

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 **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

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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Any Senator who wishes to draw matters to the attention of the
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Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the *Aboriginal Land Rights (Northern Territory) Act 1976* to grant the Hodgson Downs Land Claim area to the traditional owners.

The committee has no comment on this bill.

Agricultural and Veterinary Chemicals Amendment Bill 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to extend the commencement date of the *Agricultural and Veterinary Chemicals Act 1994* from 15 March 1995 to 1 July 1995, if not proclaimed sooner.

The committee has no comment on this bill.

Anzac Day Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Minister for Veterans' Affairs.

The bill proposes to provide that the national day of commemoration to recognise and commemorate the contribution of all those who served Australia in time of war and in war-like conflicts is to be known as Anzac Day and observed on 25 April each year.

The Committee has no comment on this bill.

Archives Amendment Bill 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to provide that:

- # bodies either established for a public purpose or subject to Commonwealth control remain subject to the Archives Act unless specifically excluded from its operation;
- # the prior records of bodies which are subsequently removed from the application of the Archives Act remain subject to the Act unless specifically excluded from its operation;
- # the Australian Federal Police retain custody of certain sensitive documents relating to the National Witness Protection Program (NWPP) rather than requiring their transfer to the Australian Archives;
- # highly sensitive documents relating to the NWPP are exempted from public disclosure under the Archives Act; and
- # the Commissioner of the Australian Federal Police or certain staff members may provide documents and/or evidence to a private hearing of the Administrative Appeals Tribunal.

Inappropriate delegation of legislative power **Proposed section 3A**

Proposed section 3A, if enacted, would allow regulations as well as primary legislation to deem a particular body not to have been established for a public purpose for the purposes of the *Archives Act 1983*. Where Parliament legislates to establish an authority, body, tribunal or organisation for a public purpose, Parliament automatically places the agency within the purview of the *Archives Act 1983*. The proposed subsection would enable such an agency to be taken outside the Act by regulation. This may be regarded as an inappropriate delegation of legislative power. The **committee, therefore, seeks the Minister's advice** on whether it might be more appropriate to achieve this purpose by an amendment of primary legislation.

Pending the Minister's advice, 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.

Audit (Transitional and Miscellaneous) Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Minister for Finance.

The bill proposes to repeal the *Audit Act 1901* and deals with the transitional and consequential matters arising from the repeal and the enactment of replacement legislation, namely, the Auditor-General Bill 1994, the Financial Management and Accountability Bill 1994 and the Commonwealth Authorities and Companies Bill 1994.

The Committee has no comment on this bill.

Broadcasting Services Amendment Bill 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the *Broadcasting Services Act 1992* to ensure events can be removed from the Pay-TV anti-siphoning list and clarifies the Minister's power to add events to the list.

The Committee has no comment on this bill.

Communications and the Arts Legislation Amendment Bill 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the following Acts:

- # *Australian Broadcasting Corporation Act 1983* to remove the requirement for the ABC to obtain Ministerial approval prior to entering into certain contracts and lease back arrangements;
- # *Australian Film, Television and Radio School Act 1973* to make administrative changes relating to the School Council;
- # *Broadcasting Services Act 1992* to:
 - 9 clarify drafting anomalies;
 - 9 express maximum financial penalties in terms of 'penalty units';
 - 9 amend definitions relating to Australian drama content requirements; and
 - 9 clarify certain penalty provisions and enforcement powers of the Australian Broadcasting Authority;
- # *Radiocommunications Act 1992* to implement a new apparatus licensing regime and make other operational changes required since the Spectrum Management Agency commenced operations on 1 July 1993;
- # *Special Broadcasting Service Act 1991* to remove the requirement for the SBS to obtain Ministerial approval prior to entering into certain contracts; and
- # *Telecommunications Act 1991* to express maximum financial penalties in terms of 'penalty units'.

Inappropriate delegation of legislative power Item 119 of the Schedule

This item inserts a new section 314A into the *Radiocommunications Act 1992* to enable instruments under the Act to adopt by reference any matter in other instruments or

documents as is force at a particular time or as in force from time to time.

Proposed new subsection 314A(2) provides that '[s]ection 49A of the *Acts Interpretation Act 1901* does not apply in relation to instruments made under this Act'. Section 49A allows material to be adopted by reference into an instrument but only as in force at the time when the instrument takes effect not as in force from time to time. The effect of proposed section 314A, therefore, is to enable the adoption by reference of material not only in the form the material has at the time the instrument is made but in any form that the material subsequently takes.

The committee is concerned that this may be regarded as inappropriately delegating legislative power as it would allow a determination to be made to adopt any matter contained in an instrument that is made by any person or body in Australia or elsewhere, and the law in force in Australia will change every time that person or body alters that instrument.

The committee notes that the *Radiocommunications Act 1992* (with the exception of three provisions) appears in Schedule 2 of the Legislative Instruments Bill. Acts listed in Schedule 2 of the Bill become subject to Part 3 which requires a process of consultation so as to ensure that persons likely to be affected by a legislative instrument made under such an Act have an opportunity to make submissions concerning the policy or content of the instrument. This means that, when the Legislative Instruments Bill becomes law, the Minister or other rule-maker must consult before a rule can be made or changed under the *Radiocommunications Act 1992*. The committee is concerned at the lack of consultation if a rule adopted some radiocommunications standards of a body in another country as in force from time to time. That body could not be required to consult with persons in Australia before it changed its standards. The width of the power in proposed section 314A appears to be at odds with the policy enshrined in the Legislative Instruments Bill.

The **committee, therefore, seeks the advice of the Minister** whether it would be more appropriate for a less wide power to be delegated.

Pending the Minister's advice, 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.

Corporations Law (Securities and Futures) Amendment Bill 1994

This bill was introduced into the Senate on 5 December 1994 by the Minister for Environment, Sport and Territories.

The bill proposes to permit regulations to prescribe particular exchange-traded agreements and to regulate such agreements as if they were securities or futures contracts.

Inappropriate delegation of legislative power Clauses 4 and 6

Proposed section 72A of the Corporations Law, to be inserted by clause 4, and proposed section 92A of the Corporations Law, to be inserted by clause 6, were the subject of comment by the committee, in Alert Digest No. 6 of 1994, when they were included in the Corporations Legislation Amendment Bill 1994. The committee took the view that the proposed sections may be an inappropriate delegation of legislative power, as the definition of a futures contract and a security, for the purposes of the Corporations Law, may to some extent, be determined by regulations and not in the primary legislation. The proposed provisions also would enable the Corporations Law to be modified by regulation. The proposed sections were withdrawn from the earlier bill in the course of its being debated in the House of Representatives.

For the information of Senators, part of the committee's Tenth Report of 1994 dealing with the earlier bill and the Attorney-General's reply is reproduced:

The committee received a submission from Michael G Hains expressing concern at 'the delegation of substantial powers to modify the Corporation Law as it applies to derivative financial products'.

The submission argued that the definition of what constitutes a futures contract or a security should be in primary legislation and not left to delegated legislation.

The committee sought the Attorney-General's advice on the matters raised by Mr Hains submission.

Pending the Attorney-General's advice, the committee drew 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.

On this issue the Attorney-General has responded as follows:

The Committee has sought my advice on the matters raised by the submission from Mr Michael G Hains which is attached to the Digest.

I wish to advise the Committee that the Government has decided not to proceed with the amendments proposed by item nos 4 to 8 and item 21 of Schedule 8. The amendments in question are to the definitions of "securities" and "futures contract", to facilitate the trading of equity based instruments having the characteristics of both equity and futures products.

The amendments were included in the Bill, as an urgent measure, following the public exposure of the draft Bill and before its introduction. I acted quickly to incorporate the amendments in the Bill at that stage, following representations by the Australian Stock Exchange ("ASX") stressing their importance and urgency. The ASX stated that they wished to be able to trade an important new product from 1 July this year. However, I have now been informed by the ASX that they will not be in a position to trade this product until later in the year.

In light of that, I decided to withdraw the amendments so that further consultation can be undertaken with industry representatives. An amendment to this effect was moved on behalf of the Government and agreed to by the House of Representatives during the course of the second reading debate in the House.

As clauses 4 and 6 of this bill, if enacted, would enable the regulations to modify the Corporations Law and the definitions of a futures contract and a security to be determined by regulation rather than by primary legislation, the concerns of the committee have not been addressed.

The committee, therefore, continues to draw 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.

Environment, Sport and Territories Legislation Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Parliamentary Secretary to the Minister for the Environment, Sport and Territories.

The bill proposes to amend the following Acts:

Great Barrier Reef Marine Park Act 1975 to:

- 9 give representation on the Authority for the Aboriginal people living adjacent to the Park;
- 9 increase penalties;
- 9 introduce the mental fault element into certain offences and change them from indictable to summary offences;
- 9 revise waste discharge provisions;
- 9 allow for the making of statutory management plans for areas, species and ecological communities within the Park;
- 9 expand the powers of Parks inspectors; and
- 9 make further minor and consequential amendments;

National Parks and Wildlife Conservation Act 1975 to:

- 9 allow for fees collected under the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* to be paid into the Australian National Parks and Wildlife Fund; and
- 9 allow for the use of credit cards by the Director;

Norfolk Island Act 1979 to change the titles of the presiding officers in the Legislative Assembly of Norfolk Island;

Australian Sports Commission Act 1989 to:

- 9 allow credit card use by the Commission;

- 9 appoint the Secretary of the Department of the Environment, Sport and Territories to the Commission as an ex officio member;
- 9 repeal an obsolete Part of the Act; and
- 9 make consequential amendments; and

Australian Heritage Commission Act 1975 and *Australian Sports Drug Agency Act 1990* to allow credit card use by these agencies.

Criminal liability for negligence

Schedule 1

Many of the amendments to the *Great Barrier Reef Marine Park Act 1975* contained in Schedule 1 impose criminal liability on those who act either intentionally or negligently. In so doing the amendments go beyond the normal requirement of intention or recklessness for the imposition of criminal liability. However, the explanatory memorandum points out the reason for including negligence. For example, paragraph 14 states, in part:

14. The use of the lower level of culpability of "negligently" is to encourage a greater assumption of responsibility by persons undertaking activities in the Marine Park. Damage to the Marine Park arising from the range of possible unlawful activities may be quite extensive, even irreversible. Examples include the use of explosives for reef fishing, trawling in a Preservation Zone, or the removal of an endangered species. Therefore, the mental state has been set at a level whereby the standard of care exhibited by the offender is judged by what a reasonable person would have exercised in the circumstances.

In the light of this explanation the committee makes no further comment on these provisions.

Appointment of a 'person'

Item 32

Item 32 provides for the appointment of any person as an inspector. The explanatory memorandum states at paragraph 130:

130. This item amends paragraph 43(a) of the Principal Act by allowing the

Authority to appoint any person as an inspector. This allows the Authority to appoint community rangers from Aboriginal communities in northern Queensland as inspectors under the Act. It is part of the process of empowerment of Aboriginal communities living adjacent to the Marine Park.

In the light of this explanation the committee does not consider that this amendment makes personal rights and liberties unduly dependent on insufficiently defined administrative powers and so the committee makes no further comment on the provision.

Export Market Development Grants Amendment Bill (No. 2) 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the *Export Market Development Grants Act 1974* to:

- # continue the Export Market Development Grants (EMDG) scheme up to and including grant year 1998/99;
- # provide eligibility to single service tourism providers;
- # allow departure taxes and visa costs as eligible expenses;
- # limit the provision of free technical information and tenders and quotations to the written form;
- # limit the total of grants paid to company groups in any one grant year;
- # render certain projects receiving financial assistance under schemes administered by Austrade, ineligible for EMDG assistance;
- # ensure any apportionment of overseas visit allowance includes travel undertaken on behalf of non-claimants under the EMDG scheme;
- # provide that approved joint venture and consortium are subject to EMDG insolvency and convictions provisions;
- # provide eligibility to that portion of expenditure directly related to promotion in 'new markets';
- # prevent payment of grants to persons where they refuse to allow a search of criminal records for the purposes of the Act;
- # render payments of a capital nature relating to promotion of industrial property rights and know-how ineligible;
- # repeal the restrictive provision relating to the Republic of South Africa;
- # enhance penalty provisions where a person provides false or misleading

- material or statements in support of a claim for grant; and
- # increase Austrade's powers to prevent abuse where persons buy, sell, transfer, or modify business undertakings in a manner which would make them eligible for grants in excess of the general eight grant limit.

The Committee has no comment on this bill.

First Corporate Law Simplification Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Attorney-General.

The bill proposes to simplify the provisions of the Corporations Law relating to share buy-backs, proprietary companies and company registers.

The committee has no comment on this bill.

Health Legislation (Private Health Insurance Reform) Amendment Bill 1994

This will was introduced into the House of Representatives on 7 December 1994 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to amend the following Acts:

National Health Act 1953 to:

- 9 implement casemix episodic benefit payments;
- 9 allow health benefit organizations to enter into agreements with hospitals and day hospital facilities for direct payment of benefit;
- 9 enable health benefit organizations to enter into agreements with medical practitioners for the provision of in-hospital professional services;
- 9 establish an independent Private Health Insurance Complaints Commissioner to provide a complaints mechanism for persons with private health insurance;
- 9 enable the Private Health Insurance Administration Council to disseminate information about private health insurance products;
- 9 remove the requirement for health benefits organizations to conduct separate funds in each State in which they operate;
- 9 require health benefits organizations to notify the Secretary of the Department of changes to the constitution, articles of association and rules in advance of the changes being made; and
- 9 provide the Health Insurance Commission with access to documents held by health benefits organizations in relation to claims for the assignment of the 75 per cent Medicare benefit for professional services render in-hospital;

Health Insurance Act 1973 to facilitate the assignment of the 75 per cent Medicare benefit to health benefits organizations for in-hospital professional services rendered by certain medical practitioners; and

Health Insurance Commission Act 1973 to remove the need for Medibank Private to

conduct a separate health fund in each State.

The committee has no comment on this bill.

Human Rights Legislation Amendment Bill 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the following Acts:

Human Rights and Equal Opportunity Act 1986 to:

- 9 provide that the responsibility for the management of the Commission is vested in the Commission as a body corporate with Chief Executive Officer powers delegated by it to an Executive Director appointed by the Commission under the Public Service Act;
- 9 clarify the President's powers; and
- 9 require the Commission to prepare a corporate plan; and

Human Rights and Equal Opportunity Act 1986, Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992 and Privacy Act 1988 provides that each position of Commissioner requires general qualifications and appropriate knowledge or experience for appointment.

Retrospectivity Subclause 2(2)

Subclause 2(2), if enacted, would provide that the amendment contained in item 16 of the Schedule would have effect retrospectively from 30 October 1992.

As the amendment is a technical and minor one, the committee makes no further comment on this bill.

Immigration (Education) Charge Amendment Bill 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Minister for Justice.

The bill proposes to amend the *Immigration (Education) Charge Act 1992* to enable automatic indexation at the commencement of each financial year of the English Education charge payable under the Principal Act.

The committee has no comment on this bill.

Law and Justice Legislation Amendment Bill (No. 3) 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to:

- # abolish the Security Appeals Tribunal (established under the *Australian Security Intelligence Organization Act 1979*) and create a Security Appeals Division of the Administrative Appeals Tribunal (AAT) (established under the *Administrative Appeals Tribunal Act 1975*);
- # make consequential amendments to the above changes to the *Administrative Decisions (Judicial Review) Act 1977* and *Migration Act 1958*,
- # insert an additional reading-down provision in the *Acts Interpretation Act 1901*;
- # amend the *Administrative Appeals Tribunal Act 1975* to provide:
 - 9 for two member hearings;
 - 9 for the office of Conference Registrar;
 - 9 where the parties consent, for the AAT to dispense with a hearing if issues can be determined without the parties present;
 - 9 for rules for the variation of decisions when an application for review has been lodged; and
 - 9 for review by the AAT of a taxation of costs;
- # make consequential amendments on the amendments to the AAT Act to the: *Estate Duty Assessment Act 1914*; *Federal Proceedings (Costs) Act 1981*; *Fringe Benefits Tax Assessment Act 1986*; *Income Tax Assessment Act 1936*; *Pay-roll Tax Assessment Act 1941*; *Pay-roll Tax (Territories) Assessment Act 1971*; and *Safety, Rehabilitation and Compensation Act 1988*,
- # amend the *Federal Court of Australia Act 1976* to provide for a review on a question of law of awards made in arbitration;
- # amend the *Judiciary Act 1903* to repeal section 77F(3); and

remove gender-specific language from the *Administrative Appeals Tribunal Act 1975*.

The committee has no comment on this bill.

Migration Agents Registration (Application) Levy Amendment Bill 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Minister for Justice.

The bill proposes to amend the *Migration Agents Registration (Application) Levy Act 1992* to enable automatic indexation at the commencement of each financial year of the migration agents registration (application) levy payable under the Principal Act.

The committee has no comment on this bill.

Migration Agents Registration (Renewal) Levy Amendment Bill 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Minister for Justice.

The bill proposes to amend the *Migration Agents Registration (Renewal) Levy Act 1992* to enable automatic indexation at the commencement of each financial year of the migration agents registration (renewal) levy payable under the Principal Act.

The committee has no comment on this bill.

Migration Legislation Amendment Bill (No. 3) 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the *Migration Act 1958* to clarify certain provisions of the Act relating to custody of certain persons arriving unlawfully in Australian in boats.

Retrospectivity

This bill contains the same provisions as those in the Migration Legislation Amendment Bill No. 2 1994 to which the committee drew Senators' attention in Alert Digest No 10. of 1994 and reported to the Senate in the committee's Eleventh Report of 1994 with discussion of the Minister's response to the committee's Alert Digest comments.

The bill retains the retrospective provisions. The explanatory memorandum continues to put forward the same rationale for retrospectivity which did not appear to the committee to justify validating the unlawfulness of the detention in custody.

Accordingly, the committee continues to draw 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.

For the information of Senators the extract from the committee's Eleventh Report concerning the earlier bill follows:

The committee dealt with the bill in Alert Digest No. 10 of 1994, in which it made various comments. The Minister for Immigration and Ethnic Affairs responded to those comments in a letter dated 4 August 1994. A copy of that letter is attached to this report and relevant parts of the response are discussed below.

Retrospectivity Subclause 2(2)

In Alert Digest No. 10 of 1994, the committee noted that subclause 2(2) of this bill, if enacted, would give retrospective effect from 1 November 1989 to clauses 5, 6 and 7 of the bill. The explanatory memorandum and clause 4, which states the object of the amendments, show that the purpose of the retrospectivity is to limit the effect of recent Court decisions.

The committee indicated that in its approach to considering whether the retrospectivity in this bill unduly trespasses on personal rights and liberties the committee needed to separate the effect of the amendments made by the bill from the effect of making those amendments apply retrospectively.

The committee had no doubt that it is proper for the Commonwealth to have the power to detain appropriately a person who applies for an entry permit irrespective of the date of departure (or otherwise) of the vessel on which the person arrives in Australia. The committee questioned whether the *Migration Act 1958*, as presently constituted, did not adequately provide this.

In the committee's opinion the issue was whether making the amendments retrospective unduly trespassed on personal rights and liberties. To assist the Senate to decide this, the committee needed to examine the rationale put forward to justify the retrospectivity.

The background

The committee pointed out by way of background that the Constitution by section 51(xix) confers on Parliament legislative power with respect to 'Naturalization and aliens'. A statute, therefore, can authorise the executive to detain an alien in custody for the purposes of expulsion or deportation and can include detention while an application for an entry permit is being considered.

Under the common law an alien who is within this country, whether lawfully or unlawfully, is not an outlaw (except enemy aliens in time of war). 'Neither public official nor private citizen can lawfully detain him or her... except under and in accordance with some positive authority conferred by the law' (*Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1, at p. 19 per Justices Brennan, Deane and Dawson). Their Honours go on to point out that, if the unlawful detention is by a person who is an officer of the Commonwealth, the status of that person as such an officer will not, of itself, confer immunity from proceedings against him or her personally in the ordinary courts of the land.

In the *Chu Kheng Lim* case, six of the seven judges of the High Court discussed the meaning of section 36 of the *Immigration Act 1958*, the section into which clause 7

of the present bill will insert significant subsections. The section as it stood on 1 November 1989 authorised the detention of the particular person in custody only until the departure of the vessel from Australia or 'until such earlier time as an authorised officer directs'. All six judges had no difficulty with the plain meaning of the section. It was not considered ambiguous or doubtful or open to other interpretations. Justices Brennan, Deane and Dawson in their joint judgment concluded that the view apparently taken by the Minister's Department was a mistaken approach to the construction of that section: the view that, in a case where a vessel can never leave because it has been destroyed, temporary custody can continue indefinitely was mistaken. They also concluded that 'the continued detention of each plaintiff in custody after the destruction of the boat on which he or she arrived in Australia was unlawful'(at p. 22).

On p.19 their Honours had pointed out that, in the absence of a legislative provision to the contrary an alien does not lack the standing or the capacity to invoke the intervention of a domestic court of competent jurisdiction if he or she is unlawfully detained. Under the common law a person who has been unlawfully detained has the right to sue for damages for that unjust imprisonment.

Section 54RA of the *Immigration Act 1958*, as the explanatory memorandum points out at paragraph 5, was inserted in December 1992 to extinguish the common law right of action to sue for damages for unlawful imprisonment for persons found to have been unlawfully detained under section 36 and to substitute a statutory right of action limiting the damages payable to \$1 per day.

Recent High Court decisions raise doubts whether section 54RA is constitutionally valid in that the taking away of the general right to damages and substituting compensation of \$1 a day may be the acquisition of a person's property on unjust terms. In the event of such a finding, substantial damages for unlawful imprisonment may be awarded. Hence the proposal to amend the law retrospectively to validate the unlawful imprisonment.

Rationale justifying retrospectivity

It seemed to the committee that the explanatory memorandum contained three elements justifying retrospectivity:

- # the amendments need to be retrospective to prevent a possible windfall through substantial awards of damages;
- # because the Minister and the Department thought that the law gave them the power to detain these people in custody, it ought to be changed retrospectively so that it will be taken to have meant from 1 November 1989 what the Minister and the Department understood it to mean; and

- # none of those who were unlawfully imprisoned had sought to challenge lawfulness of their custody before the High Court said that it was unlawful.

The committee suggested that the first element was founded on the notion that an award of damages is a windfall. Inherent to the notion of a windfall is that the person who picks up by chance what the wind of fortune has cause to fall at his or her feet has no right to that property. Unlawful imprisonment, however, carries the right to just compensation. The concept of windfall has no application here. That certain classes of people should not have a right to compensation challenges the concept of equality before the law. The High Court has more than once pointed out that neither citizen nor alien can be deprived of liberty by mere administrative decision or action; that any officer of the Commonwealth who, without judicial warrant, purports to authorise or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. Both citizens and aliens have equal rights not to be deprived of liberty unlawfully, both should have equal rights to compensation.

The committee was of the view that the second element clearly trespassed on the basic right that those subject to the law are entitled to know what the law says and to be treated according to what the law says, ultimately according to what the courts declare the law to mean.

As far back as 1765, in his *Commentaries*, Sir William Blackstone said:

... a base resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it.

In the committee's opinion the third element did not overcome the hurdle that the right of a person to challenge the unlawful excess of authority does not take away the obligation on the person exercising authority to ensure that the use of that authority is within power.

The rationale given for retrospectivity did not appear to the committee to justify validating unlawful imprisonment.

The committee drew 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.

The Minister has responded as follows:

Your Committee expressed concern about subclause 2(2) of the bill , which would

give retrospective effect to clauses 5, 6 and 7 of the Bill, and noted the purpose of the retrospectivity was to limit the effect of recent Court decisions. I note the comments about the justification for the retrospectivity - which goes to the fundamental issue of the proposed effect of the Bill. I also note the findings that the Bill does not appear to justify validating unlawful imprisonment and may be considered to trespass unduly on personal rights and liberties.

Notwithstanding your Committee's comments, the Government continues to consider that the proposals in the Bill are warranted. The Government's primary objective in proposing the Bill is to avoid the possibility of the Australian taxpayer underwriting compensation payments, which would be in the nature of windfalls, to certain unauthorised boat arrivals in Australia.

As set out in the Explanatory Memorandum to the Bill, recent Court decisions have cast doubt on the way the Commonwealth administered section 36 of the *Migration Act 1958* (renumbered section 88 by section 35 of the *Migration Legislation Amendment Act 1989* on 19 December 1989). Consequently, the understanding of the law held at the relevant time by the Minister and the Department and the persons detained has been proven to be incorrect.

Other Court decisions have now cast doubt on the effectiveness of section 54RA of the *Migration Act 1958* - the specific legislation enacted by Parliament in December 1992 to limit the possible compensation payable by the Commonwealth in this situation. That legislation dealt with exactly the same fact situation as does the current Bill. It is worth noting that section 54RA was also retrospective in nature, in that it altered rights that existed before its commencement.

In commenting upon the Government's justifications for retrospectivity, I do not consider your Committee placed sufficient weight on the fact that the uncertainty about the operation of section 36 (section 88) turned not on the issue of unauthorised arrival, but on the haphazard fate of the boats on which the persons concerned arrived. As such, the unlawfulness of the custody arose as a result of a technical misunderstanding of the operation and effect of the section.

Furthermore, I do not consider your Committee gave sufficient weight to the fact that, until the Court decisions were handed down, the lawfulness of the custody under section 36 (section 88) of those concerned was never challenged.

In practical terms, the Government is, therefore, proposing in this Bill to do no more than restore the status quo as agreed by the Parliament in December 1992.

In its Eleventh Report of 1994 the committee thanked the Minister for responding but continued to find unconvincing the rationale for retrospectivity which the Minister had repeated. The Minister had again asserted that the award of damages would be a

windfall without addressing the reasons the committee put forward to show that windfall cannot be applied to the enforcement of a legal right. The Minister had not addressed the concept of responsibility and accountability of a person exercising authority to ensure that the use of authority is within power. Finally, no Scrutiny of Bills committee could be expected to agree that the law ought to be not what Parliament has passed but what the Minister thought had been passed.

Migration Legislation Amendment Bill (No. 5) 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following Acts:

Migration Act 1958 to:

- 9 effect some recommendations of the Committee for the Review of the System for Review of Migration Decisions, particularly in relation to the Immigration Review Tribunal (IRT);
- 9 create the positions of Deputy Principal Member and Senior Members of the Refugee Review Tribunal (RRT);
- 9 provide for the Remuneration Tribunal to determine the remuneration of members of the IRT and RRT; and
- 9 amend procedures relating to the cancellation of business skills visas; and

Immigration (Education) Act 1971 to provide for the indexation of fees.

The committee has no comment on this bill.

Motor Vehicle Standards Amendment Bill 1994

This bill was introduced into the House of Representatives on 5 December 1994 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 relating to electrical connections on motorcycles.

The committee has no comment on this bill.

National Health Amendment Bill (No. 2) 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the *National Health Act 1953* to:

- # introduce a professional allowance payable to suitably qualified pharmacists for the provision of specific professional activities not directly concerned with the supply of pharmaceutical benefits;
- # create two distinct allowances from 1 July 1995 for pharmacists situated in rural areas: the isolated pharmacy allowance and the remote pharmacy allowance;
- # cease grants of financial assistance to pharmacists who close or amalgamate their pharmacies; and
- # replace the Pharmacy Restructuring Authority with the Australian Community Pharmacy Authority.

The committee has no comment on this bill.

Prawn Boat Levy Bill 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Minister for Justice.

The bill proposes to impose a levy on commercial prawn boats to finance the promotion of Australian sea-caught prawns in overseas markets.

The committee has no comment on this bill.

Prawn Export Charge Bill 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Minister for Justice.

The bill proposes to impose a charge on exports of sea-caught Australian prawns to finance the promotion of the product in overseas markets.

The committee has no comment on this bill.

Prawn Export Promotion Bill 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Minister for Justice.

The bill proposes to provide for the collection, management and expenditure of the funds collected by the imposition of a prawn boat levy and prawn export charge to fund the promotion of sea-caught Australian prawns in overseas markets.

Penalty Interest Rates Clause 17

Clause 17 sets the penalty for late payment of the prawn boat levy and the prawn export charge imposed by the cognate Bills at 2% a month, compounding monthly. This means an annualised rate of 24% but an effective annual rate of 26.82%. This rate is so in excess of current commercial rates of interest that it may be regarded as so exorbitant as to trespass unduly on personal rights. Such a rate of interest is associated with sharks rather than prawns. It might be noted that, although clause 17 sets out such a severe late payment penalty, no late payment penalty at all is incurred by the Commonwealth or the Fisheries Research and Development Corporation if either is dilatory in refunding overpaid moneys under clause 20. The **committee seeks the Minister's advice** whether a formula could be drafted that might tie the rate of interest for the late payment penalty more closely with current business rates.

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

Abrogation of the right not to incriminate oneself Subclause 22(2)

Subclause 22(2), if enacted, would abrogate the right not to incriminate oneself for a person required to submit a return or information under clause 21.

Clause 21 provides that an authorised person may require a person to furnish a return or information in relation to matters relevant to the operation of the Act.

The committee is concerned about the implications of these clauses. The committee acknowledges that it is a legitimate use of administrative power to obtain information for the purposes of administering the proposed legislation. However, it seems that the same clause is also the source of authority to investigate criminal offences in relation to avoiding paying the levy or avoiding paying the full amount owing by submitting a false or misleading return. If this is so, the committee is of the opinion that a person should retain the right to remain silent on the grounds that he or she might incriminate himself or herself where an investigation of that person's conduct, which could result in prosecution, is being carried out.

Further, the committee is concerned about the appropriateness of abrogating the right not to incriminate oneself in the circumstances dealt with in this bill. While acknowledging that in some circumstances, such as national security or irreversible damage to the Great Barrier Reef, the need to obtain information may be seen as prevailing over the right not to incriminate oneself, the committee questions whether the advantages to be gained by this provision outweigh the trespass on personal rights in abrogating that right.

Accordingly, the committee seeks the Minister's advice on whether clauses could be drafted distinguishing the power to seek returns or information for the ordinary purposes of collecting the levy from the power to seek information for the purposes of investigating breaches. The committee also seeks the Minister's advice on whether he anticipates such gross non-compliance with paying the levy that the right not to incriminate oneself must be abrogated because other compliance measures would be inadequate to collect it and whether the levy of itself outweighs the serious trespass on personal rights of abrogating the right not to incriminate oneself.

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

Primary Industries and Energy Legislation Amendment Bill (No. 3) 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the following Acts:

Livestock Diseases Act 1978 is to be repealed;

Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994 to:

- 9 enable the Act to apply for 1995/96 and thereafter;
- 9 change the date for payment of the levy from 1 June to 31 July each year;
and
- 9 enable levy payments to be paid by instalments, with payments to be set by primary legislation, rather than prescribed by regulation;

Australian Horticultural Corporation Act 1987 to:

- 9 enable other members of the Corporation Board (as well as the Chairperson) to provide the Corporation's annual report of its activities to the annual general meetings of industry bodies; and
- 9 abolish the requirement for the Australian Dried Fruits Board and other product boards to convene annual general meetings (effective from 1 July 1994). In future, Chairpersons of products boards will be required to report to the annual general meeting of the product board's industry body;

Farm Household Support Act 1992 to provide for the payment of Farm Household Support to farmers who have reached pension age;

Horticultural Research and Development Corporation Act 1987 to enable other members of the Corporation's Board (as well as the Chairperson) to provide the Corporation's annual report of its activities to the annual conference or meeting of the executive of each eligible industry body; and

Rural Adjustment Act 1992 to allow the Rural Adjustment Scheme to operate at regional level.

Retrospectivity
Subclause 2(3)

Subclause 2(3), if enacted, would provide that items 15, 16 and 18 of the Schedule would have effect retrospectively from 1 July 1994. These items repeal the requirement for product boards to hold an annual general meeting. The explanatory memorandum in indicating in paragraph 9 the need for the repeal provisions to have retrospective effect does not disclose any trespass on individual rights.

Accordingly, the committee makes no further comment on this bill.

Private Health Insurance Complaints Levy Bill 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to impose a levy on the health benefits funds conducted by registered health benefits organizations. The purpose of the levy is to cover the administrative costs which may be incurred by the Private Health Insurance Complaints Commissioner.

The committee has no comment on this bill.

Radiocommunications (Receiver Licence Tax) Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Minister for Finance.

The bill is part of package of three bills to implement a new apparatus licensing regime. This bill proposes to amend the *Radiocommunications (Receiver Licence Tax) Act 1983* to enable tax to be imposed on the issue, the anniversary of the issue or the holding of a licence.

The committee has no comment on this bill.

Radiocommunications Taxes Collection Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Assistant Treasurer.

The bill is part of package of three bills to implement a new apparatus licensing regime. This bill proposes to amend the *Radiocommunications Taxes Collection Act 1983* to amend the long title of the Act and provide payment options in relation to the tax imposed on applicants for receiver licences in relation to the licences.

The committee has no comment on this bill.

Radiocommunications (Transmitter Licence Tax) Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Assistant Treasurer.

The bill is part of package of three bills to implement a new apparatus licensing regime. This bill proposes to amend the *Radiocommunications (Transmitter Licence Tax) Act 1983* to amend the long title of the Act and provide payment options in relation to the tax imposed on applicants for transmitter licences in relation to the licences.

The committee has no comment on this bill.

Road Transport Reform (Dangerous Goods) Bill 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to regulate the transport of dangerous goods by road in the Australian Capital Territory and Jervis Bay Territory. Adopting legislation to be passed by the States and the Northern Territory will create a legislative scheme for the making, administration and enforcement of uniform or consistent national regulations relating to the road transport of dangerous goods.

Commencement on proclamation

Clause 2

Clause 2 of the Bill provides:

2.(1) Sections 1 and 2 commence on the day on which this Act receives the Royal Assent.

(2) Subject to subsection (3), the remaining provisions of this Act commence on a day to be fixed by Proclamation.

(3) If the provisions referred to in subsection (2) do not commence under that subsection within the period of 12 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.

By subclauses 2(2) and (3), this bill will come into effect on a day to be fixed by Proclamation, with automatic commencement if the bill has not been proclaimed within twelve months of 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, preferably, the time for proclamation should not be longer than 6 months and that the reason for a longer period should be contained in the explanatory memorandum.

The committee notes, from both clause 3 of the bill and the relevant paragraph in the explanatory memorandum that the bill is intended to form part of a national scheme and that the twelve months has been chosen to allow time for complementary State and Territory legislation to be enacted. It would therefore appear that paragraph 6 of the Drafting Instruction is applicable.

Accordingly, the committee makes no further comment on this clause.

Delegation of legislative power

Clause 11

Clause 11 provides for a substantial number of matters relating to the transport of dangerous goods to be regulated by delegated rather than primary legislation. The committee notes that the bill is part of the continuing development of nationally uniform or consistent road transport regulations pursuant to inter-governmental agreements.

The committee discussed the advantages and disadvantages of nationally uniform legislation in its Fourth Report of 1993 and referred to the concerns expressed at, and the

resolution of, the 1993 Conference on Delegated Legislation and Scrutiny of Bills. The committee 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.

In that Report, the response of the Minister was quoted in which he said:

Similarly, it is envisaged that the further proposed modules dealing, respectively, with the transport of dangerous goods, heavy vehicle registration, driver licensing and enforcement procedures will require a much greater application of primary legislation.

In this respect the committee notes that this bill devotes Parts 3, 4 and 5 to matters properly included in primary legislation, such as the powers of the authorised officers in respect of the transport of dangerous goods, exemptions from compliance with the regulations and matters concerning offences, penalties, evidence and procedure.

In these circumstances, the committee makes no further comment on clause 11.

Abrogation of the privilege against self-incrimination Clause 23

Clause 23, if enacted, would abrogate the privilege against self-incrimination for a person required to answer a question under clause 18.

Subclause 18(11) provides that an authorised officer may, in order to find out whether this Act is being complied with, direct a person to answer questions that may help the authorised officer. While acknowledging that in some circumstances, such as the spillage of materials that may be extremely hazardous, the need to get accurate information may be paramount, the committee questions whether in all the circumstances covered by the provision the advantages to be gained by the provision outweigh the trespass on personal rights in the abrogation of the privilege against self-incrimination. For example, there are many minor matters that must be complied with under the Act. Information about these would not be of sufficient importance to warrant the abrogation of the privilege.

Accordingly, **the committee seeks the Minister's advice** on whether a more discriminating provision could be drafted that would distinguish between less important matters and those where there is a belief on reasonable grounds that a dangerous situation exists. In this respect the committee notes the difference between subclauses 18(1) and 18(2), where more extensive power is given on the reasonable belief in the existence of a dangerous situation.

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

Social Security (Non-Budget Measures) Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following Acts:

Social Security Act 1991 to:

- 9 modify carer pension provisions in relation to accompanying the carer overseas;
- 9 extend employment entry payments to carer pensioners;
- 9 provide education entry payment to carer pensioners;
- 9 extend suspension provisions to disability support pensioners (DSP) when DSP is cancelled because of earnings;
- 9 allow certain DSP recipients to retain eligibility for fringe benefits;
- 9 allow recipients of job search allowance, newstart allowance and youth training allowance to receive mobility allowance;
- 9 ensure partner allowance is payable from the same date as other allowances under certain circumstances;
- 9 ensure the sole parent pension is available only if the separation is permanent or indefinite;
- 9 require that claimants for sole parent pension or bereavement allowance attend an interview relating to that claim;
- 9 increase the additional family payment benchmark effective from 1 January 1996;
- 9 allow retrospective family payment arrears and increases to be paid in certain circumstances;
- 9 remove the need to determine whether particular loans are exempt or not;

- 9 remove the requirement for a waiting period before sickness allowance can be paid in certain circumstances;
- 9 allow the Secretary to require job search or newstart allowance recipients to attend a particular place for a specified purpose;
- 9 provide that training supplement is payable only if the training course undertaken has the approval of the Employment Secretary;
- 9 expand the circumstances in which a notice of decision is taken to be 'given' to a person;
- 9 ensure that a person is taken to have failed to negotiate an activity agreement if the Secretary is satisfied that the person is unreasonably delaying the agreement;
- 9 reduce rates of payments of certain allowances from a certain date when a customer with an earnings credit balance fails to notify receipt of income that could result in a decreased allowance payment;
- 9 allow customer information to be disclosed to other Commonwealth agencies in certain cases;
- 9 allow the Secretary to collect information relating to claims for Seniors Health Cards;
- 9 clarify that Ministerial decisions under sections 1099E and 1099L are not subject to internal or Social Security Appeals Tribunal review;
- 9 exempt specified exchange trading systems from the income test provisions;
- 9 simplify the continuation, variation and termination of determinations;
- 9 clarify the concept of payability; and
- 9 make minor and technical amendments;

National Health Act 1953 to:

- 9 enable certain persons who receive mature age allowances to retain eligibility for Commonwealth fringe benefits; and

- 9 preserve health care card entitlement for certain mobility allowees;
- # *Data-matching Program (Assistance and Tax) Act 1990* to effect the Department of Housing and Regional Development's withdrawal from the data-matching program; and
- # *Social Security (Budget and Other Measures) Legislation Amendment Act 1993* to remove amendments relating to telephone allowance and their commencement on 1 July 1991.

Retrospectivity

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

By virtue of these subclauses various provisions of the bill would have retrospective effect. However, in each case, the proposed amendment is beneficial to Social Security recipients.

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

Retrospectivity

Subclauses 2(8) to (13)

By virtue of these subclauses various provisions proposed by clause 141 (not clause 131 as stated at present in the bill) would have retrospective effect. However, in each case, the proposed amendment is to correct drafting or other errors.

Accordingly the committee makes no further comment on these provisions.

Unnecessary powers?

Part 2, Division 7

Division 7 of Part 2 of this bill, if enacted, would provide additional power to the Department to require claimants for sole parent pension and bereavement allowance to attend an interview to give information relating to the person's claim and would also provide an additional ground to reject the claim - the ground of not taking reasonable steps to comply with the requirement to attend the interview. At first blush, these seem to be not unreasonable, but the committee is concerned on several counts.

By way of background it should be noted:

- 9 The Department already has the power to compel attendance at an interview - subsection 1304(5) - although subsection 1304(6) provides that the time specified for a compulsory interview must be at least 14 days after the notice is given.
- 9 The explanatory memorandum indicates that the 14 day period is considered impractical for new claims because such persons are generally in hardship and need to have their claims determined as quickly as possible. Section 1304 is considered to prevent the department from arranging an interview in less than fourteen days.
- 9 The explanatory memorandum also indicates that section 1304 also prevents the Department from rejecting a claim within that 14 day period.
- 9 The explanatory memorandum also states that in order to ensure that claims do not remain undetermined for 'lengthy periods of time simply because the claimants has failed to attend an interview' the amendments allow the Department to reject a claim if the person has failed to attend an interview within the (reduced) notice period.

It seems to the committee that the proposed amendments raise several questions:

- 9 Why is there a problem only with sole parents and widowed persons and not with other claimants for income support?
- 9 Surely if claimants are in hardship, they would be willing voluntarily to attend an interview - is there a legal impediment to such an interview?
- 9 Why give officials an extra power to reject a claim on a ground that has nothing to do with whether the claimant is qualified but solely for disobeying a departmental instruction to come and be interviewed?
- 9 Why force a claimant who has perhaps been traumatised by bereavement and therefore forgets or is unable to face an interview to justify themselves to a bureaucrat under pain of losing their first or perhaps first and second instalment of pension?

The committee is of the opinion that, if claimants for special benefit, who by definition are in hardship, can be satisfactorily dealt with on a voluntary basis without being dragooned by special powers to require attendance, a change in approach to sole parent

and widowed claimants would be of more benefit than changes to the Act. The committee would be interested to know whether the Minister agrees and **seeks his advice on the questions above.**

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

Non-reviewable decision

Clause 28

Clause 28, if enacted, would include in the list of non-reviewable decisions in section 1250 of the *Social Security Act 1991* a decision by the Employment Secretary not to approve a person's participation in a specified vocational training course for the purpose of payment of the jobsearch/newstart training supplement.

The committee notes that the explanatory memorandum seems to give as the reason for the amendments in Division 11 the need to restrict the payment of training supplement to those undertaking a training course of labour market program only where the course will assist the particular person to find full-time paid work or acquire the skills necessary to do so.

The Act already requires the Employment Secretary to approve the particular course as suitable for a vocational training course or labour market program. The Act also makes non-reviewable the decision of the Employment Secretary not to approve a particular course as suitable.

The committee is of the opinion that there is a vast difference between the approval in general of a course as suitable for vocational training or labour market program and the decision that a particular course will not assist a particular person to find work or obtain the skills to do so. It may be appropriate that there be no review of the decision to approve a course as suitable in general for the job training program. A decision, however, that a particular course, already approved as a course suitable for job training, will or will not assist a particular person requires the Ministerial guidelines, referred to in proposed subsections 560(8) and 644(8), to be applied to the circumstances of a particular person. Such a decision is apt for review on the merits. Whether or not review is available should not rest merely on whether other decisions of the decision-maker are subject to review but on the nature of the decision to be made.

It seems that the proposed mechanism could result in Billy Bloggs and Mary Brown both undertaking the same vocational training course, with one receiving payment of training supplement and the other not. The decision to exclude one of them ought to be subject to review on the merits. The clause therefore can be considered to make personal rights

unduly dependent on a non-reviewable decision.

Further, there does not appear to be any requirement for the ministerial guidelines, in accordance with which the decision will be made, to be gazetted or subject to tabling or disallowance by Parliament. Such a lack of publication may be considered to make personal rights unduly dependent upon insufficiently defined administrative powers. If, however, the view is taken that the ministerial guidelines are an exercise of legislative power, that exercise may be considered to be insufficiently subject to parliamentary scrutiny.

The committee seeks the Minister's advice on these matters.

Pending the Minister's advice, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference. The committee also draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference or, in the alternative, to make the exercise of legislative power insufficiently subject to Parliamentary scrutiny in breach of principle 1(a)(v) of the committee's terms of reference.

Disclosure of information

Clauses 37 and 38

These clauses would widen the range of people by whom and to whom information about Social Security clients may be disclosed. This may be considered as trespassing unduly on personal rights and liberties.

Clause 37 repeals the provision that prevented the delegation of the power of the Secretary to disclose information to the Secretary of a Commonwealth Department or the head of a Commonwealth authority. Clause 38 enables the disclosed information to be received not only by the relevant Secretary or head but also by staff of their agencies.

In respect of the receipt of information, (clause 38), the committee is uncertain whether to regard this as a real widening or a mere clarification of the law. Subsection 1314(4) of the *Social Security Act 1991* obviously contemplates that the staff of the various agencies to whom disclosure is made, as the Act stands at present, will have access to the information as it binds them to some of the same confidentiality obligations as staff of the Social Security Department.

In respect of disclosing the information, (clause 37), the committee notes that the explanatory memorandum indicates that it is unworkable for the Social Security Secretary to consider and disclose information personally in all relevant cases. While accepting this consideration, the **committee seeks the Minister's advice** on whether it would be more appropriate for the law expressly to place some limit on the delegation of this power. If Parliament thought it appropriate to prevent the delegation of this power even to the Deputy Secretary of the Department, it seems a major reversal to remove all restrictions.

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

Non-reviewable decisions Clauses 40 and 41

These clauses, if enacted, would ensure that certain decisions of the Minister exercising a power or function under the Act would not be reviewable whether internally or through the Social Security Appeals Tribunal and thereafter by the Administrative Appeals Tribunal. The explanatory memorandum suggests that it had always been assumed that decisions of the Minister under the relevant sections were not reviewable but that recent legal advice had brought this assumption into question.

It seems clear that the decisions of officers are reviewable and from the definition of officer in the Act - a person performing duties or exercising powers or functions under the Act - that the Minister's decisions would be reviewable when he or she exercises powers or functions under the Act.

The question for the committee is whether exempting the Minister's decision from the review process makes personal rights and liberties unduly dependent on non-reviewable decisions. The committee is not convinced that a decision should not be reviewable just because it is made by a Minister. Otherwise administrative review might be avoided by giving to the Minister all the discretionary and contentious decisions. The committee readily acknowledges that general policy decisions are not apt for administrative review, nor is a range of other decisions. But it is the nature of the decision not the status of the decision-maker that is relevant to the issue of whether a decision should be reviewable on the merits.

The decisions in question are decisions under sections 1099E and 1099L of the Act. The Act provides that income for the purposes of the income test on social security payments includes amounts deemed to be earned by moneys deposited in accounts which bear little or no interest or by moneys loaned with little or no interest. Sections 1099E and 1099L enable the Minister to decide that specified money of a person, or of a class of persons and specified loans or a specified class of loans may be disregarded and so no deemed amount is included in the income test. Where the Minister decides with respect to a class of persons or a class of loans, it may be characterised as a general policy decision that would be inappropriate for review. But fairness demands, where an individual seeks the favourable exercise of what is so obviously a discretion, that review on the merits be available.

It may be felt that there is some difficulty in review of ministerial decisions by departmental officers or by a tribunal whose members are appointed by the Minister. The Administrative Appeals Tribunal, therefore, may be the appropriate forum along the lines of the former jurisdiction with respect to certain Migration Appeals.

The committee seeks the Minister's advice on this matter.

Pending the Minister's advice, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Tax Law Improvement (Substantiation) Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Assistant Treasurer.

The bill proposes to replace the substantiation provisions of the *Income Tax Assessment Act 1936* with clearer structure and layout, language, and simpler administrative requirements.

Retrospectivity Schedule 2, item 8

The amendments proposed by item 8 of Schedule 2 are partly retrospective in application in that the proposed subdivision GA provides for calculating and substantiating car expenses for the 1994-95 income year as well as later income years.

It is clear, however, that taxpayers will not suffer detriment from the retrospectivity as proposed sections 82KZBE and 82KZBF ensure that, for the 1994-95 income year, the old law will continue to apply where it will be of advantage to taxpayers.

Accordingly, the committee makes no further comment on this bill.

Taxation Laws Amendment Bill (No. 5) 1994

This bill was introduced into the House of Representatives on 7 December 1994 by the Minister for Justice.

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1936 to:

- 9 avoid an element of double taxation in relation to the cost of certain bonus shares received as assessable dividends and subsequently sold from the insurance funds of a life company;
- 9 allow life companies to use the average rate of tax payable on their non-fund component of taxable income;
- 9 ensure payments of disability wage supplement are given similar tax treatment to other comparable social security payments;
- 9 ensure that natural increase of a class of live stock for which no minimum value is prescribed is valued at the actual cost of production when the producer chooses to value at cost;
- 9 amend the depreciation, capital gains and related miscellaneous 'rollover' provisions in relation to panel vans and utility trucks that carry one tonne or more;
- 9 allow income tax deductions for gifts made to certain funds and organisations;
- 9 include in assessable income of a friendly society or other registered organisation income derived from certain assets of the organisation;
- 9 deal with the tax treatment in respect of certain transitional matters arising from the privatisation of the State Bank of New South Wales;
- 9 amend capital gains tax (CGT) provisions to ensure certain transactions involving the creation of assets will be subject to CGT;
- 9 repeal the existing anti-avoidance provision of the new company tax instalment arrangements, and make technical and consequential

amendments;

- 9 amend provisions setting out when the Commissioner of Taxation is deemed to have made an assessment under the existing and new company tax instalment regimes; and
- 9 to replace the definitions of 'tainted calculated liabilities' and 'calculated liabilities';

Taxation Administration Act 1953 to:

- 9 streamline the circumstances when administrative penalty becomes payable;
- 9 amend provisions so that a public ruling is made when it is published and notice of the ruling is published in the Commonwealth Gazette; and
- 9 amend provisions providing for a tax liability to be rounded down to the nearest multiple of five cents;

Superannuation Guarantee (Administration) Act 1992 to defer the requirement that employers meet their superannuation guarantee obligations on a quarterly basis until the regime is more established; and

Ombudsman Act 1976 to allow the Commonwealth Ombudsman, when performing investigative functions in relation to the Australian Taxation Office, to be known as the Taxation Ombudsman.

Retrospectivity

Subclause 2(2)

Subclause 2(2) of this bill provides that Part 8 of Schedule 1 is taken to have commenced on the day on which the State Bank (Privatisation) Act 1994 of New South Wales commenced. Part 8 of Schedule 1 deals with some transitional tax issues arising out of the sale of the State Bank of New South Wales to private interests. Upon sale, the bank changes from exempt to taxable status.

The committee notes that the explanatory memorandum at paragraph 7.2 gives the purpose of the amendments in more detail as:

The amendments will:

- . ensure appropriate gains and losses accrued in assets and liabilities of the NSW State Bank at the time of its sale are not taken into account in

determining its post sale taxable income;

- . deny deductions for superannuation contributions in respect of liabilities accrued during the time when the bank was exempt from tax; and
- . disallow deductions for bad debts written off after the bank's sale where the debt was known to be doubtful before the sale.

In view of this explanation, the committee makes no further comment on these provisions.

Retrospectivity Subclause 2(3)

Subclause 2(3) of this bill provides for the amendments to the *Superannuation Guarantee (Administration) Act 1992* to be made by Part 2 of Schedule 2 of this bill to commence retrospectively from 1 July 1994.

The effect of the amendments is to defer the introduction of quarterly contribution and to extend the present annual contribution requirement. As the amendments are beneficial to the persons affected by them, the committee makes no further comment on these provisions.

Retrospective application Schedule 1, items 6 and 35

Items 6 and 35 of Schedule 1 of this bill provide for certain amendments to the *Income Tax Assessment Act 1936* to have retrospective application from 1 July 1994.

The effect of the amendments is to avoid double taxation in respect of certain bonus shares and dividend rebates of life insurance companies. As the amendments are beneficial to the persons affected by them, the committee makes no further comment on these provisions.

Retrospectivity Schedule 1, item 20

Item 20 of Schedule 1 of this bill provides for some of the amendments to the *Income Tax Assessment Act 1936* to be made by Part 2 of this bill to commence retrospectively from

12 November 1991 and for the remainder to commence from 1 July 1994.

The effect of the amendments is to provide tax exemption for payment of disability wage supplement along the same lines as other comparable social security support payments such as disability support pension. As the amendments are beneficial to the persons affected by them, the committee makes no further comment on these provisions.

Retrospectivity

Schedule 1, item 71

Item 71 of Schedule 1 of this bill provides for the amendments to the *Income Tax Assessment Act 1936* to be made by Part 9 of this bill to apply retrospectively from 12 January 1994.

The committee notes that the amendments, which concern the capital gains tax in relation to the assignment of non-corporeal interests, were announced by a press release of the Assistant Treasurer on 12 January 1994. This is an example of legislation by press release to which the resolution of the Senate of 8 November 1988 may apply.

That resolution states:

where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of a draft Bill within 6 calendar months after the date of that announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill.

As more than 6 calendar months elapsed before the introduction of the bill and as the committee is not aware of any publication of a draft bill within that period, the committee draws the amendments to the attention of Senators for action in accordance with that resolution or any further resolution.

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.

Telecommunications (Interception) Amendment Bill 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the following Acts:

Telecommunications (Interception) Act 1979 to:

- 9 extend the categories of offences for which interception warrants may be sought;
- 9 oblige the Australian Federal Police to compile and submit to the responsible Minister every three months a register with details of certain warrants;
- 9 create new civil remedies for unlawful interceptions or unlawful communication of information derived from an interception;
- 9 prohibit the disclosure of information about the existence of or details of a warrant issued under the Act except as expressly allowed by the Act;
- 9 improve the quality of reports by agencies to the responsible Minister and by the Minister to Parliament; and
- 9 ensure employees or subcontractors may intercept communications only in particular circumstances; and

Telecommunications Act 1991 to make it a licence condition that holders of general and mobile carrier licences are to bear the costs of creating or developing an interception capability of any existing or new telecommunications service.

The committee has no comment on this bill.

Tobacco Advertising Prohibition Amendment Bill 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the *Tobacco Advertising Prohibition Act 1992* to clarify the purpose and operation of the Act, and make minor technical and drafting amendments.

The committee has no comment on this bill.

Transport Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 December 1994 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to amend the following Acts:

Air Navigation Act 1920 to ensure articles of association of an Australian international airline (other than Qantas) conform with the Corporations Laws so they might be eligible to participate in the Clearing House Electronic Subregister System;

Australian Maritime Safety Authority Act 1990 to:

- 9 enable the Minister to notify the Authority of his or her views on the appropriate strategic direction for the Authority and the performance of its functions;
- 9 provide grounds for termination of appointment of members of the Authority when failure to provide information to the Minister occurs;
- 9 provide for the payment of interim dividends;
- 9 empower the Authority to appoint the Chief Executive Officer and Acting Chief Executive Officer; and
- 9 transfer the employment of staff from the *Public Service Act 1922* to the Authority;

Australian National Railways Commission Act 1983 to:

- 9 enable the Minister to notify the Commission of his or her views on the appropriate strategic direction for the Commission and the performance of its functions;
- 9 provide grounds for termination of appointment of members of the Commission when failure to provide information to the Minister occurs;
- 9 provide for the payment of interim dividends;
- 9 empower the Commission to appoint the Managing Director and Acting

Managing Director; and

- 9 allow financial targets to be set as a specified rate of return on assets;

Civil Aviation (Carriers' Liability) Act 1959 to increase the liability limits in respect of passenger death or injury for Australian international carriers;

Federal Airports Corporation Act 1986 to:

- 9 enable the Minister to notify the Corporation of his or her views on the appropriate strategic direction for the Corporation and the performance of its functions;
- 9 provide grounds for termination of appointment of members of the Board of the Corporation when failure to provide information to the Minister occurs;
- 9 provide for the payment of interim dividends; and
- 9 empower the Board to appoint the Chief Executive Officer;

Motor Vehicle Standards Act 1989 to:

- 9 introduce categories of identification plates and specify administrative procedures; and
- 9 allow the Minister to incorporate standards produced by recognised international standards organisations into the national standards, including subsequent amendments to those international standards;

Navigation Act 1912 to:

- 9 revise the system of ship survey and certification, giving effect to a resolution of the International Maritime Organisation;
- 9 remove a seaman's entitlement to wages when there is entitlement to compensation under the *Seafarers Rehabilitation and Compensation Act 1992*;
- 9 revise salvage operations;
- 9 provide an objective standard and prescribed forms of testing for alcohol and drug impairment; and

9 remove sexist language;

Protection of the Sea (Civil Liability) Act 1981 to remove sexist language;

Protection of the Sea Legislation Amendment Act 1986 to ensure compensation is available to persons who suffer oil pollution damage as a result of maritime casualties involving oil carrying ships; and

Ships (Capital Grants) Act 1987 to define the procedure for demanding the repayment of an overpayment of a grant.

Commencement Subclauses 2(4) and (5)

Subclauses 2(4) and (5) of this Bill provide that various amendments proposed by the bill would commence on Proclamation with no period fixed within which commencement must take place.

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 3 of the Drafting Instruction suggests that the time for proclamation should not be open-ended, but that the commencement clause should provide for either automatic commencement or repeal at a fixed time.

Paragraph 6 of the Drafting Instruction, however, suggests that an open-ended power of proclamation may be warranted in unusual circumstances, where the commencement depends on an event whose timing is uncertain, such as the enactment of complementary State and Territory legislation.

The committee notes that the commencement dates are tied to the acceptance of Protocols of International Conventions, events the timing of which are uncertain. It would therefore appear that paragraph 6 of the Drafting Instruction is applicable.

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

Inappropriate delegation of legislative power

Item 11 of Schedule 1

This item inserts a new section 7A into the *Motor Vehicles Standards Act 1989* to enable the Minister to incorporate by reference documents that set out vehicle standards produced by various bodies as in force from time to time.

It seems to the Committee that proposed new section 7A exhibits the contrary intention which would exclude the application of section 49A of the *Acts Interpretation Act 1901* in relation to instruments made under section 7A. Section 49A allows material to be adopted by reference into an instrument but only as in force at the time when the instrument takes effect not as in force from time to time. The effect of proposed section 7A, therefore, is to enable the adoption by reference of material not only in the form the material has at the time the instrument is made but in any form that the material subsequently takes.

The committee is concerned that this may be regarded as inappropriately delegating legislative power as it would allow a determination to be made to adopt documents containing vehicle standards that is made by a body in Australia or elsewhere, and the law in force in Australia will change every time that body alters those standards.

The committee notes that the *Motor Vehicles Standards Act 1989* appears in Schedule 2 of the Legislative Instruments Bill. Acts listed in Schedule 2 of the Bill become subject to Part 3 which requires a process of consultation so as to ensure that persons likely to be affected by a legislative instrument made under such an Act have an opportunity to make submissions concerning the policy or content of the instrument. This means that, when the Legislative Instruments Bill becomes law, the Minister or other rule-maker must consult before a rule can be made or changed under the *Motor Vehicles Standards Act 1989*. The committee is concerned at the lack of consultation if a rule adopted some vehicle standards of a body in another country as in force from time to time. That body could not be required to consult with persons in Australia before it changed its standards. The width of the power in proposed section 7A appears to be at odds with the policy enshrined in the Legislative Instruments Bill.

The committee, therefore, **seeks the advice of the Minister** whether it would be more appropriate for a less wide power to be delegated.

Pending the Minister's advice, 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.

Reversal of the onus of proof

Proposed new subsections 386E(3), 386F(2) and 386H(2) of the *Navigation Act 1912*

Proposed new subsections 386E(3), 386F(2) and 386H(2) of the *Navigation Act 1912* would reverse the onus of proof in criminal proceedings. However, it appears in each case that the matters which the defence would be required to prove are matters peculiarly within the knowledge of the defendant and would be unduly costly and burdensome for the prosecution to disprove.

In the light of these considerations, the committee makes no further comment on these provisions.

Veterans' Affairs Legislation Amendment Bill (No. 3) 1994

This bill was introduced into the Senate on 7 December 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the following Acts:

Social Security and Repatriation Legislation Amendment Act (No. 2) 1984 to give the Repatriation Commission the power to retain or dispose, at its discretion, the Anzac Hostel in Victoria; and

Veterans' Entitlements Act 1986 to:

- 9 give the Repatriation Commission power to suspend or cancel service pension or income support supplement when the claimant or pensioner has failed to comply with certain notices;
- 9 clarify the provisions relating to the provision of tax file numbers to the Secretary;
- 9 enable certain documents to be accepted as *prima facie* evidence by the courts;
- 9 provide the cessation date for Cambodia as an operational area; and
- 9 make minor technical amendments.

Tax file numbers

Clauses 4 to 10: Response to AAT decision

Clauses 4-10 are proposed because of the decision of the Administrative Appeals Tribunal in *Re Malloch and Secretary, Department of Social Security*. The explanatory memorandum states that the Tribunal held that the relevant provisions did not preclude payment to a person who has no tax file number and has no intention of getting one, despite being requested to do so by the Department.

The **committee seeks the Minister's advice** on why the provision of tax file numbers is necessary in this class of cases.

Pending the Minister's advice, the committee draws Senators' attention to

the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Senate Standing Committee
for
The Scrutiny of Bills

ALERT DIGEST

No. 2 of 1995

8 FEBRUARY 1995

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THE SCRUTINY OF BILLS

SENATE STANDING COMMITTEE FOR

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

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.**

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.

Electoral and Referendum Amendment Bill 1994

This bill was introduced into the House of Representatives on 1 February 1995 by the Minister for Administrative Services.

The bill proposes to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to:

- 9 enable the Australian Electoral Commission (AEC) to delegate its power to staff to supply and charge for goods and services;
- 9 allow relatives and friends to apply for removal of electors of unsound minds from electoral rolls;
- 9 remove from the roll in the period between the issue of the writ for an election and the close of rolls any elector whose enrolment has been objected to;
- 9 ensure personal details of silent electors are not disclosed to persons inspecting applications for postal votes;
- 9 allow the AEC to use security printing of ballot papers instead of watermarked ballot papers;
- 9 disallow canvassing in and around hospitals that are polling places on polling days and in special hospitals during the five days before and including polling day;
- 9 extend the right to vote to all Divisional Returning Officers and Australian Electoral Officers and standardise the method for resolving ties during the counting of votes; and
- 9 extend the two-candidate preferred count to the fresh scrutiny and declaration votes scrutinies.

The committee has no comment on this bill.

Migration Legislation Amendment Bill (No. 2) 1995

This bill was introduced into the Senate on 31 January 1995 by the Minister for Defence.

The bill proposes to enable the recently enacted safe third country provisions of the *Migration Act 1958* to cover Vietnamese refugees who had already been successfully resettled in the People's Republic of China but who lodged claims for a protection visa in Australia after 30 December 1994. Further, the bill proposes to enable the safe third country provisions of the Act to have effect from a specified date preceding the date of commencement of any future agreements and relevant regulations.

Retrospective application - legislation by press release Subclause 4(1)

Subclause 4(1), if enacted, would bring the substantive provisions of the bill into effect from 30 December 1994, the date on which the Minister announced the proposal for these amendments. It provides that applications from certain asylum seekers made, but not granted, during the transitional period (from that date until 27 January 1995) would cease to be valid on the commencement of the bill and would be treated as having been made after commencement.

The committee has consistently taken the view that, in principle, legislating in this way is unsatisfactory. It shares the unfairness that attaches to any form of retrospective legislation which adversely affects personal rights. But it also suffers the drawback of uncertainty. Legislation by press release assumes that Parliament will not only pass the bill but also pass it in the same terms as the press release. This detracts from Parliament's ability, capacity and inclination to amend legislation.

In this instance the introduction of the bill shortly after the Minister's announcement lessens the uncertainty about the details of the proposed legislation but does not lessen the uncertainty on whether the bill will be passed unamended. The committee notes that, for practical reasons, the Senate has been prepared to accept a degree of retrospectivity in relation to taxation legislation which has been announced by press release, as is evident from the resolution of 8 November 1988 (see *Journals of the Senate*, No. 109, 8 November 1988, pp 1104-5).

On the other hand, the retrospective application of the proposed bill takes away the present rights of this class of asylum seekers under the current law of Australia.

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 decision

Schedule, item 1 ~ Proposed subsection 91F(1)

Item 1 of the Schedule proposes to omit subsection 91F(1) and substitute a new subsection in the same terms as the previous subsection but with the addition of a further non reviewable discretion of the Minister.

In Alert Digest No 15 of 1994 the committee dealt with the insertion of section 91F into the Act. The committee noted that proposed section 91F of the *Migration Act 1958*, if enacted, would give to the Minister, if the Minister thinks it is in the public interest, a discretion to determine that the new scheme for asylum seekers is not to apply to a particular person. The decision not to exercise this discretion is apparently not reviewable in any way, as subsection 91F(6) provides that the Minister does not have a duty to consider whether to exercise the power to exempt a particular person from the scheme.

The committee sought the Minister's advice on this matter, as it appeared inappropriate that, where it may be in the public interest to exercise a power, the bill should provide that the Minister does not have a duty even to consider exercising that power.

The committee also noted that the then proposed subsection 96F(3) required the Minister to lay before Parliament a favourable determination and the reasons for making it but the committee was of the opinion that scrutiny ought to be directed at the reasons for not considering to make a determination or, having considered, the reasons for refusing the determination. Accordingly, the committee sought the Minister's advice on an appropriate method of review.

Pending the Minister's advice, the committee drew Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

On this issue the Minister responded on 10 November 1994 as follows:

Your Committee expressed concerns about section 91F of the Bill. This section would give me, if I think it is in the public interest, a discretion to determine that the new scheme for asylum seekers is not to apply to a particular person. The Committee noted that subsection 91F(6) would provide that I do not have a duty consider whether to exercise this power.

The Committee queried, since the power may be exercised in the public interest, whether it was appropriate that I am not subject to a duty to consider the exercise of the power.

There are currently five sections of the *Migration Act 1958* (the Act) which provide the Minister with a non-compellable discretion to act in a certain manner where it is in the public interest to do so. These provisions are:

- (i) Subsections 345(1) and 345(7) - following review by the Migration Internal Review Office (MIRO).
- (ii) Subsections 351(1) and 351(7) - following review by the Immigration Review Tribunal (IRT).
- (iii) Subsections 391(1) and 391(7) - following review by the Administrative Appeals Tribunal (AAT) of an IRT reviewable decision.
- (iv) Subsections 417(1) and 417(7) - following review by the Refugee Review Tribunal (RRT).
- (v) Subsections 454(1) and 454(7) - following review by the AAT of an RRT - reviewable decision.

These non-compellable discretions provide me with the power to act where the circumstances of a particular case are such as to merit my intervention in the "public interest". Thus, the powers involved provide for a "safety-net".

The various discretions are non-compellable to ensure that persons whose circumstances are such that they do not require my intervention cannot require that I exercise these powers. This will ensure that the powers are used sparingly and the integrity of the statutory scheme is maintained.

The Committee also noted that proposed subsection 91F(3) requires that the Minister lay before Parliament a favourable determination and the reasons for the making of the determination. However, the Committee formed the opinion that scrutiny ought to be directed at the reasons for not considering to make a determination, or at the reasons for refusing the determination and requested advice on an appropriate method of review of such matters.

Notwithstanding the Committee's comments, the Government does not consider it is appropriate to provide for the review of a non-compellable discretion that may only be exercised personally by the Minister when it is the "public interest" to do so.

In its Seventeenth Report, the committee thanked the Minister for this response but continued to draw Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

As this bill repeats the features of the earlier bill which were of concern, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Insufficient parliamentary scrutiny

Proposed section 91G

Proposed section 91G, if enacted, would authorise the Minister to legislate by notice in the *Gazette* (at least during the transition period referred to in the section) without the opportunity for review by the Parliament. The proposed section envisages that at various times in the future regulations will be made which, while not coming into force retrospectively, will have retrospective application. The amendment enables the Minister to issue a notice in the *Gazette* in respect of a country that is not a safe third country for the purposes of the *Migration Act 1988*. A Regulation prescribing that country to be a safe third country would be made later (but within 6 months). The Regulation will make void any application for refugee status in relation to the safe third country made during the period between the notice in the *Gazette* and the coming into effect of the Regulation. Any subsequent application will also be void. It appears that the Minister could delay making the regulation for up to six months. In the absence of any regulation laid before Parliament, parliamentary scrutiny and possible disallowance is frustrated. The committee seeks the Minister's advice on this issue.

Pending the Minister's advice, 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.

Migration Legislation Amendment Bill (No. 3) 1995

This bill was introduced into the Senate on 31 January 1995 by the Minister for Defence.

The bill proposes to:

- 9 ensure that fertility control policies of the government of a foreign country are disregarded in making certain determinations for the purposes of considering an application for a protection visa; and
- 9 prevent a non-citizen from making further applications for a protection visa when they have already made an application, whether or not the prior application has been finally determined.

Exclusion of present rights Proposed subsection 36(3)

The effect of the proposed subsection is to take away the present rights of certain asylum seekers to claim refugee status on the basis of a well-founded fear of persecution through belonging to a particular social group. The Federal Court has already accepted this as a basis for refugee status. The bill overrides that judicial determination.

Unusual circumstances exist with respect to this bill in that it has already been referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report.

In considering whether in excluding present rights the provision trespasses unduly on personal rights, the Senate will have the benefit of that Committee's report.

In these circumstances, the committee makes no further comment on this issue.

Non reviewable decision Schedule, item 4 - Proposed section 48B

Item 4 of the Schedule proposes a new section in the same terms as Section 91F about which the committee expressed its concerns in Alert Digest No. 15 of 1994.

In Alert Digest No 15 of 1994 the committee dealt with the insertion of section 91F into the Act. The committee noted that proposed section 91F of the *Migration Act 1958*, if enacted, would give to the Minister, if the Minister thinks it is in the public interest, a discretion to determine that the new scheme for asylum seekers is not to apply to a particular person. The decision not to exercise this discretion is apparently not reviewable in any way, as subsection 91F(6) provides that the Minister does not have a duty to consider whether to exercise the power to exempt a particular person from the scheme.

The committee sought the Minister's advice on this matter, as it appeared inappropriate that, where it may be in the public interest to exercise a power, the bill should provide that the Minister does not have a duty even to consider exercising that power.

The committee also noted that the then proposed subsection 91F(3) required the Minister to lay before Parliament a favourable determination and the reasons for making it but the committee was of the opinion that scrutiny ought to be directed at the reasons for not considering to make a determination or, having considered, the reasons for refusing the determination. Accordingly, the committee sought the Minister's advice on an appropriate method of review.

As proposed section 48B of this bill repeats features of that earlier bill which were of concern, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Parliamentary Contributory Superannuation Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 1 February 1995 by the Minister for Administrative Services.

The bill proposes to amend the following acts:

Parliamentary Contributory Superannuation Act 1948 to:12

- 9 extend the period during which the Parliamentary Retiring Allowances Trust has discretion to enter a contract (with former members required to repay lump sums when re-entering Parliament) from six to 12 months;
- 9 amend the repayment provisions;
- 9 make transitional provisions; and

Superannuation Laws Amendment Act 1994 to remedy a numbering error inserted in the Principal Act.

Retrospectivity Subclause 2(2)

Subclause 2(2), if enacted, would provide that Part 2 of the Schedule would have effect retrospectively from 1 July 1994. The amendment, however, is solely to correct a drafting error.

Accordingly, the committee makes no further comment on this bill.

Senate Standing Committee
for
The Scrutiny of Bills

ALERT DIGEST

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THE SCRUTINY OF BILLS

SENATE STANDING COMMITTEE FOR

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

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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;
 - (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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*** The Committee has commented on these Bills.**

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Any Senator who wishes to draw matters to the attention of the
Committee under its terms of reference is invited to do so.

Income Tax (International Agreements) Bill 1995

This bill was introduced into the House of Representatives on 8 February 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Income Tax (International Agreements) Act 1953* to enforce a new comprehensive agreement between Australia and New Zealand for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

The committee has no comment on this bill.

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Senate Standing Committee
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ALERT DIGEST

No. 4 of 1995

8 MARCH 1995

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THE SCRUTINY OF BILLS

SENATE STANDING COMMITTEE FOR

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

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 this bill.**

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Committee under its terms of reference is invited to do so.

Auditor-General Bill 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Minister for Finance.

The bill is one of a package of three to replace the *Audit Act 1901*. Particularly, this bill:

- # creates the office of Auditor-General for the Commonwealth and defines powers and functions of that office to support its functional independence;
- # establishes the Australian National Audit Office (ANAO); and
- # provides for the appointment of the Independent Auditor to audit the ANAO.

Sensitive information not to be included in public reports. Clause 34

Following discussion of this clause at a public hearing of the Finance and Public Administration Legislation Committee (*Hansard* p.27ff), the committee would like to take this opportunity of making some observations.

Clause 34, as amended, provides:

- (1) The Auditor-General must not include particular information in a public report if:
 - (a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or
 - (b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2).
- (2) The reasons are:
 - (a) it would prejudice the security, defence or international relations of the Commonwealth;

- (b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;
 - (c) it would prejudice relations between the Commonwealth and a State;
 - (d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the commonwealth;
 - (e) it would unfairly prejudice the commercial interests of any body or person;
 - (f) any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.
- (3) If, because of subsection (1), the Auditor-General decides:
- (a) not to prepare a public report; or
 - (b) to omit particular information from a public report;

the Auditor-General may prepare a report under this subsection that includes the information concerned. The Auditor-General must give a copy of each report under this subsection to the Prime Minister, the Finance Minister and the responsible Minister or Ministers (if any).

- (4) In this section:

"public report" means a report that is to be tabled in either House of the Parliament;

"State" includes a self-governing Territory.

It seems only common sense that some legislative mechanism be put in place to prevent disclosure of information that would prejudice national security and at the same time enable the Auditor-General to carry out his or her functions. To the extent that the clause achieves that purpose, the committee has no problem with it.

What has been raised is whether clause 34 would prevent the Auditor-General from disclosing to a parliamentary committee or to Parliament itself, other than by way of tabling a report in either House, information coming within paragraph 34(1)(a) or (b).

As at present advised, the committee is of the opinion that clause 34, as it stands, would not operate as a declaration under section 49 of the Constitution to prohibit disclosure to Parliament or its committees.

In case the contrary is correct, however, **the committee seeks advice of the Minister** as to whether the clause could be so drafted that it is clear that Parliament and its committees has right of access (suitably safeguarded) to the information.

For Parliament not to have access to some of the information which might be excluded by the clause impinges on the rights of Australians to have the administration of the country by the executive properly scrutinised by Parliament.

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

Banking (Queensland Industry Development Corporation) Amendment Bill 1995

This bill was introduced into the House of Representatives on 2 March 1995 by the Assistant Treasurer.

The bill proposes to list the Queensland Industry Development Corporation (QIDC) under the definition of a bank in section 5 of the *Banking Act 1959* to provide a legislative base for supervision of the QIDC by the Reserve Bank.

The Committee has no comment on this bill.

Commonwealth Authorities (Australian Capital Territory Pay-roll Tax) Bill 1995

This bill was introduced into the House of Representatives on 2 March 1995 by the Assistant Treasurer.

The bill proposes to create an ACT pay-roll tax liability for certain Commonwealth authorities previously not subject to ACT pay-roll tax because of general exempting regulations.

The committee has no comment on this bill.

Land Fund and Indigenous Land Corporation (ATSIC Amendment) Bill 1994

This bill was introduced into the House of Representatives on 28 February 1995 by the Prime Minister.

The bill proposes to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* to establish a Land Fund and an Indigenous Land Corporation (ILC) to receive moneys from the Fund. The ILC is to acquire lands for indigenous people and to undertake or make arrangements for the management of land held by indigenous people. The bill also makes amendments to the *Native Title Act 1993* and *Remuneration Tribunal Act 1973* consequent upon this bill.

The committee has no comment on this bill.

Senate Standing Committee
for
The Scrutiny of Bills

ALERT DIGEST

No. 5 of 1995

22 MARCH 1995

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*** The Committee has commented on these bills.**

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Committee under its terms of reference is invited to do so.

Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 8 March 1995 by the Minister for Aboriginal and Torres Strait Islander Affairs.

The bill proposes to amend Schedule 1 of the *Aboriginal Land Rights (Northern Territory) Act 1976* to add a parcel of land described as Western Desert Locality. This effectively grants this area of land to the Aboriginal Land Trusts to hold title on behalf of Aboriginal people.

The committee has no comment on this bill.

Bankruptcy Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 8 March 1995 by the Minister for Justice.

The bill proposes to make significant changes to bankruptcy law, implementing the following measures:

- # establish a 'One Stop Service' for bankrupts and insolvent debtors, and abolish the offices of Registrar and Deputy Registrar in Bankruptcy;
- # revise antecedent transaction avoidance provisions;
- # create alternative regimes to bankruptcy, and making meeting procedures align with those in bankruptcy;
- # create debt agreements for low income indigent debtors;
- # modernise the statement of the duties of bankruptcy trustees and amend investigative powers;
- # establish new administrative arrangements for the registration of trustees;
- # correct anomalies and amend the compulsory income contribution regime;
- # provide for forms to be approved administratively, rather than incorporated in statutory forms;
- # confer jurisdiction in bankruptcy on the Federal Court of Australia;
- # amend the power to make subordinate legislation so that the Governor-General will be empowered to make regulations relating to matters other than court practice and procedure;
- # create a new register of bankruptcies and personal insolvencies to be known as the National Personal Insolvency Index;
- # make powers of trustees discretionary;

amend investigative powers of trustees; and

repeal certain provisions and make consequential amendments.

Retrospective application Subclauses 82(2) and 83(2)

These subclauses provide that the amendments made by subclauses 82(1) and 83(1) 'apply to all bankruptcies that are current on or after the day on which this Part commences, but do not affect any distributions made before this part commenced'.

Subclauses 82(1) and 83(1) effect amendments which increase the range of transactions by a bankrupt which are to be void as against the trustee in bankruptcy. The amendments will enable a trustee in bankruptcy to lay claim to more former assets of the bankrupt for distribution among the creditors. They deal with undervalued transactions (where the transferee gave no consideration or inadequate consideration), transfers to defeat creditors and transfers in favour of a creditor which give that creditor a preference, priority or advantage over other creditors.

As some of the transactions referred to in the proposed new sections may have taken place up to five years before the bankruptcy commenced, the amendments may have considerable retrospective application.

The issue for the committee is whether the retrospective application of these clauses unduly trespasses on personal rights. People who are bankrupts when these clauses commence may, at various times over the five years before the date of their bankruptcy, have entered into transactions which according to the present law, would have had the effect of preventing the trustee in bankruptcy from claiming certain former assets of the bankrupt for distribution to creditors.

On the other hand, the purpose of the amendments is to seek to increase the amount available for distribution among creditors whose rights to be paid in full may be considered to have been trespassed against.

In these circumstances, the committee makes no further comment on these provisions.

Dairy Produce Amendment Bill 1995

This bill was introduced into the House of Representatives on 8 March 1995 by the Minister for Resources.

The bill proposes to implement new current dairy market support arrangements, including winding-up the current Market Support Fund and establishment of a new Domestic Support Fund. The new scheme will operate from 1 July 1995 and terminate on 30 June 2000.

The committee has no comment on this bill.

Dairy Produce Levy (No. 1) Amendment Bill 1995

This bill was introduced into the House of Representatives on 8 March 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to impose a levy on market milk (to be paid by the producer) and a levy on manufacturing milk (to be paid by the manufacturer) produced in Australia.

The committee has no comment on this bill.

Dairy Produce Levy (No. 2) Amendment Bill 1995

This bill was introduced into the House of Representatives on 8 March 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to impose a levy on re-imports of Australian dairy produce in the same form, or substantially the same form, as that which received a rebate of the manufacturing levy on the milk fat and protein content of the exported product, whether the rebate was an offset against manufacturing levy liability or a direct export rebate to a downstream manufacturer.

The committee has no comment on this bill.

Housing Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 8 March 1995 by the Minister for Housing and Regional Development.

The bill proposes to amend the *First Home Owners Act 1983* to effect administrative arrangements resulting from the winding down of the First Home Owners Scheme.

The bill also proposes to make equivalent amendments to earlier first home ownership assistance legislation: *Homes Savings Grant Act 1964*, *Home Savings Grant Act 1976* and *Home Deposit Assistance Act 1982*.

The bill proposes to amend the *Housing Assistance Act 1989* to authorise the Commonwealth Minister to provide up to the full level of Commonwealth funding in the expected final grant year of the Commonwealth-State Housing Agreement in certain circumstances.

The committee has no comment on this bill.

Interstate Road Transport Amendment Bill 1995

This bill was introduced into the House of Representatives on 8 March 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to amend the *Interstate Road Transport Act 1985* to provide the framework for the Federal Interstate Registration Scheme for vehicles engaged in interstate trade and commerce.

The committee has no comment on this bill.

Interstate Road Transport Charge Amendment Bill 1995

This bill was introduced into the House of Representatives on 8 March 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to amend the *Interstate Road Transport Charge Act 1985* to replace the current charging arrangement with an annual registration charge for vehicles engaged in interstate trade and commerce.

The committee has no comment on this bill.

Migration Legislation Amendment Bill (No. 4) 1995

This bill was introduced into the House of Representatives on 7 March 1995 by the Parliamentary Secretary to the Minister for Social Security.

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

- # allow the fertility control policies of a government of a foreign country to be disregarded in deciding whether a class of persons is a "particular social group" (for the purposes of applying the Refugees Convention) when considering an application for a protection visa; and
- # to stop the use of repeat applications for protection visas by non-citizens to delay their removal and to circumvent the immigration requirements of Australia.

This bill is virtually identical to the Migration Legislation Amendment Bill (No. 3) of 1995 which the committee dealt with in Alert Digest No. 2 of 1995. The committee has no additional comments on this bill. For the information of Senators, the comments of the committee in Alert Digest No. 2 of 1995 are reproduced:

Exclusion of present rights Proposed subsection 36(3)

The effect of the proposed subsection is to take away the present rights of certain asylum seekers to claim refugee status on the basis of a well-founded fear of persecution through belonging to a particular social group. The Federal Court has already accepted this as a basis for refugee status. The bill overrides that judicial determination.

Unusual circumstances exist with respect to this bill in that it has already been referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report.

In considering whether in excluding present rights the provision trespasses unduly on personal rights, the Senate will have the benefit of that Committee's report.

In these circumstances, the committee makes no further comment on this issue.

Alert Digest No. 2 continues:

Non reviewable decision Schedule, item 4 ~ Proposed section 48B

Item 4 of the Schedule proposes a new section [section 48B] in the same terms as Section 91F about which the committee expressed its concerns in Alert Digest No. 15 of 1994.

In Alert Digest No 15 of 1994 the committee dealt with the insertion of section 91F into the Act. The committee noted that proposed section 91F of the *Migration Act 1958*, if enacted, would give to the Minister, if the Minister thinks it is in the public interest, a discretion to determine that the new scheme for asylum seekers is not to apply to a particular person. The decision not to exercise this discretion is apparently not reviewable in any way, as subsection 91F(6) provides that the Minister does not have a duty to consider whether to exercise the power to exempt a particular person from the scheme.

The committee sought the Minister's advice on this matter, as it appeared inappropriate that, where it may be in the public interest to exercise a power, the bill should provide that the Minister does not have a duty even to consider exercising that power.

The committee also noted that the then proposed subsection 91F(3) required the Minister to lay before Parliament a favourable determination and the reasons for making it but the committee was of the opinion that scrutiny ought to be directed at the reasons for not considering to make a determination or, having considered, the reasons for refusing the determination. Accordingly, the committee sought the Minister's advice on an appropriate method of review.

As proposed section 48B of this bill repeats features of that earlier bill which were of concern, the committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Primary Industries and Energy Legislation Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 8 March 1995 by the Minister for Resources.

The bill proposes to amend the following Acts:

Export Inspection (Quantity Charge) Act 1985 to:

- # specify circumstances in which charges cannot be imposed under this Act if charges have been imposed under the *Export Inspection (Service Charge) Act 1985* to certain products; and
- # allow a quantity charge to be imposed on fish exports;

Wool International Act 1993 to:

- # provide that the regulations specify an amount below which Wool International is not required to automatically register wool tax payments; and
- # allow the Australian Wool Research and Promotion Organisation to request that Wool International provide information regarding persons who have paid wool tax on carpet wool; and

Australian Wool Research and Promotion Organisation Act 1993 to:

- # allow the Board to meet overseas so meetings can be held in conjunction with International Wool Secretariat Board meetings; and
- # allow wool tax collected for research and development in one year but not spent in that year, to be rolled over to later years and receive a matching Commonwealth contribution.

The committee has no comment on this bill.

Small Superannuation Accounts Bill 1995

This bill was introduced into the House of Representatives on 8 March 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes to establish the Superannuation Holding Accounts Reserve to provide a collection mechanism for small superannuation contributions made by employers in respect of employees who have small, and especially intermittent, superannuation amounts.

The committee has no comment on this bill.

Superannuation Laws Amendment (Small Accounts and Other Measures) Bill 1995

This bill was introduced into the House of Representatives on 8 March by the Parliamentary Secretary to the Treasurer.

The bill proposes to make amendments to the following Acts, consequent upon the Small Superannuation Accounts Bill 1995: *Fringe Benefits Tax Assessment Act 1986*, *Income Tax Assessment Act 1936*, *Superannuation Guarantee (Administration) Act 1992*, *Superannuation Entities (Taxation) Act 1987*, *Superannuation Industry (Supervision) Act 1993* and *Taxation Administration Act 1953*. The bill also proposes to repeal the *Superannuation (Rolled-Over Benefits) Levy Act 1993*.

The committee has no comment on this bill.

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10 MAY 1995

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*** The Committee has commented on these bills.**

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Committee under its terms of reference is invited to do so.

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*** The Committee has commented on these bills.**

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Air Navigation Amendment (Extension of Curfew and Limitation of Aircraft Movements) Act 1995

This bill was introduced into the Senate on 27 March 1995 as a Private Senator's bill (Senator Bourne).

The bill proposes to:

- # extend the Kingsford-Smith Airport curfew; and
- # freeze the rate of aircraft movements at the Airport while a Commission of Inquiry is conducted.

The committee has no comment on this bill.

Air Services Bill 1995

This bill was introduced into the House of Representatives on 30 March 1995 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to establish Airservices Australia to provide Australia's national airways system. This organisation, together with the Civil Aviation Safety Authority, replaces the Civil Aviation Authority.

Inappropriate delegation of legislative power: Imposition of charges by determination Clause 52

Subclause 52(1) provides:

Board can set charges for services and facilities

52.(1) The Board may make a written determination that sets:

- (a) charges for services or facilities provided by AA; or
- (b) penalties for late payment of service charges.

Under clause 52, the Board of Airservices Australia (AA) will be permitted to determine the amount of charges for services and facilities, with no upper limit being set in monetary terms.

The committee has consistently drawn attention to provisions which allow for the rate of a levy or other imposition to be set by regulation or determination, largely on the basis that a rate or an amount 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 or other imposition, the primary legislation should prescribe either a maximum rate or a method of calculating the maximum rate.

Subclause 52(3), however, ensures that the charges will be reasonably related to the expenses incurred and cannot be such as amount to taxation.

In these circumstances, the committee makes no further comment on the determination of charges.

**Inappropriate delegation of legislative power:
Setting of late payment penalty by determination
Clause 55**

Subclause 55(2) provides that the penalty for late payment, determined under subclause 52(1):

must not exceed a penalty equivalent to 1.5%, **or such other percentage as is prescribed by the regulations**, of the unpaid amount of the charge for each month or part of a month during which it is unpaid, calculated from the date for payment, and compounded. (emphasis added)

The effect of this subclause, if enacted, would be to provide an unfettered power to prescribe any percentage as the basis to determine the late payment penalty.

Although regulations are disallowable by either House of 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 amount of the penalty.

Further disallowance is effective only from the date it occurs. Late payment would have automatically attracted the penalty set out in the determination from the date the determination was made. Disallowance would not have the retrospective effect of cancelling an obligation already incurred during the period (if any) from when the determination was made until the regulation was disallowed. **The committee seeks the Minister's advice** on whether an appropriate upper limit either of the penalty itself or on the method of calculating it can be specified in the bill.

Pending the Minister's advice, 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.

**Subclauses 69(2) and 70(2)
Negligence and the test for criminal liability**

Clauses 69 and 70 of this bill provide:

Removal from Australian territory of aircraft under statutory lien

69.(1) A person who knows that a statutory lien is in effect in respect of an aircraft must not remove the aircraft from Australian territory without the prior approval of an authorised employee.
Penalty: Imprisonment for 3 years.

(2) For the purposes of establishing a contravention of subsection (1), a person is taken to have known that a statutory lien was in effect in respect of an aircraft if the person ought reasonably to have known that fact, having regard to:

- (a) the person's abilities, experience, qualifications and other attributes; and
- (b) all the circumstances surrounding the alleged contravention.

Dismantling etc. aircraft under statutory lien

70.(1) A person who knows that a statutory lien is in effect in respect of an aircraft must not detach any part or equipment from the aircraft unless the person has:

- (a) lawful authority; or
- (b) the prior approval of an authorised employee.

Penalty: Imprisonment for 2 years.

(2) For the purposes of establishing a contravention of subsection (1), a person is taken to have known that a statutory lien was in effect in respect of an aircraft if the person ought reasonably to have known that fact, having regard to:

- (a) the person's abilities, experience, qualifications and other attributes; and
- (b) all the circumstances surrounding the alleged contravention.

The committee has consistently drawn attention to offence provisions in this form since subsection 852KA(3) and 852KB(3) were inserted in the *Crimes Act 1914* in 1989.

The issues have been canvassed in the committee's Twelfth Report of 1989 in respect of the Law and Justice Legislation Amendment Bill 1989 and Sixth Report of 1993 in respect of the Australian Wine and Brandy Corporation Amendment Bill 1993.

The crux of the matter appears to the committee to be whether mere negligence should attract criminal liability for a serious offence. The committee notes the response of the Deputy Prime Minister to the committee of 11 July 1989, a copy of which is attached to the Digest.

That response states in part:

What may be of concern to your Committee is the test of "ought reasonably to know". The

legislative intention behind the provision is to cover both actual knowledge and recklessness. In certain circumstances "wilful blindness" may be construed as actual knowledge (see the facts of He Kaw Teh), but it may be that not all circumstances of wilful blindness will be taken as actual knowledge. It is theoretically better to treat "wilful blindness" as a type of recklessness rather than elevate it to actual knowledge. Thus the provisions have been formulated to cover both actual knowledge and recklessness (ie in other words where the defendant knew, or ought reasonably to have known).

The committee does not have any difficulty with a legislative intent to eliminate wilful blindness as a defence; but the committee is concerned that the formula proposed, in attempting to include wilful blindness, will cover not only actual knowledge and recklessness, which is the apparent legislative intent, but also mere negligence.

For mere negligence, no liability would attach under the present law.

The committee seeks the Minister's advice whether he agrees that the test of liability under these proposed provisions is less stringent than one requiring actual knowledge or a reckless disregard of the facts. The committee considers such a test to be the appropriate standard to be applied before a person is found guilty of a serious offence.

Pending the Minister's advice, the committee draws Senators' attention to the provisions, 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.

Australian Meat and Live-stock (Quotas) Amendment Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister representing the Minister for Primary Industries and Energy.

The bill proposes to:

- # extend the Australian Meat and Live-stock Corporation's (AMLC) powers to implement a quota scheme to those markets that impose quota tariffs on imports of Australian meat and live-stock; and
- # provide that the AMLC may allocate entitlement to quota amongst licensed exporters by auction, sale by tender, private sale or by allocation free of charge.

The committee has no comment on this bill.

Beef Production Levy Amendment Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister for Communications and the Arts.

The bill proposes to introduce a component of the levy on the production of beef to fund the Meat Industry Council. This component will be offset by a reduction in the marketing component which funds the Australian Meat and Live-stock Corporation.

The committee has no comment on this bill.

Cattle Export Charges Amendment Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister for Communications and the Arts.

The bill proposes to introduce a component of the levy on the export of cattle from Australia to fund the Meat Industry Council. This component will be offset by a reduction in the marketing component which funds the Australian Meat and Live-stock Corporation. The bill also proposes to impose two further charges, one being on cattle held by an exporter for over 60 days prior to export and the other on cattle exported from Australia where the cattle transaction levy has not previously been payable.

Retrospectivity Subclause 4(1)

Section 55 of the Constitution provides in part:

laws imposing duties of customs shall deal with duties of customs only, and
laws imposing duties of excise shall deal with duties of excise only.

Unfortunately, the *Cattle Transaction Levy Act 1990* imposed a customs duty and an excise duty in the same Act. To overcome this drafting error it is necessary to repeal the offending Act and to re-impose the customs and excise duties in separate Acts. To validate the payments already made and to collect those yet to be paid, the imposition has been made retrospective.

Consequential retrospectivity is also required in the following bills:

Cattle Transaction Levy Bill 1995
National Cattle Disease Eradication Trust Account Amendment Bill 1995
National Residue Survey Administration Amendment Bill 1995
National Residue Survey (Cattle Export) Levy Bill 1995
National Residue Survey (Cattle Transactions) Levy Bill 1995

In these circumstances, the committee makes no further comment on this bill.

Cattle Transaction Levy Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister for Communications and the Arts.

The bill proposes to impose a flat rate per head levy on the sale of cattle and transfer of cattle from the production to the processing stage, replacing the levy imposed by the *Cattle Transaction Levy Act 1990* (which contained a legal drafting error). The bill also proposes to introduce a component of the levy to fund the Meat Industry Council. This component will be offset by a reduction in the marketing component which funds the Australian Meat and Live-stock Corporation.

Retrospectivity Subclause 4(1)

As noted with respect to the Cattle Export Charges Amendment Bill 1995, Section 55 of the Constitution provides in part:

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Unfortunately, the *Cattle Transaction Levy Act 1990* imposed a customs duty and an excise duty in the same Act. To overcome this drafting error it is necessary to repeal the offending Act and to re-impose the customs and excise duties in separate Acts. To validate the payments already made and to collect those yet to be paid, the imposition has been made retrospective.

Consequential retrospectivity is also required in the following bills:

National Cattle Disease Eradication Trust Account Amendment Bill 1995
National Residue Survey Administration Amendment Bill 1995
National Residue Survey (Cattle Export) Levy Bill 1995
National Residue Survey (Cattle Transactions) Levy Bill 1995

In these circumstances, the committee makes no further comment on this bill.

Civil Aviation Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 30 March 1995 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to establish a Civil Aviation Safety Authority to be responsible for the safety regulation of civil aviation in Australia. This organisation, together with Airservices Australia, replaces the Civil Aviation Authority.

The committee has no comment on this bill.

Communications and Tourism Legislation Amendment Bill 1995

This bill was introduced into the Senate on 29 March 1995 by the Minister for Defence.

The bill proposes to amend the following Acts:

Australian Tourist Commission Act 1987 to:

- 9 remove the requirement that members of the Board cease to hold office at the age of 65; and
- 9 remove the requirement that the Board not employ persons on terms and conditions more favourable than those of the Managing Director;

Broadcasting Services Act 1992 to:

- 9 enable commercial television broadcasting licensees in sole markets to be allocated a second licence to operate a service in the same licence area; and
- 9 provide that a price-based allocation process proposed to be conducted by the ABA is able to proceed before the ABA need consider giving a permission to operate a second service to an existing licensee;

Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992 to:

- 9 remove the Minister's powers to vary or revoke technical conditions and impose further conditions in respect of certain transmitter licences; and
- 9 remove transitional provisions relating to provisions of the *Broadcasting Act 1942* relating to political broadcasting; and

Radiocommunications Act 1992 to:

- 9 enable the SMA, in determining a price-based allocation system in relation to specified transmitter licences, to limit eligibility to apply for those licences to certain persons; and
- 9 enable radio inspectors to enter unoccupied premises to turn off Emergency

Position Indicating Radio Beacons which have activated spontaneously.

The committee has no comment on this bill.

Competition Policy Reform Bill 1995

This bill was introduced into the Senate on 29 March 1995 by the Minister for Defence.

The bill proposes to provide a new national competition policy, main elements taking the form of amendments to the *Trade Practices Act 1974* and *Prices Surveillance Act 1983* to:

- # apply to all businesses in Australia prohibitions against anti-competitive conduct;
- # create a new legal regime to facilitate businesses obtaining access to the services of certain essential infrastructure facilities;
- # replace the Trade Practices Commission and Prices Surveillance Authority with the Australian Competition and Consumer Commission;
- # establish the National Competition Council, an advisory body; and
- # streamline prices surveillance processes, extending their jurisdiction to State and Territory government businesses.

Commencement

Clause 2(4)

Under subclause 2(4), some parts of this bill will not commence till 12 months after Royal Assent.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. 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).

In respect of this bill, both paragraphs 4 and 6 of the Drafting Instruction appear to be applicable. The period chosen being longer than 6 months, the explanatory memorandum contains the reason that the longer period has been chosen is because complementary State and Territory legislation needs to be passed. Such a reason is cited in paragraph 6 as an example where it is appropriate to depart from the requirements of the earlier paragraphs of the Drafting Instruction.

In these circumstances, the committee makes no further comment on this provision.

Retrospective application Clauses 30 and 84

Clauses 30 and 84 appear to contain some retrospective application in that subclause (3) of each of them refers to a cut-off date which is determined under subclause (5) of each clause as the 19 August 1994. There appears to be no indication in either the bill or the explanatory memorandum of the reason that such a date was chosen.

The clauses deal with contracts which came into existence before the 19 August 1994. Such contracts will be exempt from the anti-competitive provisions inserted in the *Trade Practices Act 1974* (the Principal Act) by this bill. The committee notes paragraph 98 of

the explanatory memorandum which states:

If the making of, and giving effect to, the contract did not contravene the Principal Act before the commencement of Division 1 of this Part (other than by reason of a subsection 51(1) exception), the amendments made by this Bill will not make the contract unenforceable, and will not prevent the parties giving effect to the contract.

As the clauses grant exemptions from the anti-competitive obligations which would otherwise have been imposed by the bill, it does not seem to the committee unreasonable for the bill to provide some time limitation on the contracts it proposes to exempt. If the bill did not provide such a limitation it would leave the way open for 'exempt' contracts to be made until the commencement of the legislation (28 days after Royal Assent). These contracts would be exempt from the obligations to be imposed by the bill and thus would frustrate the purposes of the bill indefinitely.

In these circumstances, the committee makes no further comment on this bill.

Constitution Alteration (Ecology, Diversity and Sustainability) Bill 1995

This bill was introduced into the Senate on 29 March 1995 as a Private Senator's bill (Senator Coulter).

The bill proposes to amend the Constitution to ensure the Parliament takes into account the effect of laws it makes on the maintenance of ecosystems and of essential ecological processes, the biological diversity of Australia, and the utilisation of the living natural resources on a sustainable basis.

The committee has no comment on this bill.

Customs, Excise and Bounty Legislation Amendment Bill 1995

This bill was introduced into the Senate on 30 March 1995 by the Minister for Defence.

The bill proposes to amend the following Acts:

Customs Act 1901 to:

- 9 introduce search and seizure power reforms to implement the Government's response to the recommendations of the Conroy Report;
- 9 make structural and organisational reforms to the Australian Customs Service;
- 9 control the movement of goods where there has been a technical breakdown of the ACS computer entry system for a prolonged period;
- 9 specifically exclude the making of end use Tariff Concession Orders and allow for the revocation of existing end use TCOs; and
- 9 to extend origin preference concessions to Papua New Guinea, Fiji and other Forum Island Countries;

Customs Act 1901 and *Excise Act 1901* to extend provisions governing the sale of duty free goods to passengers departing Australia by sea;

Excise Act 1901 to allow the Minister for Primary Industries and Energy to review and replace excise by-laws which grant an excise duty exemption to the first 30 million barrels of crude oil recover from certain onshore and offshore fields for up to 3 years; and

Bounty (Fuel Ethanol) Act 1994 to clarify the total amount available for payment of bounty in respect of bountiable fuel ethanol produce in a bounty year; and 23 Acts are also amended consequent upon the reforms to the ACS; and the

Bounty (Ship Repair) Act 1986, *Bounty (Ships) Act 1980* and *Customs Tariff (New Zealand Preference) Agreement Act 1933* are repealed.

Retrospectivity
Subclauses 2(2) and (3)

Under these subclauses various provisions of this bill would have retrospective effect.

The committee notes, however, that paragraphs 3 and 4 of the explanatory memorandum point out that the retrospectivity is either not disadvantageous or is beneficial to the public.

In these circumstances, the committee makes no further comment on this bill.

Customs Tariff Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 27 March 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

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

- # allow certified reference materials to be used in a broader range of industrial and scientific processes;
- # reinstate the level of assistance for goods of mixed fibre content;
- # free all imports of unmanufactured and manufactured tobacco and tobacco products from customs duty; and
- # maintain the intended rate of duty for parts of regulating and controlling instruments and burglar alarms, consequent upon the World Trade Agreement coming into effect.

Retrospectivity Subclauses 2(2) to (5)

By virtue of these subclauses most of the substantive provisions of this bill will have retrospective effect.

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. The amendments made by proposed sections 3 and 4 and Schedule 2, however, 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 on those provisions.

Schedule 1, however, if enacted, would retrospectively impose customs duty on certain items that the Administrative Appeals Tribunal has declared to be free of duty under the Act as it stands at present. Where a change in duty has been announced by a Customs Tariff Proposal tabled in Parliament, the committee has been prepared to accept the retrospectivity of the subsequent ratifying legislation. It is not clear from the explanatory memorandum whether the change in this instance has been made by way of a Custom Tariff Proposal. The **committee seeks the advice of the Minister** on whether this is so.

On the other hand, the explanatory memorandum seems to suggest that the change has been made to restore what the law was intended to mean. The committee has no objection to amendments which change the law from what the law has been found to mean to what the law was intended to mean, provided that it is not changed retrospectively to anyone's disadvantage. People have the right to have the law applied as it stands at the time of application if that is to their advantage. Serious revenue implications might be considered to justify retrospectivity in some circumstances. The committee notes, however, that this amendment is among those which the explanatory memorandum in its Financial Impact Statement indicates 'have little or no revenue implications'. Accordingly, the **committee also seeks the Minister's advice** on any other reason which might justify retrospectivity.

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

Defence Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister representing the Minister for Defence.

The bill proposes to amend the following Acts:

Defence Act 1903 to:

- 9 enable senior statutory appointments to be for fixed terms; and
- 9 allow acting appointments to be made at ministerial level, rather than by the Governor-General;

Defence Act 1903 and *Naval Defence Act 1910* to:

- 9 allow for specific procedures for the retirement of officers or termination of their appointments; and
- 9 allow for procedures for the management initiated early retirement and limited-tenure promotion of officers;

Defence Force Discipline Act 1982 to implement recommendations of the Defence Force Discipline Legislation Board of Review;

Defence Force (Home Loans Assistance) Act 1990 to extend the deadline from 1 September 1994 to 1 December 1994 within which certain incapacitated members can apply for home loan assistance; and

Military Superannuation and Benefits Act 1991 to ensure the Military Superannuation and Benefits Scheme complies with the *Superannuation Industry (Supervision) Act 1993*.

Retrospectivity Subclause 2(4)

Under this subclause Schedule 3 would have retrospective effect from 1 September 1994.

The committee notes, however, that paragraphs 85 to 89 of the explanatory

memorandum point out that the retrospectivity is beneficial to persons with Defence home loans.

In these circumstances, the committee makes no further comment on this bill.

Employment, Education and Training Amendment Bill 1995

This bill was introduced into the Senate on 29 March 1995 by the Minister for Defence.

The bill proposes to:

- # create two new Councils: the Australian Language and Literacy Council and the Australian International Education Foundation Council;
- # allow the establishment of new Councils by disallowable instrument;
- # abolish the Commonwealth/State Consultative Committee;
- # streamline mechanisms for appointments; and
- # make minor and technical amendments.

The committee has no comment on this bill.

Exotic Animal Disease Control Amendment Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister representing the Minister for Primary Industries and Energy.

The bill proposes to amend the *Exotic Animal Disease Control Act 1989* to return any unexpended money remaining after the sunset of the Act on 30 June 1995 to the Australian Meat and Live-stock Corporation and the Meat Research Corporation to be used on industry's behalf.

The committee has no comment on this bill.

Family Law Reform (Consequential Amendments) Bill 1995

This bill was introduced into the Senate on 29 March 1995 by the Minister for Defence.

The bill proposes to amend the *Australian Citizenship Act 1948*, *Child Support Assessment Act 1988*, *Child Support (Registration and Collection) Act 1988*, *Childcare Rebate Act 1993*, *Migration Act 1948*, *Passports Act 1938* and *Social Security Act 1991* as a consequence of the enactment of the Family Law Reform Bill 1994.

The committee has no comment on this bill.

Human Services and Health Legislation Amendment Bill (No. 1) 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposed to amend the following Acts:

Childcare Rebate Act 1993 to:

- 9 provide hardship provisions to include certain groups of persons currently excluded from the rebate scheme;
- 9 make amendments to administrative issues and to correct technical errors in drafting;
- 9 allow the suspension of family and carer registrations if cancellation of registrations is being considered;
- 9 allow the Health Insurance Commission (HIC) to backdate carer registrations to the day on which they were first eligible to register;
- 9 cancel family and carer registrations which occurred due to administrative error;
- 9 ensure the rebate is not paid for child care costs which are reimburseable by another agent;
- 9 clarify that the rebate is payable for child care costs incurred for certain specified absences from care;
- 9 clarify the backdating of family registrations; and
- 9 clarify the eligibility of overseas students to claim the rebate;

Health Insurance Act 1973 to:

- 9 correct drafting errors; and
- 9 allow for the appointment as Presidents of the Professional Services Review Tribunals persons who hold or have held judicial office in State and Territory

- jurisdictions;
- 9 allow the HIC to provide consultancy and management services; and
- 9 enable the HIC to retain evidential material seized pursuant to the execution of a search warrant until a specified time;
- # *National Health Act 1953* to:
 - 9 remove several redundant provisions relating to review of decisions; and
 - 9 amend provisions relating to 'exempt bed status';
- # *National Health and Medical Research Council Act 1992* to provide the Minister consult with specific Ministers before making certain appointments to the Council and the Australian Health Ethics Committee; and
- # *Therapeutic Goods Act 1989* to:
 - 9 clarify the distinction between 'food' and 'therapeutic goods';
 - 9 enable the Minister and certain senior officers to temporarily approve the supply of unevaluated drugs for use in Australia in limited circumstances;
 - 9 establish a new procedure for listing on the Australian Register of Therapeutic Goods drugs that are supplied for use in Australia;
 - 9 require sponsors of goods that have been unlawfully supplied to inform the public accordingly and take steps to recover any goods already distributed;
 - 9 establish a Therapeutic Goods Administration Reserve;
 - 9 clarify offence provisions and introduce new offences;
 - 9 streamline and update the search and seizure powers provisions relating to warrants; and
 - 9 amend procedures for reviewing decisions relating to the registration of therapeutic goods in the Australian Register of Therapeutic Goods.

Retrospectivity
Subclause 2(2)

Under this subclause many of the provisions of the bill would have retrospective effect from 1 July 1994. Although the explanatory memorandum appears to give no explanation for the choice of this date, the committee notes that 1 July 1994 is the commencement date of the *Child Rebate Act 1993*.

It seems to the committee that the amendments are generally beneficial or of a minor technical nature.

In these circumstances, the committee makes no further comment on this provision.

Retrospectivity

Subclause 2(3) and subclauses 2(6) to (9)

Under these subclauses, a number of provisions of the bill would have retrospective effect. It seems that in each case the amendment is minor and technical.

In these circumstances, the committee makes no further comment on these provisions.

Reversal of the onus of proof

Item 89, Schedule 1

Item 89, if enacted, would insert new subsection 20(1A) in the *Therapeutic Goods Act 1989* to provide a defence to a prosecution for intentionally or recklessly dealing with therapeutic goods contrary to new subsection 20(1).

The committee notes that the explanatory memorandum states on pages 21-22 in respect of this matter:

Offences under s.20(1) of the Act apply only to sponsors. Sponsors can be broadly described as principal importers, exporters and manufacturers, and the definition of "sponsor" does not extend to include those who act on behalf of the principals, except where the principals operate offshore. Currently, in proceedings under this provision, to establish that a person is a sponsor the Crown is required to show, among other things, that there is no agency arrangement. However it is not possible to establish something that does not exist and a fact that is within the knowledge of the sponsor.

The effect of the changes made by ITEM 89 will be to require a "sponsor" in such a situation to establish that there was an agency arrangement, and that therefore the person did not act as a principal in unlawfully importing, exporting or manufacturing therapeutic goods.

The principal/agent relationship, particularly in cases not involving major corporations, can only be ascertained conclusively through confidential commercial arrangements known only to the parties concerned, to which the Commonwealth is not privy and often precluded from discovery for the purposes of establishing who committed an offence under s.20. Until the identity of the sponsor can be established, it is not possible to lay charges under s.20 of the Act so as to effectively preclude the exportation, importation, supply and use within Australia of unapproved therapeutic goods, including counterfeit drugs.

No change has been made to the nature of the offences under s.20, which apply only to "sponsors", as defined in s.3(1) of the Act.

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

Law and Justice Legislation Amendment Bill (No. 2) 1995

This bill was introduced into the Senate on 29 March by the Minister for Defence.

The bill proposes to amend the following Acts:

Administrative Appeals Act 1975 to:

- 9 establish a Small Taxation Claims Tribunal;
- 9 provide for costs awards in the AAT; and
- 9 remove gender-specific language;

Bankruptcy Act 1966 and *Family Law Act 1975* to provide:

- 9 for the conferral of jurisdiction so either the Federal or Family Court can handle all aspects of a case where the bankruptcy of one spouse affects the family law entitlements of the other;
- 9 that either court may transfer the case to the other court, where appropriate for the other court to hear the matter or it is otherwise in the interests of justice for the other court to do so; and
- 9 that prior to the distribution of the estate of the bankrupt to the creditors the non-bankrupt spouse may be able to retrieve from assets any property he or she may be entitled to;

Federal Court of Australia Act 1976 to provide for the method of conversion of Australian currency and New Zealand currency with respect to the enforcement of certain New Zealand judgments;

Foreign Judgments Act 1991 to provide for the method of conversion of Australian currency and foreign currency with respect to the enforcement of certain foreign judgments;

Freedom of Information Act 1982 to:

- 9 allow documents relating to the commercial activities of the Indigenous Land Corporation to be exempted from the operation of the Act and certain aspects of the *Privacy Act 1988*; and

- 9 allow documents relating to the commercial activities of the Department of Administrative Services to be exempted from the operation of the Act;
- # *Judges' Pensions Act 1968* to provide that a retired judge is entitled to receive the pension and hold judicial office in relation to a Territory;
- # *Jurisdiction of Courts (Cross-vesting) Act 1987* to provide that the Act applies to the Australian Capital Territory;
- # *Privacy Act 1988* to:
 - 9 insert a definition of 'guarantee';
 - 9 empower the Privacy Commissioner to determine that an agency is a credit provider;
 - 9 allow an overdue payment under a guarantee to be listed on the guarantor's credit information file; and
 - 9 empower the Privacy Commissioner to copy and retain certain documents;
- # *Service and Execution of Process Act 1992* to provide that:
 - 9 'magistrate' includes a bail justice under the *Magistrates Court Act 1989* of Victoria;
 - 9 'warrant' includes a warrant issued under the Act;
 - 9 State or Territory laws relating to service or execution within the State or Territory of process, including judgments, of another State or Territory, are excluded;
 - 9 the time an interstate defendant in a civil proceeding has to enter an appearance is the longer of 21 days or the period within which an appearance could be entered if the process has been served within the State of issue;
 - 9 procedures relating to persons under restraint who are arrested under an interstate warrant do not apply where the person is under restraint only in the State or Territory which issued the warrant; and
 - 9 an order made by a magistrate under section 83 cannot be challenged other than by an application for review under section 86;

- # *Superannuation Act 1976* to allow a member of the Tribunal who is a member or pensioner under the *Superannuation Act 1990* to hear applications for review;
- # *Taxation Administration Act 1953* to make consequent amendments upon the establishment of the Small Taxation Claims Tribunal; and
- # *Administrative Decisions (Judicial Review) Act 1977* and *Federal Proceedings (Costs) Act 1981* to make minor technical amendments.

The committee has no comment on this bill.

Live-stock Export Charge Amendment Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister for Communications and the Arts.

The bill proposes to introduce a component of the levy on export from Australia of sheep, lambs, buffalo and goats to fund the Meat Industry Council. This component will be offset by a reduction in the marketing component which funds the Australian Meat and Live-stock Corporation. The bill also proposes to pay moneys equal to the marketing and research component of the levy on the export of buffalo to the Rural Industries Research and Development Corporation.

The committee has no comment on this bill.

Live-stock Slaughter Levy Amendment Bill 1995

The bill was introduced into the House of Representatives on 29 March 1995 by the Minister for Communications and the Arts.

The bill proposes to introduce a component of the levy on the slaughter of sheep, lambs, buffalo and goats to fund the Meat Industry Council. This component will be offset by a reduction in the marketing component which funds the Australian Meat and Live-stock Corporation. The bill also proposes to pay moneys equal to the marketing and research component of the levy on the slaughter of buffalo to the Rural Industries Research and Development Corporation.

The committee has no comment on this bill.

Meat and Live-stock Industry Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister representing the Minister for Primary Industries and Energy.

The bill proposes to provide for the:

- # establishment, functions and powers for the Meat Industry Council and sets out funding for industry consultations;
- # functions, powers and continuation of the Australian Meat and Live-stock Corporation and Meat Research Corporation;
- # selection committee which is to nominate people for appointment to the Australian Meat and Live-stock Corporation and Meat Research Corporation; and
- # legislation to commence on 1 July 1995 and sunset on 30 June 1998, the three statutory industry authorities then reverting to non-statutory status.

Abrogation of privilege against self-incrimination Subclause 152(3)

This subclause, if enacted, would abrogate the privilege against self-incrimination for a person required to give information or produce documents under proposed subsection 152(1). The information and documents sought under the subsection relate generally to the administration of the proposed law and are not directly related to the institution of criminal proceedings.

Further the proposed abrogation 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 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.

Meat and Live-stock Industry Legislation Repeal Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister for Communications and the Arts.

The bill proposes to repeal the following Acts:

Australian Meat and Live-stock Corporation Act 1977

Australian Meat and Live-stock Industry Policy Council Act 1984

Australian Meat and Live-stock Industry Selection Committee Act 1984

Cattle Transaction Levy Act 1990

Meat Research Corporation Act 1985 and

National Residue Survey (Cattle Transactions) Levy Act 1992.

The bill also proposes to provide transitional provisions relating to AMLC's export licences, keeping of registers, export quotas, enforcement, EEO program, AMLC's and MRC's membership and staff, 1994-95 annual reports and payments of money and ministerial directions to AMLC and MRC.

The committee has no comment on this bill.

Migration Legislation Amendment Bill (No. 5) 1995

This bill was introduced into the House of Representatives on 30 March 1995 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to repeal the *Migration (Delayed Visa Applications) Tax Act 1992* and to amend the following Acts:

Migration Act 1958 to:

- 9 provide the Minister with a discretion to determine that a person is an 'eligible non-citizen';
- 9 extend the duration of the Migration Agents Registration Scheme until 21 September 1996; and
- 9 allow flexibility with questions asked on passenger cards;

Immigration (Education) Act 1971 to remove the Commonwealth's obligation to provide any tuition in an approved English course to persons holding visas because that persons satisfied certain criteria; and

Migration Legislation Amendment Act (No. 4) 1995 to remove Item 7 of the Schedule.

Retrospectivity Subclauses 2(2) and (3)

Under these subclauses various provisions of this bill would have retrospective effect.

It seems to the committee that the amendments are beneficial to persons other than the Commonwealth or of a minor technical nature.

In these circumstances, the committee makes no further comment on this provision.

National Cattle Disease Eradication Trust Account Amendment Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister representing the Minister for Primary Industries and Energy.

The bill proposes to validate the payment of amounts of money equal to the National Cattle Eradication Trust Account's components of levies and charges into the Trust Account.

Retrospectivity Subclause 2(2)

As noted with respect to the Cattle Export Charges Amendment Bill 1995, Section 55 of the Constitution provides in part:

laws imposing duties of customs shall deal with duties of customs only, and
laws imposing duties of excise shall deal with duties of excise only.

Unfortunately, the *National Residue Survey (Cattle Transactions) Levy Act 1992* imposed a customs duty and an excise duty in the same Act. To overcome this drafting error it is necessary to repeal the offending Act and to re-impose the customs and excise duties in separate Acts. To validate the payments already made and to collect those yet to be paid, the imposition has been made retrospective.

Consequential retrospectivity is also required in the following bills:

Cattle Transaction Levy Bill 1995
National Residue Survey Administration Amendment Bill 1995
National Residue Survey (Cattle Export) Levy Bill 1995
National Residue Survey (Cattle Transactions) Levy Bill 1995

In these circumstances, the committee makes no further comment on this bill.

National Residue Survey Administration Amendment Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister for Communications and the Arts.

The bill proposes to amend the *National Residue Survey Administration Act 1992* to provide that certain persons are liable to pay a flat rate per head levy on the sale of cattle and the transfer of cattle from the production to the processing stage and on the export of cattle, to replace the levy imposed by the *National Residue Survey (Cattle Transactions) Levy Act 1992* (which contained a legal drafting error).

Retrospectivity Schedule

As noted with respect to the Cattle Export Charges Amendment Bill 1995, Section 55 of the Constitution provides in part:

laws imposing duties of customs shall deal with duties of customs only, and
laws imposing duties of excise shall deal with duties of excise only.

Unfortunately, the *National Residue Survey (Cattle Transactions) Levy Act 1992* imposed a customs duty and an excise duty in the same Act. To overcome this drafting error it is necessary to repeal the offending Act and to re-impose the customs and excise duties in separate Acts. To validate the payments already made and to collect those yet to be paid, the imposition has been made retrospective.

Consequential retrospectivity is also required in the following bills:

Cattle Transaction Levy Bill 1995
National Cattle Disease Eradication Trust Account Amendment Bill 1995
National Residue Survey (Cattle Export) Levy Bill 1995
National Residue Survey (Cattle Transactions) Levy Bill 1995

In these circumstances, the committee makes no further comment on this bill.

National Residue Survey (Cattle Export) Levy Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister for Communications and the Arts.

The bill proposes to impose a flat rate per head levy on the export of cattle, replacing one component imposed by the *National Residue Survey (Cattle Transactions) Levy Act 1992* (which contained a legal drafting error).

Retrospectivity Clause 6

As noted with respect to the Cattle Export Charges Amendment Bill 1995, Section 55 of the Constitution provides in part:

laws imposing duties of customs shall deal with duties of customs only, and
laws imposing duties of excise shall deal with duties of excise only.

Unfortunately, the *National Residue Survey (Cattle Transactions) Levy Act 1992* imposed a customs duty and an excise duty in the same Act. To overcome this drafting error it is necessary to repeal the offending Act and to re-impose the customs and excise duties in separate Acts. To validate the payments already made and to collect those yet to be paid, the imposition has been made retrospective.

Consequential retrospectivity is also required in the following bills:

Cattle Transaction Levy Bill 1995
National Cattle Disease Eradication Trust Account Amendment Bill 1995
National Residue Survey Administration Amendment Bill 1995
National Residue Survey (Cattle Transactions) Levy Bill 1995

In these circumstances, the committee makes no further comment on this bill.

National Residue Survey (Cattle Transactions) Levy Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister for Communications and the Arts.

The bill proposes to impose a flat rate per head levy on the sale of cattle and the transfer of cattle from the production to the processing stage, replacing the levy imposed by the *National Residue Survey (Cattle Transactions) Levy Act 1992* (which contained a legal drafting error).

Retrospectivity Clause 6

As noted with respect to the Cattle Export Charges Amendment Bill 1995, Section 55 of the Constitution provides in part:

laws imposing duties of customs shall deal with duties of customs only, and
laws imposing duties of excise shall deal with duties of excise only.

Unfortunately, the *National Residue Survey (Cattle Transactions) Levy Act 1992* imposed a customs duty and an excise duty in the same Act. To overcome this drafting error it is necessary to repeal the offending Act and to re-impose the customs and excise duties in separate Acts. To validate the payments already made and to collect those yet to be paid, the imposition has been made retrospective.

Consequential retrospectivity is also required in the following bills:

Cattle Transaction Levy Bill 1995
National Cattle Disease Eradication Trust Account Amendment Bill 1995
National Residue Survey Administration Amendment Bill 1995
National Residue Survey (Cattle Export) Levy Bill 1995

In these circumstances, the committee makes no further comment on this bill.

Overseas Mission (Privileges and Immunities) Bill 1995

This bill was introduced into the Senate on 29 March 1995 by the Minister for Defence.

The bill proposes to allow privileges and immunities to be conferred upon the premises of, and persons associated with certain overseas missions in Australia which represent self governing or autonomous foreign territories that are not states and are not recognised by Australia as states.

The committee has no comment on this bill.

Overseas Missions (Privileges and Immunities) (Consequential Amendments) Bill 1995

This bill was introduced into the Senate on 29 March 1995 by the Minister for Defence.

The bill proposes to amend the *Australian Protective Service Act 1987*, *Crimes (Internationally Protected Persons) Act 1976*, *Diplomatic and Consular Missions Act 1978* and *Public Order (Protection of Persons and Property) Act 1971* consequent upon the *Overseas Missions (Privileges and Immunities) Act 1995*.

The committee has no comment on this bill.

Primary Industries Levies and Charges Collection Amendment Bill 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Minister for Communications and the Arts.

The bill proposes to amend the *Primary Industries Levies and Charges Collection Act 1991* to give effect to the repeal of the *Cattle Transaction Levy Act 1990*, which contained a legal drafting error, and replacement by the *Cattle Transaction Levy Act 1995*.

The committee has no comment on this bill.

Prime Minister and Cabinet (Miscellaneous Provisions) Bill 1995

This bill was introduced into the Senate on 29 March 1995 by the Minister for Defence.

The bill proposes to amend the following Acts:

- # *Economic Planning Advisory Council Act 1983* to abolish the Council and establish the Economic Planning Advisory Commission;
- # *Parliamentary Allowances Act 1952* to:
 - 9 update references to the titles of Deputy Presiding Officers; and
 - 9 remove gender-specific language;
- # *Parliamentary Presiding Officers Act 1965* to correct the reference to the Deputy Speaker's title; and
- # *Public Service Act 1922* to:
 - 9 implement the agreement between the Prime Minister and the Joint Committee of Public Accounts to table Departmental annual reports by 31 October each year;
 - 9 allow Presiding Officers to delegate; and
 - 9 enable Presiding Officers to cancel and approve promotions in certain circumstances.

The committee has no comment on this bill.

Sales Tax Assessment (Refunds for Certain Public Interest and Charitable Bodies) Amendment Bill 1995

This bill was introduced into the Senate on 27 March 1995 as a Private Senator's bill (Senator Watson).

The bill proposes to allow certain public interest and charitable bodies to claim a refund of overpaid sales tax under sales tax law.

The committee has no comment on this bill.

Sex Discrimination Amendment Bill 1995

This bill was introduced into the House of Representatives on 30 March 1995 by the Attorney-General.

The bill proposes to amend the *Sex Discrimination Act 1984* to:

- # insert a preamble;
- # simplify the test for indirect discrimination;
- # include potential pregnancy as an unlawful ground of discrimination;
- # clarify that certain measures do not amount to discrimination and are designed to achieve equality of outcomes;
- # remove the reference to 'combat-related duties' in the exemption for the Australian Defence Forces; and
- # make minor technical and consequential amendments.

The committee has no comment on this bill.

Social Security Legislation Amendment Bill No. 1) 1995

This bill was introduced into the House of Representatives on 30 March 1995 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following Acts:

Social Security Act 1991 to:

- 9 exempt payments of financial supplement paid under the Student Financial Supplement Scheme from the definition of income;
- 9 amend the definition of 'long term social security recipient' so that periods on AUSTUDY or ABSTUDY are included for the purposes of qualification for the job search allowance and newstart allowance bereavement payments;
- 9 clarify residence requirements for certain refugees and temporary entrants;
- 9 clarify the qualification requirements for the disability support pension and disability wage supplement;
- 9 give the Secretary a discretion to waive parts of a waiting/deferment period for certain persons commencing vocational training;
- 9 modify the rules relating to reduction of an education leavers waiting period;
- 9 allow certain persons to receive payment of job search or newstart allowances for three weeks after commencing an AUSTUDY/ABSTUDY approved course;
- 9 amend provisions to provide that a person complying with a recipient statement notice relating to job search, newstart and partner allowances, and payment is varied, cancelled or suspended as a result of the information provided, the date of effect to vary, cancel or suspend payment is the day of the event or change in circumstances;
- 9 make available telephone allowance to disability wage supplement pensioners continuing to qualify for fringe benefits;
- 9 make available employment entry payments to disability wage supplement customers who satisfy certain conditions;

- 9 extend education entry payment to certain job search, newstart and youth training allowances customers who commence a full-time training course because they are formally required to do so;
 - 9 allow 'period of grace' payments to be made to all categories of mobility allowance;
 - 9 bring the seniors health card qualifying age into line with new arrangements for the age pension age (the women's pension age will, from 1 July 1995, start to increase incrementally until 65 becomes the new age pension in 2014);
 - 9 amend the definition of 'superannuation fund' to exclude 'non-resident' rather than 'foreign' superannuation funds;
 - 9 provide that native title rights and interests are not to be taken into account when applying the assets test in the Act;
 - 9 provide an automatic mechanism for determining the notional rate of interest for loan fringe benefits that would be based on current market rates of interest for specified loans;
 - 9 simplify the calculation of prepayment debts; and
 - 9 ensure recipients of education entry payments do not incur overpayments under the Act;
- # *Social Security Act 1991 and Student and Youth Assistance Act 1973 to:*
- 9 remove the earnings disregard and introduce a 70 per cent taper for the income test; and
 - 9 abolish the joint income test for sickness or youth training allowance couples;
- # *Social Security Act 1991, Social Security (Parenting Allowance and Other Measures) Legislation Amendment Act 1994, Health Insurance Act 1973 and Veterans' Entitlements Act 1986 in relation to superseded compensation payments, split compensation settlements, application of compensation provisions to claimants and assessment of periodic and lump sum compensation for the purposes of the Disadvantage Persons Health Scheme;*
- # *Data-matching Program (Assistance and Tax) Act 1990 to:*

- 9 provide for a capacity to add a numeral to a identity number for the purposes of personal assistance to ensure any particular number will refer to only one person; and
- 9 provide for a new definition of 'spouse' for the purposes of any 'personal assistance' to overcome an inconsistency with the *Social Security Act 1991*; and
- # *Social Security Act 1991, Social Security (Budget and Other Measures) Legislation Amendment Act 1993, and Social Security (Parenting Allowance and Other Measures) Legislation Amendment Act 1994* to make several minor technical amendments.

Retrospectivity Subclauses 2(2), (3) and (7)

Under these subclauses various provisions of this bill would have retrospective effect.

It seems to the committee that the amendments are beneficial to Social Security recipients.

In these circumstances, the committee makes no further comment on these provisions.

Retrospectivity Subclauses 2(8) to (14)

Under these subclauses various provisions of this bill would have retrospective effect.

It seems to the committee that the amendments made by these provisions are of a minor or technical nature.

In these circumstances, the committee makes no further comment on these provisions.

Superannuation Legislation Amendment Bill (No. 1) 1995

This bill was introduced into the House of Representatives on 29 March 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes to amend the following Acts:

- # *Superannuation Act 1922* to provide for the recognition of employment as public employment as applied under the *Superannuation Act 1976*;
- # *Superannuation Act 1976* to:
 - 9 ensure the Commonwealth Superannuation Scheme (CSS) complies with the *Superannuation Industry (Supervision) Act 1993*;
 - 9 correct certain anomalies;
 - 9 restore the original intentions of the 1976 Act in response to changes in the Commonwealth employment environment;
 - 9 make administrative changes;
 - 9 name the scheme and to simplify the names of the Board and the Fund set up under the Act;
 - 9 to make technical and drafting changes; and
 - 9 remove gender-specific terms;
- # *Superannuation Act 1990* to:
 - 9 ensure the CSS complies with the *Superannuation Industry (Supervision) Act 1993*;
 - 9 name the scheme and to simplify the names of the Board and the Fund set up under the Act;
 - 9 make administrative changes; and
 - 9 minor technical changes;

- # *Superannuation Legislation Amendment Act 1994* to correct a technical deficiency; and
- # *Parliamentary Contributory Superannuation Act 1948* to remove gender-specific terms.

Retrospectivity Subclause 2(2)

Subclause 2(2) provides that the amendment made by item 160 in Schedule 2 has retrospective effect from 1 July 1976.

The committee notes the reason for this retrospectivity is given in paragraphs 304 and 305 of the explanatory memorandum which state:

Item 160 omits subsection 185(3) of the 1976 Act to ensure that persons who were transferred to the CSS from the superannuation scheme under the 1922 Act are permitted to pay supplementary contributions under arrangements at least as generous as those applying to members joining the CSS on or after 1 July 1976.

The omission of subsection 185(3) from the Act reflects the administration of the provision since 1 July 1976 and the original intention. As a consequence the amendment is given retrospective effect to 1 July 1976.

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

Retrospectivity Subclause 2(5)

Under this subclause, the amendment proposed by Schedule 6 would have retrospective effect. The amendment, however, is of a minor, technical nature to correct a drafting error.

In these circumstances, the committee makes no further comment on this provision.

Taxation Laws Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 30 March 1995 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to amend:

- # the income tax and sales tax laws to exempt certain wholly-owned State and Territory bodies from these taxes; and amend the following Acts:
- # *Income Tax Assessment Act 1936* and *Fringe Benefits Tax Assessment Act 1986* to provide for the taxation of shares or rights acquired under an employee share scheme;
- # *Income Tax Assessment Act 1936* to:
 - 9 institute new procedures associated with the refund of TFN amounts incorrectly deducted by investment bodies;
 - 9 change the tax status of the mature age partner allowance from non-taxable to taxable;
 - 9 amend capital gains provisions to allow certain superannuation funds to defer any accrued capital gains or losses that would be realised as a result of the merger on the assets transferred;
 - 9 clarify the taxation arrangements for superannuation pensions and roll-over annuities;
 - 9 restrict deductions for employer superannuation contributions to contributions made to certain funds;
 - 9 ensure the 90 day roll-over period applies to eligible termination payments received before 1 July 1994; and
 - 9 enable a penalty to be imposed on all relevant entities and instalment taxpayers where they are late in lodging an income tax return;
- # *Superannuation Guarantee (Administration) Act 1992* to:
 - 9 clarify the jurisdiction of the Australian Industrial Relations Commission in

- relation to arbitration on superannuation matters;
- 9 ensure that the percentage level of superannuation support provided for an employee under flat dollar arrangements is calculated based on the actual superannuation contribution paid by the employer; and
- 9 exempt payments received by local government councillors in the course of their duties from the scope of the Act;
- # *Superannuation Industry (Supervision) Act 1993* to:
 - 9 insert new definitions of employee and employer to overcome unintended consequences resulting from the exclusion of councillors from the SGAA;
 - 9 allow the Insurance and Superannuation Commissioner to undertake statistical surveys of the superannuation industry and to provide information to the Australian Bureau of Statistics for statistical purposes;
 - 9 ensure that the trustee or investment manager of certain superannuation funds is not precluded from taking advantage of the exception to the rule prohibiting acquisition of member's assets;
 - 9 allow the financial backing requirements imposed on approved trustees and custodians to be met by having an approved guarantee and net tangible assets; and
 - 9 allow the regulations to provide some flexibility in determining the date by which an application for a pre 1 July 1988 funding credit must be made;
- # *Superannuation Entities (Taxation) Act 1987* to change the method of collecting the superannuation supervisory levy and make consequential amendments;
- # *Sales Tax (Exemptions and Classifications) Act 1935* to exempt from sales tax certain UHF television transmitters, if they are for use in transmitting commercial television programs and acquired under the equalisation program;
- # *Sales Tax Assessment Act 1992* to insert a new credit ground for unregistered persons where they have borne tax on an assessable dealing even though they were entitled to quote an exemption declaration; and
- # *Development Allowance Authority Act 1992, Income Tax Assessment Act 1936, Taxation (Interest on Overpayments and Early Payments) Act 1983, and Taxation Laws Amendment Act (No. 3) 1994* to make several minor technical amendments.

Retrospectivity
Subclauses 2(2) to (10)

Under these subclauses various provisions of this bill would have retrospective effect.

It seems to the committee that the amendments made by these provisions are of a minor or technical nature.

In these circumstances, the committee makes no further comment on these provisions.

Retrospective application
Schedule 3, Part 7
Schedule 4, Part 2
Schedule 5

Amendments made under Schedule 3, Part 7, Schedule 4, Part 2 and Schedule 5 of this bill, while commencing on Royal Assent, will have retrospective application from 1 July 1994.

It seems to the committee that the retrospective application of these amendments is beneficial to taxpayers.

In these circumstances, the committee makes no further comment on these provisions.

Retrospective application
Schedule 3, Part 2

The amendments proposed under Part 2 in Schedule 3 mostly have retrospective application.

It seems to the committee that these amendments do no more than remove obsolete references from legislation.

In these circumstances, the committee makes no further comment on these

provisions.

Taxation Laws Amendment (Drought Relief Measures) Bill 1995

This bill was introduced into the House of Representatives on 28 March 1995 by the Parliamentary Secretary to the Minister for the Environment, Sport and Territories.

The bill proposes to amend the following Acts:

- # *Income Tax Assessment Act 1936* to make various amendments to provide for an investment allowance of 10 per cent for capital expenditure of up to \$50,000 per taxpayer in each year the allowance is claimed on fodder storage, water storage for live stock, water conveyancing and minimum tillage equipment; and
- # *Loans (Income Equalization Deposits) Act 1976* to make farm management bonds a more attractive investment vehicle for farmers.

The committee has no comment on this bill.

Trade Marks Bill 1995

This bill was introduced into the Senate on 30 March 1995 by the Minister for Defence.

The bill proposes to provide for the registration of trade marks, collective trade marks, certification trade marks and defensive trade marks and sets out and protects the rights deriving from registration. It will repeal the *Trade Marks Act 1955* and repeal and replace the *Trade Marks Act 1994*, which has not yet come into force.

Commencement Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would provide for the commencement of the substantive provisions of this bill to be on a date to be fixed by Proclamation, or on 1 January 1996, whichever occurs first.

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:

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 period between Royal Assent and commencement may be longer than the 6 months period suggested in paragraph 4 of the Drafting Instruction.

The committee also notes, however, that the explanatory memorandum states at page 2:

3. The timing is necessary to allow trade mark owners and users, practitioners and the Trade Marks Office sufficient opportunity to prepare for implementation of the provisions in the Act. It is consistent with the Agreement Establishing the World Trade Organization.

In the light of this explanation, the committee makes no further comment on this bill.

Transport Legislation Amendment Bill (No. 2) 1995

This bill was introduced into the Senate on 29 March 1995 by the Minister for Defence.

The bill proposes to amend the following Acts:

Air Navigation Act 1920 to:

- 9 allow regulations to be made which apply to a range of aircraft operated outside Australian Territory by Australians and Australian companies;
- 9 introduce mental elements into criminal offences; and
- 9 move penalties for violation of aviation security from the regulations to the Act, providing penalties commensurate with the gravity of the offence;

Civil Aviation (Carriers' Liability) Act 1959 to require carriers to hold liability insurance and delegates the administration of this requirement to the Civil Aviation Safety Authority;

Crimes (Aviation) Act 1991 to correct drafting errors to two definitions and make a consequential amendment; and

Road Transport Reform (Vehicles and Traffic) Act 1993 to ensure that the operation of the Act within the Australian Capital Territory is regulated by the Australian Capital Territory administrative procedures.

Strict liability ~ reversal of the onus of proof

Item 19 of the Schedule ~ Aviation Security

Item 19 of the Schedule inserts a new Part 3 into the *Air Navigation Act 1920* to provide for aviation security. It creates a number of offences of strict liability subject to the accused showing a 'reasonable excuse' for the action. This, in effect, reverses the onus of proof.

Offences are categorised as of strict liability where it is immaterial whether the person had the 'guilty knowledge' which at common law is an integral part of any statutory offence, unless the statute itself or its subject matter rebuts that presumption. At common law offences of strict liability are subject to the defence of honest and reasonable mistake

of fact. In such cases the accused must raise the defence, though the prosecution has the ultimate onus of proving the elements which constitute the offence. In a statute, a strict liability offence may also be made subject to a specific defence or defences.

Where public policy dictates that strict liability offences should be created, the committee acknowledges that both specific and general defences assist the personal rights and liberties of the accused. The primary issue, therefore, is whether a strict liability ought to be imposed.

The committee notes that the explanatory memorandum indicates the reasons for creating strict liability. Paragraph 25 states:

There are essentially two types of offences contained in Part 3:

- . there are offences which are directed at members of the aviation industry (principally, airlines and airport operators). These are couched as strict liability offences which provide reasonable excuse as a defence. Since these offences are concerned with ensuring public safety on aircraft, having these offences as strict liability offences accords with Commonwealth criminal law policy. Their significant nature makes it as important to discourage careless non-compliance as it is to prevent intentional and reckless breaches - either one has the potential to lead to a serious breach of the aviation security system; and
- . there are offences which are directed at individuals not employed within the aviation industry (passengers, visitors to airports, etc). These offences have the mental elements of intention and reckless attached to them. The principal reason for this is that these offences are seen as supporting, rather than forming a part of, the aviation security system. By way of example, section 22A provides that a person cannot enter a sterile area unless she or he has been screened and cleared. While it is important to have such an offence, section 22A essentially supports the primary offence (section 21) which requires the airline to screen people who enter a sterile area. It would not be appropriate to prosecute a person, who through no fault of his or her own (eg, due to a breakdown of the airline's security system) unintentionally breaches section 22A. In such a situation, attention should be directed at the airline rather than the passenger.

In the light of this explanation, the committee makes no further comment on this item.

Parliamentary scrutiny of the exercise of legislative power

Item 23 ~ proposed section 28

Proposed section 28 of this bill, if enacted, would prevent instruments relating to aviation security from being subject to scrutiny and disallowance under the proposed legislative instruments legislation.

The committee, however, notes the reasons given for this in the explanatory

memorandum at paragraph 165 which states:

Owing to the extremely sensitive nature of instruments dealing with aviation security issued under the Act and regulations, section 28 deems these instruments not to be legislative instruments for the purposes of the *Legislative Instruments Act 1995*. At the time of drafting this document, the proposed Legislative Instruments Act does not exist. But the Legislative Instruments Bill does, and the current version of that Bill specifically excludes those instruments relating to aviation security issued under Part XVIA of the Air Navigation Regulations (this exclusion was arrived at following consultations between officers of the Department of Transport and the Attorney-General's Department). However, the present amendments to the *Air Navigation Act 1920* (inserting new Part 3 into the Act) provide for the making of instruments relating to aviation security under the Act. Consequently, the exclusion in the Legislative Instruments Bill will not be broad enough to cover the aviation security instruments which will be made under the *Air Navigation Act 1920*. Section 28 overcomes this deficiency.

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

Senate Standing Committee
for
The Scrutiny of Bills

ALERT DIGEST

No. 7 of 1995

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THE SCRUTINY OF BILLS

SENATE STANDING COMMITTEE FOR

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

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.**

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.

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*** 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.

Aircraft Noise Levy Bill 1995

This bill was introduced into the House of Representatives on 11 May 1995 by the Parliamentary Secretary to the Prime Minister.

The bill proposes to impose a levy to landings of jet aircraft at declared airports. Currently, only Sydney (Kingsford Smith) Airport meets the declared airports criteria. The rate of the levy will be designed to recover costs associated with noise amelioration works under way in Sydney.

The committee has no comment on this bill.

Aircraft Noise Levy Collection Bill 1995

This bill was introduced into the House of Representatives on 11 May 1995 by the Parliamentary Secretary to the Prime Minister.

The bill proposes to enable the collection of the levy imposed by the Aircraft Noise Levy Bill 1995.

Abrogation of the privilege against self-incrimination Subclause 15(3)

Subclause 15(3) of this bill provides:

(3) A person is not excused from giving a return or information on the ground that the information, or giving the return, might tend to incriminate the person. However, any information or return given, and any information or thing (including any document) obtained as a direct or indirect consequence of the giving of the return or information, is not admissible in evidence against the person in:

- (a) criminal proceedings other than proceedings for an offence against subsection (1) or (4); or
- (b) proceedings for recovery of an amount of late-payment penalty.

This subclause, if enacted, would abrogate the privilege against self-incrimination for a person required to give information or a return under proposed subsection 15(1).

The proposed abrogation, however, 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 can be put. The committee notes in particular that the **indirect** as well as the direct use of such information would be precluded. This is, therefore, a 'use/derivative use' indemnity.

The committee also notes at page 9 of the explanatory memorandum that consideration was given to whether the provision could be drafted so as to distinguish between the power to seek returns or information for the ordinary purposes of collecting the levy and the power to seek information from a person for the purpose of investigating breaches. The explanatory memorandum continues:

It was considered that, from a drafting perspective, drawing such a distinction would be very difficult, if not impossible. Moreover, to hedge the

power to require information with qualifications would make it more difficult to use the power for the ordinary purposes of collecting the levy: if, whenever a request for information were made, the authorised officer could be required to justify his or her actions as being within stated criteria, the provision would, in practical terms, be of little use.

In these circumstances, the committee makes no further comment on this bill.

Appropriation Bill (No. 1) 1995~96

This bill was introduced into the House of Representatives on 9 May 1995 by the Treasurer.

The bill proposes to appropriate money (\$31,689.4 million) out of the Consolidated Revenue Fund for the service of the year ending on 30 June 1996, and for related purposes.

The committee has no comment on this bill.

Appropriation Bill (No. 2) 1995~96

This bill was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes to appropriate money (\$4,365.5 million) out of the Consolidated Revenue Fund for certain expenditure in respect of the year ending on 30 June 1996, and for related purposes.

The committee has no comment on this bill.

Appropriation (Parliamentary Departments) Bill 1995~96

This bill was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes to appropriate money (\$144.5 million) out of the Consolidated Revenue Fund for certain expenditure in relation to the Parliamentary Departments in respect of the year ending on 30 June 1996, and for related purposes.

The committee has no comment on this bill.

Civil Aviation Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 30 March 1995 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to establish a Civil Aviation Safety Authority to be responsible for the safety regulation of civil aviation in Australia. This organisation, together with Airservices Australia, replaces the Civil Aviation Authority.

The committee dealt with this bill in Alert Digest No. 6 of 1995, in which the committee made no comment. The committee has become aware of concerns raised by the Aircraft Owners and Pilots Association of Australia with respect to an apparent widening of criminal liability.

Criminal liability

Items 57 and 58 of Schedule 1

Items 57 and 58 would amend section 20A of the *Civil Aviation Act 1988* from:

- (1) An aircraft must not be flown or operated in a reckless or negligent manner so as to be likely to endanger life.
- (2) An aircraft must not be flown or operated in such a manner, or in such circumstances as is or are likely to cause danger to any person or property.

to:

- (1) An aircraft must not be flown or operated in a reckless or negligent manner so as to be an actual or potential danger to the life of any person.
- (2) An aircraft must not be flown or operated in such a manner, or in such circumstances, so as to be an actual or potential danger to any person or property.

Item 57

With respect to subsection 20A(1) the amendment proposed by item 57 does not appear to the committee to come within its terms of reference. The amendment does not alter the existing requirement that commission of an offence requires proof of intention or negligence on the part of the accused. While the committee regularly comments on provisions which expose a person to criminal liability if he or she has been negligent (rather than intending to commit the act), that aspect of subsection 20A(1) is already in

the legislation.

In these circumstances, the committee makes no further comment on this item.

Item 58

The amendment proposed by item 58 appears to come within the committee's terms of reference. The existing subsection 20A(2) creates an offence of strict liability (ie, which may be committed even in the absence of recklessness or negligence), but is limited to acts which are likely to cause danger to persons or property. The amendment would extend the range of acts which would contravene the subsection to include those which are no more than a potential danger to persons or property. The increase of the applicability of a penal provision in this way may well be regarded as trespassing unduly on personal liberties.

The committee **seeks the Minister's advice** on this issue.

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

Customs and Excise Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 11 May 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to amend the

Customs Act 1901 to:

- # remove the eligibility for the payment of rebate of customs duty in respect of the use of diesel fuel at residential premises;
- # remove from the definition of 'minerals' materials that are more valuable for use in their own right rather than for their inherent mineral worth;
- # ensure that rebate of customs and excise duty is payable only where the diesel fuel is for use in an activity included in the definition of 'agriculture'; and
- # remove the clause conferring rebate on activities 'connected with' mining operations and primary production and insert a clear list of eligible activities; and the

Excise Act 1901 to remove the eligibility for the payment of rebate of excise duty in respect of the use of diesel fuel at residential premises.

Retrospectivity Subclause 2(2)

By subclause 2(2) of this bill, if enacted, items 4, 7, 8 and 10 of Schedule 1 would have effect retrospectively from 1 August 1986.

The committee notes the comments of the explanatory memorandum with respect to these items:

These items propose amendments to the definitions of "agriculture", "minerals" and "mining operations" in subsection 164(7) of the *Customs Act 1901* (the Customs Act), which set out some of the uses of diesel fuel in respect of which rebate of customs duty and excise duty is payable.

The amendments are proposed to clarify the ambit of the Diesel Fuel Rebate

Scheme (DFRS) as being a targeted scheme intended to provide rebate of duty paid on diesel fuel used by those who are genuinely involved in the business of mining or farming, or those who undertake activities that are intimately bound up with mining or farming. This intention is implicit in paragraphs 164(1)(a) and (aa) of the Customs Act, which provides that rebate is payable in respect of diesel fuel purchased for use in mining operations and in primary production.

Rebate was originally intended to be payable to those who the ordinary person would have considered to be 'farmers' and 'miners'. However, as the years have progressed, various decisions of courts and tribunals have expanded the ambit of the DFRS to the extent that many activities that should never have been regarded as being eligible to receive rebate have received, and continue to receive, rebate.

The committee has no difficulty with amending the law when interpretation by the courts over time has shown that the law was not drafted narrowly enough to implement a particular policy.

But the committee is concerned with the proposal to do so retrospectively. This clearly trespasses on the basic right that those subject to the law are entitled to be treated according to what the law says at the relevant time and according to what the law means at that time as declared by the courts. The committee is not persuaded by the argument that 'an ordinary person' would not have interpreted the law in the way in which the courts have interpreted it.

When the Diesel Fuel Rebate Scheme was passed into law, all parties knew that the courts would interpret what its terms meant. Just as all parties knew that if the courts' interpretation was too narrow or too wide, the legislative scheme could be altered by parliamentary amendment.

The Financial Impact Statement in the explanatory memorandum indicates that the one-off retrospective savings amounting to \$86 million are three times the \$27 million savings for 1995-96 for the same categories. It would be a matter of grave concern if this position has been reached because for up to three years the executive has refrained from administering the rebate according to the law as declared by the courts, forcing applicants for the rebate into court action to obtain their rights. This could be a factor in the Senate's consideration of whether to take away those rights retrospectively amounts to trespassing unduly on those rights.

The committee **seeks the Minister's advice** on this issue.

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

Fringe Benefits Tax Amendment Bill 1995

This bill was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes to increase the fringe benefits tax rate from 48.4 per cent to 48.75 per cent, effective from 1 April 1995 with a subsequent increase in the rate from 48.75 per cent to 48.5 per cent, effective from 1 April 1996.

The committee has no comment on this bill.

Income Tax Rates Amendment Bill 1995

This bill was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes to increase the rate of company tax from 33 per cent to 36 per cent in respect of taxable income for the 1995-96 and subsequent income years.

The committee has no comment on this bill.

Loan Bill 1995

This bill was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes to provide authority to charge to the Loan fund, out of borrowings also authorised by the bill, defence expenditures which would otherwise be met from the Consolidated Revenue Fund (CRF). It also proposes to reimburse the CRF from the Loan Fund for certain non-defence expenditures.

The committee has no comment on this bill.

Local Government (Financial Assistance) Bill 1995

This bill was introduced into the House of Representatives on 10 May 1995 by the Parliamentary Secretary to the Minister for Housing and Regional Development.

The bill proposes to replace and repeal the *Local Government (Financial Assistance) Act 1986* as the basis upon which Commonwealth financial assistance is provided to local government through the States and Territories. The bill will replace the intra-state principles for the distribution of financial assistance to local government with nationally applicable principles.

The committee has no comment on this bill.

Medicare Levy Amendment Bill 1995

This bill was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes to:

- # increase the rate of Medicare levy from 1.4 to 1.5 per cent;
- # raise the low income thresholds for individuals, married couples and sole parents; and
- # correct a consequential amendment which had been overlooked when the Medicare levy rate was increased from 1.25 per cent to 1.4 per cent.

Retrospective application

Clause 2

Under this clause the amendment to be made by Schedule 1 of this bill will apply retrospectively from 1 July 1993.

It seems to the committee that the amendment is to correct a drafting oversight and is beneficial to some persons paying the Medicare levy.

In these circumstances, the committee makes no further comment on this bill.

Qantas Sale Amendment Bill 1995

This bill was introduced into the House of Representatives on 10 May 1995 by the Minister for Finance.

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

- # increase the foreign ownership limit for Qantas from 35 per cent of issued capital to 49 per cent;
- # restrict individual foreign airlines to holding no more than 25 per cent of the issued share capital of Qantas; and
- # restrict foreign airlines, in total, to holding no more than 35 per cent of the issued share capital of Qantas.

The committee has no comment on this bill.

Sales Tax (Exemptions and Classifications) Modification (Customs) Bill 1995

This bill was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill, together with two others, proposes to modify the operation of the *Sales Tax (Exemptions and Classifications) Act 1992* to give effect to the following changes:

- # scaffolding, wall and floor safes and racking and shelving systems excluded from exemption;
- # safes, musical instruments and bric-a-brac excluded from concessional treatment;
- # rate of tax on passenger motor vehicles increased;
- # certain currently exempt building materials and other goods to be subject to tax;
- # model aircraft excluded from exemption; and
- # exemptions for recycled paper removed.

Retrospectivity Subclause 2(1)

By virtue of subclause 2(1) of this bill, some of the substantive provisions of the bill will have effect from Budget night and therefore prior to Royal Assent. The committee notes that the amendments give effect to a budget announcement.

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, 1981-85*, 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 this bill.

Sales Tax (Exemptions and Classifications) Modification (Excise) Bill 1995

This bill was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill, together with two others, proposes to modify the operation of the *Sales Tax (Exemptions and Classifications) Act 1992* to give effect to the following changes:

- # scaffolding, wall and floor safes and racking and shelving systems excluded from exemption;
- # safes, musical instruments and bric-a-brac excluded from concessional treatment;
- # rate of tax on passenger motor vehicles increased;
- # certain currently exempt building materials and other goods to be subject to tax;
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The committee makes no further comment on this bill.

Sales Tax (Exemptions and Classifications) Modification (General) Bill 1995

This bill was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill, together with two others, proposes to modify the operation of the *Sales Tax (Exemptions and Classifications) Act 1992* to give effect to the following changes:

- # scaffolding, wall and floor safes and racking and shelving systems excluded from exemption;
- # safes, musical instruments and bric-a-brac excluded from concessional treatment;
- # rate of tax on passenger motor vehicles increased;
- # certain currently exempt building materials and other goods to be subject to tax;
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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 this bill.

Student and Youth Assistance Amendment (Youth Training Allowance) Bill 1995

This bill was introduced into the House of Representatives on 11 May 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Student and Youth Assistance Act 1973* to make the following changes to the Youth Training Allowance provisions:

- # amend the liquid assets waiting period applicable to youth training allowance clients;
- # ensure that people receiving payments under predecessors of the current payment types under the *Social Security Act 1991* and who receive compensation are caught by the compensation recovery provisions;
- # remove tables listing compensation affected payments and replace them with text descriptions;
- # ensure that two or more lump sum compensation payments made in respect of a disease, injury or condition sustained in one compensable event are treated as one lump sum compensation payment for the purposes of the compensation recovery provisions;
- # allow qualification assessment to be bypassed if the person's prospective payment will be precluded anyway following the application of the compensation recovery provisions;
- # simplify the debt creation provisions, principally by removing the concept of payability;
- # clarify that if a person loses qualification for youth training allowance it is not then necessary to make a determination that the allowance is not payable and loss of payability is automatic;
- # ensure that customers who notify the department of an event or change in circumstances that affects their maximum payment rate will incur a debt from the end of the notification period only;
- # amend the date of effect of rate reduction for clients with an earnings credit balance who fail to notify income from employment;

- # allow the Secretary to disclose client information to certain agencies and to be able to delegate this disclosure power to departmental staff;
- # clarify that certain Ministerial decisions are not subject to internal review or review by the Social Security Appeals Tribunal;
- # ensure that the Secretary may waive only so much of a waiting/deferment period that overlaps with vocational training being undertaken by a client and to modify the rules relating to reduction of an education leaver's waiting period;
- # extend the three week rule to clients who undertake full-time courses of education or training regardless of the duration of the course;
- # introduce an automatic mechanism for setting interest rates based on current market rates (with an effect of loan fringe benefit provisions);
- # provide that where a person complies with a recipient statement notice and the payment is varied, cancelled or suspended as a result of the information provided, the date of effect of the determination to vary, cancel or suspend payment is the day of the event or change in circumstances;
- # clarify the Youth Training Activity Agreement provisions relating to unreasonable delay;
- # allow the Secretary to require a YTA recipient to attend a particular place for a particular purpose;
- # modify eligibility conditions for payment of the youth training supplement and to include participation in labour market programs as eligible for the supplement; and
- # allow notices of decisions to be sent to post office boxes as well as residential addresses.

Retrospectivity

Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would permit Schedule 1 of the bill to commence on the 20 March 1995. The amendments seek to allow certain amounts to be deducted from a person's liquid assets. Disregarding these amounts would make the application of the liquid assets test for the waiting period fairer for youth training allowance clients.

In these circumstances, the committee makes no further comment on this provision.

**Disclosure of information
Schedule 7**

The amendments made by Schedule 7 would widen the range of people by whom and to whom client information may be disclosed.

The amendments are similar to those effected by the *Social Security (Non-Budget Measures) Legislation Amendment Act 1995* with respect to Social Security client information. The issues involved were thoroughly canvassed when the committee dealt with that Act in Alert Digest No. 1 of 1995 and in the Sixth Report of 1995.

In the light of the explanation provided by the Minister for Social Security with respect to those issues, the committee makes no further comment on this Schedule.

**Non-reviewable decisions
Schedule 8**

The amendments made by Schedule 8 would provide that certain decisions of the Minister exercising a power or function under the Act would not be reviewable either internally or by the Social Security Appeals Tribunal.

The amendments are similar to those effected by the *Social Security (Non-Budget Measures) Legislation Amendment Act 1995* with respect to certain similar decisions under the *Social Security Act 1991*. The issues involved were thoroughly canvassed when the committee dealt with that Act in Alert Digest No. 1 of 1995 and in the Seventh Report of 1995.

In the light of the explanation provided by the Minister for Social Security with respect to those issues, the committee makes no further comment on this Schedule.

Retrospective application

Schedule 11

Schedule 11 of this bill, if enacted, would provide that proposed subsections 16(2) and (2A) of Schedule 3 of the *Student and Youth Assistance Act 1973* would have retrospective application, inserting notional rates of interests for the fringe benefit years ending on 31 March 1994 and 1995.

It is not clear to the committee whether the rates of interest so specified are declaratory of the present position or represent a retrospective change of interest. The committee, therefore, **seeks the Minister's advice** on this matter and also on whether, if they do represent a retrospective change, that change is beneficial to clients or not.

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

Taxation Laws Amendment (Budget Measures) Bill 1995

This bill was introduced into the House of Representatives on 9 May 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes to amend the following Acts:

Taxation (Deficit Reduction) Act (No. 1) 1993 to make consequential amendments in relation to the increased company tax rate as the increase will not apply to the concessional rates of tax applicable to recognised medium credit unions and recognised large credit unions for the 1995-96 and 1996-97 years of income;

Taxation (Deficit Reduction) Act (No. 2) 1993 to:

- # freeze the rate of tax imposed on the eligible insurance business of friendly societies and other registered organisations at 33 per cent of the 1995-96 and 1996-97 years of income; and
- # increase the rebate applying to taxable bonuses paid on life insurance policies issued by friendly societies to 33 per cent from 1 July 1995 and maintaining that level for the year beginning 1 July 1996;

Sales Tax Assessment Act 1992 and five Sales Tax (Deficit Reduction) Acts to make consequential amendments upon the increase of sales tax payable on passenger motor vehicles;

Sales Tax Assessment Act 1992 to:

- # ensure that the Commonwealth is not liable to pay refunds if the liability to the refund does not arise under the provisions of the Assessment Act; and
- # remove the concessional treatment afforded goods which contain computer programs embodied in non-permanent microchips; and

Sales Tax Amendment (Transitional) Act 1992 to ensure that the Commonwealth is not liable to refund sales tax that was paid or overpaid under the old law, if the liability to the refund does not arise under the provisions of the old sales tax law.

Retrospectivity

Subclause 2(1)

By virtue of subclause 2(1) of this bill, some of the substantive provisions of the bill will have effect from Budget night and therefore prior to Royal Assent. The committee notes that the amendments give effect to a budget announcement.

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, 1981-85*, 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 this provision.

Retrospective application

Schedule 9, item 3 in Part 3

Item 3 in Part 3 of Schedule 9, if enacted, would allow the amendments proposed by the Schedule to apply to liabilities that arose prior not only to Royal Assent but also to Budget night, where legal proceedings to enforce the liabilities had not commenced before that night.

It should be kept in mind that, although the bill speaks of the liability of the Commonwealth, the words are referring to the right of a taxpayer to recover moneys which the common law or statutory law other than the sales tax legislation would deny that the Commonwealth had any right to keep.

The effect of item 3, therefore, is to take away a right of recovery that was in existence on Budget night. The explanatory memorandum does not appear to give any reason for taking away this right and the committee seeks the Treasurer's advice on this matter.

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

reference.

General comment
Schedule 9, Part 1

The committee is not conversant with all the express provisions of the sales tax legislation. The committee, however, **seeks the Treasurer's advice** whether an express provision covers the situation where through administrative error sales tax on a batch of goods was paid twice. A mistake of fact would give rise to a liability to refund under common law but, absent common law through this amendment, is there an avenue of redress?

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

Telecommunications (Carrier Licence Fees) Amendment Bill 1995

This bill was introduced into the House of Representatives on 11 May 1995 by the Parliamentary Secretary to the Prime Minister.

The bill proposes to enable the 'telecommunications standardisation' component of Australia's contribution to the International Telecommunication Union to be recovered through carrier licence fees payable by telecommunications carriers from 1 July 1995.

The committee has no comment on this bill.

Wildlife Protection (Regulation of Exports and Imports) Amendment Bill 1995

This bill was introduced into the Senate on 9 May 1995 by the Minister for Defence.

The bill proposes to amend the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* to fulfil Australia's international obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Convention on Biological Diversity. Amending provisions include:

- # that commercial harvests of native Australian and certain species of overseas wildlife be conducted on a sustainable basis with no detriment to the long term survival of any species;
- # that management programs and declarations for controlled specimens, for the commercial export of native plants, animal products and live fish or invertebrates be only approved where appropriate State or Territory legislation is in place;
- # that a maximum period applies for which a management program can be approved;
- # flexibility for granting permits for private importation of species relating to species which could become extinct if stringent regulation of trade is not undertaken;
- # relating to species identified by a Party as under regulation to prevent or restrict exploitation and cooperation of others in control of trade;
- # a new offence relating to the cruel treatment of live animals being imported or exported;
- # strengthening enforcement powers of inspectors appointed under the Act;
- # ensuring penalties are consistent with other Commonwealth legislation;
- # limiting the maximum number of native household pets that may be exported to two, and elimination of the ownership requirements for pet birds;
- # introducing a national registration scheme for certain species of exotic birds; and
- # more stringent control over native wildlife species that are, or are to be, exported as inter zoological gardens transfers.

Commencement

Subclause 2(4)

The amendments proposed by Schedule 14 with respect to the regulation of the possession of classified exotic birds will commence either on Proclamation during the eleven months after Royal Assent or, if not proclaimed during that period, on the first day after the expiry of the period.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. 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).

In respect of this bill, paragraph 4 of the Drafting Instruction appears to be applicable. The period chosen being longer than 6 months, the explanatory memorandum on page 5 indicates that the longer period has been chosen in order to allow sufficient time to

implement administrative changes, additional public consultation on the species that will be subject to regulation and an extensive public education and information campaign.

In these circumstances, the committee makes no further comment on this provision.

Criminal liability and negligence
Schedule 14, item 4 - proposed new section 57C

The committee has consistently drawn attention to provisions which attach criminal liability to negligent conduct. Proposed new section 57C of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* creates an offence of intentionally transferring possession of a classified exotic bird to a recipient under certain circumstances which may involve negligent conduct on the part of the transferor.

The concern of the committee has been directed to the possibility that mere negligence would be sufficient to attract criminal liability. Proposed subsection 57C(2), however, makes it clear that the mental element required for the commission of the offence is gross negligence and not merely a lack of care.

In these circumstances, the committee makes no further comment on this provision.

Senate Standing Committee
for
The Scrutiny of Bills

ALERT DIGEST

No. 8 of 1995

7 JUNE 1995

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THE SCRUTINY OF BILLS

SENATE STANDING COMMITTEE FOR

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

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.
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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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Committee under its terms of reference is invited to do so.

Parliamentary Approval of Treaties Bill 1995

This bill was introduced into the Senate on 31 May 1995 by Senator Bourne as a Private Senator's bill.

The bill proposes to provide that treaties, conventions, protocols or reservations to treaties which the Government proposes should apply to Australia require parliamentary approval. It proposes to further refine provisions of the Parliamentary Approval Treaties Bill 1994 (now discharged) which was introduced into the Senate by Senator Bourne on 29 June 1994.

The committee has no comment on this bill.

Passenger Movement Charge Amendment Bill 1995

This bill was introduced into the House of Representatives on 30 May 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to clarify the treatment of travel involving Australia's external Territories and brings the status of departures to installations in Area A of Australia of the Australia-Indonesia Zone of Cooperation into line with that in the *Customs Act 1901* and the *Migration Act 1958*.

The committee has no comment on this bill.

Passenger Movement Charge Collection Amendment Bill 1995

This bill was introduced into the House of Representatives on 30 May 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to enable collection of the \$27 passenger movement charge (PMC) by international air and sea passenger carriers, as part of ticketing arrangements. Further, the bill identifies 12 categories of exemption from PMC liability to replace the 24 categories currently existing.

The committee has no comment on this bill.

Senate Standing Committee
for
The Scrutiny of Bills

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

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Child Care Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 7 June 1995 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to amend the *Child Care Act 1972*, the *Childcare Rebate Act 1993* and the *Health Insurance Commission Act 1973* to change the eligibility for childcare assistance for occasional care in long day child care services to 12 hours per week.

The committee has no comment on this bill.

Higher Education Funding Amendment Bill (No. 1) 1995

This bill was introduced into the House of Representatives on 7 June 1995 by the Minister for Employment, Education and Training.

The bill proposes to amend the *Higher Education Funding Act 1988* to:

- # vary the funding provided for the Major Research Facilities Program and provide general supplementation of funding;
- # vary the funding to provide supplementation funds in relation to grants for superannuation expenses, grants to teaching schools and grants for special capital projects;
- # vary the maximum grant amounts for open learning organisations so that unused funds are rolled-over into funding for subsequent years;
- # enable the Minister to make grants for providing teaching and learning assistance to persons other than clients of an open learning organisation;
- # enable the Minister to make a grant for expenditure by a co-operative multimedia centre;
- # enable certain students to be declared exempt for the purposes of paying contributions under the HEC Scheme;
- # modify provisions so that it will no longer possible for an application for a tax file number to be lodged with the appropriate officer of an institution;
- # enable the Secretary to review a decision reconsidering an application by a student for remission of a semester debt; and
- # makes technical and various consequential and transitional amendments relating to the amendments outlined above.

The committee has no comment on this bill.

Public Service (Abolition of Compulsory Retirement Age) Amendment Bill 1995

This bill was introduced into the Senate on 7 June 1995 by Senator Patterson as a Private Senator's bill.

The bill proposes to allow the recruitment of officers by the Commonwealth after the age of 65 and allow people who are employed by the Commonwealth to work beyond the current retirement age of 65 years.

The committee has no 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 **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **committee Ellison**

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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Committee under its terms of reference is invited to do so.

Industry Research and Development Amendment Bill 1995

This bill was introduced into the Senate on 21 June 1995 by the Minister for Industry, Science and Technology.

The bill proposes to amend the *Industry Research and Development Act 1986* to:

- extend the time after which the Industry Research and Development Board cannot enter into new agreements from 31 December 1995 to 30 June 1996; and
- validate certain guidelines and decisions made on the basis of those guidelines which were not tabled in Parliament within the required 15 sitting days of gazettal.

Retrospectivity Subclauses 2(2)-(4)

By virtue of these subclauses, substantive parts of this bill will have retrospective effect from a variety of dates. The purpose of the retrospectivity is to validate various guidelines and criteria which had been thought (wrongly) to be valid. They were invalid because of a failure to table in Parliament disallowable instruments addressing four key areas of the 150% tax concession in respect of Research and Development.

The committee notes that the explanatory memorandum states:

The Bill corrects this failure to table before Parliament by validating both the guidelines and decisions made on the basis of those guidelines.

The disallowable instruments in question are:

- guidelines to enable eligible companies to ascertain whether proposed research and development activities will be regarded as having Adequate Australian Content, as described in section 39E of the Act;
- guidelines to enable eligible companies to ascertain whether Finance Schemes in relation to research and development activities

will be taken to be ineligible Finance Schemes, as described in section 39EA of the Act;

- . criteria to be met by bodies wishing to be registered as Registered Research Agencies, as described in section 39F of the Act; and
- . guidelines setting out criteria to be met by eligible government bodies wishing to be entered on the Register of Commercial Government Bodies, as described in section 39HB of the Act.

The amendments appear to relate to guidelines and criteria with respect to a tax concession. The retrospectivity, therefore, appears to be beneficial to persons other than the Commonwealth.

In these circumstances, the committee makes no comment on this bill.

Ozone Protection Amendment Bill 1995

This bill was introduced into the House of Representatives on 21 June 1995 by the Parliamentary Secretary to the Minister for Environment, Sport and Territories.

The bill proposes to:

- amend the *Ozone Protection Act 1989* to:
 - bring control of all ozone depleting substances together under the Act by incorporating measures from various regulations;
 - remove existing references to current licences and quotas for chlorofluorocarbons, halons, carbon tetrachloride and methyl chloroform, as the import and manufacture of these substances will be banned from 1 January 1996;
 - introduce a system of 'controlled substances licences', quotas and reporting for the import, export and manufacture of hydrochlorofluorocarbons and methyl bromide;
 - impose a two-yearly administration fee for each licence issued;
 - ban the manufacture and export of hydrobromofluorocarbons;
 - establish an Ozone Protection Trust Fund; and
- to repeal the *Ozone Protection (Licence Fees-Imports) Act 1989* and the *Ozone Protection (Licence Fees-Manufacture) Act 1989*.

Inappropriate delegation of legislative power Subclause 4(1) and item 19 of Schedule 1

Item 19 of Schedule 1 provides in part for the insertion of proposed subsection 16(2) into the *Ozone Protection Act 1989*. If enacted, proposed subsection 16(2) would provide that the Minister must not grant a licence to a person unless the person has paid the prescribed fee for the grant of the licence. Neither the Act nor the bill provides for a maximum amount for the fee or a method of calculating it.

The committee has consistently drawn attention to provisions which allow Ministers unfettered power to make regulations to set the rate of a fee as such provisions may be considered to delegate legislative power inappropriately in that a fee may be set so high that it amounts to a tax. Creating a tax is a matter for primary legislation in the view of the committee.

The committee notes, however, that the explanatory memorandum indicates on page 3 the intention to impose a two-yearly administration fee for each licence, which will be set by regulation at \$10 000 until the year 2000, except for essential uses licences, for which the fee will be \$2 000 and that these amounts are based on cost recovery.

In the light of this explanation the committee **seeks the Minister's advice** on whether those fees could be included in the primary legislation as it should not be too difficult to make a small amendment in five years time to alter the fee if that should prove necessary.

Pending the Minister's advice, 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.

Ozone Protection (Licence Fees—Imports) Bill 1995

This bill was introduced into the House of Representatives on 21 June 1995 by the Parliamentary Secretary to the Minister for Environment, Sport and Territories.

The bill proposes to provide that a licensee who holds a controlled substances licence must pay to the Commonwealth a quarterly licence fee for HCFCs or methyl bromide imported during that quarter.

Inappropriate delegation of legislative power Subclause 4(1)

Subclause 4(1) of the bill provides:

There is payable to the Commonwealth by a licensee who holds a controlled substances licence, in respect of each quarter during which the licence is in force, a fee calculated at the rate fixed by the regulations for HCFCs and methyl bromide imported by the licensee during that quarter.

This subclause, if enacted, would provide for an activity fee at a rate set by regulation without any provision in the primary legislation either for a maximum amount for the fee or a method of calculating the maximum amount.

The committee has consistently drawn attention to provisions which allow Ministers unfettered power to make regulations to set the rate of a fee as such provisions may be considered to delegate legislative power inappropriately in that a fee may be set so high that it amounts to a tax. Creating a tax is a matter for primary legislation in the view of the committee.

The committee notes, however, that the explanatory memorandum indicates on page 4 that the purpose of the activity fee is to fund the furthering of the phase out programs for HCFCs and methyl bromide and related public awareness programs. The committee also notes that the explanatory memorandum indicates on page 3 that industry representatives have been consulted on the level of fees. In the light of these statements, the committee **seeks the Minister's advice** on whether some maximum amount or a means of calculating it could not be provided in the primary legislation while allowing the regulations to adjust the actual amount each quarter. This would avoid an open-ended power to set fees.

Pending the Minister's advice, 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.

Ozone Protection (Licence Fees—Manufacture) Bill 1995

This bill was introduced into the House of Representatives on 21 June 1995 by the Parliamentary Secretary to the Minister for Environment, Sport and Territories.

The bill proposes to provide that a licensee who holds a controlled substances licence must pay to the Commonwealth a quarterly licence fee for HCFCs or methyl bromide manufactured during that quarter.

Inappropriate delegation of legislative power Subclause 4(1)

Subclause 4(1) of the bill provides:

There is payable to the Commonwealth by a licensee who holds a controlled substances licence, in respect of each quarter during which the licence is in force, a fee calculated at the rate fixed by the regulations for HCFCs and methyl bromide manufactured by the licensee during that quarter.

This subclause, if enacted, would provide for an activity fee at a rate set by regulation without any provision in the primary legislation either for a maximum amount for the fee or a method of calculating the maximum amount.

The committee has consistently drawn attention to provisions which allow Ministers unfettered power to make regulations to set the rate of a fee as such provisions may be considered to delegate legislative power inappropriately in that a fee may be set so high that it amounts to a tax. Creating a tax is a matter for primary legislation in the view of the committee.

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Pending the Minister's advice, 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.

Patents Amendment Bill 1995

This bill was introduced into the Senate on 21 June 1995 by the Minister for Industry, Science and Technology.

The bill proposes to amend the *Patents Act 1990* to correct minor and technical errors and ambiguities identified by patents system users and the Australian Industrial Property Organisation following the commencement of the Act in April 1991.

The committee has no comment on this bill.

Public Order (Protection of Persons and Property) Amendment Bill 1995

This bill was introduced into the House of Representatives on 21 June 1995 by the Minister for Justice.

The bill proposes to amend the *Public Order (Protection of Persons and Property) Act 1971* to allow police and other authorised persons to take protective security measures on the premises of Federal Courts and Tribunals. The application of these powers will be determined by regulations made under this Act.

The committee has no comment on this bill.

Social Security Legislation Amendment (Family Measures) Bill 1995

This bill was introduced into the House of Representatives on 21 June 1995 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following Acts:

Social Security Act 1991 to:

- introduce a one-off maternity allowance payment;
- amalgamate the two existing payments of basic family payment and additional family payment into a single family payment;
- integrate family payment assets tests as a consequence of the above amalgamation;
- provide that family payment is payable to the primary carer of a child;
- make changes to the family payment income test; and
- align the income and assets levels and indexation arrangements for family payment and AUSTUDY; and

Data-matching Program (Assistance and Tax) Act 1990 and *Income Tax Assessment Act 1936* to make consequential amendments relating to the maternity allowance payment;

Veterans' Entitlements Act 1986, *Child Support (Assessment) Act 1989* and *Health Insurance Act 1973* to make consequential amendments relating to the family payment; and

Social Security (Non-Budget Measures) Legislation Amendment Act 1995 to remove section 15 of the Act which refers to benchmarks for family payments which are now obsolete.

Tax File Numbers Item 1 of Schedule 1

Proposed new sections 900D and 900E, to be inserted by item 1 of Schedule 1, would make payment of maternity allowance conditional upon the applicant and the applicant's

partner providing the Department with their tax file numbers. The committee has been concerned with the use of tax file numbers as mere identifiers. In this case, however, it appears that the requirement for the provision of tax file numbers is necessary to prevent fraud.

In these circumstances the committee makes no further comment on these provisions.

States Grants (General Purposes) Amendment Bill 1995

This bill was introduced into the House of Representatives on 22 June 1995 by the Assistant Treasurer.

The bill proposes to amend the *States Grants (General Purposes) Act 1994* to provide for general revenue assistance to the States and Territories in 1995-96.

The committee has no comment on this bill.

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 11 of 1995

1995

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

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Extract from Standing Order 24

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★ The Committee has commented on these bills.

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Committee under its terms of reference is invited to do so.

Aboriginal Education (Supplementary Assistance) Amendment Bill 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Aboriginal Education (Supplementary Assistance) Act 1989* to modify the funding level for the 1995 calendar year and provide new funding for the 1996 calendar year. The funding provides assistance to State and Territory governments, non government school systems, education institutions and Aboriginal and Torres Strait Islander education consultative bodies for the purpose of advancing the education of Aboriginal and Torres Strait Islander people.

The committee has no comment on this bill.

Aboriginal Land Grant and Management (Jervis Bay Territory) Legislation Amendment Bill 1995

This bill was introduced into the Senate on 29 June 1995 by the Minister for the Environment, Sport and Territories.

The bill proposes to amend the following Acts:

Aboriginal Land Grant (Jervis Bay Territory) Act 1986 to enable title to the Jervis Bay National Park and the Jervis Bay Botanic Gardens to be granted to the Wreck Bay Aboriginal Community Council, following Ministerial authorisation;

National Parks and Wildlife Conservation Act 1973 to:

- amend the definition of 'prescribed park or reserve' to include the Jervis Bay National Park and the Jervis Bay Botanic Gardens;
- amend the definition of 'traditional Aboriginal owners' to include the registered members of the Wreck Bay Aboriginal Community Council; and

Commonwealth Grants Commission Act 1973 to enable the Commonwealth Grants Commission to report on appropriate funding for works and services in Jervis Bay as well as enabling inquiries into the financial relationships between the Commonwealth and Norfolk Island.

The committee has no comment on this bill.

Administrative Decisions (Effect of International Instruments) Bill 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Attorney-General.

The bill proposes to eliminate any expectation which might exist that administrative decisions, whether at the Commonwealth, State or Territory level, will be made in conformity with provisions of ratified but unimplemented treaties or, that if a decision is to be made contrary to such provisions, an opportunity will be given for the affected person to make submissions on the issue. The bill will apply to administrative decisions made on or after 10 May 1995.

Retrospectivity Clause 2

Clause 2 of this bill provides that it will be taken to have come into effect on 10 May 1995, that being the date on which the Attorney-General and the Minister for Foreign Affairs jointly issued a statement on behalf of the Commonwealth Government to oust any legitimate expectation that administrative decisions would be made in conformity with the requirements of an international treaty to which Australia is a party.

The High Court in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* held that the ratification of a treaty by Australia creates a legitimate expectation that administrative decision-makers will act in accordance with treaty provisions, even if they have not become part of the domestic law of Australia by being passed by the Parliament. The High Court also held that procedural fairness requires that the person affected be given notice and an adequate opportunity to reply to a proposal to make a decision inconsistent with the legitimate expectation. The Court also held that the legitimate expectation would not arise if there is either a statutory or executive act amounting to a contrary indication.

It seems to the committee that if the joint statement of the Attorney-General and the Minister for Foreign Affairs is an executive act amounting to a contrary indication no legitimate expectation has arisen since 10 May 1995. There would, therefore, be no need for the bill to commence retrospectively. On the other

hand, as no right to a legitimate expectation has existed since that date, the legislation cannot be said to take away the right retrospectively except in a most formal sense.

In these circumstances, the committee makes no further comment on this bill.

Crimes Amendment (Controlled Operations) Bill 1995

This bill was introduced into the House of Representatives on 29 June 1995 by the Minister for Justice.

The bill proposes to amend the *Crimes Act 1914* to:

- allow the Commissioner, Deputy Commissioners and Assistant Commissioners of the Australian Federal Police (AFP) and members of the National Crime Authority (NCA) to issue certificates authorising a controlled law enforcement operation involving the import, export and/or possession of narcotic drugs;
- provide that certain law enforcement officers involved in an authorised controlled operation are not criminally liable for offences against section 233B of the *Customs Act 1901*, and associated offences;
- require the AFP and NCA to report to the Minister on results of applications for certificates authorising controlled operations and the reasons for the decision in each case, and require the Minister to report on these matters to Parliament;
- provide that the fact that law enforcement officials took part in or facilitated, the importation of narcotics prior to the commencement of this legislation, is not to render evidence of that importation inadmissible where the importation was made pursuant to a request from the AFP to the Australian Customs Services for an exemption from detailed customs scrutiny.

Abrogation of the effect of a High Court decision General Comment

This bill seeks to abrogate the effect of the decision of the High Court in *Ridgeway v R*. In that case the High Court held that evidence should generally not be admitted where law enforcement officers break the law by committing an element of the offence for which an accused person is being prosecuted. This decision was based on public policy grounds and in defence of the civil liberties of an accused person.

To the extent that the bill abrogates the rights of an accused person, it may be considered to trespass on personal rights and liberties. The committee notes that the abrogation is limited to prosecutions in respect of certain offences relating to

narcotics. The committee also notes, however, that the Victorian Council for Civil Liberties, among others, opposes these measures. Whether the trespass on personal rights and liberties, therefore, is appropriately balanced by the need to ensure that crimes relating to narcotics are detected and the offenders punished is a matter for ultimate resolution by the Senate.

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.

Retrospective application

Proposed subsection 15T(1)

Proposed section 15T provides:

(1) In this Division, a reference to a controlled operation is a reference to a controlled operation started before the commencement of this Part.

(2) In this Division:

Collector of Customs for a State or Territory has the same meaning as in the *Customs Act 1901*.

Ministerial Agreement means the agreement:

- a) concerning the relationship between the Australian Customs Service on the one hand, and the National Crime Authority and the Australian Federal Police on the other, with respect to narcotic drug law enforcement; and
- b) made by the Minister for Industry Technology and Commerce and the Special Minister of State on 3 June 1987.

Proposed subsection 15T(1), if enacted, would allow the retrospective application of the other provisions of the bill relating to the admissibility of evidence where law enforcement officers break the law by committing an element of the offence for which an accused person is being prosecuted. The effect is not only to abrogate the rights of the accused person, but to do so retrospectively. The committee **seeks the Minister's advice** whether retrospectivity, which could extend as far as June 1987, is necessary.

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

Crimes Amendment (Forensic Procedures) Bill 1995

This bill was introduced into the House of Representatives on 29 June 1995 by the Minister for Justice.

The bill proposes to amend the *Crimes Act 1914* to establish a regime for effecting forensic procedures during the investigation of Commonwealth offences, and for the storage, use and destruction of material derived from those procedures. Consequential amendments are also made to the *Crimes Act 1914*, *Commonwealth Places (Application of Laws) Act 1970* and *Crimes at Sea Act 1979*.

Forensic procedures and suspects' rights

Proposed Part 1D to be inserted in the *Crimes Act 1914*

The provisions of proposed Part 1D would allow various forensic procedures (including intimate forensic procedures such as taking samples from or making examination of a person) to be carried out on a suspect. Suspect is defined in proposed section 23WA and includes a person whom a constable suspects on reasonable grounds has committed an indictable offence. The provision would therefore enable a police officer to carry out a number of personal and intrusive procedures on a person who has not even been charged with an offence. Proposed section 23WC, however, makes it clear that the procedures can only be carried out on a person who has not yet been charged with an offence if that person gives informed consent or if a magistrate, at a hearing at which the suspect may be legally represented, orders the procedures to be carried out.

In these circumstances, the committee makes no further comment on this bill.

Customs (Prohibited Imports) Regulations (Prevention of Child Labour) Bill 1995

This bill was introduced into the House of Representatives on 26 June 1995 by Mr Cleary as a Private Member's bill.

The bill proposes to amend the Customs (Prohibited Imports) Regulations to prohibit the importation of goods produced using child labour unless a permission to import is granted by the Minister.

The committee has no comment on this bill.

Electoral and Referendum Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Minister for Administrative Services.

The bill proposes to amend the following Acts:

Commonwealth Electoral Act 1918 to:

- give the Australian Electoral Commission flexibility in the method of conducting Electoral Roll Reviews;
- enable prisoners, other than those convicted of treason or treachery and not pardoned, to enrol and vote in federal elections;
- allow electors going overseas to apply to register as Eligible Overseas Electors within three months of the expected departure or within one year after actual departure from Australia;
- extend the time for the close of the Rolls from 6.00pm to 8.00pm on the day that the Rolls close for an election;
- ensure that the death or withdrawal of a bulk nominated candidate does not invalidate the nomination of the other candidates so nominated;
- allow for the despatch of postal ballot materials to all registered General Postal Voters without them first having to complete a postal vote application; and
- allow for the commencement of the preliminary scrutinies of declaration votes on the Monday prior to polling day; and

Referendum (Machinery Provisions) Act 1984 to make consequential amendments.

The committee has no comment on this bill.

Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 1995

This bill was introduced into the Senate on 29 June 1995 by the Minister for the Environment, Sport and Territories.

The bill proposes to amend the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* to improve regulatory controls over the import, export and transit of hazardous waste in order that such wastes are managed in an environmentally sound manner consistent with Australia's international obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

The committee has no comment on this bill.

Higher Education Funding Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 30 June 1995 by the Minister for Employment, Education and Training.

The bill proposes to amend the *Higher Education Funding Act 1988* to:

- vary the maximum grant amounts for operating purposes for higher education institutions for the funding years 1994, 1995 and 1996 and provide a maximum grant amount for each of the funding years 1997 and 1998;
- provide a maximum total amount of financial assistance payable to higher education institutions for superannuation expenditure for each of the years 1997 and 1998;
- provide a maximum total amount of financial assistance payable in grants to open learning organisations for each of the years 1997 and 1998;
- vary the limit on total funds available for certain grants under the Acts in respect of the funding years 1994, 1995 and 1996 and provide a limit on total funds available for such grants for each of the years 1997 and 1998;
- provide a maximum total amount of financial assistance payable as grants in respect of teaching hospitals for each of the years 1997 and 1998;
- provide a maximum total amount of approved expenditure for grants for approved special capital projects for each of the years 1997 and 1998;
- enable grants to be made in relation to innovation in or the quality of higher education and proposals to be approved for grants for projects of national priority, including projects which are consistent with the development of a Higher Education Innovations Program;
- provide a 15 per cent discount in respect of a voluntary payment of \$500 or more in discharge of certain HECS and Open Learning debts;
- introduce a new, voluntary HECS repayment threshold, below the existing minimum threshold, and allow a 10 per cent discount in respect of a person's accumulated HEC debt in certain circumstances;
- require certain New Zealand and Australian citizens to pay their HECS contribution up-front and preclude them from access to the Open Learning Deferred Payment Scheme;
- provide no discount on HECS contributions which must be paid up-front;

- remove the exemption from HECS for holders of scholarships for the professional development of teachers;
- introduce additional repayment thresholds for the repayment of accumulated HEC debt; and
- redefine 'taxable income' for HEC assessment purposes.

The committee has no comment on this bill.

Human Services and Health Legislation Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to amend the following Acts:

Health Insurance Act 1973 to:

- prevent temporary resident doctors and overseas trained doctors from being able to breach their visa or registration conditions;
- ensure Medicare benefits are payable for diagnostic imaging services rendered by consultant physicians;
- provide that the form and content of written requests for diagnostic imaging services by dental practitioners, chiropractors, physiotherapists and podiatrists may be prescribed in the same way as those by medical practitioners; and
- provide for remote area exemptions to be for a shorter term than the present fixed period of three years; and

National Health Act 1953 to give general patients eligibility to be issued with a safety net concession card when the total of the amounts charged for supplies of pharmaceutical benefits made to the patient and members of the patient's family during an entitlement period is \$600.

The committee has no comment on this bill.

Industrial Relations and other Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 29 June 1995 by the Minister for Industrial Relations.

The bill proposes to amend the following Acts:

Industrial Relations Act 1988 to amend unfair dismissal provisions so that:

- all applications will commence in the Australian Industrial Relations Commission (the Commission), rather than in the Industrial Relations Court of Australia;
- the option of binding arbitration by the Commission will be available where parties agree;
- the provisions will not apply where there is an alternative available under another law that satisfies certain requirements; and
- the Industrial Relations Court will be required to consider all the circumstances of a case in deciding what remedy (if any) should be given; and
- to clarify that the Industrial Relations Court of Australian can have jurisdiction to enforce coal industry awards made by Australian Industrial Relations Commission in the combined exercise of Commonwealth and State powers;

Safety, Rehabilitation and Compensation Act 1988 to:

- clarify the circumstances under which an employee may claim an injury as being compensable; and
- clarify that certain sections of the Act do not apply to the reduced amount of compensation calculated in another section of the Act; and

Defence Act 1903 and *Sex Discrimination Act 1984* to provide for the Defence Force Remuneration Tribunal to review determinations referred to the Tribunal by the Sex Discrimination Commissioner; and

Industrial Relations Legislation Amendment Act (No. 2) 1994 to remove a provision that would have used the constitutional 'trade and commerce' power to give the Australian Industrial Relations Commission a wider jurisdiction in coal industry matters.

The committee has no comment on this bill.

International Shipping (Australian-resident Seafarers) Grants Bill 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Minister for Transport.

The bill proposes to provide a taxable grant payable to the employers of Australian seafarers on Australian-operated ships engaged in international trades.

The committee has no comment on this bill.

Primary Industries Charges Bill 1995

This bill was introduced into the House of Representatives on 29 June 1995 by the Minister for Consumer Affairs.

The bill proposes to allow regulations to be made for the purpose of imposing charges on products of primary industry. The charges collected will allow industry to undertake marketing and research and development.

Inappropriate delegation of legislative power Clauses 9, 12 and 13

Clause 9 of the bill provides:

The rate of a charge is ascertained in accordance with the regulations.

General principles

The committee has consistently drawn attention to provisions which allow Ministers an unfettered power to make regulations to set the rate of a levy or a charge as such provisions may be considered to delegate legislative power inappropriately. The basis for this view is that, with such a power, a rate of charge could be set so high that it amounts to a tax. The committee is firmly of the view that taxation is a matter for primary legislation. Where it is impracticable to set the rate of the levy or charge in primary legislation the Committee has developed a policy of requesting that the primary legislation should prescribe either a maximum rate of charge or a method of calculating such a maximum rate.

The bill's alternative mechanism

In this respect, however, the committee notes that the bill does not provide for such a mechanism in the primary legislation but clauses 12 and 13 provide for a similar mechanism to be established by regulation.

One concern allayed

The committee notes especially that clause 13 provides that the regulations specifying, or specifying a method of ascertaining, the maximum total rate of a charge will not come into force until the time for passing a resolution of disallowance in either House of the Parliament has expired. Thus, one of the

concerns of the committee in respect of these clauses is allayed: the committee has had occasion to point out that where regulations come into effect when they are made, the effect of disallowance does not cancel any charges that may have become payable in the interim period.

Primary concern not allayed

The committee notes that clause 7 of the bill makes it clear that the charges set by this bill are valid only to the extent that the charge is a duty of customs within the meaning of section 55 of the Constitution. So the question of deciding whether the charge is so high as to amount to a tax does not arise. Section 55 of the Constitution clearly implies that a law imposing a customs duty is a law imposing taxation.

There remains, therefore, the question whether the arrangements put in place by this bill obviate the committee's concern that taxation should be in primary legislation. Authorising taxation has been regarded as a matter for Parliament not the executive - tax laws being passed by an affirmative vote of both Houses.

Which course to follow

It seems to the committee that there are three options:

1. to maintain the status quo by which Parliament enacts primary legislation to set or alter the rate of a tax;
2. to accept the mechanism proposed by this bill to enable the executive to set the rate of the tax by regulation subject to disallowance but with the tax only coming into force after the disallowance period; and
3. to alter the mechanism proposed by this bill to substitute a requirement for an affirmative resolution of both Houses of Parliament to adopt the regulation within a similar time frame.

Option 1 has the advantage of retaining within Parliament the right to set taxes - a right which the history of our Parliamentary tradition shows was won with hardship and difficulty and has been jealously guarded.

Option 2 while having the merit of doing away with multiple Acts and amending Acts setting, or amending the rates of, such taxes, passes the initiative to the executive in these matters of taxation. It downgrades, however, the importance of the measure and the degree of attention that the imposition may attract. Further, because the charge is a duty of customs, the rate of the charge cannot be subject to limitation in the way in which a charge to raise money to cover costs for a specific purpose can be subject to scrutiny as to the fairness of the amount. A corollary of this might be that the amount of the tax, considered

as an expression of government policy, might not attract comment from the Senate Standing Committee on Regulations and Ordinances.

Option 3 is marginally more attractive than option 2 in that it would require deliberation by Parliament to resolve to adopt the taxing measure. The issue, however, of adopting some but not others of the charges would need to be examined.

In these circumstances, the committee **seeks the views of the Minister** on the pros and cons of these three options.

Pending the Minister's advice, 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.

Less time for scrutiny

Clause 14

The effect of section 14 is to oust inconsistent provisions in the *Acts Interpretation Act 1901* and the as yet not enacted Legislative Instruments Bill 1994.

The committee notes that the mechanism set up by clause 13 for disallowance substantially lessens the period within which the Senate would normally be able to consider the regulation.

The mechanism established by the *Acts Interpretation Act 1901* allows a period of 15 sitting days from the date of tabling for a motion for disallowance to be moved and a further period of 15 sitting days for the motion to be dealt with.

The committee notes also that the outcome under clause 13 is vastly different from the outcomes in the *Acts Interpretation Act 1901*. Failure to deal with the motion of disallowance brings the regulation into permanent effect whereas under the *Acts Interpretation Act 1901* failure to deal with the motion would result in automatic disallowance.

The committee therefore **seeks the Minister's advice** why more of the mechanism in the *Acts Interpretation Act 1901* could not apply to this disallowance scheme.

Pending the Minister's advice, 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.

Primary Industries Levies Bill 1995

This bill was introduced into the House of Representatives on 29 June 1995 by the Minister for Consumer Affairs.

The bill proposes to allow regulations to be made for the purpose of imposing levies on products of primary industry. The levies collected will allow industry to undertake marketing and research and development.

Inappropriate delegation of legislative power Clauses 9, 12 and 13

Clause 9 of the bill provides:

The rate of a levy is ascertained in accordance with the regulations.

General principles

The committee has consistently drawn attention to provisions which allow Ministers an unfettered power to make regulations to set the rate of a levy or a charge as such provisions may be considered to delegate legislative power inappropriately. The basis for this view is that, with such a power, a rate of levy could be set so high that it amounts to a tax. The committee is firmly of the view that taxation is a matter for primary legislation. Where it is impracticable to set the rate of the levy or charge in primary legislation the Committee has developed a policy of requesting that the primary legislation should prescribe either a maximum rate of levy or a method of calculating such a maximum rate.

The bill's alternative mechanism

In this respect, however, the committee notes that the bill does not provide for such a mechanism in the primary legislation but clauses 12 and 13 provide for a similar mechanism to be established by regulation.

One concern allayed

The committee notes especially that clause 13 provides that the regulations specifying, or specifying a method of ascertaining, the maximum total rate of a levy will not come into force until the time for passing a resolution of disallowance in either House of the Parliament has expired. Thus, one of the concerns of the committee in respect of these clauses is allayed: the committee

has had occasion to point out that where regulations come into effect when they are made, the effect of disallowance does not cancel any levies that may have become payable in the interim period.

Primary concern not allayed

The committee notes that clause 7 of the bill makes it clear that the levies set by this bill are valid only to the extent that the levy is a duty of excise within the meaning of section 55 of the Constitution. So the question of deciding whether the levy is so high as to amount to a tax does not arise. Section 55 of the Constitution clearly implies that a law imposing an excise duty is a law imposing taxation.

There remains, therefore, the question whether the arrangements put in place by this bill obviate the committee's concern that taxation should be in primary legislation. Authorising taxation has been regarded as a matter for Parliament not the executive - tax laws being passed by an affirmative vote of both Houses.

Which course to follow

It seems to the committee that there are three options:

1. to maintain the status quo by which Parliament enacts primary legislation to set or alter the rate of a tax;
2. to accept the mechanism proposed by this bill to enable the executive to set the rate of the tax by regulation subject to disallowance but with the tax only coming into force after the disallowance period; and
3. to alter the mechanism proposed by this bill to substitute a requirement for an affirmative resolution of both Houses of Parliament to adopt the regulation within a similar time frame.

Option 1 has the advantage of retaining within Parliament the right to set taxes - a right which the history of our Parliamentary tradition shows was won with hardship and difficulty and has been jealously guarded.

Option 2 while having the merit of doing away with multiple Acts and amending Acts setting, or amending the rates of, such taxes, passes the initiative to the executive in these matters of taxation. It downgrades, however, the importance of the measure and the degree of attention that the imposition may attract. Further, because the levy is a duty of excise, the rate of the levy cannot be subject to limitation in the way in which a levy to raise money to cover costs for a specific purpose can be subject to scrutiny as to the fairness of the amount. A corollary of this might be that the amount of the tax, considered as an expression of government policy, might not attract comment from the Senate Standing Committee on Regulations and Ordinances.

Option 3 is marginally more attractive than option 2 in that it would require deliberation by Parliament to resolve to adopt the taxing measure. The issue, however, of adopting some but not others of the levies would need to be examined.

In these circumstances, the committee **seeks the views of the Minister** on the pros and cons of these three options.

Pending the Minister's advice, 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.

Less time for scrutiny

Clause 14

The effect of section 14 is to oust inconsistent provisions in the *Acts Interpretation Act 1901* and the as yet not enacted Legislative Instruments Bill 1994.

The committee notes that the mechanism set up by clause 13 for disallowance substantially lessens the period within which the Senate would normally be able to consider the regulation.

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The committee notes also that the outcome under clause 13 is vastly different from the outcomes in the *Acts Interpretation Act 1901*. Failure to deal with the motion of disallowance brings the regulation into permanent effect whereas under the *Acts Interpretation Act 1901* failure to deal with the motion would result in automatic disallowance.

The committee therefore **seeks the Minister's advice** why more of the mechanism in the *Acts Interpretation Act 1901* could not apply to this disallowance scheme.

Pending the Minister's advice, 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.

Primary Industries Levies and Charges (Consequential Amendments) Bill 1995

This bill was introduced into the House of Representatives on 29 June 1995 by the Minister representing the Minister for Primary Industries and Energy.

As a consequence of the Primary Industries Levies Bill 1995 and the Primary Industries Charges Bill 1995, this bill proposes to repeal 59 Acts that impose a levy or charge for such purposes as research and development, promotion and monitoring of residues. The following Acts will also be amended to reflect the new arrangements:

Australian Horticultural Corporation Act 1987;

Australian Wine and Brandy Corporation Act 1980;

Horticultural Research and Development Corporation Act 1987;

National Cattle Disease Eradication Trust Account Act 1991;

National Residue Survey Administration Act 1992;

Pig Industry Act 1986;

Primary Industries and Energy Research and Development Act 1989;

Primary Industries Levies and Charges Collection Act 1991; and

Wheat Marketing Act 1989.

The committee has no comment on this bill.

Prohibition of Exportation of Uranium to France (Customs Act Amendment) Bill 1995

This bill was introduced into the Senate on 27 June 1995 by Senator Coulter as a Private Senator's bill.

The bill proposes to amend the *Customs Act 1901* to prohibit the exportation of uranium-bearing ore or uranium ore concentrates to France until the cessation of French nuclear weapons testing in the South Pacific Region.

The committee has no comment on this bill.

Public Service (Abolition of Compulsory Retirement Age) Amendment Bill 1995

This bill was introduced into the House of Representatives on 26 June 1995 by Mr Connolly as a Private Member's bill.

The bill proposes to allow the recruitment of officers by the Commonwealth after the age of 65 and allow people who are employed by the Commonwealth to work beyond the current retirement age of 65 years.

The committee has no comment on this bill.

Public Service Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Minister Assisting the Prime Minister for Public Service Matters.

The bill proposes to amend the *Merit Protection (Australian Government Employees) Act 1984* and *Public Service Act 1922* to enable the amalgamation of the Public Service Commissioner's staff with those required for the purposes of the Merit Protection Act. The amalgamated body will be known as the Public Service and Merit Protection Commission.

The committee has no comment on this bill.

Superannuation Supervisory Levy Amendment Bill 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Superannuation Supervisory Levy Act 1991* to amend the method of calculating the late lodgment amount in relation to lodging annual returns under the *Superannuation Industry (Supervision) Act 1993*.

The committee has no comment on this bill.

Sydney Airport Curfew (Air Navigation Amendment) Act 1995

This bill was introduced into the House of Representatives on 26 June 1995 by Mr Howard as a Private Member's bill.

The bill proposes to provide a legislative base for the curfew arrangements at Sydney (Kingsford-Smith) Airport.

Inappropriate delegation of powers and functions Proposed section 25B

Clause 6 of the bill provides for a new Part 3 to be inserted in the *Air Navigation Act 1920* to regulate the Sydney Airport Curfew. Proposed new section 25B, if enacted, would permit the Minister to delegate to a person all or any of his or her powers and functions under proposed Part 3.

The committee notes that there is no limitation as to the persons or classes of persons to whom the Minister can delegate all his or her powers and functions. The committee also notes that the clause repeats the present Air Navigation Regulation. Neither the bill nor the explanatory memorandum indicates the need for a power of such width.

Since its establishment the committee has consistently drawn attention to provisions which allow for the delegation of significant and wide-ranging powers to 'a person'. Generally, the committee has taken the view that it would prefer to see a limit on either the sorts of powers that can be delegated in this way or the persons to whom the powers can be delegated. If the latter course is adopted, the committee prefers that the limit should be to the holders of a nominated office, to members of the Senior Executive Service or by reference to the qualifications of the person to be delegated the powers.

Accordingly, the committee **seeks the Member's advice** on the reasons for having no limitation on the class of persons who can receive the delegation.

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

Taxation Laws Amendment Bill (No. 3) 1995

This bill was introduced into the House of Representatives on 29 June 1995 by the Minister for Consumer Affairs.

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1936 to:

- provide that, for the purposes of controlled foreign company (CFC) measures, the cost base of assets owned by a company that becomes a CFC after 30 June 1990, is their market value at the time the company becomes a CFC;
- ensure that an attributable taxpayer in relation to a CFC is attributed income under the CFC measures where the CFC is liquidated and ceases to exist before the end of the CFC's statutory accounting period;
- clarify that a taxpayer is not entitled to a credit for foreign tax where the tax is refunded to the taxpayer or to any other person;
- clarify that the Commissioner of Taxation may make adjustments to amounts used in determining whether a CFC has passed the active income test;
- disqualify from being rebateable or frankable dividends that are debited to, or paid out of amounts transferred from, share capital or share premium accounts or asset revaluation reserves of a company;
- ensure the Act denies deductions for losses incurred before bankruptcy notwithstanding that the bankruptcy is later annulled in connection with arrangements under which debts are released;
- prevent net capital losses incurred before bankruptcy or release from debts under bankruptcy law from being taken into account in ascertaining future net capital gains or losses;
- lower the tax instalment threshold above which a group employer is required to remit tax instalments twice monthly instead of once from \$5 million to \$1 million;
- increase the infrastructure borrowings tax rebate from 33 per cent to 36 per cent;
- require an employer to forward original group certificates to the ATO and give two copies to employees;

- remove tax stamp provisions as they relate to employers and replace them, as they relate to self employed persons, with a tax voucher system;
- enable quarterly remittance by employers who remit less than \$10,000 per annum in tax instalment deductions to the ATO;
- remove redundant provisions relating to the Commissioner's former priority to recover unremitted PAYE deductions over all other debts in cases of insolvency; and
- extend the special provision relating to the depreciation of trading shipping from 1 July 1997 to 30 June 2002;

Bankruptcy Act 1966, Child Support (Registration and Collection) Act 1988, Crimes (Taxation Offences) Act 1980, Crown Debts (Priority) Act 1981 and Taxation (Interest on Overpayments and Early Payments) Act 1983 to make consequential amendments;

Superannuation Guarantee (Administration) Act 1992 to:

- extend the use of pre 21 August 1991 employee earnings bases if employers restructure their superannuation funds; and
- exempt employers from the superannuation guarantee charge in respect of an employee who makes an election because his or her accumulated superannuation entitlements exceed the pension reasonable benefit limit (the *Income Tax Assessment Act 1936* is also amended so that taxpayers who make this election will not be entitled to deductions for personal superannuation contributions); and

Taxation Laws Amendment (Drought Relief Measures) Act 1995 to correct an error in subsection 170(10).

Retrospectivity

Subclause 2(2)

Subclause 2(2), if enacted, would allow the amendments proposed by Schedule 4 to commence retrospectively.

It seems to the committee, however, that these amendments are technical only and correct a drafting error.

In these circumstances, the committee makes no further comment on this provision.

Retrospectivity Part 1 of Schedule 1

The amendments proposed by Part 1 of Schedule 1 would apply from either 29 June 1995 or 1 July 1995 and therefore to some extent retrospectively from Royal Assent.

It seems to the committee, however, that the retrospectivity is necessary to prevent evasion of the effects of the amendments.

In these circumstances, the committee makes no further comment on this provision.

Retrospectivity Part 2 of Schedule 1

The amendments proposed by Part 2 of Schedule 1 will have effect from Budget night and therefore prior to Royal Assent. The committee notes that the amendments give effect to a budget announcement.

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, 1981-85*, 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.

In these circumstances, the committee makes no further comment on these provisions.

Retrospectivity
Part 3 of Schedule 1

The amendments proposed by Part 3 of Schedule 1 would apply retrospectively from 25 February 1995, that being the date of the Treasurer's relevant press release.

The bill, however, has been introduced within six months of the press release and so conforms with the criteria set out in the Senate Resolution of 8 November 1988.

In these circumstances, the committee makes no further comment on these provisions

Retrospectivity
Part 1 of Schedule 3

The amendments proposed by Part 1 of Schedule 3 would apply 1 July 1995 and therefore to some extent retrospectively from Royal Assent.

It seems to the committee, however, that these amendments are beneficial to taxpayers.

In these circumstances, the committee makes no further comment on these provisions.

Taxation Laws Amendment (FBT Cost of Compliance) Bill 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the following Acts:

Fringe Benefits Tax Assessment Act 1986 and *Income Tax Assessment Act 1936* to reduce the cost to employers of complying with the requirement to pay fringe benefits tax (FBT) on meal entertainment expenditure incurred on employees and their associates; and

Fringe Benefits Tax Assessment Act 1986 to:

- change the rules relating to living away from home allowance benefits;
- reduce the cost to employers of complying with the requirements to pay FBT on car parking benefits;
- exempt a range of employment-related benefits from FBT;
- exempt car phones and mobile phones provided to employees where the phones are primarily for use in the employee's employment from FBT;
- exempt taxi travel provided by an employer to employees who are required to travel home between 8.00pm and 6.00am, or to sick employees to travel home or to another place of care;
- entitle certain non-profit medical research bodies that are not operated for governments to an FBT rebate;
- reduce the number of declarations that an employer must obtain from employees for certain fringe benefits;
- increase the taxable value of car benefits calculated under the statutory formula method;
- make consistent the substantiation rules under the Act with income tax substantiation rules; and
- reduce the retention period for FBT records from seven to five years.

Retrospective application Various items

Although this bill will not commence until Royal Assent, various items in the Schedules would allow for the application of some of the proposed amendments to dates prior to Royal Assent. In all cases, however, the amendments either are beneficial to taxpayers or make changes to the implementation of the legislation which do not involve any overall change to the tax burden on taxpayers.

Schedule 1, item 5, Schedule 3, item 9 and Schedule 5, item 8 allow for the application of the proposed amendments from 1 April 1995 but it seems to the committee that the amendments are beneficial to taxpayers.

Schedule 4, subitems 4(1), 4(2) and 4(3) provide for the application of amendments from 1 April 1993 but it seems to the committee that the amendments are beneficial to taxpayers.

In these circumstances, the committee makes no further comment on these provisions.

Retrospective application Schedule 6, item 74

Schedule 6, item 74 provides for the application of the amendments in Schedule 6 from 1 April 1995. Items 2 to 5 provide for an increase in the fractions in the statutory formula method of calculating the taxable value of car benefits. As paragraph 8.5 of the explanatory memorandum points out: 'The greater the statutory fraction, the higher is the taxable value of the car benefit and the more tax is payable.'

The committee notes that the amendments to the statutory fractions were announced in the Treasurer's press release of 24 February 1995. The bill, therefore, has been introduced within six months of the press release and so conforms with the criteria set out in the Senate Resolution of 8 November 1988.

The Senate Resolution states that:

where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way

of publication of a draft Bill within 6 calendar months after the date of that announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill.

In these circumstances, the committee makes no further comment on these provisions

Transport Legislation Amendment Bill (No. 3) 1995

This bill was introduced into the Senate on 29 June 1995 by the Minister for the Environment, Sport and Territories.

The bill proposes to amend the following Acts:

Air Navigation Act 1920 to:

- provide the Secretary with power to designate a departmental position as being that of Director of Air Safety Investigation;
- confer powers and impose obligations on the Director in relation to investigations; and
- provide other administrative procedures relating to air safety investigations;

Civil Aviation Act 1988 and *Freedom of Information Act 1982* to make consequential amendments; and

Seafarers Rehabilitation and Compensation Act 1992 to provide that the Seafarers Safety, Rehabilitation and Compensation Authority is no longer a statutory authority and removes all financial provisions relating to the Authority.

Abrogation of the privilege against self-incrimination **Proposed subsections 19CC(6) to (10)**

Proposed subsections 19CC(6) to (10) provide:

(6) It is not a reasonable excuse for a person's refusal or failure to:

- (a) answer a question; or
- (b) produce a document; or
- (c) produce a part or component of an aircraft or other thing;

that the giving of an answer, or the production of the document, part, component or thing, as the case may be, may tend to incriminate the person or make the person liable to a penalty.

(7) If a person objects to:

- (a) answering a question put to the person by the Director; or
- (b) producing a document to the Director; or
- (c) producing a part or component of an aircraft or other thing to the Director;

on the ground that the answer to the question, or the production of the document, part or component or thing, as the case may be, may tend to incriminate the person or make the person liable to a penalty, subsections (8) to (10) have effect.

(8) The person is not relieved of the obligation to answer the question or produce the document, part, component or thing, as the case may be.

(9) The answer to the question, the production of the document, part, component or thing, or any information or thing obtained as a direct or indirect consequence of the answer to the question or the production of the document, part, component or thing is not admissible in evidence against the person in a criminal proceeding or in a proceeding for the recovery of a penalty.

(10) Subsection (9) does not render an answer inadmissible in evidence in proceedings in respect of the falsity of the statement.

These provisions, if enacted, would abrogate the privilege against self-incrimination of a person required to answer a question, produce a document or a specified part or component of an aircraft under proposed subsection 19CC(1).

They are, however, in a form which the committee has previously been prepared to accept as they contain a limit on the use to which any information 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.

Further, the committee endorses the form in which the exception to the indemnity in proposed subsection (10) is expressed. The committee has been concerned with other bills which have abrogated the privilege, granted the 'use/derivative use' indemnity but which have contained exceptions to the indemnity which the committee is of the opinion have been too widely expressed. Upon seeking the relevant Minister's advice on whether the exceptions could be narrowed, the committee has been told that it would be too difficult to draft. Subsection (10), however, expresses precisely the exact limitation which the committee has been seeking. It enables the statement provided in answer to a question to be admissible in evidence for a prosecution

for giving that false statement in answer to that question. The statement, however, cannot be used in evidence to prove the falsity of some other (perhaps earlier) statement by the person.

In these circumstances, the committee makes no further comment on these provisions.

Power to enter accident site premises without consent Proposed section 19FE

Proposed section 19FE would permit an investigator to enter accident site premises without the permission of the occupier and without a warrant.

Generally the committee would consider that a power to enter premises without consent and without a warrant trespasses on personal rights and liberties. The committee notes, however, the purpose for which this power is granted and the circumstances in which it is to be exercised:

- an accident site is defined as a site where an accident has occurred; or on which there is an impact point caused by an aircraft that has been involved in an accident; or on which there is an aircraft that has been involved in an accident;
- accident site premises includes premises on which there is an accident site; or premises which it is necessary to enter to get to premises on which there is an accident site;
- accident site powers are outlined in proposed section 19FD and the explanatory memorandum states on page 18 that they 'are intended to give effect to the ICAO requirement set out in paragraph 5.6 of Annex 13 to the Chicago Convention that:

"The investigator-in-charge shall have unhampered access to the wreckage and unrestricted control over it to ensure that a detailed examination can be made without delay by authorised personnel participating in the investigation."

Further, the committee notes the quite different circumstances in which proposed section 19CE provides for a magistrate to issue a warrant for entry of premises in relation to the general power to investigate accidents, incidents and safety deficiencies. That proposed section requires the magistrate to be satisfied by information on oath or affirmation that there are reasonable grounds for

suspecting that there is, or maybe within the next 72 hours, material that is evidential material in relation to the investigation at the premises.

It seems to the committee that a magistrate could not but be satisfied that wreckage at an accident site was evidential material in relation to an investigation.

In these circumstances, the committee makes no further comment on this provision.

Delegation of powers to a 'person' **Proposed paragraph 19GE(b)**

Proposed new paragraph 19GE(b), if enacted, would, when read with proposed new subsection 19GC(2), allow the Director to delegate all his or her powers under the Act and regulations to a 'person'.

The committee notes, however that the explanatory memorandum at page 22 states:

Clause 19GE provides that the Director may, by signed writing, delegate all or any of the Director's statutory powers to an officer of the Department or an investigator who is not an officer of the Department. This provision will allow the Director to delegate his powers to persons such as accredited representatives or advisers from other Contracting States to the Chicago Convention or to investigators appointed from an operator or manufacturer of an aircraft.

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

Veterans' Affairs (1995-96 Budget Measures) Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Minister for Veterans' Affairs.

The bill proposes to amend the following Acts:

Defence Service Homes Act 1918 to:

- remove the restriction on issuing a certificate of entitlement to an eligible person and their spouse where the title of the holding in respect of which an advance is sought is held as tenants in common;
- provide Defence Service Homes eligibility to full time members of the World War II Women's Services;
- allow eligible persons to assign their service homes entitlement by mutual agreement to certain providers of retirement village accommodation;
- allow assistance to eligible persons where the title to the property is a company title or any type of leasehold title acceptable as security for the Bank;
- provide for the cancellation of subsidy from a date three months after the death of the last surviving member of an eligible couple if the subsidised advance has not already been discharged;
- allow certificates of entitlement to be issued for purposes listed in the Act, rather than for specific purposes;
- allow all eligible persons to insure their homes under the Defence Service Homes Insurance Scheme irrespective of whether they have received a Defence Service Home loan on the home;

Veterans' Entitlements Act 1986 to:

- clarify aspects of pension eligibility in relation to allotment for duty and service in the operational area;
- extend the definition of operational service to include service by persons who were allotted for duty in Korea during the Korean War, but who only served in Japan;
- establish a new methodology for the calculation of the lump sum arrears payment of pensions payable to veterans;

- set a 50 year minimum age requirement for partner service pension for partners without dependent children;
- allow retention of eligibility in certain circumstances where the veteran ceases to be paid;
- limit the rate of service pension to the 'married' rate in any circumstance where the other member of a couple is not receiving a pension or benefit;
- extend eligibility in certain circumstances to the partners, widows and widowers of non-service pensioner veterans;
- extend eligibility for income support supplement to war widow/ers with pensioner partners;
- exclude war widow/er's pensions from the adjusted income definition for the purposes of calculating bereavement payment;
- extend automatic treatment eligibility for all veterans suffering from post-traumatic stress disorder; and
- provide for the department to issue a Seniors Health Card to certain widow/ers and non-illness separated spouses of veterans.

The committee has no comment on this bill.

Veterans' Affairs Legislation Amendment and Repeal Bill 1995

This bill was introduced into the House of Representatives on 28 June 1995 by the Minister for Veterans' Affairs.

The bill proposes to amend the following Acts:

Veterans' Entitlements Act 1986 to:

- implement a rate calculation methodology for blind service pensioners with children;
- ensure the beneficial tax treatment intended by the 1987 poverty traps legislation is achieved without changing the total amount of pension payable;
- exempt credit entries in certain exchange trading systems from the income test provisions in the Act;
- exclude maintenance income provided in relation to expenses arising from a disability or learning difficulty that is likely to be permanent;
- provide further consequential amendments as a result of the removal of the waiting period for service pensions for refugees;
- provide the cessation date for Somalia as an operational area; and
- make minor, technical and consequential amendments;

Veterans' Affairs Legislation Amendment Act 1990, Veterans' Entitlements (Re-write) Transition Act 1991, Veterans' Affairs Legislation Amendment Act (No. 2) 1992 and Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act (No. 2) 1994 to correct misdescribed amendments;

Military Compensation Act 1994 to remove references to the *Veterans' Affairs Legislation Amendment Act (No. 3) 1993* which was disagreed to by the Senate and lapsed; and to repeal the *War Services Homes Agreement Act 1932* and *War Service Homes (South Australia) Agreement Act 1934*.

Retrospectivity

Subclauses 2(2) to 2(8) and 2(10) to 2(19)

These subclauses, if enacted, would enable a number of provisions of this bill to have retrospective effect. It seems to the committee, however, that the amendments are either beneficial to service pensioners or are technical in nature.

In these circumstances, the committee makes no further comment on these provisions.

Retrospectivity

Subclause 2(9)

The amendments proposed to be made by items 1 and 2 of Schedule 1 would, if enacted, reduce the rate by half of their first instalment of service pension for blind pensioners who transfer from a social security pension to a service pension. The committee understands that such a transfer would under the present law entail a fortnightly instalment of pension being paid in successive weeks because service pension and social security pensions are paid in alternate weeks.

The committee has no objection to the change proposed but is concerned that, by virtue of subclause 2(9), the amendments are intended to have retrospective effect from 20 March 1995. The committee is unable to find any indication in the explanatory memorandum justifying the need for retrospectivity. Each of the legion(?) of blind pensioners who have transferred from social security to service pension in the period since 20 March 1995 was entitled under the law to the full rate of that instalment of pension. The committee **seeks the Minister's advice** on the reasons warranting the raising of an overpayment against those pensioners by having their entitlement retrospectively taken away.

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 12 of 1995

1995

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

TERMS OF REFERENCE

Extract from **Standing Order 24**

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☐ **The Committee has commented on these bills**

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Any Senator who wishes to draw matters to the attention of the
committee under its terms of reference is invited to do so.

Customs Tariff Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 24 August 1995 by the Parliamentary Secretary to the Treasurer.

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

- exclude certain textiles and goods made of textiles from receiving concessional treatment;
- reinstate the intended level of assistance for blood packs and blood pack systems used for collecting blood;
- increase the customs duty on manufactured tobacco and tobacco products by 10 per cent;
- define fuel oil and razor wire;
- increase the customs duty on aviation gasoline and aviation kerosene; and
- make administrative and technical amendments.

Retrospectivity

Subclauses 2(2) to (6)

Subclauses 2(2) to (6), if enacted, would give retrospective effect to the substantive provisions of this bill.

Retrospectivity is normally seen as potentially breaching principle 1(a)(i) of the committee's terms of reference, in that to change the law after the event may unduly trespass on personal rights and liberties.

The committee notes from the explanatory memorandum that the proposed amendments either are technical, correcting a cross-reference or are necessary in order to prevent evasion of the increases in customs tariff proposed.

Further, where a change in tariff has been announced by a Customs Tariff Proposal tabled in Parliament, the committee has been prepared to accept retrospectivity. The committee notes that the Proposals have been tabled.

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

Defence Cooperation Control Bill 1995

This bill was introduced into the House of Representatives on 24 August 1995 by Mr Gibson as a Private Member's bill.

The bill proposes that Australian defence forces should not engage in any cooperative arrangements with the armed forces of any nation which uses those forces as a deliberate instrument of state policy to deny basic human rights to its own people or people of another state.

The committee has no comment on this bill.

Senate Standing Committee

for

The Scrutiny of Bills

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1995

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
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☐ **The committee has commented on this bill**

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Customs and Excise Legislation Amendment Bill (No. 2) 1995

This bill was introduced into the Senate on 29 August 1995 by the Minister for Foreign Affairs.

The bill proposes to amend the *Customs and Excise Legislation Amendment Act 1995* to:

- correct transcription errors; and
- correct the application and savings provisions of the Act, with particular regard to sand mining.

Retrospectivity Clause 2

Clause 2, if enacted, would allow this bill to be taken to have commenced on 1 July 1995. The committee notes, however, that the purpose of the bill is to amend the *Customs and Excise Legislation Amendment Act 1995* (the CELA Act) which commenced on that date and contained a number of amendments moved in the Senate.

The committee notes that the explanatory memorandum outlines the need for this bill and for the retrospectivity:

The CELA Act amended the provisions of the *Customs Act 1901* and the *Excise Act 1901* relating to the Diesel Fuel Rebate Scheme, as part of the Government's Budget package, to tighten the eligibility criteria for rebates of customs and excise duty paid of purchases of diesel fuel.

The CELA Act was debated in the Senate on 29 and 30 June 1995 and received the Royal Assent on 1 July 1995. During the course of the Senate debate, 28 amendments were successfully moved by the Government to the Bill as introduced and a further 52 amendments were successfully moved by non-Government

parties.

In the process of translating the will of the Parliament into a final Royal Assent Bill, a number of transcription errors occurred. Also several substantive problems with the commencement and savings provisions of the CELA Act have been identified which are contrary to the expressed intention of the Senate.

The transcription errors are of a technical drafting nature and are dealt with in items 7 to 18 of the Schedule to the Bill.

The commencement provisions errors occurred in some cases because necessary consequential alterations to the commencement section in the CELA Act were not made, even though it was agreed that particular amendments would commence at particular times. Items 1 and 2 of the Schedule to the Bill effect these corrections.

Items 3 to 6 of the Schedule to the Bill effect the corrections to the application and savings provisions of the CELA Act to restore the state of the law as it existed before 1 July 1995, in particular with regard to sand mining.

In the light of this explanation, the committee makes no further comment on this bill.

Vocational Education and Training Funding Amendment Bill 1995

This bill was introduced into the House of Representatives on 30 August 1995 by the Minister for Schools, Vocational Education and Training.

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

- supplement general funding for 1995 and 1996 for the Australian National Training Authority (ANTA);
- appropriate general funding for 1997 for ANTA;
- appropriate off-the-job training funding for 1997 for ANTA; and
- clarify the manner in which the Minister may make determinations under the Act.

The committee has no comment on this bill.

Senate Standing Committee

for

The Scrutiny of Bills

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

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ANL Sale Bill 1995

This bill was introduced into the House of Representatives on 20 September 1995 by the Special Minister of State.

The bill proposes to make the necessary provisions to facilitate the sale of the Commonwealth's shares in ANL Limited.

Retrospectivity Subclause 37(1)

This subclause, if enacted, would provide that subsection 48(2) of the *Acts Interpretation Act 1901* not apply to regulations or other subordinate instruments made under other Acts where they are connected with the sale of ANL and take effect on the sale day.

The committee notes that the explanatory memorandum, in paragraph 71, states as the reason for this provision that it may not be possible or practicable to have the subordinate legislation or instruments made prior to the sale day and 'without this provision, such subordinate legislation may not be able to commence before the date of notification in the *Gazette*'.

Subsection 48(2) of the *Acts Interpretation Act 1901*, however, provides:

A regulation, or a provision of regulations, has no effect if, apart from this subsection, it would take effect before the date of notification and as a result:

- (a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of notification would be affected so as to disadvantage that person; or
- (b) liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification.

The committee notes that this subsection of the *Acts Interpretation Act 1901* would not prevent subordinate legislation with respect to the ANL sale from commencing

retrospectively unless the rights of persons would be retrospectively affected so as to disadvantage them or liabilities would retrospectively be imposed on them. Subclause 37(1), therefore, would apply only if peoples' rights were retrospectively disadvantaged or if obligations were retrospectively imposed on them. The committee **seeks the Minister's advice** on this issue.

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

Cessation of rights

Clause 38

The committee notes that the purpose of this section is to avoid doubt about the application of Part IV of the *Public Service Act 1922* and the *Officers' Rights Declaration Act 1928*. The committee also notes that the explanatory memorandum, in paragraph 73, indicates that a small number of ANL staff may have acquired mobility rights which have been preserved.

The committee is concerned that preserved rights are being taken away merely because 'it would not be appropriate for mobility rights to be retained'. It may be that just compensation is being provided and so possible constitutional invalidity is precluded. But the committee contrasts the treatment of these officers with the treatment, under clauses 24 and 25 of this bill, of former members of the Defence Force whose continued employment by ANL is to be deemed continued public employment or eligible employment for certain purposes of the *Defence Force Retirement Benefits Act 1973*.

Accordingly the committee **seeks the Minister's advice** on this matter.

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

Governor-General Amendment Bill 1995

This bill was introduced into the House of Representatives on 20 September 1995 by the Minister for Finance.

The bill proposes to amend the *Governor-General Act 1974* to reduce the annual sum payable to the Governor-General from \$95,000 to \$58,000. The amendment will not take effect until the current Governor-General has left office. The sum is being reduced at the request of the Governor-General designate to take account of a non-contributory Commonwealth pension which he will continue to receive while in the office of Governor-General.

The committee has no comment on this bill.

Human Services and Health Legislation Amendment Bill (No. 3) 1995

This bill was introduced into the House of Representatives on 20 September 1995 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to amend the following Acts:

Childcare Rebate Act 1993 to:

- provide hardship provisions to assist certain groups of persons currently excluded from the rebate scheme;
- allow the suspension of family and carer registrations if cancellation of registrations is being considered;
- allow the Health Insurance Commission (HIC) to backdate carer registrations;
- vary a family's registration;
- cancel certain family and carer registrations;
- ensure the rebate is not paid for child care costs already reimbursed by another agent;
- clarify that the rebate is payable for child care costs incurred for certain specified absences from care;
- clarify the backdating of family registrations;
- clarify the eligibility of overseas students to claim the rebate; and
- make administrative and technical amendments;

Health Insurance Act 1973 to:

- correct drafting errors; and
- allow for the appointment as Presidents of the Professional Services Review Tribunals persons who hold or have held judicial office in State and Territory jurisdictions;

Health Insurance Commission Act 1973 to:

- confer upon the HIC the function of providing consultancy and management services and of providing information technology services to the Commonwealth;
- empower the HIC to operate outside Australia and to enter into hedging arrangements; and
- retain evidential material seized pursuant to the execution of a search warrant for a certain period of time;

National Health Act 1953 to:

- remove redundant provisions;
- include a "merits review" right for decisions on the amount of Commonwealth benefit that may be advanced to nursing home proprietors; and
- to amend provisions relating to "exempt bed status",

National Health and Medical Research Council Act 1992 to provide that appointing certain senior officers the Minister is to consult with each State and Territory Health Minister;

and to repeal the *Handicapped Persons Assistance Act 1974*.

Retrospectivity

Subclause 2(2)

Subclause 2(2), if enacted, would allow a considerable number of provisions of this bill to have retrospective effect from 1 July 1994. The committee notes from the general outline in the explanatory memorandum that several amendments will provide eligibility for the rebate scheme to certain groups, including children over the age of 13 who have a disability, who are currently excluded from the scheme. The explanatory memorandum, however, does not indicate why the provisions are to have effect from 1 July 1994 nor does it indicate whether any of the amendments would adversely affect any person other than the Commonwealth. Accordingly, the committee **seeks the Minister's advice** on these issues.

Pending the Minister's advice, the committee draws Senators' attention to the provision, as it may be considered to trespass

unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.

Retrospectivity

Subclause 2(3) to (9)

These subclauses would allow certain provisions of the bill to have retrospective effect from a variety of dates.

Retrospectivity is normally seen as potentially breaching principle 1(a)(i) of the committee's terms of reference, in that to change the law after the event may unduly trespass on personal rights and liberties.

The committee notes, however, from the explanatory memorandum that the proposed amendments are technical, correcting typographical errors and drafting oversights.

Accordingly the committee makes no further comment on these provisions.

International Tax Agreements Amendment Bill 1995

This bill was introduced into the House of Representatives on 20 September 1995 by the Special Minister of State.

The bill proposes to amend the *International Agreements Act 1953* to give the force of law in Australia to a comprehensive double taxation agreement with the Czech Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

The committee has no comment on this bill.

Therapeutic Goods Amendment Bill 1995

This bill was introduced into the House of Representatives on 20 September 1995 by the Parliamentary Secretary to the Minister for Human Services and Health.

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

- clarify the distinction between "food" and "therapeutic goods";
- enable certain senior officers to temporarily approve the supply of unevaluated drugs for use in Australia in limited circumstances;
- establish a new procedure for listing on the Australian Register of Therapeutic Goods drugs that are supplied for use in Australia;
- require sponsors of goods unlawfully supplied to inform the public and to take steps to recover any of the goods already distributed;
- establish a Therapeutic Goods Administration Reserve to replace the Therapeutic Goods Administration Trust Account;
- clarify offence provisions and introduce new offences;
- update search and seizure powers and provisions relating to warrants; and
- amend the procedures for reviewing decisions relating to the registration of therapeutic goods in the Australian Register of Therapeutic Goods.

Reversal of the onus of proof

Item 10 of the Schedule: Proposed subsection 20(1A)

Proposed subsection 20(1) creates an offence if a person intentionally or recklessly engages in certain dealings in therapeutic goods that are not registered, exempt or otherwise subject to approval. Proposed subsection 20(1A) provides a defence to a prosecution for this offence if the defendant proves that the defendant was not the sponsor of the goods at the time of the dealing.

The committee notes, however that the explanatory memorandum, on page three, is very clear in pointing out that whether a person is the sponsor is not only peculiarly within the knowledge of the defendant but also is a matter which places a considerable burden on the prosecution to prove.

The provision, therefore, comes within the class of reversals of the onus of proof which the committee has been prepared to accept.

In the light of the reasons given, the committee makes no further comment on this provision.

Search and seizure without warrant

Proposed section 46B

Proposed section 46B provides:

(1) Subject to subsection (2), if an authorised person has reasonable grounds for suspecting that:

- (a) there may be on any premises a particular thing in respect of which this Act or the regulations have not been complied with; and
- (b) it is necessary in the interests of public health to exercise powers under this section in order to avoid an imminent risk of death, serious illness or serious injury;

the authorised person may, to the extent that it is reasonably necessary for the purpose of avoiding an imminent risk of death, serious illness or serious injury, enter the premises and do any of the following:

- (c) search the premises for the thing;
- (d) if the authorised person finds the thing on the premises—seize it.

(2) An authorised person is not entitled to exercise any powers under subsection (1) in relation to premises if:

- (a) the occupier of the premises has required the authorised person to produce his or her identity card for inspection by the occupier; and
- (b) the authorised person fails to comply with the requirement.

The provision lays down narrow limits within which these powers may be exercised. It requires, in the interests of public health, a reasonable suspicion of the

need to search and, if necessary, to seize in order to avoid imminent risk of death, serious illness or serious injury.

In these circumstances, the committee makes no further comment on this provision.

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

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1995

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
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☐ **The committee has commented on these bills**

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Airports Bill 1995

This bill was introduced into the House of Representatives on 27 September 1995 by the Minister for Transport.

The bill proposes to establish the regulatory arrangements to apply to the airport currently owned and operated on behalf of the Commonwealth by the Federal Airport Corporation, and Sydney West Airport, following the leasing of those airports. The bill also contains provisions which can be applied to other airports.

Vicarious liability and reversal of the onus of proof Subclause 211(2)

Subclause 211(2) provides:

If

- (a) conduct is engaged in on behalf of a person other than a corporation by an employee or agent of the person; and
- (b) the conduct is within the employee's or agent's actual or apparent authority;

the conduct is taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in by the person unless the person establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

Clause 211, if enacted, would impose vicarious liability on a person for the criminal acts of his or her employee or agent. Subclause (2) would put the onus of disproving liability on the principal by requiring that person to establish that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

The committee has been prepared to accept the imposition of criminal liability on the manager/directors of a company for the acts of a company as that is necessary for the effective operation of the criminal law. The committee, therefore, has no concerns with clause 210 which provides for the prosecution of corporations. Different considerations, however, apply where vicarious liability for the acts of other persons is imposed on an employer or principal who is a natural person.

The committee's approach to the imposition of vicarious criminal liability is similar to its approach to the imposition of strict liability. The primary issue is

whether the consequences of the offence are so serious as to warrant the departure from the normal requirement that a person can be guilty of a crime only if they act intentionally or recklessly.

Offences are categorised as of strict liability where it is immaterial whether the person had the 'guilty knowledge' which at common law is an integral part of any statutory offence, unless the statute itself or its subject matter rebuts that presumption. At common law offences of strict liability are subject to the defence of honest and reasonable mistake of fact. In such cases the accused must raise the defence, though the prosecution has the ultimate onus of proving the elements which constitute the offence. In a statute, a strict liability offence may also be made subject to a specific defence or defences.

Where public policy dictates that strict liability offences should be created, the committee acknowledges that both specific and general defences assist the personal rights and liberties of the accused. The primary issue, therefore, is whether a strict liability ought to be imposed.

The committee can understand that an oil spill on the Great Barrier Reef or serving salmonella infected food would warrant offences of strict liability because of the serious consequences of such acts. Acts with less serious consequences may not justify imposing strict liability.

With respect to vicarious criminal liability, the committee is of the view that imposing such liability would be justified only by the seriousness of the consequences of the prohibited acts. An examination of the offences in the bill for which subclause 211(2) will impose vicarious criminal liability discloses a wide variety not all of which would equate in seriousness with an oil spill on the Great Barrier Reef. For example, the committee remains to be convinced that failure to comply with any condition attached to a certificate of fitness for use (under clause 107) warrants vicarious liability. The committee **seeks the Minister's advice** whether any of the offences have such serious consequences that vicarious liability is warranted and if so, which.

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

Airports (Transitional) Bill 1995

This bill was introduced into the House of Representatives on 27 September by the Minister for Transport.

The bill proposes to provide for:

- the revesting of the land at, and operating assets and liabilities (other than debt) of, Federal airports in the Commonwealth;
- a disposal strategy to allow either;
 - the granting of leases to Commonwealth airport specific companies, the subsequent transfer of assets and liabilities associated with those leases from either the Commonwealth or the Federal Airports Corporation (FAC) to those companies and the sale of shares in the those companies; or
 - the sale of Commonwealth airport specific companies and the subsequent granting of leases and transfer of assets and liabilities associated with those airport operations;
- continuing employment for those FAC staff wishing to remain in airport operations; and
- the assumption and/or repayment of the FAC's debts as required to facilitate the sale process.

The committee has no comment on this bill.

Bounty Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 27 September 1995 by the Minister representing the Minister for Small Business, Customs and Construction.

The bill proposes the validation of certain Ministerial declarations and the amendment of three Bounty Acts: the *Bounty (Computers) Act 1984*, the *Bounty (Machine Tools and Robots) Act 1985* and the *Bounty (Fuel Ethanol) Act 1994*.

Retrospectivity Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would provide that the amendments proposed by Schedule 1 will have retrospective effect from 1 July 1994.

The committee notes that the outline in the explanatory memorandum indicates that the amendments are to give effect to the 1995 Budget decision to ensure all fuel ethanol producers can claim bounty on post 1 July 1994 production on the same basis.

As the amendments are beneficial to claimants for bounty, the committee makes no further comment on this subclause.

Retrospective application Part 3

Part 3 of the bill, if enacted, would apply retrospectively from the commencement of the *Bounty (Computers) Act 1984* on 6 July 1984.

The committee notes, however, that the effect is to validate action purportedly taken under two Bounty Acts and is, therefore, beneficial to claimants for bounty.

In these circumstances, the committee makes no further comment on these provisions.

Customs Tariff Bill 1995

This bill was introduced into the House of Representatives on 28 September 1995 by the Minister for Human Services and Health.

The bill proposes the introduction of a new customs tariff based on the Harmonized Commodity Description and Coding System which is the international tariff system. The *Customs Tariff Act 1987* is repealed by this bill.

The committee has no comment on this bill.

Development Allowance Authority Amendment Bill 1995

This bill was introduced into the House of Representatives on 27 September 1995 by the Assistant Treasurer.

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

- allow the transfer of the development allowance benefit where ownership of a project is transferred to another entity after application for the development allowance but before registration; and
- allow the transfer of the development allowance benefit where ownership of a project is transferred from one entity structure to another type of entity structure after application for the allowance,

when all other criteria in the Principal Act are met; (these amendments will be retrospective and apply from 1 January 1993) and

- grant the Development Allowance Authority a power to determine that an application by an entity for registration of plant expenditure has lapsed in certain limited circumstances; and
- make minor administrative adjustments and correct drafting errors.

Retrospective application Items 16 and 30 of the Schedule

Items 16 and 30 of the Schedule of this bill, if enacted, would provide that the amendments proposed by those items will have retrospective effect from 1 January 1993.

The committee notes, however, that the effect is to remove certain restrictions on eligibility for the Development Allowance and is, therefore, beneficial to claimants for that allowance.

In these circumstances, the committee makes no further comment on these provisions.

Employment Services Amendment Bill 1995

This bill was introduced into the House of Representatives on 27 September 1995 by the Minister for Employment, Education and Training.

The bill proposes to amend the:

Employment Services Act 1994 to:

- provide that the CES will issue a notice to participants in the case management system only when they are to be required to come in for a referral interview;
- change Job Compact eligibility requirements for certain seasonal and part-time workers;
- enable the Employment Services Regulatory Authority to obtain goods and services on credit by the use of a credit card;
- make consequential amendments upon the amalgamation of the job search allowance and newstart allowance into one allowance type;

Social Security Act 1991 to provide for the National Convenor of the Social Security Appeals Tribunal to delegate his or her powers under the *Employment Services Act 1994*.

The committee has no comment on this bill.

Housing Loans Insurance Corporation (Transfer of Assets and Abolition) Bill 1995

This bill was introduced into the House of Representatives on 27 September 1995 by the Special Minister of State.

The bill proposes to reconstitute the Housing Loans Insurance Corporation as a new Government-owned company established under the Corporations Law and subject to regulation by the Insurance and Superannuation Commission. The bill also proposes to repeal the *Housing Loans Insurance Act 1965* and *Housing Loans Insurance Corporation (Sale of Assets and Abolition) Act 1990*.

The committee has no comment on this bill.

Income Tax (Deficit Deferral) Amendment Bill 1995

This bill was introduced into the House of Representatives on 28 September 1995 by the Minister for Human Services and Health.

The bill proposes to amend the *Income Tax (Deficit Deferral) Act 1994* to impose class C deficit deferral tax.

Retrospectivity

Clause 2

By virtue of clause 2 of this bill, the amendments proposed by the bill will have effect from 1 July 1995 and therefore prior to Royal Assent. The committee notes, however, that the amendments give effect to a budget announcement.

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, 1981-85*, 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.

In these circumstances, the committee makes no further comment on this provision.

Income Tax (Franking Deficit) Amendment Bill 1995

This bill was introduced into the House of Representatives on 28 September 1995 by the Minister for Human Services and Health.

The bill proposes to amend the *Income Tax (Franking Deficit) Act 1987* to impose Class C franking deficit tax.

Retrospectivity Clause 2

By virtue of clause 2 of this bill, the amendments proposed by the bill will have effect from 1 July 1995 and therefore prior to Royal Assent. The committee notes, however, that the amendments give effect to a budget announcement.

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, 1981-85*, 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.

In these circumstances, the committee makes no further comment on this provision.

States Grants (Primary and Secondary Education Assistance) Amendment Bill (No.2) 1995

This bill was introduced into the House of Representatives on 27 September 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Sates Grants (Primary and Secondary Education Assistance) Act 1992* to:

- discontinue funding for the gifted and talented children scheme, the gender equity program and the rural hostels program;
- extend the Early Literacy program to 1996;
- introduce a program of grants for projects in non-government special schools to assist students with disabilities to make the transition to mainstream school education or pursue further training or employment; and
- adjust capital and recurrent grants for 1995 and 1996 consequent upon cost movements in the Building Price Index and the Average Government Schools Recurrent Costs Index.

The committee has no comment on this bill.

Sydney Airport Curfew Bill 1995

This bill was introduced into the House of Representatives on 25 September 1995 by the Minister for Development Co-operation and Pacific Island Affairs.

The bill proposes to:

- reduce the quotas for international passenger movements during curfew shoulder periods and requires these movements to be justified;
- increase penalties for curfew breaches;
- introduce restrictions on take-offs after 10.45pm to over Botany Bay;
- restrict aircraft movements to take-offs and landings over Botany Bay at weekends, for certain periods;
- introduce specific consultation provisions; and
- impose additional restrictions on large propeller-driven aircraft.

The committee has no comment on this bill.

Taxation Laws Amendment Bill (No. 4) 1995

This bill was introduced into the House of Representatives on 28 September 1995 by the Minister for Human Services and Health.

The bill proposes to amend the:

Income Tax Assessment Act 1936 to:

- amend capital gains tax provisions to:
 - allow for the transfer of depreciable assets between commonly owned companies;
 - allow for grouping of assets for the purpose of determining whether adjustments to the cost bases of shares and loans in a transferor company are required; make technical amendments;
 - increase the thresholds applying to personal-use assets;
 - ensure that the listed personal-use assets threshold applies appropriately to sets of articles;
 - ensure the threshold is apportioned appropriately where an asset is jointly owned;
 - ensure the tax applies to disposals of taxable Australian assets used to produce franked dividends or income subject to withholding tax;
 - extend relief for disposals of shares in foreign companies which give rise to dividends, to shares created prior to 26 June 1992;
 - limit the relief available for disposals of shares giving rise to dividends to amounts which are not paid out of capital, or share premium or revaluation reserves and limit the operation to eligible termination payments;
 - require that, where a company disposes of an asset to a related company and the disposal gives rise to a capital loss, there will be a compulsory rollover of the asset;
 - provide that the tax will not apply where a complying approved deposit fund converts to a complying superannuation fund in certain circumstances; and

- require companies to establish a class C franking account and to convert existing class A and class B franking account balances into that account, as a result of the increase in the company tax rate from 33 to 36 per cent;
- deny franking credits under the imputation system for tax paid by companies as a result of a transfer pricing;
- deal with the taxation treatment of certain transactions likely to take place in the course of a demutualisation of a life or general insurance company;
- allow capital expenditure incurred in establishing plants for horticulture to be written off for taxation purposes;
- ensure tax is only levied on the net proceeds of the sale of standing timber, where taxpayers who conduct timber operations purchased the timber as an existing forest or plantation;
- ensure companies receive the same taxation treatment for expenditure incurred to private tax exempt entities as presently applies for expenditure incurred to public tax exempt entities under section 73CB;
- transfer responsibility for the maintenance of the Register of Approved Occupational Clothing;

Taxation Laws Amendment Act 1993 to set out the rules that have to be satisfied by trusts before a deduction is allowed for prior year and current year losses; deny deductions; and

Sales Tax (Exemptions and Classifications) Act 1992 to provide for an exemption for beverages consisting principally of rice milk.

Retrospective application

Various provisions

Most of the amendments proposed by this bill will apply retrospectively from either Budget night (9 May 1995) or from 1 July 1995 and therefore prior to Royal Assent. The committee notes, however, that the amendments give effect to budget announcements.

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, 1981-85*, 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 these provisions.

Retrospective application Schedule 1, item 37 and Schedule 6

The amendments referred to in Schedule 1, item 37 and in Schedule 6 will have retrospective application from dates prior to Budget night. The effect of the amendments, however, is beneficial to taxpayers.

In these circumstances, the committee makes no further comment on these provisions.

Retrospective application Item 34 of Schedule 1

The amendment referred to in this item will have retrospective effect from 20 September 1985.

The committee notes that the explanatory memorandum, at paragraph 2.23, states:

Generally, the amendments will apply to disposals of taxable Australian assets taking place after 19 September 1985, which is the date on which the introduction of the CGT provisions was announced. However, the amendments will not apply in relation to transactions which had been commenced to be carried out prior to 7.30pm AEST on 9 May 1995, where the transaction was covered by a private binding ruling issued by the Commissioner of Taxation under Part IVAA of the *Taxation Administration Act 1953*. *[Subitems 34(1) and (2)].*

The committee **seeks the Treasurer's advice** whether the amendments ought not to apply to a taxpayer who, prior to Budget night, had relied on the present

wording of the legislation although not obtaining a ruling from the Commissioner.

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

**Retrospectivity: transfer pricing
Subitem 160(1) of Schedule 2**

The committee has received a submission on this matter from Mr Michael Wachtel, a tax partner at Arthur Andersen. A copy of the submission is attached to this Digest. Mr Wachtel is concerned that the retrospective operation of this provision would be unfair and suggests that amendments should be confined to transactions entered into after the time of the budget announcement.

The committee **seeks the Treasurer's advice** on the issue raised by Mr Wachtel.

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 16 of 1995

1995

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

TERMS OF REFERENCE

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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☐ **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.

Australian Federal Police Amendment Bill 1995

This bill was introduced into the House of Representatives on 18 October 1995 by the Minister for Justice.

The bill proposes to amend the *Australian Federal Police Act 1979* to:

- give to the Commissioner the power to end the appointment of individual members or staff and clarifies that a person may challenge such a termination under the 'unlawful termination' provisions of the *Industrial Relations Act 1988*;
- extend to staff members the provision dealing with disciplinary obligations during special leave for service with an industrial association; and
- permit the Commissioner or a Deputy Commissioner to appoint or promote a person to a commissioned rank if authorised to do so by the Governor-General in writing.

The committee has no comment on this bill.

Commonwealth Bank Sale Bill 1995

This bill was introduced into the House of Representatives on 19 October 1995 by the Assistant Treasurer.

The bill enables the sale of the Commonwealth Government's remaining 50.39 per cent shareholding in the Commonwealth Bank and for the conversion of the Commonwealth Development Bank and the Commonwealth Bank Officers Superannuation Corporation into companies under the Corporations Law.

Commencement

Subclauses 2(2), (4), (5) and (6)

These subclauses, if enacted, would allow various provisions of this bill to commence at a date fixed by reference to the 'transfer time', defined in clause 3 as:

transfer time means the time when the Commonwealth ceases to have the status of being the holder of shares in the Commonwealth Bank that carry more than 50% of the total voting rights attached to the voting shares in the Commonwealth Bank.

The commencement date of the provisions is, therefore, uncertain. On the other hand, the commencement will be automatic once the condition for the transfer time has been fulfilled. As the date does not appear to be dependent upon the exercise of a discretion by the Executive Council, the provision cannot be considered to delegate the legislative power of Parliament inappropriately.

In these circumstances, the committee makes no further comment on these subclauses.

Commencement

Subclause 2(3), item 12 of the Schedule

By virtue of subclause 2(3), item 12 of the Schedule would commence on a date to be fixed by Proclamation, with no further provision in the bill limiting the discretion to proclaim commencement.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. 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 states that the proclamation will be made after the Commonwealth's shareholding falls to below ten per cent. While the timing of such a state of affairs is uncertain at present, there is nothing in the bill to compel the proclamation of the commencement once the shareholding falls below that threshold. This contrasts with the automatic commencement of those provisions of the bill which will come into effect at the 'transfer time' by virtue of subclauses 2(2), (4), (5) and (6), discussed above. The committee **seeks the Treasurer's advice** on whether a similar compulsion might be appropriate with respect to this item.

Pending the Treasurer's advice, 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

Subclause 19 (3)

This subclause, if enacted, would provide that subsection 48(2) of the *Acts Interpretation Act 1901* not apply to regulations that take effect at or after the transfer time.

The committee notes that the explanatory memorandum, in paragraph 36, states as the reason for this provision that regulations relating to savings and transitional matters related to the sale may not be able to commence before the date of notification in the *Gazette*, thereby potentially frustrating the sale.

Subsection 48(2) of the *Acts Interpretation Act 1901* provides:

A regulation, or a provision of regulations, has no effect if, apart from this subsection, it would take effect before the date of notification and as a result:

- (a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of notification would be affected so as to disadvantage that person; or
- (b) liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification.

The committee notes that this subsection of the *Acts Interpretation Act 1901* would not prevent subordinate legislation with respect to the sale from commencing retrospectively unless the rights of persons would be retrospectively affected so as to disadvantage them or liabilities would retrospectively be imposed on them. Subclause 19(3), therefore, would apply only if peoples' rights were retrospectively disadvantaged or if obligations were retrospectively imposed on them. The committee **seeks the Treasurer's advice** on this issue.

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

Corporations Law Amendment Bill 1995

This bill was introduced into the House of Representatives on 18 October 1995 by the Attorney-General.

The bill proposes to ensure that debts incurred by a company while under a deed of company arrangement are admissible to proof against the company in a subsequent liquidation of the company. Further, the bill proposes to validate acts done by liquidators, prior to commencement of the amendments, on the assumption that debts incurred by a company under a deed of company arrangement are admissible to proof.

Retrospective application Item 3 of the Schedule

Item 3 of the Schedule, if enacted, would give retrospective application to the substantive amendment. The committee notes, however, that the amendment is beneficial to creditors of a company which goes into liquidation.

In these circumstances, the committee makes no further comment on the bill.

Excise Tariff Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 18 October 1995 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

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

- exclude the rate of excise duty applicable to beer produced from 'micro breweries' and 'U-brews' from indexation (effective 1 April 1994);
- increase the excise duty on manufactured tobacco and tobacco products by 10 per cent (effective 10 May 1995);
- amend the physical characteristics of fuel oil so that 'light' fuel oil will become excisable at the same rate as diesel fuel (effective 1 July 1995);
- increase the excise duty on aviation gasoline and aviation kerosene (effective 1 July 1995);
- exempt certain condensate from the application of the Tariff Act (effective 11 October 1995); and
- increase the rate of excise duty on topped crude (effective 11 October 1995).

Retrospectivity Subclause 2(2)

This subclause, if enacted, would allow the amendments proposed in Schedule 1 to take effect from 1 April 1994. The committee notes, however, that those amendments are beneficial to those liable to pay excise duty.

In these circumstances, the committee makes no further comment on this subclause.

Retrospectivity Subclauses 2(3) to (5)

These subclauses, if enacted, would allow other amendments proposed by the bill to have effect retrospectively. The committee notes, however, that in each case the amendments have been announced prior to the date from which each is

to take effect and that without retrospective commencement duties of excise could be evaded.

In these circumstances, the committee makes no further comment on these subclauses.

Social Security and Veterans' Affairs Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 19 October 1995 by the Minister for Social Security.

The bill proposes to amend the following Acts:

- *Social Security Act 1991* to:
 - provide for a general deeming approach in the assessment of financial assets;
 - provide that people receiving certain allowances who become temporarily incapacitated for work will no longer have to transfer to sick allowance;
 - make amendments affecting provisions concerning the rate of accrual of earnings credit, the application of earnings credit balance to the calculation of ordinary income and the deductions from the earnings credit account balance;
 - provide for flexible reporting requirements for certain allowance recipients who have been screened against certain risk indicators;
 - amalgamate job search allowance and newstart allowance into one payment called newstart allowance;
 - remove the sunset clause for mature age allowance and provide for the continuation of the payment in a modified form;
 - relax or abolish a number of the conditions applicable to the Pension Loans Scheme;
 - give legislative effect to the Protocols signed by Australia and New Zealand to amend the international social security agreement;
- *Veterans' Entitlements Act 1986* and *Income Tax Assessment Act 1936* to make amendments that are consequential on the changes to the mature age allowance and the amalgamation of job search allowance and newstart allowance;
- *National Health Act 1953* to make amendments that are consequential on the changes to the ending of transfers from job search allowance and newstart allowance to sickness allowance, mature age allowance and the amalgamation of job search allowance and newstart allowance;

- *Childcare Rebate Act 1993, Health Insurance Act 1973, Farm Household Support Act 1992 and Disability Services Act 1986* to make amendments that are consequential on the amalgamation of job search allowance and newstart allowance; and
- *Veterans' Entitlements Act 1986* to make equivalent amendments as made to the *Social Security Act 1991* relating to deemed income from financial investments.

Retrospectivity

Subclause 2(2)

This subclause, if enacted, would allow the amendments proposed by Part 1 of Schedule 8 to have effect retrospectively from 1 January 1995. The committee notes, however, that the amendments are technical in nature and give effect to an agreement between New Zealand and Australia to amend the international social security agreement between the countries.

In these circumstances, the committee makes no further comment on this subclause.

Provisions with respect to tax file numbers

Schedule 6, Item 26

Item 26, if enacted, would provide inter alia for new sections 660YDF, 660YDG, 660YIA and 660YIB. These sections provide that claimants for, and recipients of, mature age allowance and their partners would have to provide information in respect of tax file numbers. The committee notes, however, that the provisions appear necessary to prevent or disclose fraud.

In these circumstances, the committee makes no further comment on these provisions.

Social Security Legislation Amendment (Carer Pension and Other Measures) Bill 1995

This bill was introduced into the House of Representatives on 19 October 1995 by the Minister for Development Co-operation and Pacific Island Affairs.

The bill proposes to amend the following Acts:

- *Social Security Act 1991* to:
 - amend provisions relating to certain pension recipients who leave Australia without receiving a departure certificate and remain absent from Australia for more than six months;
 - provide that the Secretary may waive part or the whole of a debt;
 - provide for general recovery of debts over \$50 where recovery can be effected by withholdings from DSS payments;
 - provide for negotiated settlements;
 - recover debts based on commercial considerations relating to present versus future value of the debt;
 - provide for non-recovery of debts where there are special circumstances that make recovery inequitable;
 - provide for waiver where a person has a notional entitlement to parenting allowance;
 - increase rent assistance thresholds;
 - enable rent assistance savings provisions to be phased out more quickly;
 - provide that persons who leave their homes to receive or give community-based care are immediately entitled to rent assistance;
 - extend the two-year exemption period for former homeowners to include persons who receive or give community-based care, or are in residential care;
 - provide that the carer pension will continue to be paid for 14 weeks after caring ceases due to the permanent institutionalisation of the person receiving care;
 - extend qualification for carer pension to include situations where a person cares for a non-pensioner;

- remove the requirement that, in order to receive carer pension, the carer must live in the same home as, or in an adjacent home to, the person being cared for;
- allow certain recipients of some pensions and benefits to access advance payments of their social security payments to assist in meeting their or their family members' living or capital expenses;
- increase the guardian allowance by \$4 per fortnight from 1 September 1996;
- remove the provision that allows a parenting allowance claim lodged before 1 July 1995 to be treated as a claim for home child care allowance in respect of a period before 1 July 1995;
- modify the provision that allows the treatment of a parenting allowance claim lodged after 1 July 1995 as a claim for home child care allowance in respect of a period before 1 July 1995 so that it applies only on a claimant's request;
- amend the entitlement relating to periodic compensation payments converted to a lump sum;
- amend the treatment of compensation affected payments where one member of a couple is a Social Security client and the other is a Veterans' Affairs client;
- provide that any part of a waiting period already served is transferable across allowance types;
- relax the sickness allowance qualification requirements for certain 15 year olds;
- extend the operation of the preclusion period for certain persons awaiting surgery;
- remove the requirement that a medical practitioner indicate whether the social security customer's condition is likely to improve if that person receives treatment or undertakes a rehabilitation program;
- provide that bereavement payments will be paid to the principal carer when the person being cared for dies during respite care;
- provide that the four weeks bereavement period commences on the day after the day the child dies;
- clarify the conditions under which a person's pension, benefit or allowance will cease to be payable due to the person's failure to notify a bank account into which the person's social security payment can be made;

- amend sole parent pension and sole parent special needs pension provisions to clarify the situations where a person is obliged to pursue maintenance;
- ensure all social security payments are absolutely inalienable and protected from garnishee action;
- exclude as income certain payments received by a person who is engaged in part-time training or vocation training activities under a Labour Market Program;
- enable an imprisonment term to be 'converted' to a monetary penalty by way of operation of the penalty units scheme in the *Crimes Act 1914*; and
- make minor and technical amendments;
- *Social Security Act 1991* and *Income Tax Assessment Act 1936* to replace rent assistance for people residing in nursing homes and hostels with a new residential care allowance;
- *Child Care Act 1972* to:
 - allow for the collection of tax file numbers from recipients of Childcare Assistance;
- *Data-Matching Program (Assistance and Tax) Act 1990* to:
 - repeal the sunset clause;
 - require agencies to present reports to Parliament every three years and interim annual reports on financial year outcomes to be provided to the Privacy Commissioner on an annual basis;
 - remove redundant references to identity data held by the Australian Electoral Commission and the Health Insurance Commission;
 - remove inconsistencies relating to the definition of 'income data';
 - authorise the provision of the data of a person's most recent Australian Taxation Office assessment to the Data Matching Agency; and
 - allow for the data-matching of information relating to Childcare Assistance; and
- *Farm Household Support Act 1992* to enable an imprisonment term to be 'converted' to a monetary penalty by way of operation of the penalty units scheme in the *Crimes Act 1914*.

Retrospectivity
Subclause 2(2)

This subclause, if enacted, would allow the amendments proposed by Schedule 1 to have effect retrospectively. The committee notes, however, that the amendments are beneficial to social security recipients.

In these circumstances, the committee makes no further comment on this subclause.

Retrospectivity
Subclauses 2(6), (11) and (15)

These subclauses, if enacted, would allow other amendments to have effect retrospectively. The committee notes, however, that the amendments are technical and do not alter any social security entitlements.

In these circumstances, the committee makes no further comment on these subclauses.

Provisions with respect to tax file numbers
Schedule 2, Part 1

These amendments, if enacted, would provide that a person seeking fee relief for child care would have to provide information in respect of the tax file number of that person and his or her partner. The committee notes, however, that the provisions appear necessary to prevent or disclose fraud.

In these circumstances, the committee makes no further comment on these provisions.

**Non-reviewable decision
Schedule 3, items 3 and 4**

New section 1285A of the *Social Security Act 1991*, proposed by item 5 of Schedule 3, enables an agreement for a settlement to be made between the Secretary and other parties to proceedings for debt recovery before the AAT. The new section also provides that, on the Secretary giving the AAT a copy of the agreement to settle the proceedings, the application for review will be taken to have been dismissed.

Items 3 and 4 of Schedule 3 provide that the Secretary's decision to settle the matter is non-reviewable. As the explanatory memorandum points out at page 24 to allow review would defeat the purpose of the amendment.

In these circumstances, the committee makes no further comment on these provisions.

Student and Youth Assistance Amendment (Youth Training Allowance) Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 18 October 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend provisions relating to the Youth Training Allowance in relation to:

- entitlement to periodic compensation payments converted to a lump sum;
- treatment of compensation affected payments where one member of a couple is in receipt of youth training allowance and the other is a Veterans' Affairs client;
- qualification of 15 year olds to receive the allowance;
- recovery of any allowance overpayments which a person may owe to the Commonwealth from subsequent student assistance entitlements of that person;
- changing the definition of 'late payment charge' as a consequence of the repeal of the *Seamen's War Pensions and Allowances Act 1940*;
- providing that any part of a waiting period already served is transferable across allowance types;
- certain sections of the Act allowing for part of a debt to be waived as well as allowing for the whole of a debt to be waived;
- general recovery of debts over \$50 where recovery can be effected by withholding from Youth Training Allowance payments;
- negotiated settlements to avoid administrative appeals;
- recovery of debts based on commercial considerations relating to present versus future value of the debt;
- providing for non-recovery of debts where there are special circumstances that make recovery inequitable;
- clarifying the conditions under which a person's pension, benefit or allowance will cease to be payable due to the person's failure to notify a bank account into which the person's social security payment can be made;
- increased rent assistance thresholds;
- making minor administrative amendments.

Retrospectivity
Subclause 2(5)

This subclause, if enacted, would enable the amendment proposed by item 3 of Schedule 7 to have effect retrospectively. The committee notes, however, that the amendment is technical only.

In these circumstances, the committee makes no further comment on this subclause.

Non-reviewable decision
Schedule 5, item 3

New section 326A of the *Student Youth Assistance Act 1973*, proposed by item 4 of Schedule 5, enables an agreement for a settlement to be made between the Secretary and the other parties to proceedings for debt recovery before the AAT. The new section also provides that, on the Secretary giving the AAT a copy of the agreement to settle the proceedings, the application for review will be taken to have been dismissed.

Item 3 of Schedule 3 provides that the Secretary's decision to settle the matter is non-reviewable. The committee notes that to allow review would defeat the purpose of the amendment.

In these circumstances, the committee makes no further comment on these provisions.

Superannuation Industry (Supervision) Legislation Amendment Bill 1995

This bill was introduced into the House of Representatives on 19 October 1995 by the Parliamentary Secretary to the Treasurer.

The bill proposes amend the following Acts:

- *Superannuation Industry (Supervision) Act 1993* to:
 - amend the definition of 'independent director';
 - amend provisions relating to public offer superannuation funds;
 - provide that copies of audit certificates have to be provided when an annual return is lodged;
 - allow an approved deposit fund to become a regulated superannuation fund without losing taxation concessions;
 - amend the 'sole purpose test' provision;
 - ensure certain persons comply with Superannuation Complaints Tribunal determinations;
 - amend the in-house asset rules;
 - amend the equal representation rules;
 - allow certain trustees to be considered independent trustees in certain circumstances;
 - allow persons who can complain to the Tribunal under the Superannuation (Resolutions of Complaints) Act to have the right to complain to the trustee under the Superannuation Industry (Supervision) Act;
 - require that all investments by superannuation entities are maintained on an arms-length basis;
 - provide that a statement of cash flows must be prepared for superannuation entities;
 - require auditors' reports to include opinions on the compliance of entities with certain provisions;
 - extend restrictions on payments to former standard employer-sponsor funds and former standard employer-sponsors;
 - ensure certain requirements for actuarial certification apply irrespective of a fund's trustee structure;

- amend provisions relating to 'disqualified persons';
- allow the Commissioner to refer an actuary or auditor to a professional body for disciplinary action;
- expand inspectors' ability to require assistance/information from persons so they can seek assistance from former 'relevant persons';
- make Act terminology consistent with the Corporations Law in relation to official management;
- allow the Commissioner to make an application to the Court for an order to be made against a trustee for the protection of beneficiaries;
- amend the definition of superannuation standards officer and the role of the Australian Bureau of Statistics in collecting survey information; and
- provide that a trustee who pay certain benefits to a bankruptcy trustee in the event of the member's bankruptcy will not breach the Act; and
- *Superannuation (Resolution of Complaints) Act 1993* to:
 - enable the Tribunal to review and make determinations in respect of certain decisions made by insurers;
 - enable the Tribunal to provide appropriate remedies where it determines that certain decisions are unfair or unreasonable;
 - enable the Tribunal to review life office conduct and decisions in relation to the sale and management of superannuation related-annuity products;
 - allow the Tribunal to review decisions relating to permanently disabled persons;
 - exclude certain disability complaints;
 - remove the requirement for the Tribunal to establish that a complaint has been dealt with 'adequately' by the other complaint handling body;
 - clarify the requirements of a person with a disability to be represented by an agent;
 - clarify that certain provisions relating to complaints about benefit payments only apply to complaints about death benefit payments;
 - allow certain persons the opportunity to become a party to a complaint where a complaint has been made in relation to a death benefit payment; and
 - allow the appointment of a Deputy Chairperson and two additional part-time members to assist the Tribunal; and
- *Superannuation Entities (Taxation) Act 1987* to correct a drafting error; and

- *Insurance Act 1973* and *Life Insurance Act 1995* to require general insurance companies and life offices to comply with determinations of the Tribunal and enabling the Commissioner to apply to the Federal Court for an injunction in the event of non-compliance with such a determination.

The committee has no comment on this bill.

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 17 of 1995

1995

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator **J Troeth** (Chairman)
Senator **M Forshaw** (Deputy Chairman)
Senator **R Bell**
Senator **M Colston**
Senator **B Cooney**
Senator **C Ellison**

TERMS OF REFERENCE

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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☐ **The committee has commented on these bills**

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Any Senator who wishes to draw matters to the attention of the
committee under its terms of reference is invited to do so.

Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 3) 1995

This bill was introduced into the House of Representatives on 26 October 1995 by the Minister for Aboriginal and Torres Strait Islander Affairs.

The bill proposes to amend Schedule 1 of the *Aboriginal Land Rights (Northern Territory) Act 1976* to add a parcel of land described as Bauhinia Downs. This effectively grants this area of land to the Aboriginal Land Trusts to hold title on behalf of Aboriginal people.

The committee has no comment on this bill.

Appropriation Bill (No. 3) 1995-96

This bill was introduced into the House of Representatives on 26 October 1995 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to appropriate money (\$836.3 million) out of the Consolidated Revenue Fund, additional to the money appropriated by the *Appropriation Act (No. 1) 1995-96*, for the service of the year ending on 30 June 1996, and for related purposes.

The committee has no comment on this bill.

Appropriation Bill (No. 4) 1995-96

This bill was introduced into the House of Representatives on 26 October 1995 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to appropriate money (\$576.5 million) out of the Consolidated Revenue Fund, additional to the money appropriated by the *Appropriation Act (No. 2) 1995-96*, for certain expenditure in respect of the year ending on 30 June 1996, and for related purposes.

The committee has no comment on this bill.

Appropriation (Parliamentary Departments) Bill (No. 2) 1995-96

This bill was introduced into the House of Representatives on 26 October 1995 by the Parliamentary Secretary to the Minister for Transport.

The bill proposes to appropriate money (\$3.192 million) out of the Consolidated Revenue Fund, additional to the money appropriated by the *Appropriation (Parliamentary Departments) Act 1995-96*, for certain expenditure in relation to the Parliamentary Departments in respect of the year ending on 30 June 1996, and for related purposes.

The committee has no comment on this bill.

Industry Commission Amendment Bill 1995

This bill was introduced into the House of Representatives on 25 October 1995 by the Assistant Treasurer.

The bill proposes to amend the *Industry Commission Act 1989* to allow:

- the appointment of Commissioners on a part-time basis in addition to the current full-time basis;
- a consequential increase in the maximum number of Commissioners (other than the Chairperson) from eight to 11; and
- a Commissioner to act on behalf of all other Commissioners on an inquiry in the absence of other Commissioners, but limited to public hearings and only in emergency situations.

The committee has no comment on this bill.

Student and Youth Assistance Amendment (Budget Measures) Bill 1995

This bill was introduced into the House of Representatives on 25 October 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the:

- *Student and Youth Assistance Act 1973* to:
 - remove the "cut off dates" by which AUSTUDY/ABSTUDY benefits are to be repaid, so as to be eligible to receive a financial supplement;
 - remove the ability for people ineligible to receive AUSTUDY or ABSTUDY to receive financial supplement;
 - modify the eligibility provisions of the AUSTUDY scheme for certain categories of permanent residents;
 - remove the reference to the AUSTUDY/ABSTUDY Dependent Spouse Allowance;
 - remove the criminal offence of failing to advise the Department of an event relevant to the level of benefit paid;
 - amend the application of the parental income test when calculating the amount of youth training allowance payable to a person in State or foster care;
 - establish rules for when the part payment of a student assistance debt can be accepted as full satisfaction of the full debt owed;
- *Data-Matching Program (Assistance and Tax) Act 1990, Social Security Act 1991* and *Student and Youth Assistance Act 1973* to establish an income support payment, to be known as the basic student payment; and
- *Social Security Act 1991* to preclude the payment of family payment for any person aged 16 or over (responsibility for assistance for 16 year and older students having been transferred from the Department of Social Security to the Department of Employment, Education and Training).

Retrospectivity

Subclause 2(2)

This subclause, if enacted, would allow the amendments proposed in Schedule 8 to take effect from 1 January 1995. The committee notes, however, that those amendments are beneficial to recipients of the youth training allowance.

In these circumstances, the committee makes no further comment on this subclause.

Commencement

Subclauses 2(7) and 2(8), Schedule 5

By virtue of subclauses 2(7) and 2(8), the amendments proposed by Schedule 5 would commence on a date to be fixed by Proclamation, or on 1 June 1996, whichever is the earlier.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. 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, however, that although the commencement may fall outside the period of 6 months from Royal Assent preferred in paragraph 4 of the Drafting Instruction, the difference is likely to be minimal.

In these circumstances, the committee makes no further comment on these provisions.

Schedule 5, Part 1

Delegation of legislative power

The amendments proposed by Part 1 of Schedule 5 would create the legislative basis for the new basic student payment scheme. Almost all of the administrative framework, however, is to be established by regulations. The question arises, therefore, whether this is an appropriate delegation of legislative power.

This issue is usually determined by whether matters to be delegated are so important that they should be placed in primary legislation. One criterion is whether the matters to be dealt with by regulation are so central to the operation of the legislation that Parliament should not be denied the chance to make a positive input by being able to amend rather than merely disallow a discrete provision.

On examination, it seems to the committee that the primary legislation will contain many of the main elements of the scheme, including the maximum amount to be paid and the basic qualifications for applicants. Although the relevant income and assets test is to be prescribed by regulations, it seems to the committee, on balance, that the primary legislation contains sufficient of the matters central to the scheme to take this delegation out of the category of inappropriate.

In these circumstances, the committee makes no further comment on these provisions.

Student and Youth Assistance Amendment (Youth Training Allowance) Bill (No. 3) 1995

This bill was introduced into the House of Representatives on 25 October 1995 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend youth training allowance provisions of the *Student and Youth Assistance Act 1973* to:

- extend the deeming rules which apply to investments held by recipients of youth training allowance;
- eliminate the need for recipients of youth training allowance to transfer to sickness allowance in certain circumstances;
- amend earnings credit scheme provisions to allow a person to access earnings credit notwithstanding that the person's ordinary income amount would, if the income test were applied, reduce the rate of the assistance to nil; and
- make consequential amendments resulting from the amalgamation of job search allowance and newstart allowance (into newstart allowance).

Retrospectivity

Schedule 1, proposed subsection 185(4)

This subsection, if enacted, would permit the Minister to make a determination for the purposes of subsection 185(1) which might have a retrospective effect. The committee notes, however, that those amendments would result in determinations which are beneficial to recipients of the youth training allowance.

In these circumstances, the committee makes no further comment on this subclause.

Insufficient scrutiny

Proposed subsection 185(1)

Subsection 185(1), if enacted, would provide for the Minister to determine that certain financial investments are to be disregarded for the purposes of the deeming test in proposed sections 178 and 179. It seems to the committee that the determinations would be at least quasi-legislative in character but there is no provision for them to be disallowable instruments. This contrasts with the determinations made by the Ministers in proposed section 183 as to the below threshold rate and the above threshold rate which, by force of that section, are to be disallowable instruments.

It may be that, when the Legislative Instruments Bill 1994 is enacted, the determinations will come within its purview as instruments legislative in character and thus become disallowable instruments. The committee, therefore, **seeks the Minister's advice** whether, pending the enactment of the Legislative Instruments Bill, the determinations should be made disallowable.

Pending the Minister's advice 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.

Veterans' Affairs Legislation Amendment (1995-96 Budget Measures) Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 26 October 1995 by the Minister for Veterans' Affairs.

The bill proposes to amend the:

- *Veterans' Entitlements Act 1986* to:
 - replace the rent assistance of people residing in nursing homes and hostels with a residential care allowance;
 - increase the maximum rate of rent assistance and rent thresholds by \$5 per fortnight;
 - replace certain saving and transitional provisions as a result of the rent assistance changes;
 - enable the phasing out of the rent assistance provisions;
 - provide for the continued payment of a carer service pension or income support supplement to a carer for 14 weeks after the permanent institutionalisation of the care recipient;
 - extend the period for which the former home of a person receiving or providing community-based care can be disregarded for the purpose of the assets test applicable to pensions paid by the Department of Veterans' Affairs;
 - allow for the payment of rent assistance to certain pensioners as soon as they leave their home to enter or provide community-based care;
 - extend eligibility for carer service pension and the carer stream of the income support supplement to include situations where a person cares for a non-pensioner;
 - provide pensioners access to lump sum advances of pension of up to \$500 to assist in meeting unplanned living expenses;
 - rewrite and simplify bereavement payment;
 - remove the requirement that a carer live with or adjacent to the person being cared for;
 - increase the guardian allowance by \$104 per annum;

- introduce a scheme which allows pensioners to request the Department to pay their state housing authority rent on their behalf by deduction from their pension;
- *Social Security and Veterans' Affairs Legislation Amendment Act 1988* and *Veterans' Affairs Legislation Amendment Act (No. 2) 1992* to effect minor adjustments to the savings provisions relating to rent assistance before these are repealed;
- *Income Tax Assessment Act 1936* to make changes consequential upon:
 - changes resulting from the introduction of the residential care allowance;
 - changes associated with the rewrite of bereavement payments provisions and changes to the payments;
 - the repeal of the *Seamen's War Pensions and Allowances Act 1940*;
- *Fringe Benefits Tax (Application to the Commonwealth) Act 1986* to make changes consequential upon the repeal of the *Seamen's War Pensions and Allowances Act 1940*; and
- *Social Security Act 1991* to provide for a minimum amount of rent assistance to be used in calculating the pension or benefit of a person receiving a social security payment if that person becomes a partner of a Veterans' Affairs pensioner to whom the 1993 rent assistance savings provisions applies.

Retrospectivity

Subclauses 2(2) to 2(5)

These subclauses, if enacted, would allow various amendments proposed in Schedules 10 and 11 to have retrospective effect. The committee notes, however, that the amendments are essentially technical in nature and do not appear to affect adversely recipients of veterans pensions.

In these circumstances, the committee makes no further comment on this subclause.

Senate Standing Committee

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☐ **The committee has commented on these bills**

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Any Senator who wishes to draw matters to the attention of the
committee under its terms of reference is invited to do so.

Export Market Development Grants Amendment Bill (No. 2) 1995

This bill was introduced into the Senate on 22 November 1995 by the Minister for Defence.

The bill proposes to amend the *Export Market Development Grants Act 1974* to

- reduce the maximum grant payable in any one year from \$250,000 to \$200,000;
- cap the amount of extra grant that may be generated in respect of expenditure details which are submitted by a claimant after the lodgement of that claimant's claim;
- limit the number of EMDG approved joint ventures and consortia to which a 'person' may be a member;
- provide for disallowance of expenditure by an approved joint venture or consortium which breaches the conditions of its approval;
- provide that claims prepared by a consultant or other persons who have been convicted of offences relating to fraud or dishonesty are invalid;
- exclude from eligibility any expenditure which relates to activities which are illegal under Australian law or the law of the country in which the activities take place;
- more clearly define the term 'ordinarily employed';
- provide for the re-registration of first time EMDG claimants; and
- establish a grants entry test for first time EMDG claimants.

Retrospectivity

Item 3 of Schedule 5

Proposed new subsection 13F(1)

Proposed new subsection 13F(1) of the Principal Act, to be inserted by item 3 of Schedule 5 to the Bill, would treat as a disqualified individual (and hence as someone not permitted to assist in the preparation of a claim for export market assistance) a person who has been convicted of various offences, even though such a conviction had been recorded before the commencement of the new

section. It might appear that this provision therefore has a possible retrospective application, a view which the committee took in relation to sections 11YA and 14A of the same Act, in the committee's Fourth Report of 1993.

In relation to proposed subsection 13F(1), however, the committee takes the view that the proposed new subsection does not have any retrospective application. It seems to the committee that future eligibility to assist in the preparation of claims is being defined, in part, by past events. In this respect, the provision is similar to section 57 of the *Employment Services Act 1994* which (despite misgivings in other respects) the committee accepted, in its Fourth Report of 1995, as not having a retrospective application.

In these circumstances, the committee makes no further comment on this provision.

Health Insurance Amendment Bill 1995

This bill was introduced into the House of Representatives on 22 November 1995 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to amend the *Health Insurance Act 1973* to assist the Health Insurance Commission to establish and maintain the Australian Childhood Immunisation Register.

The committee has no comment on this bill.

Health Legislation (Private Health Insurance Reform) Amendment Bill (No. 2) 1995

This bill was introduced into the House of Representatives on 22 November 1995 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to amend the:

National Health Act 1953 to:

- introduce new reinsurance arrangements for registered health benefits organisations;
- clarify the powers of the Private Health Insurance Complaints Commissioner to apply and invest money, and to enter into contracts; and
- change the definition of 'health insurance business'; and

makes a consequential amendment to the *Health Legislation (Private Health Insurance Reform) Amendment Act 1995*.

Retrospectivity Subclauses 2(4) and (5)

By virtue of subclauses 2(4) and (5), some of the provisions of this bill will have retrospective effect. It seems to the committee, however, that the retrospectivity will not prejudicially affect any individual.

In these circumstances, the committee makes no further comment on these provisions.

National Food Authority Amendment Bill 1995

This bill was introduced into the House of Representatives on 23 November 1995 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to amend the *National Food Authority Act 1991* to establish a joint system for developing food standards between Australia and New Zealand.

Commencement

Subclauses 2(2) and (3)

By virtue of subclauses 2(2) and (3), the substantive provisions of this bill may not commence until up to 12 months after Royal Assent. If the provisions have not commenced by that date, the Act will automatically be repealed.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. 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).

In respect of this bill, the committee notes that

- \$ the repeal option has been chosen to come into effect 12 months after Royal Assent, if the provisions have not commenced by that date;
- \$ the explanatory memorandum indicates the reason for choosing a 12 month period: because New Zealand needs 'to adopt by reference and without amendment standards developed by Australia'; and
- \$ the timing of the adoption by reference is uncertain.

In these circumstances, the committee makes no further comment on these provisions.

Sydney Airport Curfew Amendment Bill 1995

This bill was introduced into the House of Representatives on 20 November 1995 by Mr Howard as a Private Member's bill.

The bill proposes to amend the *Sydney Airport Curfew Act 1995* to re-open the east-west runway at Sydney airport.

The committee has no comment on this bill.