATION (DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on the 17 August 1993 by the Assistant Treasurer.

The Bill proposes to amend the *Income Tax Assessment Act 1936*, the *Income Tax Rates Act 1986*, the *Fringe Benefits Tax Act 1986*, the *Fringe Benefits Tax Assessment Act 1986*, the *Medicare Levy Act 1986* and the *Sales Tax (Exemptions and Classifications) Act 1992* in relation to:

. personal tax cuts;
. fringe benefits tax;
. low-income rebate;
. unused annual leave and long service leave payments;
. credit unions;
. taxation of friendly societies and other registered organisations;
. medicare levy thresholds;
. sales tax - general rate increases;
. sales tax on wine, cider and other similar beverages; and
. sales tax on luxury motor vehicles.

The Committee dealt with this Bill in Alert Digest No. 4 of 1993 (1 September 1993) and made certain comments about the Bill. However, since its introduction into the House of Representatives amendments have been made which alter the retrospectivity of clauses 48 to 52 in respect of unused long service leave, on which the Committee had commented. However, in other respects the Bill is in the same form as on its introduction, and the comments made in that Alert Digest continue to apply.

The Committee notes the introduction of a package of Bills into the House of Representatives on 27 September 1993 which, in the words of the second reading speech, is designed to replace this Bill.

Accordingly, the Committee has no further comment on this Bill.

TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 31 August 1993 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to give effect to certain of the recommendations arising out of a review of the *Telecommunications (Interception) Act 1979* by:

. enabling the replacement of the present system of routing interceptions through Canberra with a system under which the AFP maintains control of State interceptions by means of computer links but without listening to, or recording, those communications;

. permitting law enforcement agencies to monitor or record telephone calls without a warrant in certain emergency situations;

. removing the geographical restrictions on State law enforcement agencies provided interceptions made by them are within their functions; and

. including computer related offences under Part VIA of the *Crimes Act 1914*.

The Committee has no comment on this Bill.

THERAPEUTIC GOODS (CHARGES) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 7 September 1993 by the Parliamentary Secretary to the Minister for Housing, Local Government and Community Services.

The Bill proposes to amend the *Therapeutic Goods (Charges) Act 1989* to:

. accommodate proposed State and Territory legislation that is to be enacted to implement a uniform national system of controls for therapeutic goods; and

. allow the Commonwealth to collect charges in relation to activities conducted on behalf of States and Territories in accordance with complementary State and Territory legislation.

The Committee has no comment on this Bill.

TOXIC CHEMICALS (COMMUNITY RIGHT TO KNOW) BILL 1993

This Bill was introduced into the Senate on 1 September 1993 by Senator Chamarette as a Private Senator's Bill.

The Bill proposes:

. the establishment of a National Register of toxic chemicals;

. the appointment of a Registrar of toxic chemicals;

. that information and reports concerning toxic chemicals be made freely available to the public; and

. that codes of practice and policies be developed relating to the use and production of toxic chemicals.

The Bill is substantially the same as a Bill introduced into the Senate by Senator Powell on 19 May 1993. The Committee commented on that Bill in its Alert Digest No. 2 of 1993 and those comments are reproduced below.

Inappropriate delegation of legislative power
Clause 23 - Duty to notify Registrar of use or production of toxic chemicals

Clause 23 of the Bill provides:

> **Duty to notify Registrar of use or production of toxic chemicals**
>
> **23.(1)** A person who, at the commencement of this Act, is producing or using toxic chemicals at levels that exceed the prescribed safety levels for those chemicals must give to the Registrar within 4 weeks after that commencement the prescribed details of that production or use.
>
> **(2)** A person who, after the commencement of this Act, commences to produce or use toxic chemicals at levels that exceed the prescribed safety levels for those chemicals must give to the Registrar within 4 weeks after that commencement the

prescribed details of that production or use.

(3) A person referred to in subsection (1) or (2) must, at the end of each anniversary after the initial notification, notify the Registrar of the person's current production and use of toxic chemicals, as prescribed.

(4) The details must be provided in accordance with the prescribed form.

(5) A person who fails to comply with this section is guilty of an offence.
Penalty: 2,000 penalty units.

Clause 23, if enacted, would both impose a duty to notify and create an offence of failing to comply with that duty. The duty rests on those whose use or production of toxic chemicals exceeds prescribed safety levels. They must comply on a prescribed form with respect to prescribed details.

The Bill leaves the determination of the safety levels and the details to be provided to be set by regulation. There is no mention in the Bill of the way in which safety levels might be established.

Given the importance of the notification process within the scheme of the legislation, these matters may be considered as more appropriately dealt with in primary rather than subordinate legislation.

On the issue of importance, the Committee notes the difference between the penalty for a breach of the notification provision and that which attaches to a breach of the other major purpose of the Bill - the establishment of codes of practice. A notification offence would carry a penalty of 2000 units. In contrast, 500 penalty units is set for a breach of the code of practice for which clause 10 sets out an elaborate process of consultation by publishing a draft code in the Gazette and inviting comments. The size of the penalty is an indicator of the importance of the notification scheme within the Bill.

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.

Non-reviewable decisions
Subclause 26(3) - Exemption for information that is commercial-in-confidence
Subclause 27(3) - Exemption on the grounds of military security

Clause 26 of this Bill provides:

> **Exemption for information that is commercial-in-confidence**
>
> **26.(1)** A person may apply to the Registrar for an exemption from compliance with this Act on the grounds that the identity of a chemical is commercial-in-confidence information where all of the following conditions are met:
>
> (a) that the identity of the chemical has never previously been disclosed to an employee of the applicant not bound by a confidentiality agreement;
> (b) that no person to whom this Act applies has ever rejected a claim by the applicant that the chemical is a trade secret or that its identity may be treated as commercial-in-confidence information;
> (c) that competitors could deduce the use or identity of the chemical from the notification form;
> (d) that knowledge of the identity of the chemical could cause 'substantial competitive harm' to the applicant;
> (e) that the identity of the chemical could not be discerned by reverse engineering or any other method from the applicant's products or releases;
> (f) that the applicant has taken all reasonable measures to protect the identity of the chemical;
> (g) that the precise use of the chemical by the applicant is not available in any information source accessible to the public;
> (h) that the identity of the chemical need not

be disclosed under any other law.

(2) An application shall be in the prescribed form.

(3) The Registrar may grant to the applicant an exemption from compliance if the Registrar is satisfied that the conditions specified in subsection (1) have been met.

Clause 27 of the Bill provides:

Exemption on the grounds of military security

27.(1) A person may apply to the Registrar for an exemption from compliance with this Act on the grounds that the identity of a chemical relates to military security where all of the following conditions are met:

(a) that the Registrar has not previously rejected an application for exemption for that chemical by the applicant;

(b) that a foreign power could not deduce the military purpose from information about the chemical provided in the notification form;

(c) that public knowledge of the identity of the chemical could cause a substantial threat to national security;

(d) that the identity of the chemical could not be discerned by reverse engineering or any other method from the applicant's products or releases;

(e) that the applicant has taken all reasonable measures to protect the identity of the chemical;

(f) that the precise use of the chemical by the applicant is not available in any information source accessible to the public or to a foreign power; and

(g) that the identity of the chemical need not be disclosed under any other law.

(2) An application shall be in the prescribed form.

> **(3)** The Registrar may grant to the applicant an exemption from compliance if the Registrar is satisfied that the conditions specified in subsection (1) have been met.

Clauses 26 and 27, if enacted, would give to the Registrar a discretion to exempt from compliance with the Act where the identity of a chemical either is commercial-in-confidence information or relates to military security and certain conditions are met. However, the Bill does not provide for review on the merits under the *Administrative Appeals Tribunal Act 1975*, where the Registrar refuses the exemption on the grounds that the Registrar is not satisfied that the conditions have been met.

The Committee draws Senators' attention to these provisions as they may be regarded as making rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

General comment

With respect to paragraph 27(1)(b), the Committee wonders whether the condition should be expressed in the affirmative rather than the negative - that is, the 'not' should be omitted. A person would seek an exemption from supplying information on the notification form if a foreign power could deduce the military purpose from the information about the chemical provided on the form. The Registrar would presumably wish to be satisfied before granting the exemption that a foreign power could deduce a military purpose when the notification form is made public. The Committee presumes that this is essentially a drafting error.

SCRUTINY OF BILLS ALERT DIGEST

NO. 6 OF 1993

6 OCTOBER 1993

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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 Land Transport Development Amendment Bill 1993

* Australian Wine and Brandy Corporation Amendment Bill 1993

Australian Wool Research and Promotion Organisation Bill 1993

* Childcare Rebate Bill 1993

* CSL Sale Bill 1993

Customs and Excise Legislation Amendment Bill 1993

Diesel Fuel (Customs Duty Rebate) Administration Charge Bill 1993

Diesel Fuel (Excise Duty Rebate) Administration Charge Bill 1993

* Domestic Meat Premises Charge Bill 1993

Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1993

Excise Tariff Amendment Bill (No. 2) 1993

Export Inspection Charges Laws Amendment Bill 1993

* Export Market Development Grants Legislation Amendment Bill 1993

* Financial Corporations (Transfer of Assets and Liabilities) Bill 1993

* Health Legislation (Professional Services Review) Amendment Bill 1993

* Higher Education Funding Legislation Amendment Bill 1993

Income Tax (Franking Deficit) Amendment Bill 1993

* Law and Justice Legislation Amendment Bill 1993

Maritime Legislation Amendment Bill 1993

* National Health Amendment Bill (No. 3) 1993

* Nursing Home Charge (Imposition) Bill 1993

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

* Occupational Health and Safety (Maritime Industry) Bill 1993

Occupational Health and Safety (Maritime Industry) Consequential Amendments Bill 1993

* Overseas Students Tuition Assurance Levy Bill 1993

* Sales Tax Assessment Amendment (Deficit Reduction) Bill 1993

* Sales Tax (Custom) Deficit Reduction) Bill 1993

* Sales Tax (Excise) Deficit Reduction) Bill 1993

* Sales Tax (General) Deficit Reduction) Bill 1993

* Sales Tax (In Situ Pools) Deficit Reduction) Bill 1993

* Social Security (Budget and Other Measures) Legislation Amendment Bill 1993

States Grants (Primary and Secondary Education Assistance) Amendment Bill 1993

* Taxation (Deficit Reduction) Bill (No. 1) 1993

Taxation (Deficit Reduction) Bill (No. 2) 1993

* Taxation (Deficit Reduction) Bill (No. 3) 1993

* Taxation Laws Amendment Bill (No. 3) 1993

Veterans' Affairs Legislation Amendment Bill (No. 2) 1993

Vocational Education and Training Funding Laws Amendment Bill 1993

* Wool International Bill 1993

Wool Legislation (Repeals and Consequential Provisions) Bill 1993

Wool Tax (No. 1) Amendment Bill 1993

Wool Tax (No. 2) Amendment Bill 1993

Wool Tax (No. 3) Amendment Bill 1993

Wool Tax (No. 4) Amendment Bill 1993

Wool Tax (No. 5) Amendment Bill 1993

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

AUSTRALIAN LAND TRANSPORT DEVELOPMENT AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill proposes to amend the *Australian Land Transport Development Act 1988* to extend the operation of the Australian Land Transport Development Trust Fund to:

. provide for monies to be paid into the Australian Land Transport Development Trust Fund after 31 December 1993; and

. remove the closure date set on the fund.

The Committee has no comment on this Bill.

AUSTRALIAN WINE AND BRANDY CORPORATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to implement the EC/Australia Wine Agreement to:

. improve access for Australian wines to the EC;

. provide for mutual recognition of each party's winemaking practices and standards;

. restrict the use of geographical names and indications;

. phase out Australia's use of European geographical indications;

. establish a Geographical Indications Committee as a Committee of the Australian Wine and Brandy Corporation to define the names and boundaries of Australian geographical indications for wine; and

. establish a Register of geographical indications.

Strict liability offences
Proposed subsections 40G(4) and 40H(3)

A strict liability offence is one where, if a certain fact exists or a certain event occurs, an offence has been committed without the prosecution being required to prove that the defendant had the 'guilty mind' normally required in criminal offences.

Proposed section 40G creates an offence for the sale, export or import of wine in contravention of certain registered conditions where the person knows that the wine does not comply with those conditions.

Proposed section 40H creates an offence for the sale, export or import of wine where the person knows that the wine does not comply with certain prescribed blending requirements.

Offences against these sections therefore require the prosecution to prove that the defendant knew that the wine did not comply with the various requirements.

However, proposed subsections 40G(4) and 40H(3), if enacted, would deem certain people to have committed an offence and be thereby liable to imprisonment because they ought reasonably to have known that the wine did not comply with the registered conditions or the prescribed blending requirements, **even if** they did not, in fact, have such knowledge.

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 WOOL RESEARCH AND PROMOTION ORGANISATION BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Minister for Primary Industries and Energy.

The Bill proposes the establishment of the Australian Wool Research and Promotion Organisation and its functions, powers, membership and related matters.

The Committee has no comment on this Bill.

CHILDCARE REBATE BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Parliamentary Secretary to the Minister for Housing, Local Government and Community Services.

The Bill proposes to:

. establish the rebate for expenses incurred for work-related child care;

. set conditions for eligibility;

. set conditions and procedures for claiming the rebate;

. set the amounts which may be paid via the rebate; and

. deal with the administration of the rebate by the Health Insurance Commission.

Requirement concerning tax file number
Paragraph 50(2)(a)

Clause 50 of this Bill contains eligibility criteria for becoming registered as a carer. Subclause (2) provides that the applicant is not eligible for registration unless the applicant has a tax file number and the application has a statement to that effect. Subclause (4) does not allow the Health Insurance Commission to ask for the applicant's tax file number but, under subclause (5), may ask the Commissioner of Taxation to provide information on whether an applicant or a registered carer has a tax file number.

The Committee notes the Health Insurance Commission's restrictions with regard to the tax file number of applicants and registered carers. However, the Committee continues to maintain that, although tax file numbers may be considered necessary to prevent persons defrauding the system, they may also be considered, even where used in the restricted fashion of this Bill, to be unduly intrusive into a person's private life.

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 and has asked the Minister

why the knowledge of tax file numbers is necessary.

Strict liability/reversal of onus of proof
Clause 60

Subclauses 60(1), (2) and (5) of the Bill provide:

> **Making false or misleading statements**
>
> **60.(1)** A person must not make, or authorise the making of, a statement (whether oral or in writing) that is:
>
> (a) false or misleading in a material particular; and
>
> (b) capable of being used in connection with a claim or an application under this Act.
>
> Penalty: 20 penalty units.
>
> **(2)** If:
>
> (a) a person makes a statement (whether oral or in writing) that is false or misleading in a material particular; and
>
> (b) the statement is capable of being used in connection with a claim or an application under this Act; and
>
> (c) the material particular in respect of which the statement is false or misleading is substantially based upon a statement made, either orally or in writing, to the person or to an agent of the person by another person who is an employee or agent of the first-mentioned person; and
>
> (d) the statement made by the other person is false or misleading in a material particular;
>
> the other person is guilty of an offence.
>
> Penalty: 2 penalty units
>
> ...
>
> **(5)** It is a defence if a person charged with an offence under this section relating to a statement made by the person did not know, and could not reasonably have been expected to have known, that the statement was:
>
> (a) false or misleading in a material particular; and
>
> (b) capable of being used in connection with a claim or an application under this Act.

These subclauses, if enacted, would create an offence:

. where a statement is made that is false or misleading in a material particular and is capable of being used in connection with a claim or application under this Bill.

. where a similar statement is made (but without the 'capable of being used in connection') to an employer who in turn bases a later statement on the employee's false one - in this case the employer is guilty of an offence.

The offences created by subclauses 60(1) and (2) may be regarded as strict liability offences, as they provide that, if the events contemplated occur, an offence is committed without the prosecution being required to prove that the defendant had the 'guilty mind' normally required in criminal offences. The defence created by subclause 60(5) may be regarded as an instance of reversal of the onus of proof as it provides for the defendant to prove ignorance or that knowledge could not reasonably be expected.

The effect of such a reversal is to impose criminal liability for negligent conduct in contrast with the normal requirement of knowledge and intention.

The Committee notes that clause 61 would impose criminal liability for similar statements but only on proof by the prosecution that the person knew its false or misleading nature.

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 comply with the obligation imposed. The Committee has also been accustomed to accept a reversal of the onus of proof where the matters to be proved by the defendant are peculiarly within the knowledge of the defendant.

However, the matters to be proved under subclauses 60(1) and (2) do not appear to be matters peculiarly within the knowledge of the defendant to any greater degree than the matters which clause 61 requires the prosecution to prove. The Committee therefore suggests that the offences created by clauses 60(1) and (2) should not be of strict liability but should require that the prosecution prove all the components of the offence.

The Committee is concerned that the same Bill would require the prosecution to prove that a person had knowingly made a false statement but, if the prosecution were unable to prove that knowledge, the person could still be judged guilty unless the person could prove his/her own innocence by showing that he/she did not know or could not reasonably have been expected to have known not only that the statement was false or misleading but also that it was capable of being used in connection with a claim or an application under this proposed Act.

The Committee is further concerned that the matters to be proved by the defendant are cumulative. The defendant must prove both ignorance of the falsity and ignorance of the connection with a claim. This means that the defence is useless to any person who, however innocently, makes a statement in an application or claim under this proposed Act that is false or misleading in a material particular. The Committee understands that 'false' in these circumstances simply means incorrect.

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.

CSL SALE BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Parliamentary Secretary to the Treasurer.

The Bill proposes to put in place the necessary framework for the sale of CSL Limited by the Commonwealth to ensure that:

. post-sale, CSL retains an Australian-controlled board of directors by limiting the voting rights of significant foreign shareholders in regard to appointment, replacement and removal of company directors;

. CSL's head office and principal fractionation activities be located in Australia and that CSL remain incorporated in Australia;

. continued supply of plasma products post-sale will be covered by a long term contract between CSL and the Commonwealth with a prohibition on CSL disposing of, encumbering or granting any interest in the plasma products facility without the Commonwealth's consent;

. certain pre sale administrative and legal rights and obligations, including those to employees, continue post-sale; and

. certain parts of the *Commonwealth Serum Laboratories Act 1961* are amended or repealed.

Retrospectivity
Subclause 2(3)

Subclause 2(3), if enacted, would give clauses 5 and 6 retrospective operation from 22 February 1991, the date on which the Commonwealth Serum Laboratories became a public company.

Clauses 5 and 6 insert words into subsections 8(1) and (2) of the *Commonwealth Serum Laboratories Act 1961*. The effect of the amendments will be to clarify that CSL has both an authorised and an issued share capital and that it is only the issued capital that is affected by section 9 of the *Commonwealth Serum Laboratories Act 1961*.

The purpose of the proposed amendments, as the Explanatory Memorandum points out, is:

> to clarify that only CSL's issued capital is to be equal to the amount ascertained under section 9 of the Principal Act [*Commonwealth Serum Laboratories Act 1961*]. The amount of its authorised capital is not to be affected by section 9.

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

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Defence.

This Bill is part of a package of bills. Together with the *Diesel Fuel (Customs Duty Rebate) Administration Charge Bill 1993*, the *Diesel Fuel (Excise Duty Rebate) Administration Charge Bill 1993* and the *Excise Tariff Amendment Bill (No. 2) 1993* the Bill proposes amendments to:

. *Customs Act 1901* and the *Excise Act 1901* to restrain the costs of the Diesel Fuel Rebate Scheme by establishing a time limit for claims for rebate, introduce an annual adjustment of the rebate rates and impose an administration charge on the rebate payable to claimants;

. *Excise Act 1901* (together with amendments to the *Excise Tariff Act 1921*) to address revenue loss regarding beer brewing practices;

. *Excise Act 1901* (together with amendments to the *Excise Tariff Act 1921*) to address revenue loss through the substitution of excise free or low duty products for petroleum fuels;

. *Excise Act 1901* to provide that where either blended petroleum products or crude oil are duty paid at the rate applicable to diesel fuels and where the products are for use in an eligible manner for the purposes of the DFRS, then a rebate of duty under that scheme is payable; and

. *Excise Act 1901* to allow payments to certain naphtha producers where certain conditions have been met.

The Committee has no comment on this Bill.

DIESEL FUEL (CUSTOMS DUTY REBATE) ADMINISTRATION CHARGE BILL 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Defence.

The Bill proposes to impose an administration charge on certain applications for rebate of customs duty paid in respect of diesel fuel as part of a package of bills which propose amendments to the Diesel Fuel Rebate Scheme (DFRS).

This Bill together with the *Diesel Fuel (Excise Duty Rebate) Administration Charge Bill 1993* and the *Customs and Excise Legislation Amendment Bill 1993* proposes to:

. impose an administration charge of 1% of the value of the rebate payable to claimants;

. adjust the rebate rate for indexation only once a year; and

. establish a time limit of three years after the purchase of fuel for claims for rebate.

The Committee has no comment on this Bill.

DIESEL FUEL (EXCISE DUTY REBATE) ADMINISTRATION CHARGE BILL 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Defence.

The Bill proposes to impose an administration charge on certain applications for rebate of excise duty paid in respect of diesel fuel as part of a package of bills which propose amendments to the Diesel Fuel Rebate Scheme (DFRS).

This Bill together with the *Diesel Fuel (Customs Duty Rebate) Administration Charge Bill 1993* and the *Customs and Excise Legislation Amendment Bill 1993* proposes to:

. impose an administration charge of 1% of the value of the rebate payable to claimants;

. adjust the rebate rate for indexation only once a year; and

. establish a time limit of three years after the purchase of fuel for claims for rebate.

The Committee has no comment on this Bill.

DOMESTIC MEAT PREMISES CHARGE BILL 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to provide for an annual charge on domestic abattoirs, knackeries, meat processing plants and animal food processing plants in those States and Territories where the Commonwealth's meat inspection agency, the Australian Quarantine and Inspection Service, is responsible for inspecting meat produced for domestic consumption under the *Meat Inspection Act 1983*.

Imposition of charge by regulation
Clauses 7 and 8

These clauses provide for the amount of the domestic meat premises charge to be prescribed by regulation. However the Committee notes that the maximum rate of the charge is set out in subclauses 7(2) and 8(2) of the Bill. As the Committee takes the view that where a charge is set by regulation the primary legislation should prescribe either the maximum rate or the method of calculating the maximum rate, the Committee makes no further comment on this Bill.

EDUCATION SERVICES FOR OVERSEAS STUDENTS (REGISTRATION OF PROVIDERS AND FINANCIAL REGULATION) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Minister for Employment, Education and Training.

The Bill proposes to amend the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991* to strengthen the protection afforded overseas students' pre-paid tuition fees and other funds that students are required to pay to undertake a course.

The Committee has no comment on this Bill.

EXCISE TARIFF AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Defence.

The Bill is part of a package of bills. Together with the *Customs and Excise Legislation Amendment Bill 1993* the Bill proposes to:

. ensure that beer produced using commercial facilities in unlicensed premises is subject to customs control and to duties of excise;

. ensure that certain blended petroleum products and crude oil or condensate delivered for use or otherwise than as refinery feedstock are excisable products, and that excise duty will be paid on the blend, the crude oil or condensate at a rate equal to either the diesel rate or the leaded petrol rate, depending upon the composition of the petroleum product; and

. remove the excise exemption on gasoline and mineral turpentine produced from shale mined in Australia.

The Committee has no comment on this Bill.

EXPORT INSPECTION CHARGES LAWS AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to:

. amend the title of the *Export Inspection Charges Collection Act 1985* ('the Collection Act') to read the *Export Inspection and Meat Charges Collection Act 1985* and amends the Collection Act to make provision for the collection of the domestic meat premises charge which is to be imposed by the Domestic Meat Premises Charge Bill 1993;

. allow for the implementation of a three tiered charging regime for the meat inspection services of the Australian Quarantine and Inspection Service; and

. amend the *Export Inspection (Quantity Charge) Act 1985, Export Inspection (Export Registration Charge) Act 1985* and *Export Inspection (Service Charge) Act 1985* to refer to the new title of the Collection Act.

The Committee has no comment on this Bill.

EXPORT MARKET DEVELOPMENT GRANTS LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 30 September by the Manager of Government Business in the Senate for the Minister for Foreign Affairs and Trade 1993.

The Bill proposes to amend the *Export Market Development Grants Act 1974* to:

. exclude from eligibility persons with criminal convictions under the Corporations Law, or in respect of serious fraud, and certain claimants under schemes of arrangement;

. assist in the cash flow of emerging exporters by providing them with the facility to lodge claims for grant on a half yearly basis;

. make certain technical amendments regarding the administration of ongoing risk management procedures and clarify the established intention of the Legislation.

Retrospectivity
Subclause 2(2) and Clause 3

Subclause 2(2), if enacted, would give retrospective operation to Part 3 of the Bill from 1 July 1990.

However, the Explanatory Memorandum shows that the amendments are technical amendments to correct previous drafting errors. Given this explanation the Committee makes no further comment on subclause 2(2).

Clause 3, if enacted, would provide that the amendments made by Part 2 of the Bill would apply in relation to claims for grant in relation to periods starting on or after 1 July 1993.

However, the Explanatory Memorandum points out that the purpose of the amendments is to assist the cash flow of emerging exporters by providing them with the facility to lodge claims for grant on a half yearly basis.

Retrospectivity is normally seen as potentially breaching principle 1(a)(i) of the Committee's terms of reference, in that it may unduly trespass on personal rights and liberties. However these amendments made by Part 2 are beneficial to exporters.

Where a provision is beneficial to persons other than the Commonwealth, the Committee has been prepared to accept retrospectivity.

The Committee makes no further comment on these proposed amendments.

Retrospective application
Clauses 10 and 18

Clause 10, if enacted, would result in expenditure not being claimable where a person has been convicted of certain serious offences, whether before or after the commencement of the proposed new section 11YA.

Clause 18, if enacted, would insert proposed new section 14A which would result in certain grants not being payable where there has been a conviction for an offence referred to in proposed new section 11YA. Subsection 14A(3) would prevent payment even if entitlement arose, a claim was made or a conviction occurred before the commencement of the section.

The Committee notes the purpose of these amendments. The Minister, in the second reading speech, indicates that it is considered that the integrity of the scheme is at risk where it allows convicted persons access to public funds. The Explanatory Memorandum states in respect of new section 11YA:

> 28. This section implements the Government's decision to exclude from eligibility under the Act, for a period of up to five years from release from custody, claimants with criminal convictions for breaches of key corporate duties or for offences which involve fraud or dishonesty and which carry a maximum penalty of at least two years' imprisonment.

While noting the general purpose of the sections, the Committee may be concerned that the retrospective application may be considered to trespass unduly on personal rights in that an adverse consequence may, in practical terms, act as a penalty and be imposed retrospectively on a convicted person in addition to the penalty imposed by the court. It may be that, in future cases, courts may take into account the adverse consequences imposed by this Bill in considering an appropriate sentence. Such an adjustment of sentence is not possible for those already sentenced on whom these adverse consequences are retrospectively imposed.

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.

FINANCIAL CORPORATIONS (TRANSFER OF ASSETS AND LIABILITIES) BILL 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Defence.

The Bill proposes to:

. facilitate foreign bank entry and allow foreign banks to apply to establish an authorised branch in Australia to conduct wholesale banking business;

. facilitate the transfer of certain assets and liabilities from foreign bank subsidiaries in Australia to new branches;

. waive the payment of Commonwealth and state fees and charges on the transfer of assets and liabilities from the Australian subsidiary of a foreign bank to a new Australian branch, or to a new authorised bank subsidiary; and

. include transitional income tax provisions.

Retrospectivity
Subclauses 7(2) to (5)

These subclauses, if enacted, would give retrospective application from and including 18 June 1993.

However, as the application is beneficial to persons other than the Commonwealth the Committee makes no further comment on this Bill.

HEALTH LEGISLATION (PROFESSIONAL SERVICES REVIEW) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Parliamentary Secretary to the Minister for Health.

This Bill proposes to establish new arrangements for determining whether individual health practitioners have engaged in certain inappropriate professional practices. The Bill amends the *Health Insurance Act 1973* to:

. appoint a Director of Professional Services Review and Deputy Directors of Professional Services Review; and

. establish a Professional Service Review Panel.

Retrospectivity
Proposed new section 86

The proposed section, if enacted, would enable the Health Insurance Commission to refer to the Director of the Professional Services Review Panel the conduct of a person with respect to services rendered on or after 1 September 1993. The Act, as a whole, will not commence until 31 March 1994 but this provision would enable review of services rendered since 1 September 1993.

The Committee notes that the Bill gives effect, in the words of the second reading speech, 'to an undertaking given in the Budget to introduce new measures to combat overservicing in the Medicare program'.

Retrospectivity is seen as potentially breaching principle 1(a)(i) of the Committee's terms of reference, in that it may unduly trespass on personal rights and liberties. The Bill introduces new definitions of inappropriate practice (see proposed new section 82) which will, in effect, apply from 1 September 1993 (because the review panel will use the definition to judge services rendered since 1 September 1993). To the extent that services rendered will be judged by a definition that did not exist at the time they were rendered (before the Bill was introduced into Parliament), the Committee considers that personal rights and liberties may be unduly infringed.

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
Proposed new subsection 106E(3)

This proposed subsection, if enacted, would abrogate the privilege against self-incrimination for a witness to a hearing. This contrasts with the preservation of the privilege for the person under review in proposed new subsection 104(6).

However, it is in a form which the Committee has previously been prepared to accept, as it contains a limit on 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. Accordingly, the Committee makes no further comment on the clause.

Reversal of the onus of proof
Proposed new subsection 106E(6)

This provision, if enacted, would reverse the onus of proof in proceedings for an offence of a witness refusing or failing, without reasonable excuse, to produce a document at a hearing. The defendant is required to prove that the document was not relevant to the subject matter of the hearing.

This appears to mean that:

. the Bill, if enacted, would require a person to produce a document;

. if the person refuses or fails to do so, the person may be prosecuted;

. the prosecution would be required to prove that the person refused or failed to produce the document **without reasonable excuse**;

. the defence could then decide to prove that the document was not relevant to the subject matter of the hearing.

It seems to the Committee that the document's relevance would be an essential element in the prosecution's proof that non-production was without reasonable excuse.

The Committee has consistently drawn attention to provisions reversing the onus of proof especially, as in this case, where the matters which a defendant would be required to prove are not peculiarly within the defendant's knowledge.

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.

HIGHER EDUCATION FUNDING LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Employment, Education and Training.

The purpose of this Bill is to provide funding for higher education for the 1996 funding triennium.

The Bill proposes to amend the *Higher Education Funding Act 1988* to:

. provide funding to continue the Research Infrastructure Program beyond 1994 at an enhanced level;

. provide access to a deferred payment facility for eligible clients of the Open Learning Agency of Australia;

. amend the Higher Education Contribution Scheme to ensure that the present amount of public support for higher education is used by as many Australians as possible;

. modify repayments under the Higher Education Contribution Scheme;

. provide funding to meet spare capacity in institutions;

. provide funding to support the introduction of workplace bargaining in higher education; and

. provide for other minor changes and cost supplementation of Commonwealth grants for higher education to offset movements in prices.

Requirement to provide tax file numbers
Proposed subsection 105(3)

Legislation requiring the provision of tax file numbers may be considered necessary to prevent persons defrauding the system, it may also be considered to be unduly intrusive into a person's private life.

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.

INCOME TAX (FRANKING DEFICIT) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Assistant Treasurer.

The Bill proposes amendments to the taxation law to re-impose franking deficit tax with effect from the time of changes made to the imputation system of the income tax law in the *Taxation Laws Amendment Bill (No. 3) 1993*.

The Committee has no comment on this Bill.

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 29 September 1993 by the Minister for Transport and Communications for the Minister Representing the Attorney-General.

The Bill proposes a number of minor amendments to:

- the *Disability Discrimination Act 1992* (the DDA), the *Racial Discrimination Act 1975* (the RDA) and the *Sex Discrimination Act 1984* (the SDA) to simplify and streamline the procedure for enforcing determinations of the Human Rights and Equal Opportunities Commission in the Federal Court;

- the *Privacy Act 1988* to bring provisions relating to representative complaints more closely into line with provisions relating to representative actions under the *High Court of Australia Act 1979*;

- the *Privacy Act 1988* to bring the procedure for enforcing determinations of the Privacy Commissioner into line with the procedure for enforcing determinations of the Human Rights and Equal Opportunity Commission under the DDA, RDA and SDA as effected by the *Sex Discrimination and other Legislation Amendment Act 1992*;

- the *Privacy Act 1988* to provide that compensation awarded under a determination of the Privacy Commissioner for loss or damage suffered by a complainant as a result of an act or practice which is an interference with privacy will include compensation for humiliating and hurt feelings. This will bring the Privacy provisions into line with the position under the *Crimes Act 1914* (in relation to spent convictions), the DDA, RDA and SDA;

- amend the rules governing disclosure of credit information by credit providers to State and Territory authorities to clarify the circumstances under which such disclosures may occur;

- postpone the commencement date for the superannuation provisions of the SDA to allow superannuation funds sufficient time to offer existing fund members the option to transfer to non-discriminatory schemes; and

- the *High Court of Australia Act 1979* to amalgamate the existing offices and responsibilities of the Clerk of the Court and the Registrar into one office to be called the 'Chief Executive and Principal Registrar'.

Retrospectivity
Subclause 2(2)

Subclause 2(2), if enacted, would give retrospective operation to clause 22 of the Bill from 13 January 1993, the date from which the *Sex Discrimination and other Legislation Amendment Act 1992* commenced.

However, the Explanatory Memorandum shows that the amendment is a technical amendment to correct a previous drafting error. Given this explanation the Committee makes no further comment on subclause 2(2).

General comment

In clause 2, as there is no subclause (5), the reference in subclause 2(3) to subsection (5) should perhaps be to subsection (4); and the reference in subclause 2(4) to subsection (4) should be a reference to subsection (3). The Committee assumes this to be essentially a drafting error.

The Committee makes no further comment on this Bill.

MARITIME LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 29 September 1993 by the Minister for Transport and Communications for the Minister representing the Attorney-General.

The Bill proposes amendments to the *Seas and Submerged Lands Act 1973* and other Acts to:

. replace references to the 1958 Territorial Sea and Continental Shelf Conventions with references to comparable provisions in the 1982 Law of the Sea Convention;

. provide for the first time in Commonwealth legislation provisions declaring sovereign rights and jurisdiction in an exclusive economic zone and rights of control in a contiguous zone;

. incorporate a new definition of the continental shelf based on that in the 1982 Convention; and

. other minor technical amendments.

The Committee has no comment on this Bill.

NATIONAL HEALTH AMENDMENT BILL (NO. 3) 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Health.

This Bill should be read in conjunction with the Nursing Home Charge (Imposition) Bill 1993.

The Bill proposes to amend the *National Health Act 1953* to:

. complement amendments made last year to the nursing home benefit payments scheme by the *National Health Amendment Act 1992*;

. make fee-reducing benefit received for a period up to 30 June 1993 recoverable as nursing home charge;

. allow fee-reducing benefit received for the period from 1 July 1993 to continue to be recovered as an overpayment in accordance with the 1992 amendments;

. provide that where the Commonwealth holds monies in trust for the benefit of the vendor pending completion of an investigation of the nursing home accounts, and on completion it is found that money is repayable to the vendor, the Commonwealth is liable to pay interest at commercial rates on the amount repayable; and

. complement measures in the *National Health Amendment Act 1992* to provide that amounts of unspent benefit paid prior to the recent prospective amendments, are recoverable from the vendor as debts on sale.

Retrospective application
Proposed new section 65GA

Proposed new subsection 65GA(1) provides:

> **Notice of fee-reducing benefit**
>
> **65GA.(1)** If:
>
> (a) an investigation under paragraph 65C(1)(c) or

65F(1)(c) or subsection 65G(3) in respect of an approved nursing home is completed after the commencement of this section; and

(b) the investigation establishes that the vendor or an earlier proprietor of the nursing home has received a fee-reducing benefit in respect of the investigation period;

the Secretary must work out whether some or all of that fee-reducing benefit was received in respect of the period beginning on the day determined by the Secretary under paragraph 65C(1)(c) or 65F(1)(c) or subsection 65G(3) (as the case may be) and ending on 30 June 1993 (**'charge period'**).

Proposed new section 65GC makes it clear that the amount of nursing home charge payable by the vendor of the approved nursing home equals the amount of the fee-reducing benefit stated in the notice under section 65GA. The combined effect of the provisions is retrospectively to take into account in determining the amount of the charge matters that occurred before 30 June 1993.

While noting in the second reading speech that the amendments are designed to address inequities in the recovery of unspent Commonwealth nursing home benefit when a nursing home is sold, the Committee is concerned that some inequity may remain if the vendor is retrospectively made liable for the 'debt'. This is especially so when the second reading speech alludes to the industry's practice of making appropriate provisions in contracts of sale. If, in a completed purchase, the vendor has allowed for the purchaser to be liable for the repayment, it would be inequitable for the vendor to be retrospectively made liable by this Bill. The Committee would appreciate advice from the Minister on any way in which this issue has been or may be addressed.

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.

NURSING HOME CHARGE (IMPOSITION) BILL 1993

This Bill was introduced into the House of Representatives on 28 September 1993 by the Parliamentary Secretary to the Minister for Health.

The Bill proposes to impose a charge on the vendor of a nursing home on sale, equal to the amount of any benefit unspent by the nursing home up to 30 June 1993. This Bill complements the *National Health Amendment Bill (No. 3) 1993.*

Retrospective application

This Bill imposes the charge made payable by the amendments made by the National Health Amendment Bill (No. 3) 1993. To that extent, therefore, the retrospective application of those amendments also apply to this Bill. As the matter has been dealt with under that Bill previously in this Digest, the Committee makes no further comment on this Bill.

OCCUPATIONAL HEALTH AND SAFETY (MARITIME INDUSTRY) BILL 1993

This Bill was introduced into the Senate on 29 September 1993 by the Manager of Government Business in the Senate for the Minister for Transport and Communications.

This Bill complements the *Seafarers Rehabilitation and Compensation Act 1992* with measures designed to reduce the incidence of shipboard accidents and injuries to maritime industry employees.

The Bill proposes to:

. establish a consultative framework for ship operator and maritime industry workers to cooperate in developing safer working environments and improving work practices; and

. set out the duties of care to be observed by all who work on board ships and offshore mobile units by codifying the common law.

Reversal of the onus of proof
Subclause 115(2)

Subclause 115(1) prohibits discriminatory action against an employee because the employee is or proposes to be involved in occupational health and safety matters relating to his employment.

Subclause 115(2) provides:

> In proceedings for an offence against subsection (1), if all the relevant facts and circumstances, other than the reason for an action alleged in the charge, are proved, it is for the defendant to show that the action was not taken for that reason.

Subclause 115(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 the action is other than one which would make the action discriminatory, 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.

The Committee makes no further comment on this Bill.

OCCUPATIONAL HEALTH AND SAFETY (MARITIME INDUSTRY) CONSEQUENTIAL AMENDMENTS BILL 1993

This Bill was introduced into the Senate on 29 September 1993 by The Manager of Government Business in the Senate for the Minister for Transport and Communications.

The Bill proposes to make consequential amendments to the *Seafarers Rehabilitation and Compensation Act 1992* resulting from the Occupational Health and Safety (Maritime Industry) Bill 1993 to change the name, function and constitution of the Seafarers Rehabilitation and Compensation Authority to the Seafarers Safety, Rehabilitation and Compensation Authority.

The Committee has no comment on this Bill.

OVERSEAS STUDENTS TUITION ASSURANCE LEVY BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Minister for Employment, Education and Training.

The Bill proposes to impose a levy on members of a Tuition Assurance Scheme established under section 7A of the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991*. This Bill complements the Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1993.

Imposition of charge by regulation
Clause 3

This clause provides for regulations under the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991* that establish the tuition assurance scheme for overseas students to allow the rules of the scheme to impose levies on the members of the scheme.

The Committee has consistently drawn attention to provisions which allow for the rate of a charge or 'levy' to be set by regulation, largely on the basis that a rate of levy could be set which amounted to a tax (and which, therefore, should be set by primary rather than subordinate legislation). Further, the Committee has generally taken the view that, if there is a need for flexibility in the setting of the levy, then the primary legislation should prescribe either a maximum rate of levy or a method of calculating such a maximum rate.

In the present Bill, no such maximum levy (or method of calculation thereof) is prescribed nor is there any discussion in the Explanatory Memorandum.

Although the drafting of clause 3 may leave room for doubt, the Committee assumes that the rules of the scheme which impose the levies are part of the regulations and as such would be disallowable by either House of the Parliament. It should be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the level of the charge.

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.

SALES TAX (CUSTOMS) (DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on 27 September 1993 by the Assistant Treasurer.

This Bill is part of the package of bills designed to replace the Taxation (Deficit Reduction) Bill 1993.

The Bill proposes to modify the *Sales Tax (Exemptions and Classifications) Act 1992* to the extent that that Act deals with tax imposed by the *Sales Tax Imposition (Customs) Act 1992*. The Bill will be taken to have come into operation on 18 August 1993.

Together with the Sales Tax (Excise) (Deficit Reduction) Bill 1993, the Sales Tax (In Situ Pools) (Deficit Reduction) Bill 1993 and the Sales Tax (General) (Deficit Reduction) Bill 1993, this Bill will give effect to the following changes to the sales tax law announced in the 1993-4 Budget:

. the general percentage increases in sales tax rates;

. the changes of rates on wine; and

. the changes to the tax treatment of luxury motor vehicles.

Retrospectivity
Subclause 2(1)

This provision, if enacted, would provide for an increase in customs duty from 18 August 1993.

The Committee notes that the retrospectivity will give effect to the announcement of the increase in the Budget. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on this Bill.

SALES TAX (EXCISE) (DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on 27 September 1993 by the Assistant Treasurer.

This Bill is part of the package of bills designed to replace the Taxation (Deficit Reduction) Bill 1993.

The Bill proposes to modify the *Sales Tax (Exemptions and Classifications) Act 1992* to the extent that that Act deals with tax imposed by the *Sales Tax Imposition (Excise) Act 1992*. The Bill will be taken to have come into operation on 18 August 1993.

Together with the Sales Tax (Customs) (Deficit Reduction) Bill 1993, the Sales Tax (In Situ Pools) (Deficit Reduction) Bill 1993 and the Sales Tax (General) (Deficit Reduction) Bill 1993, this Bill will give effect to the following changes to the sales tax law announced in the 1993-4 Budget:

. the general percentage increases in sales tax rates;

. the changes of rates on wine; and

. the changes to the tax treatment of luxury motor vehicles.

Retrospectivity
Subclause 2(1)

This provision, if enacted, would provide for an increase in duty from 18 August 1993.

The Committee notes that the retrospectivity will give effect to the announcement of the increase in the Budget. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on this Bill.

SALES TAX (GENERAL) (DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on 27 September 1993 by the Assistant Treasurer.

This Bill is part of the package of bills designed to replace the Taxation (Deficit Reduction) Bill 1993.

The Bill proposes to modify the *Sales Tax (Exemptions and Classifications) Act 1992* to the extent that that Act deals with tax imposed by the *Sales Tax Imposition (General) Act 1992*. The Bill will be taken to have come into operation on 18 August 1993.

Together with the Sales Tax (Customs) (Deficit Reduction) Bill 1993, the Sales Tax (Excise) (Deficit Reduction) Bill 1993 and the Sales Tax (In Situ Pools) (Deficit Reduction) Bill 1993, this bill will give effect to the following changes to the sales tax law announced in the 1993-4 Budget:

. the general percentage increases in sales tax rates;

. the changes of rates on wine; and

. the changes to the tax treatment of luxury motor vehicles.

Retrospectivity
Subclause 2(1)

This provision, if enacted, would provide for an increase in sales tax from 18 August 1993.

The Committee notes that the retrospectivity will give effect to the announcement of the increase in the Budget. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on this Bill.

SALES TAX (IN SITU POOLS) (DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on 27 September 1993 by the Assistant Treasurer.

This Bill is part of the package of bills designed to replace the Taxation (Deficit Reduction) Bill 1993.

The Bill proposes to modify the *Sales Tax (Exemptions and Classifications) Act 1992* to the extent that that Act deals with tax imposed by the *Sales Tax Imposition (In Situ Pools) Act 1992*. The Bill will be taken to have come into operation on 18 August 1993.

Together with the Sales Tax (Customs) (Deficit Reduction) Bill 1993, the Sales Tax (Excise) (Deficit Reduction) Bill 1993 and the Sales Tax (General) (Deficit Reduction) Bill 1993, this Bill will give effect to:

. increases in general rates of sales tax as they apply to dealings with in-ground pools.

Retrospectivity
Subclause 2(1)

This provision, if enacted, would provide for an increase in sales tax from 18 August 1993.

The Committee notes that the retrospectivity will give effect to the announcement of the increase in the Budget. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on this Bill.

SALES TAX ASSESSMENT AMENDMENT (DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on 27 September 1993 by the Assistant Treasurer.

This Bill is part of the package of bills designed to replace the Taxation (Deficit Reduction) Bill 1993. Together with four other bills in the package, this Bill will give effect to the changes to the sales tax law announced in the 1993-4 Budget.

The Bill proposes to make the consequential changes to the *Sales Tax Assessment Act 1992* that are necessary to give effect to the changes to the taxation treatment of luxury motor vehicles. The Bill will be taken to have come into operation on 18 August 1993.

Retrospectivity
Subclause 2(1)

This provision, if enacted, would provide for an increase in sales tax from 18 August 1993.

The Committee notes that the retrospectivity will give effect to the announcement of the increase in the Budget. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on this Bill.

SOCIAL SECURITY (BUDGET AND OTHER MEASURES) LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes amendments to the *Social Security Act 1991*, the *Social Security Act 1947*, the *Data-matching Program (Assistance and Tax) Act 1990* and the *Veterans' Entitlements Act 1986* to:

. introduce a Mature Age Allowance;

. introduce an earnings credit for Job Search Allowance, Newstart Allowance and Sickness Allowance recipients;

. implement measures to improve the effectiveness of Newstart Allowance;

. introduce an Education Entry Payment for the long term unemployed;

. require certain persons and their partners to claim and pursue entitlement to income support from specified countries;

. introduce measures relating to debt recovery relating to the fraudulent obtaining of monies by Department of Social Security clients;

. introduce measures to preserve the integrity and effectiveness of the compensation provisions in the *Social Security Act 1991*.

. abolish the waiting period for rent assistance served by young people under 18 who claim the homeless or independent rate of Job Search Allowance or Sickness Allowance;

. provide for students of up to 17 years of age to remain in the social security system;

. continue the data-matching program and make amendments to the *Data-matching Program (Assistance and Tax) Act 1990*

. make other minor technical amendments to the *Social Security Act 1991*.

Retrospectivity
Subclause 2(4)

The subclause, if enacted, would give retrospective operation to certain amendments from 19 September 1993. The Explanatory Memorandum on page 170 indicates that the effect is to overcome minor drafting omissions from various rate calculators. In the light of this explanation the Committee makes no further comment on this subclause.

Reversal of decisions of Social Security Appeals Tribunals
Subclauses 2(11) to (15)

These subclauses are designed to give retrospective operation to the relevant substantive provisions from 1 January 1988, and other subsequent dates corresponding to the commencement of various amendment Acts.

The Committee notes the summary of the proposed changes given in the Explanatory Memorandum on page 143:

> **1. Summary of proposed changes**
>
> This Division contains changes that will ensure that notices issued by the Secretary to the Department of Social Security to persons receiving pensions, benefits, allowances and family payments under the Principal Act are valid notices even where one or two of the requirements previously mandated for a valid notice are absent.

It appears that the legislation currently allows the Secretary, by written notice, to require that recipients of social security payments give the Department information or particular information as specified in the notice. Failure by the pensioner to comply can result in automatic cessation of entitlement to payment. Because of this possibility, the legislation requires the Secretary to issue the notice in a manner specified in the legislation. The Department has failed to comply with the legislation and Parliament is asked to exempt it retrospectively from doing so in order to overturn decisions of the Social Security Appeal Tribunals.

The Committee has consistently drawn Senators' attention to retrospective legislation as it may unduly trespass on personal rights and liberties. It would appear that the effect of these amendments would be that recipients of social security payments who

under the law were not required to give certain information, will be deemed retrospectively to have been obliged to have given it and will thereby become liable to repay sums of money for which under the current law there is no legal liability. It would seem, in this case, that the right of recipients of social security to have their actions judged according to the law as it stood at the time of those actions would be breached by this retrospectivity.

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.

Requirement to provide tax file numbers
Proposed new sections 660XCD, 660XCE, 660XCL and 660XCM

These proposed sections, if enacted, would oblige persons to provide their tax file numbers to the Secretary. Legislation requiring the provision of tax file numbers may be considered necessary to prevent persons defrauding the social security system, it may also be considered to be unduly intrusive into a person's private life.

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.

STATES GRANTS (PRIMARY AND SECONDARY EDUCATION ASSISTANCE) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Minister for Schools, Vocational Education and Training.

The Bill proposes to amend the *States Grants (Primary and Secondary Education Assistance) Act 1992* to:

- provide funding over three years to support existing and developing hostels for rural school students;
- establish a pilot program for transition support for students with disabilities; and
- to extend the Students at Risk Program for 1995 and 1996;
- strengthen the Commonwealth's New Schools Policy;
- limit eligibility for Commonwealth general recurrent funding to those students enrolled at non-government schools and attending those schools on a regular basis; and
- provide funding schedules for programs under the National Equity Program for Schools and joint programs to support primary and secondary education for the remainder of the 1993 to 1996 funding period.

The Committee has no comment on this Bill.

TAXATION (DEFICIT REDUCTION) BILL (NO. 1) 1993

This Bill was introduced into the House of Representatives on 27 September 1993 by the Assistant Treasurer.

This Bill is part of the package of bills designed to replace the Taxation (Deficit Reduction) Bill 1993. This Bill will commence on the date on which it receives the Royal Assent.

The Bill proposes to:

. increase the medicare low income thresholds;

. remove the concessional treatment that applies to the taxation of unused annual and long service leave;

. allow for changes to the taxation treatment of excess domestic travel allowances and expenses, and of certain non-deductible expenses;

. allow for denial of income tax deductions for car parking expenses for self-employed persons; and

. allow for changes to the taxation treatment of credit unions.

Inappropriate delegation of legislative power
Clauses 5 and 18

Clauses 5 and 18 of this Bill are in the same form as clauses 16 and 32 of the Taxation (Deficit Reduction) Bill 1993 on which the Committee commented in Alert Digest No. 4 of 1993. Those comments are reproduced below.

The Committee's comments in Alert Digest No. 4 were as follows:

Inappropriate delegation of legislative power
Clauses 16 and 32

Clauses 16 and 32 insert new provisions in the taxation legislation with respect to fringe benefits and income respectively.

Proposed subsection 31A(2) of the *Fringe Benefits Tax Assessment Act 1986* provides:

> *Excess domestic travel allowance benefit*
>
> (2) If:
>
> (a) at a particular time, in respect of the employment of an employee, a person (the **'provider'**) pays a domestic travel allowance to the employee; and
>
> (b) the amount of the allowance exceeds the prescribed limit in relation to the allowance;
>
> the payment of so much of the allowance as exceeds that prescribed limit constitutes a benefit provided by the provider to the employee at that time.

Proposed subsections 51AM(1) and (2) provide:

> **No deduction to employee for excess domestic travel expenses**
>
> *When section applies*
>
> 51AM.(1) This section applies if, apart from this section, one or more deductions (the **'gross deductions'**) are allowable to an employee under this Act for domestic travel expenses in relation to travel undertaken by the employee.
>
> *No deduction for excess domestic travel expenses*
>
> (2) If the total of the gross deductions exceeds the prescribed limit in relation to that travel, so much of that total as is equal to the excess is not allowable to the employee.

Proposed subsections 51AN(1) and (2) are in similar terms in respect of non-employees.

These provisions, if enacted, would leave to regulations the setting of monetary limits on domestic travel beyond which any excess would be subject to fringe benefits tax or not deductible for the

purposes of income tax. As the amount of that limit has such a direct effect on taxation liability, the determination of the limit by regulation may be considered to be an inappropriate delegation of legislative power.

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

Retrospectivity
Clause 35

The Committee notes that the retrospectivity in clauses 48 to 52 of the earlier Bill with respect to unused long service leave and annual leave is no longer in clause 35 of the current Bill.

TAXATION (DEFICIT REDUCTION) BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 27 September 1993 by the Assistant Treasurer.

The Bill is part of the package of bills designed to replace the Taxation (Deficit Reduction) Bill 1993. This Bill will commence on the date on which it receives the Royal Assent.

The Bill proposes to:

. increase the rate of fringe benefits tax; and

. change the taxation treatment of friendly societies, including bringing the rate of tax on their life insurance business into line with the rate of tax on similar business undertaken by life companies.

The Committee has no comment on this Bill.

TAXATION (DEFICIT REDUCTION) BILL (NO. 3) 1993

This Bill was introduced into the House of Representatives on 27 September 1993 by the Assistant Treasurer.

The Bill is part of the package of bills designed to replace the Taxation (Deficit Reduction) Bill 1993. This Bill will not commence until all of the other bills in this package, except for the Taxation (Deficit Reduction) Bill (No. 2) 1993, receive the Royal Assent.

The Bill proposes to:

. bring forward the first round of personal tax cuts, and to defer the second round; and

. introduce the $150 low income rebate.

Commencement by regulation
Subclause 2(3)

Subclause 2(3) of this Bill is in the same form as subclause 2(3) of the Taxation (Deficit Reduction) Bill 1993 on which the Committee commented in Alert Digest No. 4 of 1993. Those comments are reproduced below.

The Committee's comments in Alert Digest No. 4 were as follows:

> ### Commencement by regulation
> ### Subclause 2(3)
>
> Subclause 2(3) provides:
>
> > (3) Division 4 of Part 2 commences at the beginning of the financial year fixed by regulations made by the Governor-General for the purposes of this subsection. The financial year must be later than the financial year beginning on 1 July 1994.
>
> The effect of this provision is that the additional tax cuts provided by Division 4 of Part 2 cannot apply to a financial year earlier than 1995-1996 and may only apply then if enabling regulations are made. This has the same effect as a provision permitting

commencement by Proclamation.

The Committee notes that subclause 2(3), in substance, if not in form, is contrary to the 'general rule' set out in the Office of Parliamentary Counsel Drafting Instruction No.2 of 1989 which requires a time limit within which an Act should come into force.

The Drafting Instruction, in part, provides:

> 3. ... 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.

The Committee has consistently opposed provisions which leave the commencement of a law to be open-ended. Where there is a deviation from the rules set out in the Drafting Instruction, the Committee prefers to see the reasons set out in the Explanatory Memorandum. The Committee notes the absence of such an explanation.

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.

TAXATION LAWS AMENDMENT BILL (NO. 3) 1993.

This Bill was introduced into the House of Representatives on 29 September 1993 by the Assistant Treasurer.

The Bill proposes to:

. defer initial payment of company tax by small business;

. exempt from income tax income derived by non-profit organisations established for the purpose of promoting the development of tourism;

. exempt various activities of the RSPCA from sales tax;

. change the imputation system as a result of the reduction in the company tax rate;

. allow for determination of tax payable by life insurance companies;

. ensure taxation treatment of capital gains from life assurance policies realised by superannuation funds and similar bodies is consistent with their general concessional taxation treatment;

. retain the current provisional uplift factor of 8% for the purposes of calculating provisional tax;

. ensure that deductions relating to petroleum mining provisions are not available for expenditure incurred in carrying out activities overseas that do not generate assessable income in Australia;

. change the definition of 'stand-by value' as it relates to valuation of fringe benefits tax of airlines;

. allow the superannuation guarantee shortfall component to be paid into a complying approved deposit fund as a taxable contribution;

. ensure the Petroleum Resource Rent Tax Law does not delay exploration following changes in interests in projects or otherwise distort commercial decision-making, and to ease compliance by

resource rent taxpayers; and

. other minor technical amendments.

Retrospectivity
Subclauses 2(2) and (3)

These subclauses, if enacted, would give retrospective operation to the relevant substantive provisions of the Bill.

Retrospectivity is normally seen as potentially breaching principle 1(a)(i) of the Committee's terms of reference, in that it may unduly trespass on personal rights and liberties. However the amendments made by these subclauses are beneficial to taxpayers. Where a provision is beneficial to persons other than the Commonwealth, the Committee has been prepared to accept retrospectivity.

The Committee makes no further comment upon these proposed amendments.

Retrospectivity
Clause 18

Clause 18, if enacted, would provide that the amendments made by Division 2 of Part 4 apply from 7.30 pm on 21 August 1990.

The Committee notes that the Explanatory Memorandum indicates that the purpose of the amendments is to cure an unintended defect in the legislation introduced in the 1990 Budget.

In a comparable case with respect to the Customs Tariff Amendment Bill 1993, the Committee took the view that the Committee would not see retrospectivity as unduly trespassing on personal rights and liberties if the effect of the bill is merely declaratory of what the Government and the relevant industry have always believed to be the legal obligation and if they have always acted accordingly. The Committee has, in the past, been willing to accept retrospectivity where this has been necessary to correct a drafting error, without making further comment on the clause. The Committee would appreciate the Treasurer's advice on these aspects of the amendments.

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 26

Clause 26, if enacted, would give retrospective application to clauses 24 and 25 of the Bill.

Retrospectivity is normally seen as potentially breaching principle 1(a)(i) of the Committee's terms of reference, in that it may unduly trespass on personal rights and liberties. However the amendments made by these clauses are beneficial to taxpayers. Where a provision is beneficial to persons other than the Commonwealth, the Committee has been prepared to accept retrospectivity.

The Committee makes no further comment upon these proposed amendments.

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes to:

. extend benefits under the Veterans' Children Education Scheme to children of veterans who receive Extreme Disablement Adjustment allowance;

. assess allocated pensions and allocated annuities according to the managed investment rules;

. amend the definition of 'shares and listed securities' to ensure it applies to both Australian and foreign-sourced investments; and

. amend the *Veterans' Affairs Legislation Amendment Act (No. 2) 1991* to extend the Advance Pharmaceutical Allowance for a further 12 months.

The Committee has no comment on this Bill.

VOCATIONAL EDUCATION AND TRAINING FUNDING LAWS AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 29 September 1993 by the Minister for Schools, Vocational Education and Training.

The Bill proposes amendments to the *States Grants (TAFE Assistance) Act 1989* and the *Vocational Education and Training Funding Act 1992* to adjust Commonwealth funds for vocational education and training for the 1993-95 triennium to reflect movements in price indices applying to these grants.

The Committee has no comment on this Bill.

WOOL INTERNATIONAL BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Minister for Primary Industries and Energy.

This Bill is part of a package of bills to establish a new institutional structure and marketing arrangements in the wool industry.

The Bill proposes to:

. establish a new commercially oriented organisation called Wool International which will assume responsibility for selling, marketing and risk management mechanisms of the industry; and

. provide for arrangements to cover the transitional period between the existing and the new arrangements.

Commencement on proclamation
Subclauses 2(3) and (4)

These subclauses, if enacted, would provide for Parts 10, 11 and 12 of the Bill to commence on a day to be fixed by Proclamation.

The Committee notes that, contrary to the 'general rule' set out in the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, the period within which the Proclamations must be issued is not in any way limited.

The 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).

The Committee notes that the Explanatory Memorandum does not appear to give any reason for the conferral of this open-ended discretion to proclaim the legislation at any time. However, the Bill itself makes it clear that the relevant substantive provisions relate to the corporatisation and eventual sale of Wool International. This may be a matter about which no time can realistically be fixed. In this regard, the Committee notes that paragraph 3(c) of the Bill expresses that it would be Parliament's intention that the company would be in a position to be privatised before 1 July 1997.

In these circumstances, the Committee makes no further comment on this Bill.

WOOL LEGISLATION (REPEALS AND CONSEQUENTIAL PROVISIONS) BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Minister for Primary Industries and Energy.

This Bill is part of a package of bills to establish a new institutional structure and marketing arrangements in the wool industry.

The Bill proposes to:

. repeal the *Australian Wool Realisation Commission Act 1991*, *Australian Wool Corporation Act 1991* and the *Australian Wool Industry Council Act 1991* and amend the *Primary Industries and Energy Research and Development Act 1989* on which the current wool industry arrangements are based; and

. amend the *Wool Tax (Administration) Act 1964* to require the provision of additional information concerning wool tax paid.

The Committee has no comment on this Bill.

WOOL TAX (NO. 1) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to:

. amend the *Wool Tax Act (No. 1) 1964* to allow a tax to be imposed on the sale by a wool broker of shorn wool produced in Australia.

The Committee has no comment on this Bill.

WOOL TAX (NO. 2) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to:

. amend the *Wool Tax Act (No. 2) 1964* to allow a tax to be imposed on the purchase by a wool-dealer from a person other than a wool-broker of shorn wool produced in Australia.

The Committee has no comment on this Bill.

WOOL TAX (NO. 3) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to:

. amend the *Wool Tax Act (No. 3) 1964* to allow a tax to be imposed on the purchase by a manufacturer from a person other than a wool-broker or a registered wool dealer of shorn wool produced in Australia.

The Committee has no comment on this Bill.

WOOL TAX (NO. 4) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to:

. amend the *Wool Tax Act (No. 4) 1964* to allow a tax to be imposed on shorn wool produced in Australia when it is subject to a process of manufacture.

The Committee has no comment on this Bill.

WOOL TAX (NO. 5) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 30 September 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to:

. amend the *Wool Tax Act (No. 5) 1964* to allow a tax to be imposed on shorn wool produced in Australia at the time of export from Australia.

The Committee has no comment on this Bill.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ALERT DIGEST

NO. 7 OF 1993

20 OCTOBER 1993

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MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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

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(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.

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AUDIT (AUDITOR-GENERAL AN OFFICER OF THE PARLIAMENT) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 6 October 1993 by Senator Watson as a Private Senator's Bill.

The Bill proposes to make the Auditor-General an officer of Parliament, independent of the Government.

The Committee has no comment on this Bill.

MIGRATION AMENDMENT ("POINTS" SYSTEM) BILL 1993

This Bill was introduced into the Senate on 7 October 1993 by the Manager of Government Business in the Senate for the Minister for Immigration and Ethnic Affairs.

The Bill proposes to simplify the operation of the points system and pooling mechanism provided for in Division 2 of Part 2 of the *Migration Act 1958* by replacing the three mark system currently in operation with a two mark system consisting of a pass mark and a pool mark.

The Committee has no comment on this Bill.

WHISTLEBLOWERS PROTECTION BILL 1991

This Bill was introduced into the Senate on 5 October 1993 by Senator Chamarette as a Private Senator's Bill.

The Bill proposes to:

. allow public sector employees and others to disclose, in the public interest, illegal, improper or corrupt conduct or acts that may be of danger to public health, safety or national security; and

. establish the Whistleblower Protection Agency, headed by a Commissioner, which will have powers to investigate claims of corruption within the Commonwealth government or government agencies made by employees, applicants for employment in a Government agency or by any member of the public.

Inappropriate delegation of legislative power
Clause 4

Clause 4 of the Bill sets out various definitions relevant to the Bill, including:

> **"prescribed authority"** means:
> (a) a body corporate, or an unincorporated body, established by or in accordance with the provisions of, an enactment, other than:
> (i) a body that under subsection (2) or the regulations is not to be taken to be a prescribed authority for the purposes of this Act; or
> (ii) the Legislative Assembly of the Northern Territory; or
> (iii) the Legislative Assembly of the Australian Capital Territory; or
> (b) an other body, whether incorporated or unincorporated, being:
> (i) a body established by the Governor-General or a Minister; or
> (ii) an incorporated company over which the Commonwealth, or a body that is, by the application of another paragraph or subparagraph of this definition, a prescribed authority, is in a position to exercise control.

Subclause 4(2) provides:

> (2) An unincorporated body, being a board council, committee, sub-committee or other body established by, or in accordance with the provisions of, an enactment for the purpose of assisting, or performing functions connected with, the federal public service shall not be taken to be a separate prescribed authority for the purposes of this Act but shall be treated as incorporated in the part of the federal public service that is so assisting or in connection with which it is performing functions.

Subparagraph (a)(i) of this definition may be regarded as an inappropriate delegation of legislative power, as it would allow the Governor-General (acting on the advice of the Federal Executive Council) to promulgate regulations exempting bodies which would otherwise be subject to the legislation from the operation of the legislation. In so doing, the regulations could significantly alter the scope of the legislation.

Clause 4 also contains a definition of 'statutory office'. It provides:

> **"statutory office"** means:
> (a) an office or appointment established by an enactment; or
> (b) any other office or appointment the holder of which is appointed by the Governor-General or a Minister;
>
> other than:
> (c) an office or appointment declared by the regulations not to be a statutory office for the purposes of this Act; or
> (d) an office of Justice or Judge of the High Court, of a court established by the Parliament or of the Supreme Court of a Territory; or
> (e) an office the holder of which has, by virtue of an enactment, the status of a Justice or Judge of a court referred to in paragraph (d); or
> (f) an office or appointment in the Australian Public Service; or
> (g) an office of Member of the Parliament, member of the Legislative Assembly of the Northern Territory or member of the Legislative Assembly of the Australian Capital Territory; or
> (h) an office or appointment the holder of which performs the duties of the office as an officer or employee of the federal public service or a member of the staff of a prescribed authority; or
> (i) an office of member of a body; or

(j) an office established by an enactment for the purposes of a prescribed authority.

Paragraph (c) of the definition may also be regarded as an inappropriate delegation of legislative power. If enacted, it would allow the Governor-General to promulgate regulations to exempt certain statutory offices from the operation of the legislation and, potentially, limiting the scope of the legislation.

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.

Abrogation of the privilege against self-incrimination
Subclause 26(1)

Subclause 26(1) of the Bill provides:

> Notwithstanding the provisions of any enactment, a person is not excused from furnishing any information, producing a document or other record or answering a question when required to do so under this Act on the ground that the furnishing of the information, the production of the document or record or the answer to the question:
> (a) would contravene the provisions of any other Act, would be contrary to the public interest or might tend to incriminate the person or make him or her liable to a penalty; or
> (b) would disclose legal advice the disclosure of which would otherwise be privileged;
> but the answer to the question is not admissible in evidence against the person in proceedings other then proceedings for an offence against section 48.

This may be regarded as an abrogation of the privilege against self-incrimination, which would ordinarily operate to allow a person to decline from answering a question on the grounds that the answer might tend to incriminate them.

In making this comment, the Committee notes that any such answer would not be admissible in evidence against the person in proceedings other than proceedings for an offence against clause 48 of the Bill. That clause sets out offence provisions applicable to a failure to, for example, answer a question, produce a document or furnish information. The relevant penalty is 50 penalty units.

In its present form, the clause contains what the Committee would regard as a 'use' indemnity on any information obtained. This means, simply, that the person would be indemnified against the direct use of the information in any other proceedings. However, there is no such protection afforded in the case of any indirect use of the information. In the circumstances, such derivative-use indemnity may be regarded as appropriate.

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.

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AUDIT (AUDITOR-GENERAL AN OFFICER OF THE PARLIAMENT) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 21 October 1993 by Mr Connolly as a Private Member's Bill.

The Bill proposes to amend the *Audit Act 1901* to make it clear that the Auditor-General is an officer of the Parliament.

The Committee has no comment on this Bill.

COPYRIGHT AMENDMENT (RE-ENACTMENT) BILL 1993

This Bill was introduced into the Senate on 20 October 1993 by the Manager of Government Business in the Senate for the Attorney-General.

The Bill proposes to re-enact certain provisions of the *Copyright Amendment Act 1989* following a decision handed down by the High Court in March 1993 to re-enact all provisions from the date of their purported commencement except for those related to the blank tape royalty scheme. These provisions are not dealt with in this proposed legislation.

Retrospectivity
Subclause 2(2)

Subclause 2(2), if enacted, would provide that the amendments made by the Bill would be taken to have commenced on the dates set out in the Schedule. In turn, the Schedule sets out a series of dates from which the re-enacted provisions would be taken to have commenced.

The need to re-enact these provisions is set out in the Explanatory Memorandum:

> The need for this Bill arises from the view of the Chief General Counsel that the effect of the first paragraph of s.55 of the Constitution in this situation is that all the non-tax provisions of the entire Amending Act were thereby invalidated. Additionally, in this decision the court held that the non-taxing and the taxing provisions (the royalty) were inextricably linked thus also invalidating the provisions imposing the royalty.
>
> The Bill re-enacts the Amending Act in such a way as to re-enact all its provisions from the date of their purported commencement except for those related to the blank audio tape royalty scheme. Those provisions are not dealt with in this proposed legislation.

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

HOUSING ASSISTANCE AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 19 October 1993 by the Parliamentary Secretary to the Minister for Housing, Local Government and Community Services.

The Bill proposes to amend the *Housing Assistance Act 1989* to revise appropriations for the years 1993-1996 for the delivery of housing assistance for rental housing and home purchase in accordance with the Commonwealth-State Housing Agreement.

The Committee has no comment on this Bill.

PRIVACY AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 21 October 1993 by Mr Price as a Private Member's Bill.

The Bill proposes to amend the *Privacy Act 1988* to ensure that the operation of the Privacy Act does not obstruct Members and Senators in the performance of their duties as Members.

The Committee has no comment on this Bill.

SALES TAX (CUSTOMS) (WINE - DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on 18 October 1993 by the Assistant Treasurer.

The Bill proposes to amend the *Sales Tax (Exemptions and Classifications) Act 1992* to the extent that that Act deals with tax imposed by the *Sales Tax Imposition (Customs) Act 1992* to:

. increase the rate of sales tax on alcoholic wines from 20% to 31% for a designated period (at which time the rate is to be reduced to 22%) and then phase in an increase in the rates from 22% to 26%; and

. increase the rate of sales tax on low alcohol wines from 10% to 21% for a designated period (at which time the rate is to be reduced to 12%) and then phase in an increase in the rates from 12% to 16%.

Retrospectivity
Subclause 2(1)and (2)

These provisions, if enacted, would provide for the commencement of modifications to the sales tax on wine from 18 August 1993 and for a further modification from a date to be designated between 18 October 1993 and 1 November 1993.

The Committee notes that the retrospectivity will give effect to the announcement of the increase in the Budget and later related announcements. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on this Bill.

SALES TAX (EXCISE) (WINE ~ DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on 18 October 1993 by the Assistant Treasurer.

The Bill proposes to amend the *Sales Tax (Exemptions and Classifications) Act 1992* to the extent that that Act deals with tax imposed by the *Sales Tax Imposition (Excise) Act 1992* to:

. increase the rate of sales tax on alcoholic wines from 20% to 31% for a designated period (at which time the rate is to be reduced to 22%) and then phase in an increase in the rates from 22% to 26%; and

. increase the rate of sales tax on low alcohol wines from 10% to 21% for a designated period (at which time the rate is to be reduced to 12%) and then phase in an increase in the rates from 12% to 16%.

Retrospectivity
Subclause 2(1)and (2)

These provisions, if enacted, would provide for the commencement of modifications to the sales tax on wine from 18 August 1993 and for a further modification from a date to be designated between 18 October 1993 and 1 November 1993.

The Committee notes that the retrospectivity will give effect to the announcement of the increase in the Budget and later related announcements. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on this Bill.

SALES TAX (GENERAL) (WINE - DEFICIT REDUCTION) BILL 1993

This Bill was introduced into the House of Representatives on 18 October 1993 by the Assistant Treasurer.

The Bill proposes to amend the *Sales Tax (Exemptions and Classifications) Act 1992* to the extent that that Act deals with tax imposed by the *Sales Tax Imposition (General) Act 1992* to:

. increase the rate of sales tax on alcoholic wines from 20% to 31% for a designated period (at which time the rate is to be reduced to 22%) and then phase in an increase in the rates from 22% to 26%; and

. increase the rate of sales tax on low alcohol wines from 10% to 21% for a designated period (at which time the rate is to be reduced to 12%) and then phase in an increase in the rates from 12% to 16%.

Retrospectivity
Subclause 2(1)and (2)

These provisions, if enacted, would provide for the commencement of modifications to the sales tax on wine from 18 August 1993 and for a further modification from a date to be designated between 18 October 1993 and 1 November 1993.

The Committee notes that the retrospectivity will give effect to the announcement of the increase in the Budget and later related announcements. As the Committee accepts retrospectivity where it gives effect to a Budget measure, the Committee makes no further comment on this Bill.

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the Senate on 21 October 1993 by the Manager of Government Business in the Senate for the Minister for Transport and Communications.

The Bill proposes amendments to the following Acts within the portfolio:

. *Air Navigation Act 1920* to provide for Australian ratification of a Protocol to the Convention on International Civil Aviation;

. *Australian Land Transport Development Act 1988* to enable payments through the ALTD Trust fund to the National Rail Corporation Ltd for One Nation projects to be recognised as Commonwealth capital contributions;

. *Australian National Railways Commission Act 1983* to increase the maximum penalty that may be prescribed for offences against the by-laws or regulations from $500 to $1,500 and extend the powers of inquiry into rail safety incidents;

. *Civil Aviation Act 1988* to give effect to Article 83 *bis* of the Chicago Convention when it enters into force internationally, clarify the Authority's ability to regulate foreign registered aircraft employed domestically and empower the Authority to provide regulatory services to other countries and agencies under contract;

. *Navigation Act 1912* to provide for the making of regulations relating to competency standards and licensing where use of marine pilots is required in the Australian Coastal sea;

. *Seafarers Rehabilitation and Compensation Act 1992* to distinguish company trainees from industry trainees for the purposes of claiming compensation, allow employers to insure their liabilities with State insurance offices, rationalise provisions relating to compensation for travelling expenses incurred in seeking medical treatment and ensure that injured seafarers are not required to be examined by a medical panel;

. *Seafarers Rehabilitation and Compensation Levy Act 1992* to require the Minister to consult in relation to financial matters affecting the operation of the Authority before recommending a particular rate of levy to the Governor General in Council; and

. *Telecommunications Act 1991* to amend numbering provisions and to amend section 88 relating to the protection of the content of communications.

Commencement on proclamation
Subclause 2(3)

By subclause 2(3) various provisions of the Bill will come into effect on a day to be proclaimed, 'being a day not before the day on which the Protocol inserting [Article] 83 bis into the Convention on International Civil Aviation comes into force in relation to Australia.'

The Committee notes that the Explanatory Memorandum points out that the reason for this is that the provisions in question cannot be given legal effect until the Protocol comes into force in relation to Australia.

The Committee has consistently opposed the inclusion of open-ended proclamation provisions because it may be considered an inappropriate delegation of legislative power for the Parliament to enact legislation but have no control over when it will commence.

The Committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 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).

The circumstances of this Bill would make paragraph 6 applicable in that the commencement depends on an event whose timing is uncertain. However, the Committee suggests that an addition to the proclamation subclause could produce a result more in harmony with the thrust of the Drafting Instruction and with the principle of appropriate delegation of legislative power. The Committee seeks the Minister's advice whether the subclause could also provide that the amendments would commence within (say) 6 months of the Protocol coming into force in relation to Australia.

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.

Retrospectivity
Subclauses 2(4) to (10)

These subclauses, if enacted, would provide that various substantive amendments made by the Bill would have some retrospective effect.

The Committee notes however, that in each case the retrospectivity is to correct drafting errors and has no adverse effect on individuals. The Committee makes no further comment on these provisions.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

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ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION AMENDMENT BILL (NO. 3) 1993

This Bill was introduced into the Senate on 28 October 1993 by the Manager of Government Business in the Senate for the Prime Minister.

The Bill proposes to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* to:

. establish a Torres Strait Regional Authority;

. streamline the financial provisions of the Act and facilitate further devolution of authority to Regional Councils;

. strengthen the role of the Office of Evaluation and Audit;

. establish an independent Electoral Review Panel;

. provide for at least one Director of the Aboriginal and Torres Strait Islander Commercial Development Corporation to be an ATSIC Commissioner;

. provide for an Administrator to hold office on a full-time basis and disclosure of interests, resignation, leave of absence, and suspension and termination of appointment;

. provide for disclosure of interests, resignations and termination of members of Advisory Committees and the Torres Strait Islander Advisory Board;

. exempt ATSIC from the payment of excise duty on goods for use by the Commission;

. make Aboriginal Hostels Limited subject to the same level of accountability and administrative review mechanisms as ATSIC; and

. make other technical amendments.

Abrogation of the privilege against self-incrimination

Proposed new subsection 78A(7))

Proposed subsection (7) provides:

> *Self-incrimination*
>
> (7) For the purposes of subsection (6), it is not a reasonable excuse for a person to refuse or fail:
>
> (a) to give information; or
>
> (b) to produce a document;
>
> in accordance with a requirement made of the person, on the ground that the information or production of the document, as the case may be, might tend to incriminate the person or make the person liable to a penalty. However:
>
> (c) giving the information or producing the document; or
>
> (d) any information, document or thing obtained as a direct or indirect consequence of the giving of the information or producing the document;
>
> is not admissible in evidence against the person in any criminal proceedings, other than proceedings for an offence against, or arising out of, subsection (6) or (8).

This proposed subsection, if enacted, would abrogate the privilege against self-incrimination for a person required to answer questions or produce documents in accordance with paragraph 78A(5)(c).

It is in a form which the Committee has previously been prepared to accept however, as it contains a limit on 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. Accordingly the Committee makes no further comment on the clause.

ENVIRONMENT PROTECTION (ALLIGATOR RIVERS REGION) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 28 October 1993 by the Manager of Government Business in the Senate for the Minister representing the Minister for the Environment, Sport and Territories.

The Bill proposes to amend the *Environment Protection (Alligator Rivers Region) Act 1978* to:

. subsume the Office of the Supervising Scientist and the Alligator Rivers Region Research Institute into the Department of the Environment, Sport and Territories as part of the Commonwealth Environment Protection Agency;

. maintain the statutory functions and duties of the Supervising Scientist for the Alligator Rivers Region but without the powers of a Departmental Secretary;

. allow the Supervising Scientist, at the Minister's request, to provide scientific advice to the Minister on matters outside the Alligator Rivers Region;

. replace the Co-ordinating Committee for the Alligator Rivers Region with two more specialised committees; and

. empower the Alligator Rivers Region Research Institute to undertake contract research.

The Committee has no comment on this Bill.

ENVIRONMENT PROTECTION (SEA DUMPING) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 28 October 1993 by the Manager of Government Business in the Senate for the Minister representing the Minister for the Environment, Sport and Territories.

The Bill proposes to amend the *Environment Protection (Sea Dumping) Amendment Act 1981* to:

. implement the Government's decision to ratify the Protocol for the prevention of Pollution of the South Pacific Region by Dumping, commonly referred to as the SPREP Dumping Protocol, which is one of two protocols to the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.

Commencement on Proclamation
Clause 2

Clause 2 of the Bill provides:

> Commencement
>
> 2.(1) Subject to subsection (2), 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 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.

By clause 2 the Bill will come into effect on a day to be proclaimed, or in any event 12 months after Royal Assent.

The Committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 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).

Paragraph 4 of the Drafting Instruction suggests that the Explanatory Memorandum should explain the reason for choosing a period longer than 6 months after Royal Assent.

The Committee notes that no such explanation appears to be included in the Explanatory Memorandum. However the Committee also notes, in the second reading speech, that a complementary amendment needs to be made to the *Tasmanian Environment Protection (Sea Dumping) Act 1987* to reflect the additional requirement of the South Pacific Region Environment Protection Dumping Protocol.

It may be that in these circumstances, paragraph 6 would be applicable in that the commencement depends on an event whose timing is uncertain. The Committee seeks the Minister's advice whether the need to await the amendment of the Tasmanian law is the reason for choosing a 12 month period.

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.

INDUSTRIAL RELATIONS AND OTHER LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 28 October 1993 by the Manager of Government Business in the Senate for the Minister representing the Minister for Industrial Relations.

The Bill proposes amendments to the following Acts:

. *Sex Discrimination Act 1984* and the *Remuneration Tribunal Act 1973* to provide a mechanism for the removal of discriminatory provisions from determinations of the Remuneration Tribunal;

. *Defence Act 1903* to replace "Chairman" with the gender-neutral title "President";

. *Remuneration Tribunal Act 1973* to require superannuation entitlements to be taken into account by the Tribunal when providing advice on the remuneration of principal executive officers of Government Business Enterprises;

. *Industrial Relations Act 1988* to enable the Australian Industrial Registry to act as registry for State industrial authorities, ensure the complementary registrations system applies only to Federally registered unions that wish to take advantage of it and limit the time within which an objection to a variation of a common rule award must be made;

. *Maternity Leave (Commonwealth Employees) Act 1973* to give the President of the Senate and Speaker of the House of Representatives the same powers as are currently exercised by the Public Service Commissioner under the Act and give the Heads of the five Parliamentary departments the powers currently vested in the Secretary to the Department of Industrial Relations under the Act;

. *Occupational Health and Safety (Commonwealth Employment) Act 1991* to clarify the application of the Act to employees working outside office or factory workplaces, enhance reporting requirements in relation to occupational safety and enable standards or codes of practice of the National Occupational Health and Safety Commission to be adopted;

. *Safety Rehabilitation and Compensation Act 1988* to enable an overpayment of compensation, where a Commonwealth employee has retired and is eligible for benefit, to be recovered directly from the superannuation fund; and

. *Tradesmen's Rights Regulation Act 1946* to enable regulations to be made prescribing fees to be payable on a partial cost-recovery basis for certain functions carried out by the Department of Industrial Relations in respect of the Act.

Retrospectivity
Subclauses 2(3) and (4)

Subclauses 2(3) and (4), if enacted, would provide that the amendments made by clauses 34 and 47 would have retrospective effect.

The Committee notes however, that the Explanatory Memorandum indicates that in each case the retrospectivity is in relation to correcting drafting errors and will not adversely affect any person's interest.

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

INDUSTRIAL RELATIONS COURT (JUDGES' REMUNERATION) BILL 1993

This Bill was introduced into the House of Representatives on 28 October 1993 by the Minister for Industrial Relations.

The Bill proposes to amend the *Industrial Relations Act 1988* to appropriate money to pay the remuneration of Judges of the new Industrial Court of Australia.

The Committee has no comment on this Bill.

INDUSTRIAL RELATIONS REFORM BILL 1993

This Bill was introduced into the House of Representatives on 28 October 1993 by the Minister for Industrial Relations.

The Bill proposes amendments to the *Industrial Relations Act 1988*, the *Trade Practices Act 1974*, the *National Labour Consultative Council Act 1977*, the *Public Service Act 1922*, the *Judiciary Act 1903* and the *Jurisdiction of Courts (Cross-Vesting) Act 1987* to:

. provide for new objects and restructuring of the *Industrial Relations Act 1988;*

. maintain and strengthen the safety net for employees, through the award system and through minimum entitlements that give effect to certain treaty obligations;

. provide more effective arrangements for direct bargaining, including the establishment of a new stream of enterprise flexibility arrangements and the creation of a sanction-free bargaining period in the negotiation of agreements;

. provide a more effective regime for dealing with industrial action, including secondary boycott provisions;

. establish the Industrial Relations Court of Australia;

. revise requirements for union registration and union coverage;

. encourage industry consultative councils;

. allow for a new Bargaining Division of the Australian Industrial Relations Commission; and

. provide for restructuring of the National Labour Consultative Council.

The Committee has no comment on this Bill.

INTERSTATE GAS PIPELINES BILL 1993

This Bill was introduced into the Senate on 28 October 1993 by the Manager of Government Business in the Senate for the Minister representing the Minister for Primary Industries and Energy.

The Bill proposes to:

. implement statutory requirements for interstate gas pipeline operations to facilitate the efficient and competitive development of the natural gas industry.

Privilege against self-incrimination
Subclause 61(2)

This proposed subclause, if enacted, would expressly preserve the privilege against self-incrimination for a witness required to answer questions in accordance with paragraph 61(1)(b) in a hearing before the Trade Practices Commission.

Two matters arising from this are of concern to the Committee.

First, the privilege is expressly preserved only in relation to answering questions. The Bill is silent on whether the privilege extends to the production of documents. The principle of statutory interpretation, *expressio unius est exclusio alterius: an express reference to one matter indicates that other matters are excluded,* must always be applied with caution. A Court could rely on the principle to construe the provision as excluding the privilege in relation to a witness being required to produce documents. However, a Court will always try to ascertain whether it was the legislative intention to exclude the privilege in relation to the production of documents. The Committee would appreciate the advice of the Minister on whether or not the privilege against self-incrimination is intended to apply to the production of documents and asks whether the legislative intent could be made clear by suitable drafting.

Secondly, the Committee would appreciate the Minister's advice on whether practical steps can be taken to ensure that a witness is made aware that he/she is entitled to the privilege, whether it be in relation only to answering questions or also to producing documents.

The Committee draws Senators' attention to paragraph 61(1)(b), 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.

TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 31 August 1993 by the Parliamentary Secretary to the Attorney-General.

The Bill proposes to give effect to certain of the recommendations arising out of a review of the *Telecommunications (Interception) Act 1979* by:

. enabling the replacement of the present system of routing interceptions through Canberra with a system under which the AFP maintains control of State interceptions by means of computer links but without listening to, or recording, those communications;

. permitting law enforcement agencies to monitor or record telephone calls without a warrant in certain emergency situations;

. removing the geographical restrictions on State law enforcement agencies provided interceptions made by them are within their functions; and

. including computer related offences under Part VIA of the *Crimes Act 1914*.

The Committee considered this Bill in Alert Digest No. 5 of 1993 and made no comment. However, the Law Society of New South Wales has forwarded to the Committee a copy of its letter to the Minister for Justice, the Hon Duncan Kerr MP, in which it raises several concerns. A copy of the letter is attached.

Interceptions without warrants
Clause 10

Clause 10(b), if enacted, would insert several subsections in section 7 of the *Telecommunications (Interception) Act 1979*.

Proposed subsections (4) and (5) would provide:

> (4) Subsection (1) does not apply to, or in relation to, an act done by an officer of an agency in relation to a communication if the following conditions are satisfied:
>
> (a) the officer or another officer of the agency is a party to the communication; and
>
> (b) there are reasonable grounds for suspecting that another party to the communication has:
>
> (i) done an act that has resulted, or may result, in loss of life or the infliction of serious personal injury; or
>
> (ii) threatened to kill or seriously injure another person or to cause serious damage to property; or
>
> (iii) threatened to take his or her own life or to do an act that would or may endanger his or her own life or create a serious threat to his or her health or safety; and
>
> (c) because of the urgency of the need for the act to be done, it is not reasonably practicable for an application for a Part VI warrant to be made.
>
> (5) Subsection (1) does not apply to, or in relation to, an act done by an officer of an agency in relation to a communication if the following conditions are satisfied:
>
> (a) the person to whom the communication is directed has consented to the doing of the act; and
>
> (b) there are reasonable grounds for believing that that person is likely to receive a communication from a person who has:
>
> (i) done an act that has resulted, or may result, in loss of life or the infliction of serious personal injury; or
>
> (ii) threatened to kill or seriously injure another person or to cause serious damage to property; or
>
> (iii) threatened to take his or her own life or to do an act that would or may endanger his or her own life or create a serious threat to his or her health or safety.

In its letter the Council of the Law Society says:

> The Council is concerned about the proposed amendments contained in clause 10 of the Bill which would empower a police officer to listen to or record, without a warrant, a communication between police and a suspected offender in emergency situations. The Council considers that giving a police officer this power is both unnecessary and unacceptable.

It is unnecessary, because the present powers are adequate. Under the present laws police have the power to trace telephone calls in an emergency without warrants (s.30).

Furthermore, police may obtain "telephone" warrants in emergencies by obtaining authorisation from a duty judicial officer (ss.43, 50-52). The judicial officer determines the terms of the warrant (s.50) and the applicant agency must supply the issuing judge with written documentation within 24 hours of the application (s.51).

The Council also believes that the proposed amendments to section 7 of the Act (contained in clause 10 of the Bill) namely the new sub-sections (4) and (5) are unacceptable for the following reasons:

1. as a matter of principle the Law Society is opposed to telephone tapping without warrant;

2. the powers are not justified in the sense that there is no explanation as to why the emergency telephone warrant procedure should not be used;

3. the permission to undertake such tapping is self-issued without the need to justify the tap to an independent third person;

4. the nature of the interception is unregulated because it is self-issued with no time limit or conditions such as would be imposed by a judge;

5. there is no responsibility to report later to an independent agency about the use of such a power;

6. there is no accountability as the agencies do not have to provide parliament or the public with an account of how often, in what circumstances, and with what results such powers are exercised as they are required to do with warrants issued under the annual report provisions;

7. the phrase "being a party to the communication" in clause 10 of the Bill is inadequately defined;

8. the provision for tapping without a warrant when one party to the conversation consents to the tapping is a back-door way of introducing "participant monitoring" which has been totally

> opposed by the Commonwealth Privacy Commissioner, the NSW Privacy Committee and the NSW Council for Civil Liberties.

The Committee views the power to place an intercept in the same terms as it has approached search and seizure provisions. The Committee has consistently drawn attention to search and seizure provisions which can operate without the issue of a warrant. Such provisions will only be acceptable if the circumstances and the seriousness of the offence in question justify such a power being given.

The Committee does not have a difficulty with the seriousness of sieges or kidnapping but the issue of whether the circumstances justify the grant of such a power remains.

There appears to be little room for objection if attention is focussed only on the 'best case scenario'. But the NSW Law Society properly raises the unregulated nature of the power because it is self-issued, with no time limit or conditions such as may be imposed by a judge.

Equally, proposed section 102A limits the accountability to reporting annually only the number of occasions on which such an interception has been made - although the Committee notes that, by proposed new section 103, further information could be prescribed to be furnished to the Minister in the annual report.

Further, the Committee notes that the provisions are said, in the Explanatory Memorandum, to cover two distinct sets of circumstances. Urgency ('where it is impracticable to seek a warrant') is put forward as justifying the grant of this power with respect to sieges but nothing is suggested as warranting such a grant where the party receiving the communication is not a police officer but a party who gives consent.

The Explanatory Memorandum states:

> 12. Clause 10 also amends section 7 to provide that a member of the AFP or of a police force of a State may listen to or record, without a warrant, a communication between police and a suspected offender in emergencies where there are reasonable grounds for suspecting that the offender (who is the other party) is involved in the actual or threatened loss of life, or threat of serious injury or of serious damage to property. This will allow police to take appropriate action in sieges and other like situations where it is impracticable to seek a warrant under Part VI of the Principal Act beforehand.
>
> 13. Clause 10 similarly amends section 7 to provide that a member of the AFP or of a police force of a State may listen to or record, without a warrant, a communication with the consent of a person to whom the

> communication is directed. This amendment will allow police to take appropriate action in cases of kidnap or extortion or similar threats. As the consent of the innocent party is a prerequisite, the provision is not limited to emergencies.

The Committee considers that the urgency condition in subsection (4) should apply also in subsection (5), so that, without urgency, a warrant will be needed.

With respect to the 'urgency' cases, the Committee notes that one of the conditions to be satisfied is that it is not reasonably practicable for an application to be made for a warrant. However, that satisfaction is in the mind of the police without any accountability other than the need to report how many times it has been used, as noted above.

The Committee believes that accountability could be greatly enhanced by making the power contingent on immediate steps being taken to seek a warrant by telephone so that a judicial officer could ratify its use and set such terms and conditions as are seen to be necessary. The Committee seeks the advice of the Attorney-General on whether appropriate accountability could be achieved by such a measure.

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.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ALERT DIGEST

NO. 10 OF 1993

24 NOVEMBER 1993

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MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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.

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

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COMMONWEALTH ELECTORAL AMENDMENT BILL 1993

This Bill was introduced into the Senate on 18 November 1993 by the Minister for Veterans' Affairs.

The Bill proposes to amend the *Commonwealth Electoral Act 1918* to allow the constitution of Redistribution Committees in those States which have abolished the office of Surveyor-General (currently Queensland and Western Australia).

The Committee has no comment on this Bill.

CRIMES (SEARCH WARRANTS AND POWERS OF ARREST) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 17 November 1993 by the Minister for Justice.

The Bill proposes to amend the *Crimes Act 1914* to implement recommendations of the Review of Commonwealth Criminal Law providing specific powers and safeguards relating to search, arrest and other matters for the investigation of most Commonwealth offences.

This Bill deals with matters such as the power either of a police officer or a private citizen to arrest a person without a warrant. This may be regarded as trespassing on the rights of the individual who is arrested. In all the instances in the Bill, however, in which personal rights and liberties are affected, either the provisions are the same as the existing law, both common law and statutory law, or they afford greater protection to personal rights and liberties.

For this reason the Committee makes no further comment on the Bill.

NATIVE TITLE BILL 1993

This Bill was introduced into the House of Representatives on 16 November 1993 by the Prime Minister.

The Bill provides part of the Commonwealth's response to the High Court's decision in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

Retrospectivity
Clauses 13 and 18

Clause 13, if enacted, would be retrospective in operation in that it would validate all past acts relating to land title that are attributable to the Commonwealth.

Clause 16, however, provides for compensation to be payable for any extinguishment of native title brought about by clause 13.

Clause 18, if enacted, would be retrospective in operation in that it would validate all past acts relating to land title that are attributable to a State or Territory.

Clause 19, however, provides for compensation to be payable for any extinguishment of native title brought about by clause 18.

Accordingly the Committee does not regard these clauses as trespassing unduly on personal rights and liberties and makes no further comment on the Bill.

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EVIDENCE AND PROCEDURE (NEW ZEALAND) BILL 1993

This Bill was introduced into the House of Representatives on 25 November 1993 by the Parliamentary Secretary to the Attorney-General.

The Bill implements arrangements agreed with New Zealand to facilitate the obtaining of evidence in litigation involving trans-Tasman elements. Complementary legislation was introduced in the New Zealand Parliament on 21 September 1993.

The Bill provides:

. for service and enforcement in Australia and New Zealand of New Zealand and Australian subpoenas, in all civil proceedings (except family proceedings);

. for Australian and New Zealand courts to take evidence from New Zealand and Australia by video link or telephone, in all proceedings; and

. special rules for judicial notice of New Zealand laws and for proof of New Zealand public and official documents in all proceedings.

Commencement on proclamation
Clause 2

By subclause 2(2), the substantive provisions of the Bill will come into effect on a day to be proclaimed, without any restriction by way of automatic commencement or repeal at a fixed time.

The Committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 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).

The Committee notes that the Explanatory Memorandum indicates the need for the commencement to be by proclamation is to ensure that complementary legislation in New Zealand commences on the same day. The circumstances of this Bill, therefore, would make paragraph 6 applicable in that the commencement depends on an event whose timing is uncertain. The Committee, therefore, makes no further comment on this Bill.

EVIDENCE AND PROCEDURE (NEW ZEALAND) (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1993

This Bill was introduced into the House of Representatives on 25 November 1993 by the Parliamentary Secretary to the Attorney-General.

The Bill is consequential upon the Evidence and Procedure (New Zealand) Bill 1993 and sets out transitional arrangements for that Bill and makes consequential amendments to the *Evidence Act 1905* and the *Federal Court of Australia Act 1976*.

The Committee has no comment on this Bill.

INCOME TAX ASSESSMENT (ISOLATED AREA ZONE EXTENSION) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 25 November 1993 by Senator Panizza as a Private Senator's Bill.

This Bill proposes to extend the areas currently designed as Zone A and Zone B to allow claims for rebates to be made by those living in these disadvantaged remote areas.

The Committee has no comment on this Bill.

INDUSTRIAL RELATIONS (MEMBERSHIP OF ASSOCIATIONS) BILL 1993

This Bill was introduced into the House of Representatives on 25 November 1993 by Mr Charles as a Private Member's Bill.

This Bill proposes to ensure that employers, employees and independent contractors are free to choose to belong to, or not to belong to, representatives bodies of employers or employees.

Reversal of the onus of proof
Subclauses 11(6) and 12(2)

Subclause 11(6) provides:

> (6) In a prosecution for an offence against subsection (2), it is not necessary for the prosecutor to prove the defendant's reason for the action charged or the intent with which the defendant took the action charged, but it is a defence to the prosecution if the defendant proves that the action was not motivated solely by the reason, or taken with the sole intent, stated in the charge.

Subclause 12(2) provides:

> (2) Where, in a prosecution for an offence to which subsection (1) applies, there is specified in the charge a reason, purpose or intent for or with which the action charged was alleged to have been taken, it is a defence to the prosecution if the defendant proves that the action charged was not motivated (whether in whole or part) for the reason, nor taken for the purpose, or with the intention (whether alone or with some other purpose or intent), specified in the charge.

These subclauses, if enacted, would involve 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.

The offences to which the subclauses relate are all offences committed by either employers or employees (or their organisations) taking discriminatory action against

each other where the reason for the discriminatory action is either membership or non-membership of employers' or employees' organisations or involvement in industrial action.

In these instances, however, the Committee is prepared to accept that if the 'reason' for the action is other than one which would make the action discriminatory, the true reason is a matter peculiarly within the knowledge of the person alleged to have committed the offence. Accordingly, the Committee makes no further comment on this Bill.

PUBLIC SERVICE (PARLIAMENTARY DEPARTMENTS) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 24 November 1993 by the Speaker.

The Bill proposes to implement the recommendations of the Advisory Committee on the Proposed Creation of a Department of Parliamentary Information and Reporting Services. Consequently the Bill provides for the abolition of the Department of the Parliamentary Reporting Staff and the Department of the Parliamentary Library and the creation of the Department of Parliamentary Library and Reporting Services, effective from 1 July 1994. The Bill also makes consequential amendments to the *Archives Act 1983*, the *Audit Act 1901*, the *Long Service Leave (Commonwealth Employees) Act 1976* and the *Privacy Act 1988*.

The Committee has no comment on this Bill.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL (NO. 3) 1993

This Bill was introduced into the House of Representatives on 25 November 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes to amend the *Social Security Act 1991* and *National Health Act 1953* to:

- extend qualification conditions for mobility allowance;
- reverse several AAT decisions and so permit the AAT to order a stay of a decision under review where the Social Security Appeals Tribunal has affirmed the departmental decision;
- include a new category of recoverable debt;
- allow payment of widow B pension in certain circumstances without the need to make a proper claim;
- extend provisions relating to confidentiality of client information;
- allow the apportionment rule to apply to primary producers where a liability exists in relation to an asset that is any part exempt for the purposes of the assets test;
- provide that the value of certain life interests will not be disregarded in calculating the value of a person's assets;
- ensure the assessable period of a non-client partner will be taken into account when a 'saved' non-superannuation investment is realised;
- abolish the administrative charge relating to certain debts to be replaced by a penalty interest charge applicable under certain circumstances;
- clarify the existing definition of retirement village;
- effect a new international social security Agreement between Australia and Italy;

. prevent a dependent of a mobility allowee from attracting concessional pharmaceutical benefits; and

. correct minor and technical amendments.

Retrospectivity
Subclauses 2(2) to (7)

Subclauses 2(2) to (7), if enacted, would provide that the amendments made by various provisions in Schedule 4 would have retrospective effect.

Examination of the relevant parts of that Schedule and of the Explanatory Memorandum indicates that the retrospectivity is in relation to

. simple corrections of text, cross references, punctuation, numbering, layout or rate;

. deletion of superfluous provisions;

. correcting drafting errors where the change to the plain English version inadvertently failed to reflect the law as it stood in the now repealed *Social Security Act 1947*; and

. restoring provisions inadvertently repealed, or removing an unintended effect of a provision, in a previous amending Act.

In the light of this examination the Committee makes no further comment on these subclauses.

Retrospectivity and limitation of rights
Subclause 3(1)

Subclause 3(1), if enacted, would give retrospective operation to the amendments effected by Part 4 of this Bill. Part 4, if enacted, would substantially affect the rights of social security clients within the appeal system of administrative review.

Recoverable debts

Part 4 would insert a new section in the *Social Security Act 1991*, section 1223AB. By this proposed section, money paid to a social security client, as a result of a stay order

under section 41 of the *Administrative Appeals Tribunal Act 1975* (the AAT Act), will become a recoverable debt if the client loses the appeal to the Administrative Appeals Tribunal (the AAT).

At present the amount is not recoverable. If a sole parent pensioner, for example, loses an appeal to the Social Security Appeals Tribunal against the cancellation of pension, there is a right of further appeal to the AAT. If the appeal is made, the appellant has a further right to ask the AAT to stop the effect of the appealed decision by exercising its discretion to stay the effect of that cancellation. Payment will continue until the AAT has determined the appeal or revokes the 'stay' order.

The effect of the proposed amendment is to convert the amount paid as a result of the 'stay' order into a recoverable debt, if the AAT agrees that the decision to cancel was correct.

The Committee is concerned on two counts:

. the right to appeal is made less attractive by, in effect, inflicting a heavy penalty if a stay order is obtained and the appeal is lost;

. the operation of the amendment is made retrospective which means that appellants who obtained stay orders in the past, where the amount was not recoverable, will be now required to repay the amount they received.

The Committee considers that the amendment may unduly trespass on personal rights and liberties on both counts. The amendment undoubtedly takes away the present right to obtain a stay order where amounts paid are not recoverable.

Pressure not to appeal

The proposed amendment does not sit well with the Commonwealth's role as a model litigant. The Commonwealth properly avoids the appearance of using the 'power of the purse' to prolong litigation in order to exhaust an opponent. This amendment appears to be the obverse of that coin: to instil reluctance to risk further cost by obtaining a stay order. In effect, it imposes financial pressure on an appellant not to apply for a stay order and is an effective disincentive to exercise the right of appeal to the AAT.

The AAT Act provides for the stay order to be given under certain conditions. It is inappropriate to have other legislation in effect penalising a person where the Tribunal has properly exercised a discretion to allow a payment to continue. Where there are proper reasons to grant continuation of the payment, the 'validity' of the AAT's decision ought not to depend on the outcome of a separate issue. This seems to impugn the

correctness of the AAT's decision to grant the stay order.

Consider the relevant provisions of section 41 of the AAT Act:

> (2) The Tribunal or a presidential member may, on request being made, as prescribed, by a party to a proceeding before the Tribunal (in this section referred to as the **"relevant proceeding"**, if the Tribunal or presidential member is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review, make such order or orders staying or otherwise affecting the operation or implementation of the decision to which the relevant proceeding relates or a part of that decision as the Tribunal or presidential member considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review.
>
> (3) Where an order is in force under subsection (2) (including an order that has previously been varied on one or more occasions under this subsection), the Tribunal or a presidential member may, on request being made, as prescribed, by a party to the relevant proceeding, make an order varying or revoking the first-mentioned order.
>
> (4) Subject to subsection (5), the Tribunal or a presidential member shall not:
>
> (a) make an order, under subsection (2) unless the person who made the decision to which the relevant proceeding relates has been given a reasonable opportunity to make a submission to the Tribunal or presidential member, as the case may be, in relation to the matter; or
>
> (b) make an order varying or revoking an order in force under subsection 92) (including an order that has previously been varied on one or more occasions under subsection (3)) unless:
>
> (i) the person who made the decision to which the relevant proceeding relates;
>
> (ii) the person who requested the making of the order under subsection (2); and
>
> (iii) if the order under subsection (2) has previously been varied by an order or orders under subsection (3)-the person or persons

> who requested the making of the last-mentioned order or orders;
>
> have been given a reasonable opportunity to make submissions to the Tribunal or presidential member, as the case may be, in relation to the matter.

The Committee notes that the Department has the right to argue against the stay order being made - subsection (4) - and to request that it be revoked - subsection (3). The Committee further notes that the decision to grant the stay order depends on the AAT or a presidential member being of the opinion **that it is desirable to do so after taking into account the interests of any persons who may be affected by the review** and that the stay order is **for the purpose of securing the effectiveness of the hearing and determination of the appeal** - subsection (2).

In the light of these considerations, the Committee is concerned that the effectiveness of the general scheme of administrative review is being undermined and that a right presently enjoyed is being taken away.

Retrospective application

Subclause 3(1), if enacted, would provide that all past 'stay' orders of the AAT will be affected. The Committee notes, from the Explanatory Memorandum, that both under Part 5.2 of the present Act and at common law, before the enactment of that Part, the amounts paid were valid payments and are not recoverable.

The Committee expresses its concern that the Senate should be asked to pass legislation which would retrospectively turn into a debt amounts that were validly and properly paid pursuant to the law existing at the time of the payment.

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.

General Comment

The Committee notes that proposed new section 1229A, to be inserted by clause 8, contains two paragraphs (1)(d). An amendment will be needed to re-letter the second paragraph (d) and the succeeding paragraphs as (e), (f) and (g) respectively.

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL (NO. 3) 1993

This Bill was introduced into the House of Representatives on 24 November 1993 by the Minister for Communications on behalf of the Minister representing the Minister for Veterans' Affairs.

This omnibus Bill proposes to implement the following major changes:

- issue of a seniors health card (effective 1 July 1994) to persons of service pension age but ineligible to receive a pension;
- restructure of child-related payments to service pensioners;
- adjust the disability pension payable under Part II of the Act to take account of lump sum compensation paid for the same service-related injury or death;
- apply deprivation provisions to any asset disposal in the five years preceding the lodgement of a claim for service pension;
- offset of losses against profits on capital invested and calculation of the rate of return on certain investments; and
- alignment of carer service pension with other types of service pension payable under the VEA.

Retrospectivity
Subclause 2(2)

Subclause 2(2), if enacted, would provide that the amendments made by Part 7 of this Bill would have retrospective effect from 1 April 1993.

Neither the Explanatory Memorandum nor the Parliamentary Secretary's second reading speech suggests a reason for this date. The Committee notes, however, that the second reading speech points out that the changes are beneficial to service pensioners with managed investments. Accordingly, the Committee makes no further comment on this Bill.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

ALERT DIGEST

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M Colston (Chairman)
Senator A Vanstone (Deputy Chairman)
Senator R Bell
Senator K Carr
Senator B Cooney
Senator J Troeth

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.

CONTENTS

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

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.

CRIMES (SEARCH WARRANTS AND POWERS OF ARREST) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 17 November 1993 by the Minister for Justice.

The Bill proposes to amend the *Crimes Act 1914* to implement recommendations of the Review of Commonwealth Criminal Law providing specific powers and safeguards relating to search, arrest and other matters for the investigation of most Commonwealth offences.

This Bill deals with matters such as the power either of a police officer or a private citizen to arrest a person without a warrant. This may be regarded as trespassing on the rights of the individual who is arrested. In all the instances in the Bill, however, in which personal rights and liberties are affected, either the provisions are the same as the existing law, both common law and statutory law, or they afford greater protection to personal rights and liberties. For this reason the Committee makes no further comment on the Bill.

The Committee dealt with the Bill in Alert Digest No. 10 of 1993. Although the Committee did comment on powers to arrest without a warrant, no response was sought from the Minister.

The Law Society of New South Wales, in a letter dated 7 December 1993, has made a submission to the Committee about three proposed clauses in the Bill. Their letter is discussed below and a copy is attached to this Digest.

Proposed new section 3ZA - power to enter premises to arrest offenders

The Law Society has written:

> This clause permits police to enter private premises without a warrant and without any court oversight. The legislative basis for the entry of police is that they are seeking to make an arrest. Police have long sought such a power as a sort of legislative extension of the idea of pursuing a fugitive into premises.
>
> The existence of such a power would be an encouragement to police to refrain from taking out a search warrant and to enter private premises (including the home of an innocent

householder) without benefit of warrant on the excuse that they are in the process of making an arrest. Existing laws permit police to search premises and to seize and take away any items which might lead to a charge or might be evidence for a charge (so the proposed amendments give police the same powers as a search warrant would do if an arrest is made). The significant difference (apart from the inconvenience that getting a search warrant from a Justice could entail) is that there is no judicial returnability of a warrant and no requirement to inform a judicial officer that the warrant resulted in the discovery or otherwise of material promised.

Attention is also drawn to Article 17 of the International Covenant on Civil and political Rights:

> *17(1) No one shall be subject to arbitrary or unlawful interference with his privacy, home, family or correspondence ...*
> *(2) Everyone has the right to the protection of the law against such interference or attacks.*

The Commonwealth, by enacting Clause 3ZA, may provide the protection of the law against precisely such interference as is forbidden by Article 17.

Once police have entered such premises, what powers does the legislation give them? If someone is arrested, they have power to search the premises at which the arrested person is arrested for evidentiary material in plain view (cl.3ZF). The legislation (cll.3ZDF and 3ZE) restates the common law power of police have to search the person arrested.

If someone is not arrested, what are the police powers? The Bill is silent as to powers, such as to detain the persons in the premises, and to search and seize persons and the contents of the premises. It may be that the police will rely on the common law rules [*Ghani v Jones* (1970) 1 QB 693 at 706, 706-709, see also *G H Photography v McGarrigle* (1974) 2 NSWLR 635]. The NSW Search Warrants Act contains the following provision re seizure of goods:

> *s.7(1) A member of the police force executing a search warrant issued under this part -*

(b)may, in addition, seize any other thing -

(i)that the member of the police force finds in the course of executing the warrant; and

(ii) that the member of the police force has reasonable grounds for believing is connected with any offence.

If the common law rules apply, they should be included in the legislation for clarity.

The Committee considers that, in claiming that this section "would be an encouragement to police to refrain from taking out a search warrant", the Law Society has read too much into the proposed new section. That section is concerned only with police powers to arrest a person, and it is only when it is read in conjunction with proposed new section 3ZF that it can be said that the police have the power to conduct a search of premises without a warrant. That power to search premises, without a search warrant, is premised on the police officer being able to satisfy the provisions of proposed new subsections 3ZA(1) or (2) in order to have the right to enter premises, and on the police officer carrying out an arrest, or being present at such an arrest, as required by proposed new section 3ZF.

The Law Society asks: "Once police have entered such premises, what power does the legislation give them?" The Committee's answer is that if, when police enter premises without a warrant from the purpose of arresting someone, no arrest is made, this Bill give the police no powers to detain persons, or to search for and seize things on the premises. It was stated in *Ghani v Jones* [1970] 1 QB 693 at 708-709 by Lord Denning MR that at common law the police have the power (subject to various limitations) to seize goods found on premises, even though they do not have a search warrant and even though the seizure is not in conjunction with the arrest of an alleged offender. Despite some criticism from the Court of Appeal in New Zealand, this common law principle has been accepted as applicable in New South Wales: *G H Photography Pty Ltd v McGarrigle* [1974] 2 NSWLR 635 at 640 per Mahony J.

Since the Bill does not provide for a seizure of goods in such circumstances, the Bill is more restrictive than the existing common law. It is ironic that the Law Society would like to see this common law rule (which currently is based on three decisions at first instance, and has not apparently been accepted by an appellate court in this country) enshrined in this Bill.

The Committee considers that it is difficult to see the relevance of the reference by the Law Society to subsection 7(1) of the Search Warrants Act 1987 (NSW), as that subsection relates to searches with a warrant, whereas the Law Society's concerns appear to be directed to searches and seizures undertaken without a warrant. In any

case, the provisions of subsection 7(1) are broadly mirrored in proposed paragraphs 3F(1)(d) and (e) of the *Crimes Act 1914* to be inserted by this Bill.

Proposed section 3U - requirement to furnish name

The Law Society has written:

> The Australian Law Reform Commission in 1975 acknowledged that such a power could discriminate against the underprivileged, especially Aborigines. There is a serious risk that police would use such a new power as a weapon of harassment. For example -
>
> (a) It is important to recognise that s3 of the Crimes Act 1914 defines "constable" to include a member of the Police Force of a State or Territory. Consequently all NSW police would be vested with the power being contemplated.
>
> (b) Police in NSW have managed very well without the power until the present time.
>
> (c) The experience of defence lawyers in NSW acting on behalf of persons charged with alleged misconduct in a public street is that, all too often, the defendant is charged with three counts, namely offensive language, resist arrest and assault police. The experience of lawyers in states and territories where the additional power is given to police has been that a fourth charge becomes added to the other three namely "Fail to supply name and address".
>
> (d) The legislation proposes that the penalty provided be a fine, not jail. This is no protection against a custodial sentence; many disadvantaged citizens are unable to pay a fine and will eventually find themselves cutting out the fine in a police cell or jail.
>
> (e) Even though the penalty be only a fine police will nonetheless have power to arrest in order to initiate the prosecution for the offence. This creates a power of arrest where there should be none; why should the Police have the power to arrest a person who might be only an eye witness who wishes to keep private the fact that he or she was at a particular place at a particular time?

> There is no justification for the introduction of this additional police power. The potential for mischief on the part of police which would be created by its introduction is far greater than any advantage it might serve.

The Committee notes that although the Law Society asserts that the police in New South Wales have managed very well without the power to require a person, in some circumstances, to provide his or her name and/or address, the Law Society acknowledges that such a power has been given to police in other States and Territories. The concern of the Law Society, in essence, is that such a power may be (or has been) abused. It is a regrettable fact that any power may be abused. But such a fact is scarcely a reason for the Committee to conclude that proposed section 3U will trespass unduly on individual liberties.

Proposed subsection 3E(2) - power to search a person prior to arrest

The Law Society has commented:

> There is no legislative or common law power at present to stop and search a person before arrest. The execution of such a warrant will give the power to police to detain the person to be search.
>
> In 1975 the Australian Law Reform Commission recommended that there be a power to stop and search in the following circumstances (para 204):
>
> - *without warrant, and*
> - *where there are reasonable grounds to suspect that there may be found:*
>
> *(a)an offensive weapon*
>
> *(b)something which is the fruit of a "serious" crime (Punishable by more than 6 months imprisonment), the means by which it was committed or material evidence to prove its commission.*
>
> Those recommendations formed the background to cl.64(2) of the draft Criminal Investigation Bill included in the 1975 report.
>
> The ALRC continued (para 204):

> *It seems to us that any misuse of this power, for the purposes of harassment of citizens innocently going about their business, would be eminently well suited to disciplinary action.*

> Existing powers of police entitle police officers to carry out a search as an adjunct to arrest. The proposed new power entitles police to search a person without committing themselves to arrest or charge. This in turn contains serious potential for harassment.

The Committee notes that proposed subsection 3E(2) would enable police officers to request a warrant authorising an ordinary search or a frisk search of the person named in the warrant, even though the person to be searched has not been arrested for any offence.

The Law Society objects to this provision, at least partly on the ground that there is "no legislative or common law power at present to stop and search a person before arrest". The Committee considers, however, that this basis for objection is not entirely well founded. For example, the *Customs Act 1901*, Part XII, Division 1B, Subdivisions A and B contain provisions for the detention and search of persons suspected of carrying prohibited goods, without the need for an arrest or the issue of a warrant. Secondly, the *Summary Offences Act 1953* (SA), paragraph 68(1)(b) and the *Police Act 1927* (ACT), paragraph 16(b), empower a member of the police force to "stop, search and detain ... any person who is reasonably suspected of having, or conveying in any manner, anything stolen or unlawfully obtained", such a power being exercisable without the police officer being required to obtain a warrant, and prior to any arrest. In the light of these provisions, proposed new subsection 3E(2) of the *Crimes Act 1914*, to be inserted by this Bill, is more restrictive, as a search of a person under that subsection could be conducted only after a warrant has been issued.

The Law Society's other objection to the provision is that the power to be given to police may be abused. While this must be acknowledged as a possibility, it is suggested that the same may be said of much of the rest of the Bill, to which the Law Society does not object.

The Committee concludes that, on balance, this Bill, while trespassing to some extent on individual liberties, does not do so unduly.

The Committee thanks the Law Society for its contribution to this discussion and for raising awareness of the dangers it sees. Having regard, however, to its own terms of reference, the Committee considers that the Bill does not breach principle 1(a)(i) and therefore the Bill does not warrant being drawn to the attention of Senators.

NATIVE TITLE (STATUS QUO) BILL 1993

This Bill was introduced into the Senate on 9 December 1993 by Senator Chamarette as a Private Senator's Bill.

This Bill proposes to convert the native title (as recognised by the Mabo decision) into the law of the Commonwealth and to ensure that no Commonwealth, State or Territory legislation is able to extinguish or modify native title until the Federal Parliament legislates otherwise.

Retrospectivity
Clause 2

By virtue of clause 2, this Bill would have effect retrospectively from 1 July 1993. In the Committee's view, the purpose of that retrospectivity is to preserve, as from that date, the existing legal status of native title. The retrospectivity may therefore be regarded as generally beneficial. Accordingly, the Committee makes no further comment on the Bill.