

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 B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

TERMS OF REFERENCE

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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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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Audit (Transitional and Miscellaneous) Amendment Bill 1996

This bill was introduced into the House of Representatives on 12 December 1996 by the Minister for Finance. [Portfolio responsibility: Finance]

One of four bills proposed to replace the *Audit Act 1901*, this bill proposes to:

- repeal the *Audit Act 1901*;
- deal with the transitional and consequential matters arising from the repeal of the *Audit Act 1901*; and
- deal with the transitional and consequential matters arising from the enactment of the three related bills: the Auditor-General Bill 1996, Financial Management and Accountability Bill 1996 and the Commonwealth Authorities and Companies Bill 1996.

Retrospectivity Subclause 2(3)

Paragraphs (a), (d) and (i) of subclause 2(3) of this bill, if enacted, would allow some of the amendments of Schedule 3 to have retrospective effect. The committee notes from the explanatory memorandum, however, that the retrospectivity, in each case, is in respect of amendments which are technical and will not adversely affect any individual.

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

Auditor-General Bill 1996

This bill was introduced into the House of Representatives on 12 December 1996 by the Minister for Finance. [Portfolio responsibility: Finance]

One of four bills proposed to replace the *Audit Act 1901*, this bill proposes to:

- re-establish the office of Auditor-General for the Commonwealth, define the powers and functions and detail the processes of appointment and conditions of the office;
- expand the role of the Joint Committee of Public Accounts;
- establish the Australian National Audit Office as a statutory authority, with staff of that Office appointed or employed under the *Public Service Act 1922*; and
- re-establish the office of the Independent Auditor as the auditor of the Australian National Audit Office.

Taking away the right to silence Clause 35

This clause, if enacted, would take away the right of a person to remain silent where answering a question or producing a document may result in the person incriminating himself or herself, thus exposing the person to prosecution for, and perhaps conviction of, a criminal offence.

The committee is opposed in principle to clauses which take away the right to silence in these circumstances because such a clause takes away a fundamental right in our common law system - one of the fundamental elements of a fair and effective justice system.

Taking away this right undoubtedly trespasses on personal rights and liberties. Whether it trespasses **unduly** on personal rights and liberties will depend on the context in which it is done. The issue is whether the advantage to the common good outweighs the loss to the individual of taking away this right to silence.

Where Parliament has legislated in the past to take away this right, the law has often offered alternative protection in the form of making the information thus disclosed and other information derived from the disclosure inadmissible in certain types of criminal proceedings.

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

In this way, in theory, the need to obtain the information which the common good demands is accommodated without adverse results to the individual from taking away the right to silence.

In this case the common good calls for the Auditor-General to be able to obtain information to carry out his audit functions effectively so that he may report to the Parliament on the administration by the Executive.

The adverse effect of taking away the right to silence is mitigated by the protection included in clause 35. The individual is protected because any direct or indirect use of the material disclosed is inadmissible in criminal proceedings. This inadmissibility is subject to exceptions in relation to proceedings for failing to comply with a requirement to give the information or produce the document and for making a false statement or knowingly providing a document that is false. It is the view of the committee, on this occasion, that these exceptions do not unduly trespass on personal rights and liberties.

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

Limitation on the powers of Parliament

Subclause 37(3)

Clause 37 of this bill, if enacted, would bring into effect section 49 of the Constitution which provides:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Clause 37 of this bill 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

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

- 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) The Auditor-General cannot be required, and is not permitted, to disclose to:
- (a) a House of the Parliament; or
 - (b) a member of a House of the Parliament; or
 - (c) a committee of a House of the Parliament or a joint committee of both Houses of the Parliament;
- information that subsection (1) prohibits being included in a public report.
- (4) If the Auditor-General decides to omit particular information from a public report because the Attorney-General has issued a certificate under paragraph (1)(b) in relation to the information, the Auditor-General must state in the report:

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

- (a) that information (which does not have to be identified) has been omitted from the report; and
 - (b) the reason or reasons (in terms of subsection (2)) why the Attorney-General issued the certificate.
- (5) 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).
- (6) 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.

The committee was concerned with this issue when considering the corresponding clause in the earlier Auditor-General's Bill 1994. The committee dealt with the matter in its *Seventh, Eighth, Ninth, Tenth, Twelfth and Fourteenth Reports of 1995* although its efforts were mainly directed at whether that bill had the effect of significantly limiting the powers of Parliament and whether or not it was an intended effect or an oversight.

It seems clear that clause 37 of the present bill will have the effect of limiting the powers of Parliament.

In its *Seventh Report of 1995* the committee concluded:

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.

It also seems to the committee that, as the Auditor-General is described in subclause 8(1) as an independent officer of the Parliament, subclause 37(3) denies to the legislature, or any of its committees, the opportunity of satisfying itself that its agent is properly carrying out his or her functions and is refusing to reveal only those matters referred to in subclause 37(2).

The committee notes that subclause 37(4) provides that, where the Attorney-General issues a certificate preventing disclosure, the Auditor-General will note in the public report that information has been omitted and the reasons for doing so.

The committee further notes that the government understands the importance of the Auditor-General obtaining information as the bill by clause 35 takes away the right to silence. If obtaining the information is so important that people lose that right, why should Parliament not have access to it.

The committee **seeks the advice of the Minister** on:

- whether subclause 37(4) ought also to require the Auditor-General to publish reasons where he or she decides not to include sensitive information under clause 37(1);
- why if members of the executive, under subclause 37(5), may be given the sensitive information, Parliament and its committees might not be entrusted with access (suitably safeguarded) to the same information.

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.

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

Australian Communications Authority Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to establish the Australian Communications Authority (ACA) by the merger of the Australian Telecommunications Authority and the Spectrum Management Agency. The ACA's main function will be to regulate telecommunications and to manage the radiofrequency spectrum in accordance with appropriate Acts. The administration of competition regulation will be transferred to the Australian Competition and Consumer Commission.

The committee has no comment on this bill.

Australia New Zealand Food Authority Amendment Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the *Australia New Zealand Food Authority Act 1991* to enable the Authority to establish a three-year Standards Review Work Program. This program will enable the Authority to prioritise its workload and allow the development of a joint Australia New Zealand Food Standards Code by 1 January 2000.

The committee has no comment on this bill.

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

Charter of Budget Honesty Bill 1996

This bill was introduced into the House of Representatives on 11 December 1996 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to implement arrangements to require governments to provide regular fiscal and economic reports. Further, the bill proposes that Secretaries to the Treasury and Department of Finance release a pre-election report to provide updated fiscal and economic projections and to release publicly the fiscal impact of announced election commitments as requested by the Government or Opposition.

The committee has no comment on this bill.

Commonwealth Authorities and Companies Bill 1996

This bill was introduced into the House of Representatives on 12 December 1996 by the Minister for Finance. [Portfolio responsibility: Finance]

One of four bills proposed to replace the *Audit Act 1901*, this bill proposes to:

- provide standard financial provisions for public authorities and certain other bodies;
- replace financial provisions contained in the establishing legislation of authorities not subject to Part XI of the *Audit Act 1901*;
- provide a single set of core reporting and auditing requirements for directors of ‘Commonwealth authorities’ and set out standards of conduct for officers;
- provide a single set of requirements for ensuring that ‘wholly-owned Commonwealth companies’ keep Ministers and the Parliament informed of their activities;
- establish a penalty regime modelled on that in the Corporations Law; and
- extend the mandate of the Auditor-General to be the sole external auditor of all Commonwealth authorities and companies, and their subsidiaries.

The committee has no comment on this bill.

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

Commonwealth Services Delivery Agency Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to establish a statutory authority to be known as the Commonwealth Services Delivery Agency. The Agency will deliver all programs and services currently administered by the Department of Social Security, and some services currently provided by the Departments of Employment, Education, Training and Youth Affairs and Health and Family Services.

The committee has no comment on this bill.

Crimes and Other Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the following Acts:

- *Australian Federal Police Act 1979* and the *Crimes (Superannuation Benefits) Act 1989* to correct anomalies in relation to the cancellation of employer funded superannuation benefits;
- *Crimes Act 1914* to increase the value of a penalty unit in all Commonwealth statutes from \$100 to \$110;
- *Customs Act 1901* to enable the Commonwealth to recover costs incurred in relation to the storage and maintenance of confiscated goods such as vehicles and vessels used in drug trafficking;
- *Extradition Act 1988* to:
 - modify restrictions on further applications for bail by persons who have been remanded in custody under the Act pending their extradition hearing; and
 - require that a person who has been arrested having escaped from custody under the Act is to be taken before a magistrate who may issue a warrant authorising return of the person to custody;
- *Proceeds of Crime Act 1987* to:
 - allow for extensions of time to be granted for the making of an application in relation to restrained property;
 - make provision for a defence of reasonable corporate precaution for offences committed by bodies corporate;
- *Witness Protection Act 1994* to enable a Program participant, a former participant or a person who has undergone assessment to make disclosure, without obtaining the consent of the Commissioner, when making certain complaints to the Ombudsman; and
- Commonwealth Acts to remove provisions requiring the consent of a Minister before a prosecution can be instituted against a person suspected of a Commonwealth offence.

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

Retrospectivity

Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would allow various items in Schedule 1 to have retrospective effect. The committee notes from the explanatory memorandum that the retrospectivity is for the purpose of correcting earlier drafting errors.

The committee, however, is concerned at the possible adverse effect on individuals of the retrospective correction of the error. The committee **seeks clarification from the Attorney-General** on whether there may be adverse effects on any individual because the error is corrected retrospectively rather than from Royal Assent.

Pending the advice of the Attorney-General, 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 (No. 2) 1996

This bill was introduced into the Senate on 9 December 1996 by Senator Margetts as a Private Senator's bill.

The bill proposes to amend the *Customs Act 1901* and the *Excise Act 1901* to phase out diesel fuel rebates for mining operations over a three year period.

The committee has no comment on this bill.

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

Customs and Excise Legislation Amendment Bill (No. 2) 1996 (No. 2)

This bill was introduced into the House of Representatives on 12 December 1996 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Act 1901* and the *Excise Act 1901* in relation to the diesel fuel rebate scheme. Broadly, the bill proposes to:

- restrict eligibility in the ‘mining operations’ category;
- address recent Federal Court and Administrative Appeals Tribunal decisions in the ‘mining operations’ category; and
- improve accountability under the scheme and assist in reducing expenditure under the scheme due to misuse.

Taking away the right to silence

Item 25 of Schedule 1 and item 10 of Schedule 2

These items would insert proposed subsection 164AC(15) into the *Customs Act 1901* and proposed subsection 78AD(15) into the *Excise Act 1901*. These sections refer to the powers of the Chief Executive Officer of Customs (CEO) to obtain information for the purposes of auditing a particular diesel fuel rebate application.

These subsections, if enacted, would take away the right of a person to remain silent where providing information or producing record with respect to the diesel fuel rebate that may result in the person incriminating himself or herself, thus exposing the person to prosecution for, and perhaps conviction of, a criminal offence.

The committee is opposed in principle to clauses which take away the right to silence in these circumstances because such a clause takes away a fundamental right in our common law system - one of the fundamental elements of a fair and effective justice system.

Taking away this right undoubtedly trespasses on personal rights and liberties. Whether it trespasses **unduly** on personal rights and liberties will depend on the context in which it is done. The issue is whether the advantage to the common good outweighs the loss to the individual of taking away this right to silence.

Where Parliament has legislated in the past to take away this right, the law has often offered alternative protection in the form of making the information thus disclosed and other information derived from the disclosure inadmissible in certain types of criminal proceedings.

In this way, in theory, the need to obtain the information which the common good demands is accommodated without adverse results to the individual from taking away the right to silence.

In this case the common good calls for the Chief Executive Office of Customs to be able to obtain information to administer properly the rebate scheme.

The adverse effect of taking away the right to silence is partially mitigated by the protection included in the proposed subsections. The individual is protected because any direct or indirect use of the material disclosed is inadmissible in certain criminal proceedings. This inadmissibility is subject to exceptions in relation to proceedings for failing to comply with a requirement to give the information or produce the document and for making a false statement or knowingly providing a document that is false. It is the view of the committee that these exceptions do not unduly trespass on personal rights and liberties.

The protection, however, is quite inadequate because it does not grant immunity from prosecution under paragraphs 234(1)(c) or (d) of the *Customs Act 1901* or 120(1)(vc) or (vi) of the *Excise Act 1901* in relation to the diesel fuel rebate.

The committee notes that proposed new sections 164AA and 164AB provide avenues for avoiding prosecution. Section 164AB deals with the voluntary notification of an error or errors in the application which has led to a claim for an amount of diesel fuel rebate in excess of entitlement. Section 164AA enables the CEO, in lieu of instituting a prosecution, to serve a notice demanding repayment of diesel fuel rebate where entitlement did not exist or has ceased together with a 20% penalty.

The committee generally has no concern with forced disclosure provisions that lead to the refunding of government moneys where they have been paid in excess of entitlement. The committee, however, is opposed to forced disclosure where that disclosure is admissible in a prosecution for an offence thus disclosed.

The committee further notes that:

- the avenue of repayment through new sections 164AA and 164AB is available only at the discretion of the CEO;
- a decision by the CEO not to offer that avenue is not reviewable by the court or the AAT; and

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- the reasons of the CEO under section 164AA for believing that the applicant lacked entitlement are also not subject to review.

The committee **seeks the advice of the Minister** in respect of these issues.

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

Customs Tariff Amendment Bill (No. 2) 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Tariff Act 1995* to:

- make minor amendments to ensure the accuracy of Schedules before the Act became operative on 1 July 1996;
- ensure that customs duty only was collected on the repair cost of re-imported goods which have been sent overseas for repair that cannot be carried out in Australia;
- reduce by 0.75 cents per litre the customs duty on aviation gasoline and aviation kerosene; and
- remove certain textile articles from customs classification.

Retrospectivity **Subclause 2(2)**

Subclause 2(2) of this bill, if enacted, would allow Schedule 1 to have retrospective effect from 1 July 1996. The committee notes from the explanatory memorandum, however, that the retrospectivity is in respect of amendments which give effect to a Customs Tariff Proposal which has been tabled, are technical or correct earlier drafting errors. The committee further notes that retrospectivity is standard where there are changes in rates of duty which are tabled by means of Customs Tariff Proposals.

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

Retrospectivity **Subclause 2(3)**

Subclause 2(3) of this bill, if enacted, would allow Schedule 2 to have retrospective effect from 15 July 1996. The committee notes from the explanatory memorandum,

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however, that the retrospectivity is in respect of amendments which are technical or correct earlier drafting errors.

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

Retrospectivity Subclause 2(4)

Subclause 2(4) of this bill, if enacted, would allow Schedule 3 to have retrospective effect from 1 September 1996. The committee notes, however, that the retrospectivity is in respect of an amendment which provides for a reduction in tariff.

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

Environment, Sport and Territories Legislation Amendment Bill 1996

This bill was introduced into the Senate on 12 December 1996 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Environment]

The bill proposes to amend the following Acts:

- *Australian Capital Territory (Planning and Land Management) Act 1988* to change the name of the National Capital Planning Authority to the National Capital Authority;
- *Australian Sports Drug Agency Act 1990* to:
 - penalise competitors who wilfully interfere with samples taken for the purposes of testing for drugs; and
 - enable the Australian Sports Drug Agency to impose a fee with a profit component for the delivery of commercial services;
- *Christmas Island Act 1958* and *Cocos (Keeling) Islands Act 1955* to:
 - repeal obsolete provisions in relation to the acquisition of Australian citizenship; and
 - clarify the jurisdiction of the District Court of Western Australia in relation to the Territories of Christmas Island and Cocos (Keeling) Islands;
- *Cocos (Keeling) Islands Act 1955* to delete an incorrect reference to an Ordinance which has been repealed;
- *Coral Sea Islands Act 1969* to incorporate the land areas on Elizabeth and Middleton Reefs within the Coral Sea Islands Territory;
- *Customs Act 1901* to enable the Act in whole or part to be extended to the Territory of Ashmore and Cartier Islands by way of regulation;
- *Endangered Species Protection Act 1992* to:
 - increase the period for the Minister to make a decision from 30 to 90 days; and
 - to correct several drafting errors;
- *Environment Protection (Sea Dumping) Act 1981* to:
 - incorporate resolutions of the 16th Consultative Meeting of the Contracting Parties to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Material;

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

- allow the continued dumping of jarosite until the end of December 1997;
- allow for an extension of time where the Minister administering the *Environment Protection (Impact of Proposals) Act 1974* directs that a Public Environment Report be submitted on an application for a sea dumping permit; and
- delete reference to parts of the Annexes to the London Convention which have been deleted or incorporated elsewhere;
- *Great Barrier Reef Marine Park Act 1975* to:
 - enable the Minister to delegate the power to allow the Great Barrier Reef Marine Park Authority to provide assistance in relation to environmental management;
 - remove an offence of waste discharge by vessels and aircraft of the Australian Defence Force or the defence force of a foreign country;
 - clarify that the enforcement provisions in a plan of management for an area can prohibit or regulate the use of or entry into that area or parts thereof; and
 - correct three other minor drafting errors;
- *Migration Act 1958* to enable the Act to apply to the Territory of Ashmore and Cartier Islands;
- *Quarantine Act 1908* to enable to Act to be extended to the Territory of Ashmore and Cartier Islands by regulation;
- *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* to clarify that references to an agreement between the Commonwealth and Queensland include that agreement, as amended; and
- *Environment, Sport and Territories Legislation Amendment Act 1995*, *National Parks and Wildlife Conservation Act 1975*, and *Ozone Protection Act 1989* to correct minor drafting errors.

Retrospectivity

Subclauses 2(2 and (4))

Subclauses 2(2) and (4) of this bill, if enacted, would allow some of the amendments of Schedule 1 to have retrospective effect. The committee notes from the explanatory memorandum, however, that the retrospectivity, in each case, is in respect of amendments which are technical and will not adversely affect any individual.

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

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

Inappropriate delegation of legislative power

Item 27 of Schedule 1

Item 27 of Schedule 1 of this bill, if enacted, would amend the definition of 'Convention' in the *Environment Protection (Sea Dumping) Act 1981*. The definition enables future changes to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Material to be given the force of law in Australia by setting out the changes in regulations rather than in a Schedule to the Act itself, as has been the practice hitherto.

The committee notes that the current definition, which has been unchanged since Royal Assent was given on 24 March 1981, contains the same power to incorporate changes by regulations.

As this committee was not in existence at that time, no comment was made on whether it is an appropriate delegation of legislative power to allow changes to the Convention to be given the force of law in Australia by being set out in subordinate legislation rather than in a Schedule to the Act itself.

The committee further notes that, although the current definition would have enabled changes to the Convention to be set out in regulations, Item 35 of Schedule 1 proposes to set out the 1993 changes to the Convention in Schedules 3A, 3B and 3C.

As the explanatory memorandum does not give a reason for using regulations rather than Schedules to the Act, the committee **seeks the advice of the Minister** on this issue.

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.

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

Farm Household Support Amendment Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the *Farm Household Support Act 1992* to terminate the Farm Household Support scheme.

The committee has no comment on this bill.

Financial Laws Amendment Bill 1996

This bill was introduced into the House of Representatives on 21 November 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend 13 Acts and to repeal the *Insurance (Deposits) Act 1932*. Principally, the bill proposes to:

- enable efficient sharing of information between the Reserve Bank and the Insurance and Superannuation Commission and between those organisations and other domestic and overseas financial regulators;
- to extend by two years the deadline by which foreign bank subsidiaries or money market corporations can apply for, and convert to, branch banking and qualify for the concessional taxation and other treatment provided by legislation;
- enable the prudential controls of the *Insurance Act 1973* to be extended to companies related to an insurer where the related company and the insurer seek the approval of the Insurance and Superannuation Commissioner for such an extension;
- prevent insolvent or near-insolvent insurance companies from using the AAT process to defer the application of regulatory directions designed to protect the interests of existing policyholders, such as orders to freeze assets or cease trading;
- make minor adjustments to the balance of the respective interests of consumers and insurers under insurance contracts, remove drafting errors and technical difficulties, and give legislative backing to the industry based Code of Practice for the general insurance industry, and an industry based Code of Practice for insurance brokers;
- make provisions gender inclusive;
- update provisions that create offences in line with the current Commonwealth criminal law policy;
- delete obsolete references to Papua New Guinea; and
- update definitions by reference to the *Corporations Law*.

The committee dealt with this bill in Alert Digest No. 13 of 1996, in which it made various comments and sought the advice of the Treasurer on a number of issues. Although no response has as yet been received by the committee, it has received a

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letter dated 13 January 1997 from the President of the Administrative Review Council specifically on the issue of removing the jurisdiction of the AAT to review certain decisions. A copy of that letter is attached to this Digest and relevant parts are reproduced below for the information of Senators.

Extract from Alert Digest No. 13 of 1996:

Non-reviewable decisions Items 32 and 33, Schedule 12

Items 32 and 33 of Schedule 12 propose amendments that would remove various decisions of the Insurance and Superannuation Commissioner from review by the Administrative Appeals Tribunal.

The committee notes in the Minister's second reading speech that:

....the amendments will enhance the security of insurance policy holder interests by removing certain regulatory decisions from review by the Administrative Appeals Tribunal (AAT). This will prevent insolvent or near-insolvent companies from using the AAT appeal process to defer the application of regulatory directions designed to protect the interests of existing policy holders, such as orders to freeze assets or cease trading.

This exemption from AAT review is consistent with similar exemptions contained in prudential legislation covering the superannuation sector. The Insurance and Superannuation Commission's regulatory powers in this regard will be checked by the need for the Commissioner to obtain Ministerial consent for decisions that are non-reviewable by the AAT. In addition, exemption from AAT review will be subject to a five year sunset clause.

The matter is one of striking a balance between the interests of the policy holders and the interests of the insurance companies. The committee notes that the explanatory memorandum speaks of the appeal system's 'potential for ensuing time delays to jeopardise policy owners interests'. The committee **seeks the Treasurer's clarification** on this point which is crucial to deciding where a proper balance lies.

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

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On this issue, the President of the Administrative Review Council has written to the committee as follows:

I refer to the comments made by the Scrutiny of Bills Committee in Alert Digest No. 13 of 1996 concerning proposed amendments included in the Financial Laws Amendment Bill 1996 that will result in non-reviewable decisions in the *Life Insurance Act 1995*.

As the Committee is aware, the Council has a statutory function under the *Administrative Appeals Tribunal Act 1975* to ascertain and keep under review classes of administrative decisions that should be subject to review and to advise on the appropriate body to make that review. Therefore, it has an interest in amending legislation that removes existing review rights.

The Council notes that in addition to the provisions of the Financial Laws Amendment Bill that will remove jurisdiction of the Administrative Appeals Tribunal (AAT) specified by the Committee in Alert Digest 13 (Items 32 and 33 of Schedule 12 of the Bill) there are other provisions in that Bill that will also remove AAT review rights. These provisions are included in Schedule 5 of that Bill and concern amendments to the *Insurance Act 1973*. The types of decisions which will no longer be reviewable by the AAT are similar in both the Insurance Act and the Life Insurance Act.

The Council notes the intention of the amendments as indicated by the Minister in the Second Reading Speech is to protect the interests of policy holders. In doing so, the amendments negate the rights of insurance companies and life insurance companies to have decisions that affect them independently reviewed on their merits.

The Council considers that a strong case needs to be made out when existing rights are to be removed. The Council is not aware that the existence of AAT review for the decisions affected by these amendments has obstructed proper administration of the law to date but in any event, the fact that a right is capable of being misused does not negate the value of that right.

Provision is made in both the Insurance Act and the Life Insurance Act to ensure that Presidential members and members with special skills in the insurance field hear applications for review of these decisions. Moreover, the AAT has power to expedite hearings and uses this power in cases of real emergency. If there is a need to act quickly to protect the interests of policy holders the AAT would take this into account.

The Council acknowledges that these are prudential decisions and that there will be a need to act quickly in some cases. It also notes the Committee's comment at the bottom of page 6 of Alert Digest 13/96 that the matter is one of striking a balance between the interests of policy holders and the interests of the insurance companies. However, given that the Council is not aware that insurance companies and life insurance companies have misused the availability of AAT review rights to date and that the ability of the AAT to expedite proceedings

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means that the mere existence of a right of review by the AAT does not significantly delay matters to the detriment of policy holders, the Council does not consider that a case has been made out for removal of existing rights to AAT review of the decisions concerned.

The committee **seeks the Treasurer's advice** on the views of the Administrative Review Council on this issue, which it supports.

In Alert Digest No. 13 of 1996, the committee also sought the advice of the Treasurer with respect to the appropriateness of a number of amendments which would delegate the legislative power of Parliament. For the convenience of Senators, a copy of the relevant comments is extracted below:

Further Extract from Alert Digest No. 13 of 1996

Inappropriate delegation of legislative power Information sharing amendments

A number of amendments proposed in this bill would extend the range of persons or bodies to whom information may lawfully be passed. The relevant amendments are contained in Schedule 5, item 108; Schedule 6, item 29; Schedule 7, item 60; Schedule 8, item 4; Schedule 12, items 38-51; Schedule 13, item 2; and Schedule 14, items 3-17. The committee notes that, in each case, there is a 5 year sunset clause which will bring about a review of the provisions. However, the committee observes that, in the meantime, disclosure under these provisions would be made to 'financial sector supervisory agencies', 'law enforcement agencies' and 'overseas financial sector agencies'. The particular agencies, however, are to be specified only in regulations.

The committee **seeks the advice of the Treasurer** on whether, in relation to such a sensitive matter as the disclosure of private information, it might not be more appropriate that the agencies be specified in primary legislation.

Pending the advice of the Treasurer, 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.

Financial Management and Accountability Bill 1996

This bill was introduced into the House of Representatives on 12 December 1996 by the Minister for Finance. [Portfolio responsibility: Finance]

One of four bills proposed to replace the *Audit Act 1901*, this bill proposes to establish a new regulatory/accounting/accountability framework for dealing with and managing the money and property of the Commonwealth. Principally, the bill:

- specifies the responsibilities and powers of the Finance Minister referred to in section 83 of the Constitution;
- specifies the responsibilities and powers of Chief Executives of Commonwealth agencies;
- replaces the Commonwealth Trust Fund with the Reserved Money Fund and the Commercial Activities Fund; and
- enables the Parliament to disallow proposals by the Finance Minister to establish components of the Reserved Money Fund and Commercial Activities Fund.

Commencement by Proclamation

Clause 2

Clause 2 would allow this bill to commence on Proclamation or on 1 July in the year after the year in which it receives 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

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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. Although the explanatory memorandum does not contain an explanation for this, the committee notes that the clause does not confer on the Minister an open-ended discretion to determine when the bill will commence. The committee also notes that it may well be appropriate for a financial management bill to commence at the start of a financial year.

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

Appropriate delegation of legislative power? - Parliamentary scrutiny? **Subclause 16(2)**

Subclause 16(2) of this bill, if enacted, would allow Special Instructions issued by the Finance Minister to override the terms of this bill in cases of inconsistency. The subclause also provides that Special Instructions cannot be inconsistent with the terms of any trust that applies to the money concerned.

The purpose of the Special Instructions is to regulate the Commonwealth's dealings with money which is in the custody of or under the control of the Commonwealth but which is not held on account of the Commonwealth or for the use and benefit of the Commonwealth: it is called special public money. The Note to subclause 16(4) states that money held by the Commonwealth on trust for another person is an example of public money.

If the terms of such a trust required money to be dealt with in a manner inconsistent with this bill, the regulations or the Finance Minister's Orders, there would need to

be a mechanism to prevent the Commonwealth from being in breach of its own legislation or in breach of the trust. One such mechanism would be to exclude these trust moneys from the definition of public money and not have this bill apply at all. As this would probably necessitate another bill with similar provision for inconsistencies, nothing would be gained.

In these circumstances, it seems that the delegation of legislative power is appropriate. As it is a delegation of legislative power, the committee considers that the Special Instructions being legislative in character will be subject to the provisions for Parliamentary scrutiny contained in the Legislative Instruments Bill 1996, when that bill becomes law.

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

**Disallowance provisions - sufficiently subject to Parliamentary scrutiny?
Subclause 22(3)**

Subclause 22(3) of this bill, if enacted, would allow determinations made under subclauses 20(2) or (3) or subclauses 21(2) or (3) to be disallowable only within 5 sitting days of the tabling of the determination instead of the normal 15 sitting days.

The determinations in question are those to be made by the Finance Minister establishing or varying components of the Reserved Money Fund and the Commercial Activities Fund.

Lessening the disallowance period from 15 to 5 days puts some constraint on the ability of Parliament to undertake proper scrutiny of the disallowable instruments. Such constraint needs to be justified by weighty reasons.

The committee notes that subclause 22(4) provides that the determination will not come into effect until after the expiry of the disallowance period. This differs from the usual mechanism by which the determination takes effect before the disallowance period and remains in operation unless it is disallowed.

The committee also notes the observation in the explanatory memorandum that subclause 22(4) thus avoids the legal and practical problem that drawings against a lawfully available appropriation cannot be subsequently disallowed and recovered.

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

The committee considers that the provision achieves the necessary balance between the need to allow sufficient time for Parliamentary scrutiny of the determinations and the need not to delay unduly legitimate financial transactions of the Government.

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

Financial Transaction Reports Amendment Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Financial Transaction Reports Act 1988* to:

- allow State and Territory revenue authorities access to financial transaction reports (FTR);
- expand the definition of *transaction*;
- render inadmissible in court proceedings any suspect transaction report information;
- increase the reporting threshold for imported and exported currency and to define the point at which currency is considered to have been exported;
- require bullion sellers to identify customers;
- introduce significant cash transaction reporting by solicitors;
- consolidate the powers of inspection of AUSTRAC to access and examine the records and record keeping systems of persons required to keep records;
- update penalty provisions and to align the quantum and expression of penalties with those in other Commonwealth statutes;
- modernise and update superseded terminology; and
- make minor technical amendments.

The committee has no comment on this bill.

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

Fisheries Legislation Amendment Bill 1996

This bill was introduced into the Senate on 12 December 1996 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the following Acts:

- *Fisheries Administration Act 1991* to:
 - clarify that the Australian Fisheries Management Authority (AFMA) is able to devise, manage and carry out, adjustment, restructuring, exploratory and feasibility fishing programs;
 - enable the AFMA to provide expertise to and exchange information with States and Territories as well as overseas bodies;
 - provide for the maximum period for which a person can serve consecutive terms as a director of AFMA to be expressed in years rather than a number of terms; and
 - specify arrangements under which subcommittees to Fisheries Management Advisory Committees may be established and operate;
- *Fisheries Management Act 1991* to:
 - ensure that, where a management plan for a fishery is revoked, any subsequent plan that covers all or part of that fishery must provide that holders of statutory fishing rights at the time of revocation will have first option on a proportional basis to similar rights granted under that subsequent plan;
 - improve arrangements for the registration of interests and dealings in statutory fishing rights;
 - improve arrangements for fisheries managed by a fisheries joint authority;
 - restructure relationships between the AFMA and joint authorities;
 - enable officers to enter premises subject to a fish receiver permit for monitoring purposes at any time without the requirement for either consent or warrant and to secure property pending the obtaining of a warrant;
 - enable warrants to be obtained in a less cumbersome manner;
 - increase the level of penalties in relation to various offences; and
 - express all penalties in penalty units;

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- *Torres Strait Fisheries Act 1984* to enable the Torres Strait Protected Zone Joint Authority to make management plans;
- *Remuneration Tribunal Act 1973* to enable the Tribunal to determine travelling allowances payable to management advisory committee and subcommittee members; and
- *Fisheries Administration Act 1991* and *Fisheries Management Act 1991* to clarify some definitions and add others.

The committee has no comment on this bill.

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

Health Legislation Amendment (Private Health Insurance Incentives) Bill 1996

This bill was introduced into the House of Representatives on 13 December 1996 by the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the following Acts:

- *Health Insurance Commission Act 1973* to include in the functions of the Commission the administration of the proposed Private Health Insurance Incentives Bill 1996; and
- *National Health Act 1953* to:
 - require registered health benefit organisations to comply with the provisions of the proposed Private Health Insurance Incentives Bill 1996;
 - require registered health benefit organisations to provide information relating to the Private Health Insurance Incentives Scheme to the Private Health Insurance Administration Council;
 - require the Private Health Insurance Administration Council to include information provided by the health benefit organisations to be included in its annual report; and
- allow members of health funds to make complaints to the Private Health Insurance Complaints Commissioner about matters relating to the scheme.

The committee has no comment on this bill.

Human Rights Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend anti-discrimination legislation to:

- confer on the President of the Human Rights and Equal Opportunity Commission (HREOC) the role and functions of Chief Executive Officer;
- centralise complaint investigation and conciliation in the office of the President;
- implement common definitions and procedural provisions for complaint handling in the one Act;
- make substantial changes to the *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984* to remove provisions dealing with complaints;
- eliminate the second tier of review in HREOC;
- provide that matters which cannot be conciliated will be dealt with in the Federal Court of Australia;
- provide that the Federal Court will not be bound by technicalities or legal forms in considering proceedings brought before it under this legislation;
- enable Federal Court Judges to delegate some functions in this area to Judicial Registrars; and
- make consequential amendments to five Commonwealth Acts.

The committee has no comment on this bill.

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

Industrial Relations Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 11 December 1996 by the Minister for Industrial Relations. [Portfolio responsibility: Industrial Relations]

The bill proposes to amend the following Acts:

- *Occupational Health and Safety (Commonwealth Employment) Act 1991* to:
 - provide that Comcare be responsible for determining the amount payable by a Department or authority;
 - provide that Comcare provide advice on occupational health and safety matters to employers, employees and contractors on its own initiative or on request;
 - transfer certain powers in relation to investigations from the Commission to the Chief Executive Officer of Comcare;
 - increase the maximum penalties that can be imposed;
 - ensure that a document which is cited in the Act's regulations has effect as amended from time to time without the need to amend the regulations; and
 - require that a document which is incorporated in a code of practice be available for inspection at the offices of Comcare; and
- *Safety, Rehabilitation and Compensation Act 1988* to:
 - amend the definitions of *injury* and *disease*;
 - amend provisions relating to the procedure for determining the premiums payable by each Department and Commonwealth authority;
 - allow the Chief Executive Officer of Comcare to subdelegate any of the powers or functions delegated by the Commission;
 - enable Comcare to charge a fee for the provision of claims management services to certain licence holders;
 - reflect an existing administrative arrangement whereby the Northern Territory government reimburses Comcare for payments of compensation to certain persons and the associated administrative costs; and
 - ensure that compensation benefits are maintained at a minimum level of 70 per cent of indexed normal weekly earnings in all cases.

Regulations insufficiently subject to Parliamentary scrutiny Item 38 of Schedule 1

Item 38 of Schedule 1 provides:

After subsection 82(1)

Insert:

- (1A) The regulations may prescribe a matter by applying, adopting or incorporating, with or without modifications, a matter contained in any instrument or other writing as in force, or existing, at a particular time or from time to time.
- (1B) The regulations may do so even if the instrument or writing does not yet exist when the regulations are made.

This item, if enacted, would allow the making of regulations which adopt material from other documents, as in force from time to time. Section 49A of the *Acts Interpretation Act 1901* would ordinarily allow the adoption of material (other than Acts or regulations) only as it exists at the time of the adoption.

One of the reasons for section 49A is that if it does not apply, documents adopted and thereby having the force of law can be amended without Parliament's knowledge or without the opportunity for Parliament to scrutinise, and if so minded, to disallow the variation. A further reason of course is that one of the characteristics of good legislation is certainty and another is the onus on the lawmaker to ensure that those obliged to obey the law have adequate access to its terms.

The committee considers that these reasons far outweigh the administrative convenience advanced in the explanatory memorandum as justifying the ousting of section 49A. If the responsible rule-maker takes seriously the need to ensure adequate access to the change in the obligation, there seems little to be gained by not formally adopting by regulation the changes in the incorporated documents.

The committee, therefore, **seeks the Minister's advice** on whether there should be reconsideration of the derogation from section 49A of the *Acts Interpretation Act 1901*.

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.

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Retrospectivity

Subclause 2(2)

The committee notes that, by subclause 2(2), the amendment proposed by item 38 will apply retrospectively to regulations made since the commencement of section 82 of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*.

The committee is opposed to such retrospectivity because it could make unlawful what was lawful conduct at the time. The committee notes that, by subsection 82(1) of the Act, regulations may prescribe penalties, not exceeding \$1 000 for offences against the regulations. The committee, therefore, **seeks the Minister's advice** on whether there should be reconsideration of the retrospectivity.

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.

Retrospective effect

Item 6 of Schedule 2

Item 6 of Schedule 2 of this bill, if enacted, would provide that the amendments proposed by Part 1 of Schedule 2 would have effect only in relation to a claim made after the commencement of the Part. As the amendments made by Part 1 limit the circumstances in which an injured employee is able to claim compensation, item 6 could retrospectively deny compensation to a person who, at the time he or she suffered the injury, would have been entitled to claim under the Act. The committee **seeks the Minister's advice** on whether Part 1 ought apply only to injuries suffered after the commencement of the Part.

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.

Law and Justice Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 12 December 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the following Acts:

- *Administrative Appeals Act 1975* to:
 - establish a Small Taxation Claims Tribunal; and
 - provide for the reconstitution of a tribunal;
- *Classification (Publications, Films and Computer Games) Act 1995* to:
 - to make applicants applying for classification of ‘click-on’ access films responsible for advising the Classification Board of any contentious material existing in those films;
 - align, with the amended criterion in the National Classification Code, the criterion for refusal to approve an advertisement under the Act on the grounds that it contains child pornography; and
 - correct minor drafting errors;
- *Complaints (Australian Federal Police) Act 1981* to:
 - provide that a member of the Federal Police Disciplinary Tribunal can receive remuneration, when the member holds a judicial office or an office of Magistrate, provided that office is remunerated on a part-time basis; and
 - correct minor drafting errors;
- *Crimes Act 1914* to correct an incorrect cross-reference;
- *Death Penalty Abolition Act 1973* to repeal a spent provision;
- *Evidence Act 1995* to:
 - clarify the admissibility of evidence that relates only to the credibility of a person whose prior statement has been admitted under a hearsay exception and who has not been called to give evidence;
 - give effect to certificates in relation to self-incriminating evidence under the NSW Evidence Act in proceedings in federal and ACT courts and in prosecutions for Commonwealth and ACT offences; and

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- make other amendments, including amendments to correct minor errors in the Act and its notes, achieve consistency in drafting with the NSW Evidence Act, and include further explanatory notes;
- *Family Law Act 1975* to:
 - provide judges of the Family Court with the power to make rules of court in relation to conciliation conferences and trial management;
 - correct drafting and technical anomalies; and
 - make minor amendments, including amendments consequential upon the enactment of the *Family Law Reform Act 1995*;
- *Federal Court of Australia Act 1976* to provide:
 - for the Federal Court to appoint Marshals as officers of the Court;
 - that the ACT Attorney-General and the ACT Director of Public Prosecutions are able to bring reference appeals from the ACT Supreme Court to the Federal Court;
 - that reports of reference appeals may be published, in certain circumstances; and
 - for the method of conversion of Australia 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 and foreign currency with respect to the enforcement of certain foreign judgments;
- *Judges' Pension Act 1968* to provide that a retired judge is entitled to receive and pension and hold judicial office in relation to a Territory, provided that the judicial office is not remunerated on a full-time basis;
- *Judiciary Act 1903* to:
 - provide the Federal Court with jurisdiction under sections 75 and 76 of the Constitution; and
 - allow for the recovery of costs in Federal Court proceedings by successful parties represented by State or Territory government lawyers;
- *Jurisdiction of Courts (Cross-vesting) Act 1987* to provide that the Act will apply to the Australian Capital Territory on the same basis as it applies to the States and the Northern Territory;

- *Privacy Act 1988* to:
 - insert a definition of *guarantee*;
 - give the Privacy Commissioner the power to determine that an agency is a credit provider for the purposes of the Act;
 - allow an overdue payment under a guarantee to be listed on the guarantor's credit information file; and
 - give the Privacy Commissioner a specific power to copy and retain documents produced to him under section 44 of the Act;
- *Service and Execution of Process Act 1992* to:
 - take account of changes in State practices by providing for the use of bail justices in Victoria and by allowing Sheriff's officers and bailiffs of prescribed States to execute interstate warrants of apprehension for the enforcement of lower court fines;
 - align the period for entering an appearance to an originating process served interstate more closely with the period applying when an originating process is served within the State of issue;
 - simplify the procedures applying in some cases when a person who is under a restraint on his or her movements is arrested under an interstate warrant; and
 - provide for the situation where a person, in the course of their transfer in custody intrastate, is taken into another State;
- *Superannuation Act 1976* to allow a member of the Administrative Appeals Tribunal, who is a member or pensioner under the 1990 Act, to hear applications for review under the 1976 Act; and
- *Taxation Administration Act 1953* to:
 - make an amendment consequential upon the establishment of the Small Taxation Claims Tribunal; and
 - provide that a hearing before the Administrative Appeals Tribunal in a taxation matter, other than in the Small Taxation Claims Tribunal, is to be in private if the party who made the applications requests privacy.

The committee has no comment on this bill.

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

Medicare Levy Amendment Bill (No. 2) 1996

This bill was introduced into the House of Representatives on 13 December 1996 by the Minister for Health and Family Services. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Medicare Levy Act 1986* to:

- raise the Medicare levy low income exemption thresholds for individuals, married couples and sole parents; and
- impose an additional one per cent Medicare levy on single people with taxable incomes greater than \$50 000 and families with combined taxable incomes greater than \$100 000 who do not have private patient hospital cover.

Retrospectivity Subclause 2(2)

Subclauses 2(2) of this bill, if enacted, would allow some of the amendments of Schedule 1 to have retrospective effect from 1 July 1996. The committee notes from the explanatory memorandum, however, that the retrospectivity is in respect of amendments which are beneficial to taxpayers and were announced in the Budget.

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

Multilateral Investment Guarantee Agency Bill 1996

This bill was introduced into the House of Representatives on 11 December 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to appropriate monies and enable the Treasurer to issue securities to effect Australia's membership of the Multilateral Investment Guarantee Agency, which is part of the World Bank institutions.

The committee has no comment on this bill.

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

Primary Industries and Energy Legislation Amendment Bill (No. 3) 1996

This bill was introduced into the House of Representatives on 12 December 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the following Acts:

- *Agricultural and Veterinary Chemicals Code Act 1994* to extend compensation provisions to cover the active constituent of a chemical product;
- *Farm Household Support Act 1992* to prevent recipients of the drought relief payment or their partners 'double dipping' by receiving support in a couple-rate payment under this Act while, at the same time, obtaining payments or allowances identified separately under the *Social Security Act 1991* or *Veterans' Entitlements Act 1986*;
- *Australian Wool Research and Promotion Organisation Act 1993* to extend the sunset date from 30 June 1997 to 30 June 2000 for wool industry contributions to the Australian Animal Health Council;
- minor technical amendments are proposed to four portfolio Acts; and
- the *Tobacco Marketing Act 1965* is repealed.

Retrospectivity

Subclauses 2(3) to (5)

Subclauses 2(3) to (5) of this bill, if enacted, would allow various amendments proposed by Schedule 5 to have retrospective effect. The committee notes from the explanatory memorandum, however, that the retrospectivity, in each case, is in respect of amendments which correct earlier drafting errors and will not adversely affect any individual.

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

Private Health Insurance Incentives Bill 1996

This bill was introduced into the House of Representatives on 13 December 1996 by the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to provide the administrative arrangements to establish and operate the proposed Private Health Insurance Incentive Scheme.

The committee has no comment on this bill.

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

Productivity Commission Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to establish the Productivity Commission by merging the functions of the Industry Commission, the Economic Planning Advisory Committee and the Bureau of Industry Economics.

The committee has no comment on this bill.

Productivity Commission (Repeals, Transitional and Consequential Amendments) Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

Consequent upon the Productivity Commission Bill 1996, the bill proposes to repeal the *Industry Commission Act 1989* and the *Economic Planning Advisory Commission Act 1983*. Consequential amendments are made to four Commonwealth Acts.

The committee has no comment on this bill.

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

Public Service Amendment Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Minister Assisting the Prime Minister for the Public Service. [Portfolio responsibility: Prime Minister]

The bill proposes to amend the *Public Service Act 1922* to enable disciplinary action to be taken against officers of the Australian Public Service who have resumed duties in the service after a period of unattachment and it is alleged misconduct took place when the officer was an “unattached officer”.

Retrospective application

Schedule 1 -proposed subsections 63L(10) and (11)

Proposed subsections 63L(10) and (11) to be inserted by item 3 of Schedule 1 of this bill would give retrospective application to proposed subsection 63L(9) in respect of persons who ceased to be unattached officers or engaged in misconduct before the commencement of the subsection. The amendments rectify a procedural flaw in the *Public Service Act 1922* which currently precludes disciplinary action being taken against an officer for misconduct which occurred during a period of unattachment because the officer has ceased to be unattached.

The committee does not consider that rectifying this procedural flaw amounts to unduly trespassing on personal rights and liberties nor, on balance, does it consider that giving the amendment retrospective application warrants further comment from the committee.

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

Quarantine Amendment Bill (No. 2) 1996

This bill was introduced into the House of Representatives on 2 December 1996 by Mr Fitzgibbon as a Private Member's bill.

The bill proposes to amend the *Quarantine Act 1908* to place responsibility for the administration and execution of the Act with the Ministers for Human Services and Health and Primary Industries and Energy. In doing this, the bill would implement the first recommendation of the Senate Rural and Regional Affairs and Transport Legislation Committee report on the importation of cooked chicken meat into Australia.

The committee has no comment on this bill.

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

Radiocommunications Amendment Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to provide for:

- sale of spectrum while encumbered and later clearance of incumbent users;
- application of section 50 and related sections of the *Trade Practices Act 1974* to the allocation and issuing of radiocommunications licences;
- a Ministerial power to limit the amount of spectrum persons can acquire at price-based allocations;
- extending the period of spectrum licences to a maximum of 15 years;
- implementation of electromagnetic compatibility requirements;
- the setting of radiocommunications standards for health and safety purposes; and
- the removal of provisions for technical licence specifications.

The committee has no comment on this bill.

Radiocommunications (Receiver Licence Tax) Amendment Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

As a consequence of the establishment of the Australian Communications Authority (ACA), this bill proposes to amend the *Radiocommunications (Receiver Licence Tax) Act 1983* to enable payment of the receiver licence tax to the ACA.

The committee has no comment on this bill.

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

Radiocommunications (Transmitter Licence Tax) Amendment Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

As a consequence of the establishment of the Australian Communications Authority (ACA), this bill proposes to amend the *Radiocommunications (Transmitter Licence Tax) Act 1983* to enable payment of the transmitter licence tax to the ACA.

The committee has no comment on this bill.

Reform of Employment Services Bill 1996

This bill was introduced into the Senate on 12 December 1996 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to establish the mechanisms to deliver employment services and to establish a fully competitive market for employment assistance to job seekers. Specifically, this bill proposes to:

- enable the Commonwealth to engage entities to provide employment services;
- define the criteria for participation in the “employment assistance scheme”;
- provide for procedures to refer participants in the employment assistance scheme to employment placement enterprises;
- outline compliance requirements of job seekers under this bill;
- allow for the investigation of complaints about the provision of employment services;
- provide for the review of decisions relating to participation in the employment assistance scheme and referrals to employment placement enterprises; and
- ensure the confidentiality of information concerning users of employment services.

The committee has no comment on this bill.

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

Reform of Employment Services (Consequential Provisions) Bill 1996

This bill was introduced into the Senate on 12 December 1996 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Employment, Training and Youth Affairs]

Consequential upon the Reform of Employment Services Bill 1996, this bill proposes to:

- extend the *Privacy Act 1988* to the provision of employment services by entities engaged by the Commonwealth in the same way the Act currently applies to case management services provided by case managers;
- amend the *Freedom of Information Act 1982* to enable members of the public to have rights of access to documents relating to the provision of employment services in the same way they have under the case management system;
- amend the *Ombudsman Act 1976* to enable the Ombudsman to investigate complaints about the provision of employment services. Further, the Ombudsman is able to refer those complaints to the departmental secretary where it is considered more appropriate that the complaint be handled by the Department;
- repeal the *Employment Services Act 1994*; and
- amend seven Acts as a consequence of the abolition of the Commonwealth Employment Service.

The committee has no comment on this bill.

Retirement Savings Accounts Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to allow banks, building societies, credit unions and life insurance companies to provide superannuation without a trust structure in the form of retirement savings accounts from 1 July 1997.

Abrogation of privilege against self-incrimination Subclause 115(1)

This subclause, if enacted, would abrogate the privilege against self-incrimination for a person required to give information, sign a record or produce a book under this legislation. For the committee, proposals for the abrogation of this privilege always raise the issue of whether the advantage to be gained outweighs the loss of this protection or, to put it another way, whether the abrogation is justified by sound and sufficient reasons: a strong case needs to be made out when existing rights are to be removed. The committee, however, in considering whether the proposed provision unduly trespasses on personal rights and liberties, will take into account any alternative protection which the legislation offers.

In this case, the other proposed subsections of clause 115 provide protection by making inadmissible any direct or indirect use of the disclosure in evidence against the individual in a criminal proceeding or a proceeding for the imposition of a penalty. This inadmissibility is properly subject to an exception in relation to proceedings for making a false statement or signing a record containing a false statement.

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

Strict liability - Reversal of the onus of proof Clauses 148 and 149

These clauses provide that it is a criminal offence punishable on conviction by a fine not exceeding 40 penalty units (currently \$4 000) for innocently making a statement

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that is not true or keeping a record that is incorrect with no onus on the prosecution to prove that the person knew it was false or knew there was an incorrect record. All that the prosecution is required to prove is that the statement objectively was false or misleading in a material particular. The onus is placed on the defendant to prove that he or she not only did not know but also that he or she could not reasonably be expected to have known that the statement was false or misleading or that the record was incorrect.

The committee acknowledges that serious reasons of public policy may dictate that strict liability offences should be created and that in these cases specific statutory defences assist the personal rights and liberties of the accused.

The committee notes that clauses 150 to 154 provide a comprehensive scheme of offences for recklessly or intentionally making false statements or keeping incorrect records. These offences require the prosecution to prove the intention or recklessness of the accused. The committee is concerned that prosecutions will be launched with alternative charges so that, where the prosecution fails to prove that the accused intentionally or recklessly made false statements or kept incorrect records, the accused will then be required to prove that he or she did not know and could not be reasonably expected to have known that the statement was false or the record incorrect to avoid a fine not exceeding \$4 000.

The usual justification for reversing the onus of proof in criminal matters is that the prosecution will find it too difficult to prove intention. Without further material before it, the committee does not accept that this is the situation. In any event, the committee points out that the accused is, in these instances, put in the position of proving a negative. How does one prove that not only did one not know something at some point in the past but that at that time could not be reasonably have been expected to have known?

Given the availability of prosecutions for intentionally or recklessly making false statements, the committee **seeks the Treasurer's advice** on the necessity for offences of strict liability and reversal of the onus of proof in these clauses.

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.

Modifiable provisions - appropriate delegation of legislative power?

Part 15

Part 15 would permit the Commissioner to modify the operation of, or the provisions of, various other measures in the bill.

The committee notes in the explanatory memorandum the reasons for giving this wide legislative power to the Commissioner - reasons similar to those put forward in respect of other bills regulating financial institutions and products: flexibility in dealing with specific industry problems; ensuring that the regulatory framework remains responsive to a diverse and rapidly expanding superannuation industry.

The committee also notes that the explanatory memorandum assures Parliament that the Commissioner would exercise these powers only where he or she is satisfied that the particular RSA provider or class of providers would still comply with the spirit of the provisions concerned, or where the exercise of these powers will advance the objects of this Act.

The committee is concerned at the proposed delegation of Parliament's power to amend this legislation as well as the power to exempt RSA providers from the application of these provisions. The committee can understand the convenience of the Commissioner being able, in appropriate circumstances, to exempt an RSA provider from one or more of the operating standards prescribed under clause 38 or even from the penalty for failing to comply with them under clause 39. But the committee questions whether convenience is a sufficient warrant for including such wide powers as, by way of example, to enable the Commissioner to exempt a particular RSA from civil or criminal liability in respect of supplying false or misleading information to a prospective client (clauses 74 and 75).

For the Commissioner to intervene to declare that an act, otherwise criminal, is not to be criminal in a particular case, clause 74 raises the issue of the separation of powers. Likewise, where a person suffers loss or damage because an RSA provider has issued a regulated document that is false or misleading (clause 75), it is for a court to decide whether the circumstances warrant that no recovery of the loss be allowed.

The committee, therefore, **asks the Treasurer** whether the width of the powers delegated in Part 15 should be reviewed.

Further, the committee notes that in paragraph 364 of the explanatory memorandum reference is made to the annual report, pursuant to subclause 199(2), in respect of the exercise of the powers in Part 15. The explanatory memorandum seems to

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assume that this would be the avenue for Parliamentary scrutiny. The committee **seeks the Treasurer's advice** on whether, on the enactment of the Legislative Instruments Bill 1996, the exemptions and declarations of the Commissioner, being legislative in character and made in the exercise of a power delegated by Parliament, would be subject to the provisions of that bill and thus directly subject to Parliamentary scrutiny.

Pending the Treasurer'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.

Retirement Savings Accounts (Consequential Amendments) Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

Consequent upon the Retirement Savings Accounts Supervisory Levy Bill, the bill proposes to make amendments to ensure that retirement savings accounts are subject to the same rules which currently apply to other superannuation products.

The committee has no comment on this bill.

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

Retirement Savings Accounts Supervisory Levy Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to impose a levy on retirement savings accounts providers. The basic levy amount will be prescribed by regulation but may not exceed \$30 000.

Imposing levy by regulation

Paragraph 6(1)(a)

Paragraph 6(1)(a), if enacted, would allow the amount of the levy to be imposed by this bill to be prescribed by regulation.

The committee has consistently drawn attention to provisions which allow the rate of a levy to be set by regulation, largely on the basis that a rate of a levy could be prescribed which would amount to a tax. Generally the committee has taken the view that setting taxes is more appropriately a matter for primary legislation, a prerogative of Parliament, not of the executive. If there is a need for flexibility, (that is, adjustments to the rate of a levy need to be made so frequently and/or so quickly that it is impractical to amend primary legislation) the committee prefers that the primary legislation prescribe either a maximum rate of the levy or a method of calculating such a maximum rate.

The committee notes that in this case, the relevant provision, while allowing the basic levy to be set by regulation, sets an upper limit of \$30 000 which must not be exceeded.

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

Road Transport Reform (Dangerous Goods) Amendment Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the *Road Transport Reform (Dangerous Goods) Act 1995* to:

- clarify the power to make regulations in respect of specific subject matter;
- reflect changes arising from the development of proposed regulations, particularly in relation to terminology; and
- make consequential amendments.

The committee has no comment on this bill.

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

Road Transport Reform (Heavy Vehicles Registration) Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to make provision for the registration of heavy vehicles and related matters in the Australian Capital Territory and the Jervis Bay Territory. The bill proposes a national registration scheme for heavy vehicles throughout Australia and will provide for uniform arrangements for initial registration, renewal, transfer, suspension and cancellation of registration, and the issue and clearance of vehicle defect notices.

It is intended that the States and Northern Territory will adopt the substantive provisions of the Act as well as regulations made under the Act. The Act would then become the primary law of the States and the Northern Territory.

The committee has no comment on this bill.

Tax Law Improvement Bill 1996

This bill was introduced into the House of Representatives on 11 December 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to rewrite provisions of the *Income Tax Assessment Act 1936* in relation to assessable income; deductions; trading stock; depreciation, leased cars; capital allowance provisions for primary production and some land-holders; entertainment; and recoupment of deductible expenses. It proposes to make specific changes to the Act to:

- confirm that deductions for rates and land tax are allowable on premises used to produce mutual income;
- confirm the practice of allowing a money lender to deduct bad debts on a purchased loan when the debt is written off;
- allow a deduction for any remaining undeducted borrowing expenses if the loan is repaid early;
- clarify that a deduction is only allowed for borrowing expenses to the extent that the money is used to produce assessable income in the year in which the deduction is claimed;
- remove the provision which allows a deduction for \$50 in capital legal expenses;
- provide an explicit treatment for the conversion of assets into or from trading stock for the first time;
- bring the formula for reducing the tax cost of replacement stock on the disposal of tubercular cattle into line with the formula used for disposals due to other diseases;
- replace rules that apply to disposals of part interests in trading stock with rules that apply to a change in the taxpayer who accounts for the trading stock;
- extend the deduction allowed for the cost of plantation trees on their disposal outside the ordinary course of business to cases where the trees are disposed of because of the owner's death;
- standardise the choices of valuation of the natural increase of live stock to actual cost or a prescribed minimum value;
- allow partnerships and trusts to make a single election to defer assessing income in certain circumstances;

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- standardise the valuation of live stock and other kinds of trading stock by allowing several valuation methods;
- standardise the forms of elections to defer the assessment of profits from abnormal disposals of live stock;
- ensure that the value of stock on hand at the start of a year is always the same as the value used for it at the end of the previous year;
- allow taxpayers who hold plant under a hire purchase agreement to claim depreciation;
- allow taxpayers who acquire previously depreciated plant to depreciate it on the basis of its cost to them without approaching the Commissioner for approval;
- provide a cost for plant acquire with other assets without a specific price being allocated;
- clarify that plant is to be notionally written down for any period which it is used for a purpose other than producing assessable income;
- allow a taxpayer, when choosing a method of calculation, to elect to use the prime cost method for any unit of depreciable plant;
- allow the adoption of a lower depreciation rate;
- standardise the treatment of the profit from the disposal of previously leased cars to include insurance payments in accessible income where property passes to an insurance company;
- allowing taxpayers acting in good faith to deduct capital expenditure on a forestry road or timber mill building on the basis of its cost to them, if they acquire it from someone who has previously claimed deductions for it;
- allow a deduction for capital expenditure incurred on a telephone line where a deduction for it has been allowed to the entity which installed it for the taxpayer;
- remove the exception for 'self-entertainment' from the general rule that entertainment expenses are non deductible;
- standardise the treatment of recoupment of certain deductible expenses so that these recoupment amounts will be assessable when received, but only to the extent that they do not exceed the amount of deductions already allowed; and
- make consequential and transitional amendments to support the rewritten rules.

The committee has no comment on this bill.

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

Taxation Laws Amendment Bill (No. 4) 1996

This bill was introduced into the House of Representatives on 12 December 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
 - end the 20 per cent prime cost depreciation rate for trading ships from 30 June 1996;
 - replace the current references to specific Commonwealth education or training programs in pay-as-you-earn, rebate and exemption provisions with a generic term;
 - amend provisions relating to the taxation of foreign source income to:
 - ensure that exclusions from the section 47A deemed dividend rules operate correctly;
 - ensure that the gross turnover of a controlled foreign company for the purposes of the de minimis exemption is not reduced by amounts excluded from the active income test;
 - take account of changes to the *Migration Act 1958*; and
 - allow a notional deduction for a loss of a capital nature where a gain of a capital nature would be included in a foreign investment fund's calculated profit;
 - amend employee share scheme provisions to broaden access to benefits, increase the benefits available in some cases and to make technical amendments;
 - require public entities to periodically test on prescribed dates whether there has been a change in a majority of underlying interests in assets of the entity since 19 September 1985;
 - provide capital gains tax relief where a small business taxpayer disposes of some or all of its active assets and acquires replacement active assets;
 - amend provisions relating to the forgiveness of commercial debts as proposed to be amended by the *Taxation Law Amendment Act (No. 2) 1996*; and

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- ensure that a subsidiary company of a taxpayer which was engaged in a business of lending money can receive capital gains tax treatment on any gain or loss made from an eligible equity investment in small and medium enterprises;
- *Taxation Laws Amendment Act (No. 4) 1995* to:
 - allow companies the option to defer conversion to the class C franking account after they are paid a class C franked dividend or a trust or partnership amount with class C franking credits attached; and
 - eliminate an unintended dual liability to class C franking deficit tax or franking additional tax which may arise in certain situations; and
- *Superannuation Industry (Supervision) Act 1993* to increase the period in which eligible superannuation entities must request the tax file numbers of new beneficiaries of the entity from seven to 30 days.

Retrospectivity - beneficial to taxpayers

Subclauses 2(3), (5), (6) and (7)

Subitems 25(3) and (5) of Schedule 3

The amendments proposed by these provisions each allow for a retrospective commencement of the measure. In each case, however, the retrospectivity is beneficial to taxpayers.

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

Retrospectivity - drafting errors

Subclauses 2(2) and (9)

The amendments proposed by these provisions each allow for a retrospective commencement of the measure. In each case, however, the retrospectivity is to correct a drafting error.

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

**Retrospectivity - technical amendment/negligible impact
Subclauses 2(5) and (9)**

The amendments proposed by these provisions each allow for a retrospective commencement of the measure. In each case, however, the retrospectivity is in respect of either technical amendments or amendments which have a negligible impact on revenue.

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

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

Taxation Laws Amendment (Private Health Insurance Incentives) Bill 1996

This bill was introduced into the House of Representatives on 13 December 1996 by the Minister for Health and Family Services. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
 - ensure that existing Medicare levy exemptions for prescribed persons do not apply to the proposed surcharge where any member of a family is not a prescribed person and is not covered by private patient hospital cover; and
 - make a minor technical amendment; and
- *Income Tax Assessment Act 1996* to provide a tax rebate for certain persons who take out private health insurance.

Retrospectivity Subclause 2(3)

Subclause 2(3) of this bill, if enacted, would allow the amendment proposed by item 2 of Schedule 1 to have retrospective effect from 1 July 1994. The committee notes from the explanatory memorandum, however, that the retrospectivity is in respect of an amendment which corrects an earlier drafting error and will not adversely affect any individual.

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

Telecommunications Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to:

- identify carriers and carriage service providers as the participants in the telecommunications industry who are to be subject to regulation and create the mechanisms to impose any necessary regulation upon them;
- create obligations on carriers and carriage service providers for the benefit of consumers (such as universal service, untimed local calls and the customer service guarantee);
- create obligations on carriers and carriage service providers for the benefit of the general community (such as provision of emergency call services, protection of the privacy of communications and requirements to co-operate with law enforcement agencies);
- create obligations on carriers and carriage service providers which will promote competition (such as provision of pre-selection and requirements for calling line identification);
- provide for technical regulation and management of numbering; and
- give benefits to carriers in the form of certain powers and immunities which assist them in carrying out the obligations which the legislation places on them.

Reversal of the onus of proof

Clause 280

Clause 280 of this bill, if enacted, would reverse the onus of proof in a criminal prosecution for an offence relating to disclosure of information under Division 2 of Part 13.

Subclause(1) provides, in effect, that the persuasive burden of proof lies on the defendant where the defendant relies on the exception in clause 272. Clause 272 provides that disclosure is not prohibited where the person believes on reasonable grounds that the disclosure or use of the information is reasonably necessary to prevent or lessen a serious and imminent threat to someone's life or health.

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

The committee notes that, in the past, it has been sometimes prepared to accept a reversal of the onus of proof where the matters to be raised by way of defence by the accused are peculiarly within the knowledge of the accused and it would be extremely difficult and costly for the prosecution to be required to negative the defence. On analysis, there are some aspects of the present case which may fall outside those guidelines and other aspects which are of concern to the committee.

There needs to be a deterrent against the reckless disclosure of information on too superficial an assessment of a threat to life or health without inhibiting the reasonable disclosure where a serious and imminent threat exists. The committee is concerned that requiring the accused to establish on reasonable grounds that the disclosure was reasonably necessary to prevent or lessen a serious or imminent threat to someone's life or health favours the deterrence and may unnecessarily introduce caution that inhibits necessary and timely action.

While one element - a state of belief - may be seen as peculiarly within the accused's knowledge, other elements which would need to be established are fairly objective: the seriousness of the threat, the imminence of the threat, how the health of the person would be affected. Further, there is a requirement to establish not only that there were reasonable grounds for the belief but that the disclosure was reasonably necessary. The committee considers that a person who makes an honest mistake in disclosing may have difficulty in later establishing the reasonable grounds.

Further, in a case of this nature the decision to prosecute ought to be made only after an objective assessment that the person could not have had reasonable grounds for forming such a belief. Given that objective assessment, the question arises whether requiring the prosecution to prove the lack of reasonable grounds would be extremely difficult and costly.

As the committee considers that, in an apparent emergency, it would better to err on the side of action and that placing the onus of proof on the accused may inhibit this, the committee **seeks the Minister's reconsideration** of the necessity to reverse the onus of proof in this case.

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.

Delegation of powers to a person - rights unduly dependent on insufficiently defined administrative power
subclause 425(1)

Subclause 425(1) of this bill, if enacted, would allow the Australian Communications Authority (ACA) to delegate to a person any or all of its functions and powers under Division 9 - Cabling providers. Subclause 425(2) provides a significant list of exceptions.

The committee generally has concerns with a provision which gives a body a wide-ranging discretion to choose any person at all as the recipient of a delegated administrative power as such a discretion may result in making rights, liberties or obligations unduly dependent upon insufficiently defined administrative power.

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 has expressed a preference that the limit should preferably 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.

In this instance, while subclause 425(1) enables all powers to be delegated, subclause (2) sets limits by significantly reducing the powers that may be exercised, practically to those powers under the rule-making functions described in clauses 405 and 406. As the resulting rules are disallowable instruments, the principal exercise of the delegated powers will be subject to Parliamentary scrutiny.

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

Delegation of powers to a person - rights unduly dependent on insufficiently defined administrative power
Subclause 451(1)

Subclause 451(1) of this bill, if enacted, would enable the ACA to delegate any or all of the powers conferred on the ACA by the numbering plan to a body corporate. Clause 429 provides that the ACA must make a numbering plan which will be a disallowable instrument and thus subject to Parliamentary scrutiny.

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

The committee generally has concerns with a provision which gives a body a wide-ranging discretion to choose any person at all as the recipient of a delegated administrative power as such a discretion may result in making rights, liberties or obligations unduly dependent upon insufficiently defined administrative power.

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 has expressed a preference that the limit should preferably 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.

In this instance, as the numbering plan has yet to be made, the powers capable of being delegated are unknown and therefore without limit. Equally 'a body corporate' is an unknown quantity.

In these circumstances, the committee **seeks the advice of the Minister** on whether the bill could be amended in some way to confine the open-ended discretion.

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 upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Taking away the right to silence **Subclause 508(1)**

This subclause, if enacted, would take away the right of a person to remain silent where providing information or producing a document may result in the person incriminating himself or herself, thus exposing the person to prosecution for, and perhaps conviction of, a criminal offence.

The committee is opposed in principle to clauses which take away the right to silence in these circumstances because such a clause takes away a fundamental right in our common law system - one of the fundamental elements of a fair and effective justice system.

Taking away this right undoubtedly trespasses on personal rights and liberties. Whether it trespasses **unduly** on personal rights and liberties will depend on the

context in which it is done. The issue is whether the advantage to the common good outweighs the loss to the individual of taking away this right to silence.

Where Parliament has legislated in the past to take away this right, the law has often offered alternative protection in the form of making the information thus disclosed and other information derived from the disclosure inadmissible in certain types of criminal proceedings.

In this way, in theory, the need to obtain the information which the common good demands is accommodated without adverse results to the individual from taking away the right to silence.

In this case the common good calls for the Australian Communications Authority(ACA) to be able to obtain information to carry out the performance of the ACA'S telecommunications functions, such as, inter alia, the protection of the privacy of communications.

The adverse effect of taking away the right to silence is mitigated by the protection included in clause 508. The person is protected because any direct or indirect use of the material disclosed is inadmissible in criminal proceedings. This inadmissibility is subject to exceptions in relation to proceedings for failing to comply with a requirement to give the information or produce the document and for making a false statement or providing false records. It is the view of the committee on this occasion that these exceptions do not unduly trespass on personal rights and liberties.

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

Vicarious liability and reversal of the onus of proof

Subclause 560(3)

Subclause 560(3) 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

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- (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 560, if enacted, would impose vicarious liability on a person for the criminal acts of his or her employee or agent. Subclause (3) 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 559 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 560(3) 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. The committee notes that clause 560 specifically excludes vicarious liability from an offence against clause 42 of the bill and from certain offences under the *Crimes Act 1914*. Accordingly, the committee **seeks the Minister's advice** whether any other offences having less serious consequences might also be excluded from the ambit of this provision.

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.

Adoption or incorporation in the legislation of extrinsic material Clause 573

Clause 573 would permit delegated legislation made under this legislation to incorporate other instruments as in force from time to time in derogation of section 49A of the *Acts Interpretation Act 1901*. The committee generally draws attention to a provision of this kind as it means that documents adopted and having the force of law may be amended without Parliament being given the opportunity to scrutinise them.

The committee notes from the explanatory memorandum that this clause is in the same terms as and, in effect, will replace section 407 of the *Telecommunications Act 1991* which will be repealed on the commencement of this Act. When section 407 was introduced, the committee examined the reasons for allowing such a clause and concluded in its *Fifteenth Report of 1991* that the provision was warranted.

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

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

Telecommunications (Carrier Licence Charges) Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to:

- impose an application charge of up to \$100,000 for new carrier licences; and
- effective from 1 July 1998, impose an annual charge on a carrier licence that is in force at the beginning of a financial year.

Imposing charge by determination Clauses 9 and 10

Clause 9, if enacted, would allow the amount of the charge to be imposed by this bill on an application for a carrier licence to be determined by the ACA.

The committee has consistently drawn attention to provisions which allow the rate of a charge to be set by regulation or other means, largely on the basis that a rate of a charge could be prescribed which would amount to a tax. Generally the committee has taken the view that setting taxes is more appropriately a matter for primary legislation, a prerogative of Parliament, not of the executive. If there is a need for flexibility, (that is, adjustments to the rate of a charge need to be made so frequently and/or so quickly that it is impractical to amend primary legislation) the committee prefers that the primary legislation prescribe either a maximum rate of the charge or a method of calculating such a maximum rate.

The committee notes that, in this case, clause 10 sets an upper limit of \$100 000 which must not be exceeded.

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

Imposing charge by determination Clauses 14 and 15

Clause 14, if enacted, would allow the amount of the annual charge to be imposed by this bill to be determined by the ACA.

The committee has consistently drawn attention to provisions which allow the rate of a charge to be set by regulation or other means, largely on the basis that a rate of

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a charge could be prescribed which would amount to a tax. Generally the committee has taken the view that setting taxes is more appropriately a matter for primary legislation, a prerogative of Parliament, not of the executive. If there is a need for flexibility, (that is, adjustments to the rate of a charge need to be made so frequently and/or so quickly that it is impractical to amend primary legislation) the committee prefers that the primary legislation prescribe either a maximum rate of the charge or a method of calculating such a maximum rate.

The committee notes that, in this case, clause 15 provides that the total of the charges that are imposed on carrier licences in force at the beginning of a financial year must not exceed the sum of three amounts which are determined to be the proportion of the costs of ACA, ACCC and of the Commonwealth attributable to their involvement in telecommunications matters. This provides a method of calculating the maximum rate although the amount which is the relevant proportion of these costs is to be determined in writing by ACA and ACCC. Those determinations, however, are disallowable instruments.

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

Telecommunications (Carrier Licence Fees) Termination Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to repeal the *Telecommunications (Carrier Licence Fees) Act 1991* effective on 1 July 1998 and deal with the payment by existing telecommunications carriers of carrier licence fees on 1 July 1997.

The committee has no comment on this bill.

Telecommunications (Numbering Charges) Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to impose charges in relation to numbers allocated to certain carriage service providers.

Imposing charge by determination Clauses 13 and 20

Clauses 13 and 20, if enacted, would each allow the amount of a charge to be imposed by this bill to be determined by the ACA.

The committee has consistently drawn attention to provisions which allow the rate of a charge to be set by regulation or other means, largely on the basis that a rate of a charge could be prescribed which would amount to a tax. Generally the committee has taken the view that setting taxes is more appropriately a matter for primary legislation, a prerogative of Parliament, not of the executive. If there is a need for flexibility, (that is, adjustments to the rate of a charge need to be made so frequently and/or so quickly that it is impractical to amend primary legislation) the committee prefers that the primary legislation prescribe either a maximum rate of the charge or a method of calculating such a maximum rate.

The committee notes that clauses 14 and 21 set an upper limit of \$100 000 which must not be exceeded.

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

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

Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes transitional provisions and consequential amendments related to the proposed *Telecommunications Act 1996*. In particular, the bill:

- deals with the merger of the Australian Telecommunications Authority and the Spectrum Management Agency (SMA) and the transfer of competition policy resources to the Australian Competition and Consumer Commission;
- provides for transitional provisions relating to a number of matters including the telecommunications access regime under proposed Part XIC of the *Trade Practices Act 1974* and to carrier licences;
- makes consequential amendments to 14 Commonwealth Acts;
- makes amendments to the *Radiocommunications Act 1992* to:
 - provide for minor amendments consequential on the merger of the SMA and the Australian Communications Authority (ACA);
 - provide for minor amendments consequential on the enactment of the proposed *Telecommunications Act 1996*;
 - deal with the conduct of public inquiries by the ACA on radiocommunications matters;
 - provide for amendments relating to alignment of the technical regulation regimes of the Act and the proposed *Telecommunications Act 1996*;
- makes minor amendments consequential on the enactment of the proposed *Commonwealth Authorities and Companies Act 1996* and the *Financial Management and Accountability Act 1996*; and
- repeals six Commonwealth Acts.

The committee has no comment on this bill.

Telecommunications (Universal Service Levy) Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to impose a levy on participating telecommunications carriers equal to the amount of the carriers' levy debit balance.

The committee has no comment on this bill.

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Trade Practices Amendment (Telecommunications) Bill 1996

This bill was introduced into the House of Representatives on 5 December 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to amend the *Trade Practices Act 1974* to establish a regime for regulating anti-competitive conduct in the telecommunications industry and to also set out an access regime for the industry.

The committee has no comment on this bill.

Trans-Tasman Mutual Recognition Bill 1996

This bill was introduced into the House of Representatives on 4 December 1996 by the Minister for Science and Technology. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to establish a scheme for the mutual recognition of regulatory standards for goods and occupations adopted in Australia and New Zealand. The bill implements the Trans-Tasman Mutual Recognition Arrangement which was signed by the Prime Minister, Premiers and Chief Ministers on 14 June 1996 and the Prime Minister of New Zealand on 9 July 1996.

Commencement by Proclamation Subclause 2(2)

Subclause 2(2) of this bill provides:

- (2) The remaining provisions of this Act commence on a day or days to be fixed by Proclamation.

The bill, therefore, does not specify a time within which the commencement must occur.

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.

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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 paragraph 6 is applicable here as, although the explanatory memorandum does not indicate the reason, it is apparent that the commencement date will depend on the time taken for the enactment of complementary legislation by New Zealand and the States and Territories of Australia

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

Veterans' Affairs Legislation Amendment (1996-97 Budget and Other Measures) Bill 1996

This bill was introduced into the House of Representatives on 11 December 1996 by the Minister for Veterans' Affairs. [Portfolio responsibility: Veterans' Affairs]

The bill proposes to amend the following Acts:

- *Veterans' Entitlements Act 1986* to:
 - remove all carer income support provisions, allowing the recipients to transfer to similar payment under the *Social Security Act 1991*;
 - preserve the entitlements of certain carers who may be disadvantaged by a transfer to a carer payment under the *Social Security Act*;
 - enable the appropriation of funds from the Consolidated Revenue Fund for health services provided to certain veterans and dependants; and
 - set a new maximum rate of rent assistance for single people who share accommodation; and
- *Veterans' Entitlements Act 1986* and *Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Act 1986* to make consequential amendments relating to the change of name from carer pension to carer payment;
- *Veterans' Entitlements Act 1986*, *Veterans' Entitlements (Rewrite) Transition Act 1991* and *Veterans' Affairs Legislation Amendment Act 1992* to make amendments so that people who currently receive fringe benefits but do not receive service pension will no longer be entitled to receive fringe benefits from 1 July 1997;
- *Social Security Act 1991* to allow the Department of Veterans' Affairs, acting as an agent of the Department of Social Security, to pay and administer the age pension, and in certain circumstances the wife pension, of certain disability pensioners and their partners; and
- *Veterans' Affairs Legislation Amendment (1995-96 Budget Measures) Act (No. 2) 1995* to correct misdescribed amendments of the *Veterans' Entitlements Act 1986*.

Retrospectivity Subclause 2(3)

Subclause 2(3) of this bill, if enacted, would allow the amendments proposed by Schedule 6 to have retrospective effect from 20 March 1996. The committee notes from the explanatory memorandum, however, that the retrospectivity is in respect of

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amendments which correct earlier drafting errors and will not adversely affect any individual.

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 2 of 1997

26 February 1997

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

TERMS OF REFERENCE

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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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.

Appropriation (Parliamentary Departments) Bill (No. 2) 1996-97

This bill was introduced into the House of Representatives on 5 February 1997 by the Minister for Administrative Services. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$363 000) out of the Consolidated Revenue Fund, additional to those made by Appropriation (Parliamentary Departments) Act 1996-97, to meet recurrent expenditures of the parliamentary departments for the year ending on 30 June 1997.

The committee has no comment on this bill.

Appropriation Bill (No. 3) 1996-97

This bill was introduced into the House of Representatives on 5 February 1997 by the Minister for Administrative Services. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$930 million) out of the Consolidated Revenue Fund, additional to those made by Appropriation Act (No. 1) 1996-97, to meet payments for the ordinary annual services of the government for the year ending on 30 June 1997.

The committee has no comment on this bill.

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Appropriation Bill (No. 4) 1996-97

This bill was introduced into the House of Representatives on 5 February 1997 by the Minister for Administrative Services. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$471 million) out of the Consolidated Revenue Fund, additional to those made by Appropriation Act (No. 2) 1996-97, to meet payments for capital works and services, payments to or for the States, the Northern Territory and the Australian Capital Territory; advances and loans, and for other services for the year ending on 30 June 1997.

The committee has no comment on this bill.

Commonwealth Employees' Rehabilitation and Compensation Amendment Bill 1997

This bill was introduced into the House of Representatives on 10 February 1997 by Mr A Morris as a Private Member's bill.

The bill proposes to amend the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* to provide that the first level of external appeal against decisions by Comcare is to the Social Security Appeals Tribunal.

The committee has no comment on this bill.

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Hearing Services Administration Bill 1997

This bill was introduced into the House of Representatives on 5 February 1997 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to provide for the establishment of a voucher system for the delivery of Government-funded hearing services from 1 July 1997. The office of Hearing Services, with responsibility for the new arrangements, is established by the bill.

Retrospective application Subclause 19(5)

Subclause 19(5) of this bill provides:

For the purposes of this section, a person is a *disqualified person* at a particular time if:

- (a) the person has been convicted (whether before or after the commencement of this section) of a disqualifying offence (as defined by subsection (6)); and
- (b) if the person was sentenced to imprisonment—the time occurs during the period:
 - (i) beginning when the person was convicted; and
 - (ii) ending 5 years after the person's release from prison; and
- (c) if the person was not sentenced to imprisonment—the time occurs during the period:
 - (i) beginning when the person was convicted; and
 - (ii) ending 5 years after the conviction.

Subclause 19(5), if enacted, would set out the conditions under which a person would be a disqualified person for the purposes of the accreditation scheme for hearing services providers. One of those conditions would be that the person has been convicted of a disqualifying offence whether the conviction occurred before or after the commencement of this clause of the bill. This is subject to a time period of five years from the time of the conviction or, where a term of imprisonment was imposed, five years from the person's release.

Attaching a legal effect to past events raises the issue whether there may be undue trespass on personal rights and liberties. Further, the committee notes the arbitrary

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nature of choosing five years as the period as well as the apparently uneven treatment of natural persons as against corporations.

Both corporations and natural persons may be disqualified persons. The Minister must not accredit or must cancel the accreditation of both corporations and natural persons if they are or become disqualified persons. The period of disbarment, however, may differ. Because a corporation cannot be jailed, the period from conviction will never be more than five years. A natural person, subject to imprisonment, may have a longer period of disbarment.

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.

Application of criminal code - mental element not specified

Clause 46

The committee notes that Clause 46 would apply Chapter 2 of the Criminal code to all offences against this Act. Section 5.6 of that Code provides that if an offence does not specify a mental element, that element is to be either intention or recklessness.

Hence the offence in clause 22 of making a false or misleading statement will require the prosecution to prove that the making of the statement was intentional or reckless.

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

Hearing Services and AGHS Reform Bill 1997

This bill was introduced into the House of Representatives on 5 February 1997 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to establish the Australian Government Health Service as a wholly Commonwealth-owned company and makes transitional and consequential amendments upon the establishment.

The committee has no comment on this bill.

Superannuation Contributions Surcharge (Assessment and Collection) Bill 1997

This bill was introduced into the House of Representatives on 13 February 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to establish administrative arrangements for the assessment and collection of a superannuation contributions surcharge where the adjusted taxable income of a superannuation fund member exceeds \$70 000. Adjusted taxable income is ordinary taxable income plus generally the value of the employer's contribution to the fund. In an unfunded scheme, the employer's notional contribution will be determined actuarially.

The committee **seeks the advice of the Treasurer** on a number of matters which are not transparent or readily understandable or may be considered to trespass on personal rights and liberties in that there may be an unequal treatment of taxpayers or which may contain an aspect of unfairness.

Position of women

The committee is concerned that women and others such as short term contractors, actors and sportsmen who may have shorter periods in the workforce than the norm may be disadvantaged by the way in which the surcharge is constructed. In order to obtain reasonable levels of superannuation, people who have less time in the workforce need to arrange that their employers pay higher levels of contributions to their superannuation provider. This could result in them having to pay more by way of surcharge than someone who has a longer employment period during which a similar superannuation payout could be accumulated. The committee **seeks the Treasurer's advice** on this issue.

Superannuation (unfunded defined benefits) - government sector schemes

- ***Resignation - no employer contributions***

A person on resigning from the public service, prior to retirement age, may choose the option of a lump sum consisting of his or her contributions to the scheme plus interest. The 1992 publication by the then Retirement Benefits Office on the Commonwealth Superannuation Scheme at page 19 states:

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

Important note: If you choose this option, no employer financed component is payable, either on exit or in the future.

Subclause 8(3) of this bill, however, provides for notional surchargeable contributions. Clause 16 prescribes that the superannuation provider keep a running debit account with compound interest in respect of the actuarially determined notional contributions. Subclause 16(6) provides that the Superannuation provider deduct that amount 'when a lump sum ... becomes payable ... for the benefit of a member whose account is in debit'. As the committee understands the thrust of the scheme, it does not seem intended that the liability notionally accrued should be paid from the lump sum which consists only of the member's contributions and interest on them and where no employer contributions have been or will be paid. The clauses as they stand, however, may have this seemingly unintended effect. The committee **would like the Treasurer's assurance** on this issue.

- ***Double taxation***

It appears that on retirement, and before any benefits are paid, members of the Commonwealth public sector schemes will be required to pay a surcharge on contributions which the Commonwealth has not in fact paid to any scheme. The surcharge will have been determined each year and will have been accumulating at compound interest. When the Commonwealth actually pays either a lump sum or a fortnightly pension, the retiree will be taxed again on the lump sum or the pension. Further, there appears to be no option for a worker to avoid the interest by paying the surcharge year by year as it is assessed. The committee **would be interested in the Treasurer's views** on the equity of assessing a surcharge on an amount which has not been paid and then taxing the amount again when it is paid and also on whether any consideration could be given to an option not to defer liability.

- ***Notional surchargeable contributions factor - absence of criteria***

The committee is concerned that the legislation does not contain the criteria by which the notional surchargeable contributions factor will be determined as applying to a member of an unfunded superannuation scheme. The committee notes that the explanatory memorandum, at paragraph 2.9, speaks of the Institute of Actuaries publishing a Guidance Note to be developed in conjunction with the Australian Government Actuary and the Australian Taxation Office. But the legislation does not spell out what the notional surchargeable contributions factor is meant to achieve. Fairness would suggest that the aim would be to achieve some parity between funded and unfunded schemes with respect to the rate of

contributions to achieve similar results. As the rights of many future superannuants depend on how this factor is determined, the committee is of the view that the matter is of such importance that it ought to be in primary legislation. Accordingly, the committee **seeks the advice of the Treasurer** on how this might be achieved.

- ***Taxation not on an individual basis***

Lack of information on the notional surchargeable contributions factor makes it difficult to assess the fairness of its operation and effects. While not underestimating the expertise of actuaries, the committee is concerned that the notional contributions upon which the surcharge is to be based will not be proportional to the ultimate benefit an individual member will receive - given that people with the same salary history may choose to retire at different ages, be entitled to different pension rates and will not live the same length of time after retirement. Fairness will not result if the surcharge on the notional contributions is payable equally by each member on the amount which the fund notionally needs to pay benefits to all of its members, even though not all members will receive the same amount from the fund. In a funded accumulated benefits scheme, employer contributions in respect of a particular person attract a surcharge in respect of those contributions - contributions which will attract the surcharge but also contributions which that person will ultimately receive as benefits. Where notional contributions are equal, the same amount of surcharge will be payable whether a pension is paid for one year or twenty-five years. In an unfunded scheme where pensions are paid until death, the surcharge will be payable, not on the amount which the pensioner will actually receive, but on an equal share of the common amount needed to pay all pensioners. It seems unfair to tax individuals equally in respect of benefits that will not be received equally. The committee **seeks the Treasurer's advice on this issue.**

- ***Hindsight determination - the better option***

Commentators have suggested that actuaries may err on the side of caution and determine a value for the contributions to an unfunded scheme in excess of the value that the members ultimately receive. If, in fact, liability for the surcharge cannot be met until the point of retirement, it may be a better use of the actuaries for them to determine at the time of retirement, the value of the contributions that would have been needed over the relevant period to achieve the benefit about to be received. This would achieve a far greater accuracy and do away with the necessity to use a formula to preserve the value of the notional liability. The committee **seeks the Treasurer's advice on this issue.**

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

- *Illusory advantage?*

The second reading speech and the explanatory memorandum are apparently inconsistent with regard to the reasons for using the mechanism of applying the 10 year Treasury bond rate to the liability to pay the surcharge on notional contributions. The second reading speech says that: 'To prevent unfunded defined benefits schemes being advantaged by this deferral of the surcharge, interest will be payable on the accumulated debt'. The emphasis here is on the advantage to the unfunded schemes. It is not explained where the advantage to such schemes lies. A funded scheme receives contributions, pays the surcharge and invests the remainder to produce benefits for the members. An unfunded scheme does not receive the contributions, has no opportunity to trade with them to increase the payout to members which, in any case, is a defined benefit. As the surcharge is assessed on the amount actuarially determined which will result in the defined benefit, the effect on the funded scheme of paying the surcharge while achieving a similar benefit ought thereby to be taken into account. It is not clear that an advantage results.

It may depend on what end result the actuary is set to achieve. The committee has noted the need to have this more fully spelled out in the legislation. If parity between funded and unfunded schemes is the aim and a funded scheme in respect of a certain set of circumstances after paying the surcharge each year results in the beneficiary receiving say, \$200 000, the Guidance Note could direct the actuary determining the notional contributions to the unfunded scheme to achieve a defined benefit of \$200 000,

- before paying the accumulated surcharge and interest on it;
- before paying the surcharge but after paying the interest; or
- after paying the surcharge and the interest.

The whole exercise would seem pointless if the Government has to pay out of consolidated revenue, say \$250 000 so that, after paying the surcharge and interest back to consolidated revenue, the beneficiary receives \$200 000. Equally, it would seem manifestly unfair that, if the aim is to produce a benefit of \$200 000, the result is to penalise the beneficiary in the unfunded scheme, by reducing the amount below \$200 000 after payment of the surcharge and/or the interest.

The explanatory memorandum, on the other hand, at paragraph 3.63, suggests as the reason for charging interest at the 10 year Treasury Bond rate an advantage to the taxpayer:

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

The value of the surcharge is to be maintained to ensure no advantage would be obtained by deferring the payment.

This suggests that the reason for interest on the liability is that X dollars, owed this year but to be paid in, say, 15 years time, ought to maintain the same value over that period. The committee **seeks the advice of the Treasurer** on which of these interpretations is correct.

- *Sauce for the goose?*

If the reason for using the 10 year Treasury bond rate is to preserve the value of the surcharge, the committee **seeks the advice of the Treasurer** on the reason for choosing the 10 year Treasury bond rate rather than the indexation factor that is used in clause 9 to maintain the value of the \$70 000 threshold. It seems inappropriate to use two different rates to achieve the same purpose.

General Comment

It seems to the committee that for people not learned in the field of superannuation, the effects of this bill are very difficult to understand, for example, it is hard to understand how different classes of members of superannuation schemes are affected by the legislation.

The committee is concerned with the bill as a whole because of its complexity. Legislation should be transparent and understandable, not only to those who are expert in this field, but to all those it might affect and that is not the case in the present instance. Accordingly, the committee **seeks the advice of the Treasurer** on whether a plainer English version would be feasible.

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

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

Superannuation Contributions Surcharge (Consequential Amendments) Bill 1997

This bill was introduced into the House of Representatives on 13 February 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

Consequent upon the introduction of a superannuation contributions surcharge for high income earners, this bill proposes consequential amendments to the *Income Tax Assessment Act 1936*, the *Retirement Savings Accounts Act 1997*, the *Superannuation Industry (Supervision) Act 1993*, the *Superannuation (Resolution of Complaints) Act 1993* and the *Taxation (Interest on Overpayments and Early Payments) Act 1983*.

The committee has no comment on this bill.

Superannuation Contributions Surcharge Imposition Bill 1997

This bill was introduced into the House of Representatives on 13 February 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to impose the superannuation contributions surcharge and sets the rate of the surcharge.

The committee has no comment on this bill.

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

Taxation Laws Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 13 February 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936*, the *Taxation Laws Amendment Act (No. 1) 1997* and *Income Tax (Consequential Amendments) Act 1997* to rectify defects in the capital gains tax provisions dealing with the carry forward and transfer of net capital losses;
- *Income Tax Assessment Act 1936* to:
 - counter withholding tax avoidance arrangements, address certain specific tax avoidance arrangements and clarify that withholding tax is payable where dividends are paid from capital reserves;
 - remove the ability for employers to elect to use the standard contribution limit in calculating the upper limit of deductions allowable in relation to superannuation contributions they make for the benefit of their employees;
 - extend the operation of the Act which denies an income tax deduction to non-residents for the non-payment of interest withholding tax to residents paying interest to overseas persons;
 - define the terms “interest” for the purposes as having the same meaning as in the IWT provisions of the income tax law; and
 - provide that lease arrangements involving cars whose cost is more than the depreciation cost limit applicable under section 57AF will be treated as sale and loan transactions;
- *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to change the tax treatment in respect of certain dual resident companies;
- *Income Tax Assessment Act 1936* and the *Income Tax (Bearer Debentures) Act 1971* to restrict the Act’s operation to interest paid in Australia on bearer debentures and provide an exemption for bearer debentures issued by an Offshore Banking Unit; and
- *Income Tax Assessment Act 1936* and the *Financial Corporations (Transfer of Assets and Liabilities) Act 1993* to replace the requirement that debentures issued by an Australian company must be widely distributed on overseas capital markets with a public offer test.

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

Retrospectivity item 19 of Schedule 2

Item 19 of Schedule 2 would provide that the amendments proposed by Schedule 2 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.

Retrospective application Part 2 of Schedule 5

Item 15 of Schedule 5 would provide that the amendments proposed by Part 2 of Schedule 5 will apply in respect of a debenture issued on or after 1 January 1996 and therefore prior to Royal Assent. The committee notes, however, that a transitional provision (item 16) quarantines interest paid on such debentures before the commencement of Part 2.

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

Retrospective application Part 3 of Schedule 5

Item 18 in Part 3 of Schedule 5, if enacted, would apply the amendments proposed by Part 5 to interest paid on or after 1 January 1996. The effect of the amendments is to deny to Australian residents an income tax deduction in respect of a payment of interest overseas if those persons have neither deducted nor remitted interest withholding tax to the Australian Taxation Office.

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

The committee notes that the date of 1 January 1996 is the same as the date from which the amendments in Part 2 commence. The relevant interest in Part 2, however, is quarantined until the commencement of these provisions. Neither the explanatory memorandum nor the second reading speech give any reason for requiring the relevant interest in Part 3 to be affected retrospectively from 1 January 1996.

The committee further notes that the amendments give effect to an announcement by the Treasurer in June 1996. As the bill has been introduced more than 6 months after the announcement and as the committee is unaware of any draft bill being published in the interim, the resolution of the Senate of 8 November 1988 may apply. That 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 **seeks the Treasurer's advice** on the reasons for not quarantining these interest payments.

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.

Retrospective application

Schedule 6 - Proposed paragraph 42A-10(1)(d) of Schedule 2E of the *Income Tax Assessment Act 1936*

Proposed paragraph 42A-10(1)(d) of Schedule 2E of the *Income Tax Assessment Act 1936*, if enacted, would provide that the amendments proposed by Schedule 6 would apply to leases of luxury cars 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.

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

Termination Payments Surcharge (Assessment and Collection) Bill 1997

This bill was introduced into the House of Representatives on 13 February 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to establish administrative arrangements for the assessment and collection of a superannuation contribution surcharge applicable to termination payments (“golden handshakes”).

Retrospective application Clause 7

Clause 7, if enacted, would provide that the bill would apply to termination payments made after 20 August 1996 (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.

Termination Payments Surcharge Imposition Bill 1997

This bill was introduced into the House of Representatives on 13 February 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to impose the termination payments surcharge and sets the rate of the surcharge.

The committee has no comment on this bill.

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

Trade Practices Amendment (Petroleum Access Regime) Bill 1997

This bill was introduced into the House of Representatives on 10 February 1997 by Mr Latham as a Private Member's bill.

The bill proposes to provide downstream retail access for services provided by petrol terminals.

The committee has no comment on this bill.

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 3 of 1997

5 March 1997

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

TERMS OF REFERENCE

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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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.

Aged Care Income Testing Bill 1997

This bill was introduced into the House of Representatives on 27 February 1997 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to allow the Departments of Social Security and Veterans' Affairs to commence income testing residents in nursing homes and hostels so that residents can be advised in advance of charges they will be liable for after the introduction of the Aged Care Bill 1997 (not yet introduced).

The committee has no comment on this bill.

AIDC Sale Bill 1997

This bill was introduced into the House of Representatives on 27 February 1997 by the Minister for Veterans' Affairs. [Portfolio responsibility: Finance]

The bill proposes to effect the sale of AIDC Ltd. It also proposes for the winding up of the activities of the Australian Industry Development Corporation, its eventual abolition and the repeal of the Australian Industry Development Corporation Act once the Corporation's post-sale responsibilities are fulfilled.

Commencement by Proclamation Subclause 2(2)

Subclause 2(2) would allow Schedule 2 of this bill to commence on a day to be fixed by Proclamation. Schedule 2 provides for the abolition of the Australian Industry Development Corporation. Subclause 2(2) provides that Schedule 2 will not commence until after the Australian Industry Development Corporation has no assets and no liabilities.

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.

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

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 commencement of Schedule 2 by Proclamation appears to fall within paragraph 6 of the Drafting Instruction as the amendments in Schedule 2 are consequential upon AIDC being sold and being divested of all its assets and liabilities, a process which is inherently indeterminate.

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

Aviation Legislation Amendment Bill (No. 1) 1997

This bill was introduced into the House of Representatives on 26 February 1997 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the following Acts:

- *Air Navigation Act 1920* to:
 - provide flexibility to deal with the increased range of programs of international non-scheduled flights for which approval is sought;
 - merge the approval processes for non-scheduled applications from both Australian and foreign charter operators;
 - remove the existing distinctions drawn between aircraft from contracting and non-contracting States to the Convention on Civil Aviation signed at Chicago; and
 - enable the establishment of a national register of encumbered aircraft to be maintained by Airservices Australia;
- *Airports Act 1996* to:
 - establish new offences dealing with the deliberate causing of harm to the environment at an airport site;
 - provide certain regulation-making powers;
 - require all persons who carry out activities at an airport site to comply with a final environment strategy in force for that airport;
 - require airport-lessee companies to seek public comment prior to submitting minor variations of master plans and major development plans to the Minister for approval;
 - provide that parties, other than the airport-lessee company, be consulted by the Minister before undertaking certain activities;
 - authorise the ACCC to publish accounts and reports provided to it; and
- *Airports (Transitional) Act 1986* to correct a minor typographical error.

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

Regulations insufficiently subject to Parliamentary scrutiny

Items 64 and 66 of Schedule 1

Items 64 and 66 of Schedule 1 would insert a new subsection 3A into sections 132 and 133 of the *Airports Act 1996* respectively. The wording proposed is:

- (3A) Regulations made for the purposes of subsection (1) may make provision for or in relation to a matter by applying, adopting or incorporating (with or without modification) any matter contained in a standard proposed or approved by the Standards Association of Australia, being a standard as in force or existing from time to time.

These items, if enacted, would allow the making of regulations which adopt material from other documents, as in force from time to time. Section 49A of the *Acts Interpretation Act 1901* would ordinarily allow the adoption of material (other than Acts or regulations) only as it exists at the time of the adoption. It would not allow adoption of material as in force from time to time.

One of the reasons for section 49A of the *Acts Interpretation Act 1901* is that, if it does not apply, documents adopted and thereby having the force of law can be amended without Parliament's knowledge or without the opportunity for Parliament to scrutinise, and if so minded, to disallow the variation. A further reason of course is that one of the characteristics of good legislation is certainty and another is the onus on the lawmaker to ensure that those obliged to obey the law have adequate access to its terms.

The committee notes that subsection 132(2) of the *Airports Act 1996* prescribes a penalty of up to 250 penalty units (currently \$25 000) for offences contravening the regulations - regulations which could be changed without either Parliament or those obliged to comply with them being aware of the change.

The committee considers that the reasons for retaining the application of section 49A of the *Acts Interpretation Act 1901* far outweigh the administrative convenience of adopting the documents as in force from time to time. If the responsible rule-maker takes seriously the need to ensure adequate access to the change in the obligation, there seems little to be gained by not formally adopting by regulation the changes in the incorporated documents.

The committee, therefore, **seeks the Minister's advice** on whether there should be reconsideration of the derogation from section 49A of the *Acts Interpretation Act 1901*.

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, and 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.

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

Defence Cooperation Control Amendment Bill 1997

This bill was introduced into the Senate on 24 February 1997 by Senator Woodley as a Private Senator's bill.

The bill proposes to prohibit the transfer of military equipment to or defence cooperation between the Australian Defence Forces and the armed forces of any State which uses its armed forces to suppress basic human rights.

The committee has no comment on this bill.

Export Finance and Insurance Corporation Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 February 1997 by the Minister for Industry, Science and Tourism. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to transfer Development Import Finance Facility loan liabilities from the Export Finance and Insurance Corporation (EFIC) to the Commonwealth. Consequently, EFIC will make a once only payment of \$40 million to the Commonwealth from its reserves.

The committee has no comment on this bill.

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 Bill 1997

This bill was introduced into the House of Representatives on 27 February 1997 by the Minister for Trade. [Portfolio responsibility: Trade]

The bill proposes to create a revised Export Market Development Grants Act which simplifies the structure and readability of the current Act. It focuses on assistance to small to medium enterprise and places an upper limit on the cost of the scheme.

Retrospective application

Paragraph 7(1)(g) and clause 17

Paragraph 7(1)(g) of this bill provides:

- (1) A person referred to in subsection 6(1) (other than an approved joint venture or approved trading house) is eligible for a grant in respect of a grant year if the following conditions are satisfied:

...

- (g) there are no disqualifying convictions outstanding against the person under section 17 when the person applies for the grant

Clauses 16 and 17 provide:

16 Disqualifying convictions

- (1) For the purposes of this Act, a *disqualifying conviction* is:
 - (a) in relation to an individual—a conviction of the individual for a relevant offence; or
 - (b) in relation to a body corporate—a conviction of the body corporate or of an associate of the body corporate for a relevant offence; or
 - (c) in relation to a partnership or an approved joint venture—a conviction of an associate of the partnership or of the joint venture for a relevant offence.

Note: For *associate* see section 107.

- (2) In this section:
relevant offence means:

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

- (a) an offence that under subsection 229(3) of the Corporations Law disqualifies a person from managing a corporation; or
- (b) an offence against section 29A, 29B, 29C or 29D of the *Crimes Act 1914* that relates to an application for a grant; or
- (c) an offence against section 39 of the repealed Act; or
- (d) an offence under:
 - (i) section 5, 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*; or
 - (ii) a provision of a law of a State or Territory that corresponds to any of those provisions;that relates to an offence referred to in paragraph (a), (b) or (c).

Note: For *repealed Act* see section 107.

17 When is a disqualifying conviction outstanding?

A disqualifying conviction in respect of a person remains ***outstanding*** against the person for the period starting on the day on which the conviction was recorded and ending:

- (a) if the conviction was for a term of imprisonment—5 years after the individual convicted was released from prison; or
- (b) in any other case—5 years after the day on which the conviction was recorded.

These provisions, if enacted, would set out one of the conditions under which a person would be ineligible for a grant in a grant year. The person would be ineligible where there is an outstanding disqualifying conviction against the person. Where the person has been convicted of a relevant offence, the disqualifying conviction is outstanding during a time period of five years from the time of the conviction or, where a term of imprisonment was imposed, five years from the person's release.

The committee is not concerned that certain offences attract ineligibility for a period of time. The committee is concerned, however, with attaching a legal effect to past events which occurred before the commencement of this legislation. Retrospective application in this way raises the issue whether there may be undue trespass on personal rights and liberties.

Further, the committee notes the arbitrary nature of choosing five years as the period as well as the apparently uneven treatment of a natural person as against a body

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corporate. Both a body corporate and a natural person may be ineligible by reason of an outstanding disqualifying conviction. The periods of ineligibility, however, may differ. Because a body corporate cannot be jailed, the period from conviction will not be more than five years unless an associate of the body corporate is also convicted for a term of imprisonment. A natural person, subject to imprisonment, may have a longer period of ineligibility.

Accordingly, the committee **seeks the Minister's advice** on these issues.

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

Retrospective application Clause 78

Clause 78 of this bill, if enacted, provides that an individual, convicted of certain offences, is disqualified from preparing applications for a grant for a disqualification period of five years from the time of the conviction or, where a term of imprisonment was imposed, five years from the individual's release.

As with the outstanding disqualifying convictions dealt with above, the committee is concerned, not with the disqualification itself, but with the retrospective application of the provision to convictions occurring before the commencement of this legislation. Accordingly 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.

Vicarious liability and reversal of the onus of proof Subclauses 102(4) and (5)

Subclauses 102(4) and (5) provide:

(4) If it is necessary to establish the state of mind of an individual in relation to particular conduct, it is enough to show:

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

(a) that the conduct was engaged in by an employee or agent of the individual within the scope of his or her actual or apparent authority; and

(b) that the employee or agent had the state of mind.

(5) If

(a) conduct is engaged in on behalf of an individual by an employee or agent of the individual; and

(b) the conduct is within the scope of his or her actual or apparent authority;

the conduct is taken, for the purposes of a prosecution for an offence referred to in subsection (1), to have been engaged in by the individual unless the individual establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

These subclauses, if enacted, would impose vicarious liability on a person for the criminal acts of his or her employee or agent. Subclause (5) 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 subclauses (2) and (3) which relate to the prosecution of a body corporate. 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

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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 subclauses 102(4) and (5) will impose vicarious criminal liability does not disclose consequences which would equate in seriousness with an oil spill on the Great Barrier Reef. Accordingly, the committee **seeks the Minister's advice** whether offences having less serious consequences might be excluded from the ambit of this provision.

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.

Export Market Development Grants (Repeal and Consequential Provisions) Bill 1997

This bill was introduced into the House of Representatives on 27 February 1997 by the Minister for Trade [Portfolio responsibility: Trade]

The bill proposes to repeal the *Export Market Development Grants Act 1974* and to deal with consequential matters arising from the repeal of that Act and the enactment of the *Export Market Development Grants Act 1997*.

The committee has no comment on this bill.

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 4 of 1997

19 March 1997

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

TERMS OF REFERENCE

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
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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 Animal Health Council (Live-stock Industries) Funding Amendment Bill 1997

This bill was introduced into the House of Representatives on 5 March 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the funds raised through the Dairy Produce Levy (No. 1) Amendment Bill 1997 to be paid to the Australian Animal Health Council Ltd.

The committee has no comment on this bill.

Dairy Produce Levy (No. 1) Amendment Bill 1997

This bill was introduced into the House of Representatives on 5 March 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to impose a levy on the milk fat and protein content of manufacturing and market milk as determined on-farm to fund the dairy industry's contribution to the Australian Animal Health Council Ltd. The bill also proposes to double the maximum milk fat and protein rates of research levy.

The committee has no comment on this bill.

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

Excise Tariff Amendment Bill (No. 1) 1997

This bill was introduced into the House of Representatives on 5 March 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Excise Tariff Act 1921* to ensure the continuing excisability of all beverages which contain distilled alcohol, including spirits, regardless of their alcohol content.

Retrospectivity

Subclause 2(2) - Items 1 and 2 of Schedule 1

Subclause 2(2) of this bill, if enacted, would provide that the amendments proposed by items 1 and 2 of Schedule 1 would come into effect on 3 February 1996. These items would repeal the definition of 'spirituous beverage' in the Schedule to the *Excise Tariff Act 1921* and repeal and substitute item 2 of that Schedule which deals with the excise to be paid on beverages containing distilled alcohol.

To change a law retrospectively with adverse effect may be considered to trespass unduly on personal rights and liberties. The rule of law means that a person's actions are subject to the rights and the obligations of the law as it stands at the time of those actions.

The meaning of a law is, not what a departmental official intends the law to mean or indeed what the individual affected by the law thinks that the law means, but what Parliament has passed as interpreted by the courts.

Background

The amendments in this bill are proposed because of an interpretation by the Administrative Appeals Tribunal (AAT), pursuant to the role given it in the *Excise Act 1901* in determining, on 7 June 1996, an application for review of a decision. The AAT interpreted subitem 2(H) of the Schedule to the *Excise Tariff Act 1921* differently from the meaning which the Australian Customs Service (ACS) attributed to it when the ACS decided that a product known as "Subzero Alcoholic Soda" was excisable under that subitem.

The ACS is appealing the AAT's decision in the Federal Court.

The *Excise Act 1901* provides under section 154 that in the event of a dispute over duty, a person may deposit the amount demanded and, if, by action commenced

within six months of the deposit, it is determined that the proper duty is less than the amount deposited, the excess must be refunded. Under section 162C(2) of the Act, where a deposit under section 154 has been made, the AAT may be asked to review the matter and determine the proper duty with similar effect as to refund.

It appears from the explanatory memorandum that producers of other low alcohol beverages have been exercising their rights under sections 154 and 162C since at least 7 June 1996.

Effect of the amendments

The effect of the proposed amendments will nullify the exercise of these rights by retrospectively changing the law from 3 February 1996.

The committee is concerned

- at the misapprehension, exhibited in the explanatory memorandum, that the meaning of the law was somehow changed by the AAT decision: the law was not changed; the meaning that the ACS had attributed to that subitem was found to be incorrect;
- at the view, exhibited in the explanatory memorandum, that moneys which excise payers were not by law required to pay should not be refunded by the Government.

The committee, of course, has no problem with changing the *Excise Tariff Act 1921* with respect to this subitem, whether it be done by an Excise Tariff alteration proposed in Parliament, by gazettal under section 160B of the *Excise Act 1901* by gazettal or by formal amendment commencing with Royal Assent. The committee is concerned, however, that retrospectively changing the law will override the rights of people to have the law apply to their actions as it stands at the time of those actions.

In these circumstances, 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.

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

Superannuation Contributions Surcharge (Application to the Commonwealth) Bill 1997

This bill was introduced into the House of Representatives on 6 March 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to provide for the notional application of the superannuation contributions surcharge to all non-contributory superannuation schemes operated by the Commonwealth (essentially the judiciary and other similar Commonwealth superannuation arrangements).

Inappropriate delegation of legislative power Clause 6

Clause 6 of this bill provides:

Directions by Minister for Finance

- (1) The Minister for Finance may give any written directions that are necessary or convenient to be given for discharging the trustee's liability to pay the surcharge that arises because of the operation of section 5 and, in particular, may give directions in relation to the transfer of money within the Public Account.
- (2) Directions under subsection (1) have effect, and are to be complied with, despite any other law of the Commonwealth.

Clause 6, if enacted, would empower the Minister for Finance to give written directions to the trustees of certain non-contributory Commonwealth superannuation schemes. These directions have effect and must be complied with despite any other law of the Commonwealth.

It appears that clause 6 may delegate the legislative power of the Parliament to the Minister for Finance. The committee is concerned that this may be an inappropriate delegation of power because:

- the directions may override any other law of the Commonwealth and therefore is similar to a 'Henry VIII clause' because power is given to direct certain people not to comply with laws passed by Parliament; and
- the directions are not subject to any Parliamentary scrutiny under the current law, although they may be subject to the provisions of the Legislative Instruments Bill 1996, when it becomes law.

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

The committee **seeks the advice of the Treasurer** on this issue.

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 and 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.

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

Superannuation Contributions Surcharge (Application to the Commonwealth—Reduction of Benefits) Bill 1997

This bill was introduced into the House of Representatives on 6 March 1997 by the Parliamentary Secretary (Cabinet) to the Prime. [Portfolio responsibility: Treasury]

The bill proposes to allow a trustee of a Commonwealth unfunded benefits superannuation scheme to reduce any benefits accruing to or for a member in order to satisfy the trustee's surcharge liability.

Retrospective application Subclause 4(1)

Subclause 4(1) of this bill, if enacted, would provide that the trustee may reduce benefits accruing to or for the member of the superannuation scheme after 20 August 1996, that is prior to Royal Assent for this measure. The committee notes that the retrospective application is to date from the announcement of this proposal in the Budget.

Although it is customary for budget measures to be made retrospective to the date of the Budget, the committee continues to give consideration to each instance to ensure that retrospectivity is justified by such reasons as the need to prevent evasion of revenue. The committee is concerned where the bare announcement of a proposal is treated as though Parliament has passed it as a law, and where the proposed law is put into operation sometimes before the bill has been introduced into Parliament, thus treating a proposal as law when, under the Constitution, it is not so.

This issue, however, does not arise in respect of this bill.

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

Taxation Laws Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 13 February 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936*, the *Taxation Laws Amendment Act (No. 1) 1997* and *Income Tax (Consequential Amendments) Act 1997* to rectify defects in the capital gains tax provisions dealing with the carry forward and transfer of net capital losses;
- *Income Tax Assessment Act 1936* to:
 - counter withholding tax avoidance arrangements, address certain specific tax avoidance arrangements and clarify that withholding tax is payable where dividends are paid from capital reserves;
 - remove the ability for employers to elect to use the standard contribution limit in calculating the upper limit of deductions allowable in relation to superannuation contributions they make for the benefit of their employees;
 - extend the operation of the Act which denies an income tax deduction to non-residents for the non-payment of interest withholding tax to residents paying interest to overseas persons;
 - define the terms “interest” for the purposes as having the same meaning as in the IWT provisions of the income tax law; and
 - provide that lease arrangements involving cars whose cost is more than the depreciation cost limit applicable under section 57AF will be treated as sale and loan transactions;
- *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to change the tax treatment in respect of certain dual resident companies;
- *Income Tax Assessment Act 1936* and the *Income Tax (Bearer Debentures) Act 1971* to restrict the Act’s operation to interest paid in Australia on bearer debentures and provide an exemption for bearer debentures issued by an Offshore Banking Unit; and
- *Income Tax Assessment Act 1936* and the *Financial Corporations (Transfer of Assets and Liabilities) Act 1993* to replace the requirement that debentures issued by an Australian company must be widely distributed on overseas capital markets with a public offer test.

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

The committee dealt with this bill in Alert Digest No. 2 of 1997 in which, inter alia, it made the following comment:

**Retrospectivity
item 19 of Schedule 2**

Item 19 of Schedule 2 would provide that the amendments proposed by Schedule 2 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.

As the committee has indicated above, in relation to retrospectivity, budget measures are something of a special case. The committee, nevertheless, continues to examine each instance to ensure that retrospectivity is justified by such reasons as the need to prevent evasion of revenue. The committee is concerned at the bare announcement of a proposal being treated as though Parliament has passed it as a law, at a proposed law being put into operation sometimes before the bill has been introduced into Parliament, thus treating a proposal as law when, under the Constitution, it is not so.

Several important consequences of item 19 of Schedule 2 have come to the attention of the committee. Item 19 provides that the amendments proposed by Schedule 2 would apply to payments made after 7.30 pm EST on 20 August 1996.

**Definition of interest
items 1 and 3 of Schedule 2**

One of the matters affected by item 19 is the change to the definition of interest in section 128A of the *Income Tax Assessment Act 1936*. Although a change to the definition was foreshadowed in the budget papers, the extent of that change was not manifest.

The consequences of this underline the inherent unfairness of legislating in this fashion, which is akin to legislation by press release.

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

As a general principle the committee disapproves of legislation by press release both because, if enacted, it will have retrospective effect and because its provisions are treated as the law in the meantime. The committee is concerned when the Executive carries out its administration as if legislation had been passed whereas its enactment is yet to take place. Publishing an intention to process a bill through Parliament does not convert its provisions into law. Only Parliament can do that.

In its 1986-87 Annual Report the Committee stated:

the practice of 'legislation by press release' carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with laws made by the Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement.

The committee went on to say:

Moreover, quite apart from the debilitating effect of the practice on the Parliament, it leaves the law in a state of uncertainty. Persons such as lawyers and accountants who must advise their clients on the law are compelled to study the terms of the press release in an attempt to ascertain what the law is. As the committee has noted on two occasions, one press release may be modified by subsequent press releases before the Minister's announcement is translated into law. The legislation when introduced may differ in significant details from the terms of the announcement. The Government may be unable to command a majority in the Senate to pass the legislation giving effect to the announcement or it may lose office before it has introduced the legislation, leaving the new Government to decide whether to proceed with the proposed law or change.

With respect to the announcement of the change to the definition of interest in section 128A, Budget Paper No. 1 at 4-14 states that "Other amendments to the withholding tax provisions will further assist in preventing abuse. The definition of interest will be amended to address arrangements which attempt to convert an interest income stream into a form which it is argued is not 'interest' or 'in the nature of interest'."

The actual form in which the change to the definition of interest has been presented in the bill has apparently caught the financial industry by surprise. Roger Hogan writing in the *Australian Financial Review* of March 3, 1997 says :

Industry participants believe that a surprise government amendment to tax reform legislation ... could make the 10 per cent tax payable on a range of products now exempt. ... Mr Bryant (executive director of the Corporate Tax Association) said

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the expanded definition appeared likely to capture forward foreign exchange agreements...payments on cross currency swaps might be affected. ... Industry professionals said they were dismayed at the ATO's failure to consult them about the amendment. The ATO consulted widely ... over proposed changes to Section 128F of the Act which contains the main legislation dealing with exemptions to the tax. However, the financial industry representatives said there was no consultation over the proposed change to 128A. ... "What went through Parliament was different from what we'd seen in the consultative process."

The committee wishes to make it quite clear that it is not concerned with the change to the definition and whether or not it ought to apply to certain financial products. The committee draws attention to this incident because it highlights the dangers of retrospectively legislating in this fashion. The committee continues to acknowledge that in some circumstances the protection of the revenue and the need to preclude evasion requires some retrospectivity but the need not to trespass unduly on personal rights and liberties requires accurate announcement of the details of proposed retrospective legislation which will adversely impact on people. The committee notes that in this instance the adverse impact is heightened by the operation of the withholding tax provisions in that the tax is withheld when the interest payment is made.

The committee is of the view that the terms of the announcement in the Budget and the subsequent press release were not sufficiently clear to enable those affected to comply with the proposed legislation from the time it was to take effect. Further, they have missed the opportunity to deduct from interest payments made since Budget night the amounts which will become payable as soon as the legislation receives Royal Assent.

It also appears from Mr Hogan's article that the implications identified in the article may not have been intended.

The committee **seeks the Treasurer's advice** on these matters as the retrospectivity, coupled with the unclear announcement of the proposed law, may be considered to trespass unduly on personal rights and liberties.

Retrospective application

item 16 - the application of Part IVA

The committee has received a letter dated 12 March 1997 from the Taxation Manager of Chartered Accountants in Australia, extracts from the letter and attachment are set out below:

We refer to the review which your committee recently conducted of the retrospective application of a number of provisions contained in the above bill.

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

We are unsure whether your committee is aware of the retrospective application of certain amendments made in the above Bill in relation to withholding tax avoidance schemes. Details of these amendments and the Institute's concerns in relation to their retrospective nature are shown on the attachment to this letter.

We would request that, if possible, your committee consider and/or report on these retrospective amendments in the light of your Committee's charter.

Attachment

**Withholding Tax Avoidance
Amendments to Part IVA**

Taxation Laws Amendment Bill (No. 2) 1997 amends Part IVA in relation to so-called 'withholding tax avoidance schemes'. The amendments are expressed to apply to all **payments** made after 7.30 pm EST on 20 August 1996.

By expressing the application date in this way, the amendments will have **retrospective effect** in relation to any payment of interest made **after** 20 August 1996 pursuant to contractual arrangements entered into **before** this date. This is contrary to the way in which Part IVA has previously operated, in that Part IVA has only applied to schemes entered into (or commenced to be carried out) **after** the date of commencement, namely, 27 May 1981.

Thus, after the proposed amendments, Part IVA will apply to interest payments made pursuant to arrangements entered into before 20 August 1996, being arrangements which were quite legitimate at the time that they were entered into and which, at that time, did not give rise to any liability to withholding tax. Further, notwithstanding the amendments, such payments will continue to give rise to **no** substantive liability to withholding tax under Division 11A of the *Income Tax Assessment Act*.

It follows that the only liability which can arise in relation to such payments is when the Commissioner makes a determination under Part IVA. Short of terminating pre-existing commercial arrangements (a course of action which may not be open to all taxpayers), there is no way for an affected taxpayer to make a 'voluntary' payment of withholding tax to avoid the application of Part IVA. Not only will taxpayers be required to pay tax on arrangements which previously gave rise to no tax liability but, in addition, substantial penalties will be incurred as a result of the Commissioner's application of Part IVA.

The retrospective imposition of both tax and penalties to an arrangement which previously gave rise to no liability should be a matter of great concern. There can be no justification, in this case, for a departure from established conventions which reject retrospective legislation.

In conclusion, to avoid the consequences of retrospectivity, the amendments to Part IVA should apply only to payments made pursuant to schemes entered into or carried out after 7.30 pm EST on 20 August 1996.

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

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

**Retrospective application
items 6 and 7 - implications for royalties already being paid under
contracts**

A further consequence of item 19 of schedule 2 has been brought to the attention of the committee. Item 19 provides that the amendments proposed by Schedule 2 would apply to payments made after 7.30 pm EST on 20 August 1996.

Items 6 and 7 of Schedule 2 bring the payments of certain royalties made after that time within the ambit of the withholding tax provisions.

As the committee understands the effect of the provisions, withholding tax will become payable for the first time on royalties paid by an Australian resident to the foreign branch of an Australian resident.

The committee understands that the withholding tax on royalties under 128B(2B) was imposed to change the time of receipt of the payment of the tax already payable on royalties received by non-residents. Thus, before the 1993-94 year of income, royalties paid to non-residents were liable for tax but were paid after an assessment consequent upon the lodgement of a tax return after the end of the relevant financial year. The imposition of withholding tax on royalties paid to non-residents merely advanced the time at which the liability for the tax was to be met.

The committee understands further that when similar withholding tax was introduced on interest under section 128B(2A), its effect on Australian businesses was mitigated by the statutory exemptions from withholding tax provided in sections 128F and 128G. The committee understands that the proposed amendments imposing withholding tax on royalties will also have an effect on Australian businesses. There are, however, no similar statutory exemptions to protect them because contracts entered into before 20 August 1996 requiring royalties to be paid will need to be honoured and payments made after 20 August 1996 will be subject to withholding tax.

The committee further understands from Budget Paper No. 1 at page 4-14 that the imposition of withholding tax on these royalties does "not signal any change in the Government's policy on withholding taxes but are intended to give effect to existing policy by addressing tax avoidance. The committee finds it difficult to understand the claim of tax avoidance to justify extending the withholding tax to royalties

derived by a resident if subsection 128B(2B) clearly targets only non-residents in imposing the withholding tax on their royalties.

As the payments of royalties since Budget night are made subject to withholding tax, the measure is retrospective in itself. It also has retrospective application in that it affects contracts entered into before the Budget and not just those which have commenced since Budget night. Both these adverse effects may be considered to trespass unduly on personal rights and liberties.

Accordingly, the committee **seeks the Treasurer's advice** on this issue.

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.

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 5 of 1997

26 March 1997

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

TERMS OF REFERENCE

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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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.

Broadcasting Services Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 19 March 1997 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to amend the *Broadcasting Services Act 1992* and the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* to:

- re-locate to the *Broadcasting Services Act 1992* provisions relating to the administration of the annual licence fees in the former *Broadcasting Act 1942*;
- provide that newspapers whose readers within a commercial radio licence area represent only a small proportion of the total population within the licence area are not entered in the Associated Newspaper Register under section 59 of the *Broadcasting Services Act* as being associated with the licence area of that licence; and
- make consequential provisions enabling appeals on the merits to the Administrative Appeals Tribunal in respect of relevant decisions relating to the administration of licence fees and entries in the Associated Newspaper Register.

The committee has no comment on this bill.

Commonwealth Services Delivery Agency (Consequential Amendments) Bill 1997

This bill was introduced into the Senate on 19 March 1997 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Social Security]

Consequent upon the Commonwealth Services Delivery Agency Bill 1996, this bill proposes to amend various Acts to reflect that certain functions of the Secretary of the Department of Social Security and the Department may be carried out by the Chief Executive Officer or the Agency.

The committee has no comment on this bill.

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

Education Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 20 March 1997 by the Parliamentary Secretary to the Minister for Employment, Education, Training and Youth Affairs. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to amend the following Acts:

- *University of Canberra Act 1989*, the *Australian Capital Territory (Self-Government) Act 1988* and the *Remuneration Tribunal Act 1973* to effect the transfer of responsibility for the University of Canberra from the Commonwealth to the Australian Capital Territory; and the
- *Maritime College Act 1978* to provide the Council of Australian Maritime College with the power to make statutes for, or in relation to, the regulation or control of traffic or parking.

The committee has no comment on this bill.

Radio Licence Fees Amendment Bill 1997

This bill was introduced into the House of Representatives on 19 March 1997 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to amend the *Radio Licence Fees Act 1964* to:

- make commercial radio broadcasting licences allocated under the *Broadcasting Services Act 1992* subject to the payment of annual licence fees based on gross earnings;
- repeal redundant provisions which impose access fees and licence fees for conversions from the AM to the FM band of the radiofrequency spectrum under the National Metropolitan Radio Plan; and
- make minor and technical amendments.

Retrospectivity Subclause 2(2)

By virtue of subclause 2(2) Item 4 of Schedule 1 is to be taken as having commenced on 5 October 1992.

The purpose of the retrospectivity is to correct what is clearly a drafting error by which the definition of licence referred to paragraph 5(1)(b) instead of 5(1)(a). The effect of this correction will be to ensure that the licence fees already collected will have been validly collected.

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

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

Social Security and Veterans' Affairs Legislation Amendment (Male Total Average Weekly Earnings Benchmark) Bill 1997

This bill was introduced into the House of Representatives on 19 March 1997 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to provide that the maximum basic rate of the single adult social security pension will not fall below a rate equal to 25 per cent of the annualised original, all males, total average weekly earnings figure. The bill also provides for the same amendment to be made to service pensions and income support supplements paid under the *Veterans' Entitlements Act 1986*.

The committee has no comment on this bill.

Social Security Legislation Amendment (Work for the Dole) Bill 1997

This bill was introduced into the House of Representatives on 19 March 1997 by the Minister for Schools, Vocational Education and Training. [Portfolio responsibility: Social Security]

The bill proposes to amend the *Social Security Act 1991* and the *Data-matching Program (Assistance and Tax) Act 1990* to provide the framework to establish approved programs of work for persons receiving unemployment payments.

The committee has no comment on this bill.

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

Television Licence Fees Amendment Bill 1997

This bill was introduced into the House of Representatives on 19 March 1997 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to amend the *Television Licence Fees Act* to:

- make commercial television broadcasting licences allocated under the *Broadcasting Services Act 1992* subject to the payment of annual licence fees based on gross earnings; and
- make minor and technical amendments.

The committee has no comment on this bill.

Wine Export Charge Bill 1997

This bill was introduced into the House of Representatives on 19 March 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to impose a charge on exports of Australian wine. The charge will be based on the value of wine exported and will be paid by wine exporters. The funds raised by the charge will be paid to the Australian Wine and Brandy Corporation through the Consolidated Revenue Fund.

Setting a charge by regulation Subclause 7(1)

Subclause 7(1) of this bill, if enacted, would provide that the rate of the charge imposed by this bill is to be prescribed by regulation.

The committee has consistently drawn attention to legislation which provides for the level of a charge to be set by regulation. This creates a risk that the charge may in fact become a tax. It is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so.

Where the level of a charge needs to be changed frequently and expeditiously the question arises as to whether this can best be done by regulation rather than by primary legislation. If a compelling case can be made out for the level to be set by subordinate legislation the committee seeks to have the enabling Act prescribe a maximum figure above which the relevant regulations cannot fix the charge or alternatively a formula by which such an amount can be calculated. The vice to be avoided is taxation by non-primary legislation.

In this case, subclause 7(2) provides a formula by which an upper limit can be calculated. The upper limit must not exceed 0.5% of the free on board sales value of the wine. However, the explanatory memorandum does not set out the reasons for setting the charge by regulation rather than by primary legislation. The committee **seeks the advice of the Minister** on the reason for choosing this mechanism.

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.

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

Wine Export Charge (Consequential Amendments) Bill 1997

This bill was introduced into the House of Representatives on 19 March 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the following Acts:

- *Australian Wine and Brandy Corporation Act 1980* to:
 - ensure payers of the wine export charge are included in, and entitled to vote, at the Corporation's Annual General Meeting;
 - provide for the appropriation and payment to the Corporation from the Consolidated Revenue Fund of an amount equal to levy collections under the *Wine Grapes Levy Act 1979*, in addition to any funds that may arise from penalties for non-payment of levies under the Collection Act;
 - require the Corporation to refund to the Commonwealth an amount equal to any refund paid by the Commonwealth in respect of over-payment of levy under the *Wine Grapes Levy Act 1979*, where the over-payment arises because of exemptions specified under regulation made under that Act;
 - allow the Corporation to help, and make administrative changes, in the calculation and collection of levies and the export charge by providing information obtained through its Label Integrity Program; and
- *Primary Industries Levies and Charges Collection Act 1991* to add the proposed *Wine Export Charge Act 1997* to the list of Acts that impose a charge. Consequently, the collection procedures specified in the Collection Act will apply to the wine export charge.

The committee has no comment on this bill.

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 6 of 1997

7 May 1997

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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Senator W Crane (Deputy Chairman)
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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.

Aged Care Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to align classification and funding arrangements for nursing homes and hostels. A number of changes are also proposed to complement this alignment, including:

- changes to the financial accountability requirements for nursing homes;
- income testing of all people who receive residential care;
- payment by all residents of a basic daily resident fee, based on 85% of the pension;
- accommodation bonds being extended to nursing homes;
- providers being unable to charge accommodation bonds until set standards for building quality and care, to be certified and accredited by the Aged Care Standards Agency, are satisfied;
- a minimum number of places for concessional residents being provided for in each region, with providers receiving a Government subsidy for these residents;
- providers being required to meet responsibilities in relation to user rights, quality of care and accountability requirements imposed in relation to Commonwealth funding and a range of sanctions for providers who do not meet these responsibilities;
- funding by the Commonwealth for flexible care services;
- maintaining funding for unlimited hospital leave for nursing home and hostel residents and providing for 52 days of paid social leave each year;
- maintaining the Exempt Homes Scheme; and
- administrative arrangements, including the ability of residents seeking review of certain decisions by the Administrative Appeals Tribunal.

The committee has no comment on this bill.

Constitutional Convention (Election) Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Prime Minister. [Portfolio responsibility: Administrative Services]

The bill proposes to establish a process for the election of half (76) the delegates to the proposed Constitutional Convention. The Convention is scheduled to meet in December 1997.

Reversal of the onus of proof Subsections 139(1), (2) and (3)

Subsections 139(1), (2) and (3) of this bill, if enacted, would reverse the onus of proof in prosecutions for the offences established by those subsections.

These subsections provide:

Protection of the official mark

- (1) A person must not, without lawful authority, proof whereof is to lie upon the person:
 - (a) make any official mark on or in any paper; or
 - (b) be in possession of any paper bearing any official mark; or
 - (c) make use of or be in possession of any instrument capable of making on or in any paper an official mark.

Penalty: 10 penalty units.
- (2) A person who, without lawful authority, proof whereof is to lie upon the person, makes on or in any ballot-paper, or on or in any paper purporting to be a ballot-paper, an official mark, is to be taken to have a forged ballot-paper.
- (3) All paper bearing an official mark, and all instruments capable of making on or in paper an official mark, made, used, or in the possession of any person without lawful authority (proof whereof is to lie upon the person) are forfeited to the Commonwealth, and may without warrant, be seized by a member of the Australian Federal

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Police or a member of the police force of a State or Territory and destroyed or dealt with as prescribed.

The committee acknowledges that the reversal of the onus of proof in these circumstances is also contained in section 346 of the *Commonwealth Electoral Act 1918*. That section, however, pre-existed this committee so that the committee has not previously had an opportunity to comment upon it. The explanatory memorandum does not contain any justification of the need to reverse the onus of proof in these circumstances. The committee, therefore, **seeks the Minister's advice** on the reasons for doing so.

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.

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

Crimes Amendment (Forensic Procedures) Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Crimes Act 1914* to introduce a new regime for carrying out forensic procedures during the investigation of Commonwealth offences, and for the storage, use and destruction of material derived from those procedures.

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.

The bill raises a number of issues on which the committee intends to seek further information.

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

Excise Tariff Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

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

- require the calculation and payment of excise duty on crude petroleum oil to be paid on a monthly basis;
- remove liquid petroleum gas from the application of the Act; and
- decrease the excise duty on aviation gasoline (avgas) and aviation kerosene (avtur) by 0.75 cents per litre.

Retrospectivity

Subclause 2(2) - Items 64 and 65

Subclause 2(2) of this bill, if enacted, would provide for the amendments proposed in items 64 and 65 to take effect retrospectively from 1 September 1996. The amendments would provide for a decrease in the rate of excise on aviation spirits and therefore are beneficial to persons other than the Commonwealth.

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

Health Insurance Amendment Bill (No. 1) 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the *Health Insurance Act 1973* in relation to the Professional Services Review Scheme. Particularly, it proposes to:

- ensure that there is no doubt that judicial power is not being exercised by the executive under the Scheme;
- bring the class of practitioners in Parts VAA and VA of the Act into line with definitions contained elsewhere in the Act;
- clarify the test under which a Committee reports on the conduct of a practitioner;
- provide a clearer approach to calculating the amounts of Medicare benefits to be repaid; and
- repeal sampling provisions.

Abrogation of the right to silence

Item 9 of Schedule 1 - proposed subsection 105A(6)

Proposed section 105A deals with the production of documents prior to a hearing under the Professional Service Review Scheme. The person under review would be excused from producing a document on the grounds that it may incriminate him or her.

Proposed subsection 105A(6), however, would not excuse a person, other than the person under review, from being required to produce a document under subsection (1) on the ground that the production of the document may incriminate him or her.

Proposed subsection 105A(7), however, would make inadmissible in evidence against the person, in any criminal proceedings or proceedings for recovery of a pecuniary penalty, the document and any information obtained as a direct or indirect result of producing the document. This inadmissibility is subject to an exception with respect to a proceeding for an offence under subsection (5). That subsection makes it an offence knowingly to produce a document that contains a statement that

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is false or misleading in a material particular, without identifying the false or misleading material. The committee has no concern with such an exception.

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

Income Tax Rates Amendment Bill (No. 1) 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Rates Act 1986*, in relation to family tax assistance, to:

- ensure that family tax assistance is properly allowed to taxpayers with a special income component (such as a capital gain) and a liability to pay complementary tax;
- prevent entitlement to family tax assistance from causing an increase in the rate of penal tax on uncontrolled partnership income; and
- adjust the complementary tax provisions in relation to family tax assistance to take account of taxpayers with reduced tax-free thresholds.

The committee has no comment on this bill.

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

Industrial Chemicals (Notification and Assessment) Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Industrial Relations. [Portfolio responsibility: Industrial Relations]

The bill proposes to amend the *Industrial Chemicals (Notification and Assessment) Act 1989* to:

- require all persons manufacturing or importing industrial chemicals above a certain threshold value to register (with the Register of Industrial Chemical Introducers) and pay a registration charge;
- introduce a new permit to allow applicants for an assessment certificate to introduce a chemical before assessment is complete, provided the chemical is non-hazardous and certain other conditions are met;
- eliminate the need for notification and assessment for new chemicals introduced in quantities of less than 10 kilograms per year when the chemical does not pose an unreasonable risk to occupational health and safety, public health or the environment and subject to certain safeguards for cosmetic ingredients;
- allow subsequent introducers of a new industrial chemical to obtain an extension of the original assessment certificate for that chemical provided certain information requirements are met and the holder of the original certificate approves the extension;
- introduce a new framework for the assessment of specific risks posed by particular chemicals and allowing for a group of chemicals to be assessed together;
- revise the period for which a chemical can remain in the confidential section of the Australian Inventory of Chemical Substances and to introduce a new text for inclusion in the Inventory;
- enable the Director to formally request information from introducers of trade name products, and if that request is not provided within 12 months, to remove the trade name product from the Inventory;
- include an additional exemption from notification and assessment for site-limited research and development chemicals;
- allow for the approval of assessment reports from foreign schemes;

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- update the definition section of the Act; and
- to expressly provide for the delegation of certain functions and duties of the Director.

The committee has no comment on this bill.

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

Industrial Chemicals (Registration Charge—Customs) Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Industrial Relations. [Portfolio responsibility: Industrial Relations]

Complementary to the Industrial Chemicals (Notification and Assessment) Amendment Bill 1997, the bill proposes to impose a duty of customs on the importation into Australia of certain industrial chemicals.

The committee has no comment on this bill.

Industrial Chemicals (Registration Charge—Excise) Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Industrial Relations. [Portfolio responsibility: Industrial Relations]

Complementary to the Industrial Chemicals (Notification and Assessment) Amendment Bill 1997, the bill proposes to impose a duty of excise on certain industrial chemicals manufactured in Australia.

The committee has no comment on this bill.

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

Industrial Chemicals (Registration Charge—General) Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Industrial Relations. [Portfolio responsibility: Industrial Relations]

Complementary to the Industrial Chemicals (Notification and Assessment) Amendment Bill 1997, the bill proposes to impose a charge on the manufacture of or importation into Australia of certain industrial chemicals to the extent that the charge is not a duty of customs or excise.

The committee has no comment on this bill.

Industry, Science and Tourism Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Industry, Science and Tourism. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the following Acts:

- *Australian Science and Technology Council Act 1978* to:
 - add to the Council's functions and to reflect the addition of the term "Engineering" to the name of the Council; and
 - enable appointments to the Council to be made by the responsible Minister, with the approval of the Prime Minister, rather than the Governor-General;
- *Australian Tourist Commission Act 1987* to:
 - remove the requirement that members of the Board of the Commission cease to hold office at the age of 65; and
 - remove limitations preventing employment of staff on terms and conditions more favourable than those of the Managing Director;
- *National Measurement Act 1960* to require the Commonwealth Science and Industrial Research Organisation (CSIRO) to maintain Co-ordinated Universal Time as determined by the International Bureau of Weights and Measures;
- *Science and Industry Research Act 1949* to reflect the new framework developed by the Review of CSIRO's Management Structure and Performance by removing all references to "Institutes";
- *Bounty (Machine Tools and Robots) Act 1985, Coal Tariff Legislation Amendment Act 1992, Patents, Trade Marks, Designs and Copyright Act 1939, Resource Assessment Commission Act 1989 and Trade Marks Act 1995* to make technical amendments.

The bill also proposes to:

- repeal the *Australian Tourist Commission (Transitional Provisions) Act 1987*.

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

Retrospectivity

Subclause 2(2) - Items 19 and 20 of Schedule 1

Subclause 2(2) of this bill, if enacted, would provide for the amendments proposed in items 19 and 20 to take effect retrospectively from 26 June 1992, that being the date of Royal Assent of the *Coal Tariff Legislation Amendment Act 1992*. The amendment proposed by item 19, however, would do no more than repeat the substance of the current subsection 2(4) of that Act. The amendment proposed by item 20 would repeal a provision that is already spent.

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

Retrospectivity

Subclause 2(4) - Items 25 - 41 of Schedule 1

Subclause 2(4) of this bill, if enacted, would provide for the amendments proposed in items 25 to 41 of Schedule 1 to take effect retrospectively from 1 January 1996, that being the date of commencement of the *Trade Marks Act 1995*. The amendments, however, do no more than substitute 'CEO of Customs' for 'Comptroller' throughout that Act.

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

International Tax Agreements Amendment Bill (No. 1) 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *International Tax Agreements Act 1953* to give the force of law in Australia to an Exchange of Notes amending the comprehensive double taxation agreement with Vietnam for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. The bill also proposes an amendment to correct a minor typographical error in the principal Agreement.

The committee has no comment on this bill.

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

National Residue Survey (Ratite Slaughter) Levy Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to allow for a national residue survey levy of 75 cents per bird slaughtered to be imposed on the slaughter of ratite emu for human consumption.

Setting a levy by regulation Clause 6

Clause 6 of this bill, if enacted, would provide that the rate of the levy imposed by this bill may be prescribed by regulation.

The committee has consistently drawn attention to legislation which provides for the level of a levy to be set by regulation. This creates a risk that the levy may in fact become a tax. It is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so.

Where the level of a levy needs to be changed frequently and expeditiously, the question arises as to whether this can best be done by regulation rather than by primary legislation. If a compelling case can be made out for the level to be set by subordinate legislation, the committee seeks to have the enabling Act prescribe a maximum figure above which the relevant regulations cannot fix the levy or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is taxation by non-primary legislation.

In this case, clause 6 provides an upper limit of \$5 per head. However, the explanatory memorandum does not set out the reasons for allowing the levy to be set by regulation rather than by primary legislation. The committee **seeks the advice of the Minister** on the reason for choosing this mechanism.

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.

Petroleum Excise (Prices) Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the *Petroleum Excise (Prices) Act 1987* to:

- remove the need to determine a reference price for the month ahead for each excisable oil producing region; and
- remove the requirement to determine volume weighted average of realised prices for oil producing regions which have exceeded the excise free threshold but do not produce oil at a rate which attracts an excise liability.

The committee has no comment on this bill.

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

Primary Industries and Energy Legislation Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the following Acts:

- *Australian Horticultural Corporation Act 1987* to reduce the number of “other members” on the Australian Horticultural Corporation from six to four and to reduce the number of members required for a quorum from five to four;
- *Export Control Act 1982* to allow the Australian Quarantine and Inspection Service to confirm that Australia’s export control legislation provides appropriate coverage to contemporary administrative arrangements for the issue of certificates and for the use of electronic data transfer;
- *Farm Household Support Act 1992* and the *Social Security Act 1991* to provide mechanisms by which drought relief overpayments may be recovered;
- *Imported Food Control Act 1992* to enable regulations to be made to exempt specific food from the Act, allowing Australia to meet its obligation in respect of the Trans-Tasman Mutual Recognition Agreement;
- *Moomba-Sydney Pipeline System Sale Act 1994* to deal with outstanding pipeline easement issues related to the sale of the Moomba-Sydney Pipeline and to allow the Commonwealth to dispose of its residual pipeline easement interests;
- *Petroleum (Submerged Lands) Act 1967* to:
 - bring the licensing of offshore petroleum pipelines originating from outside Australia within the scope of the Act; and
 - ensure that changes to the territorial sea baseline do not impact on any petroleum pipeline licence granted within offshore areas under Commonwealth jurisdiction;
- *Quarantine Act 1908* to:
 - clarify and confirm the legislative authority for quarantine policy shifts that reflect areas of heightened quarantine interest, eg. the discharge of ballast water from vessels, and for changes in modern quarantine operational practices; and

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- make amendments to proclamation and regulation making powers; and
- *Sea Installations Act 1987* to exempt all Commonwealth offshore petroleum pipelines from the provisions of the Act.

Retrospectivity

Item 3 of Schedule 2

Item 3 of Schedule 2 of this bill, if enacted, would provide for the retrospective validation of orders purportedly made under section 25 of the *Export Control Act 1982* and of certificates purportedly issued under such orders.

It appears that no one will be adversely affected by the retrospective validation.

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

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

Social Security Legislation Amendment (Activity Test Penalty Periods) Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the *Social Security Act 1991* and the *Student and Youth Assistance Act 1973* to change penalties applied where recipients of newstart allowance or youth training allowance do not meet their obligations under the activity test provisions of these Acts. It also proposes to amend the *Social Security Legislation Amendment (Budget and Other Measures) Act 1996* to amend the administrative breach rate reduction period rules that came into effect on 20 March 1997.

Retrospectivity

Subclause 2(4) - Items 1 and 2 of Schedule 2

Subclause 2(4) of this bill, if enacted, would provide for the amendments proposed in items 1 and 2 of Schedule 2 to take effect retrospectively from 20 March 1977.

During the passage through the Senate of the *Social Security Legislation Amendment (Budget and Other Measures) Act 1996*, the Senate agreed to amendments postponing the commencement date of Parts 3 and 4 of Schedule 5 of that Act from 1 January 1997 to 20 March 1997. Corresponding amendments, however, were not made to the relevant application and transitional provisions. Items 1 and 2 of Schedule 2 of this bill propose amendments to bring forward the date of the commencement of the application and transitional provisions from 1 January 1997 to 20 March 1997.

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

Retrospectivity

Subclauses 2(5) to 2(7) - Items 3 - 7 of Schedule 2

Subclauses 2(5) to 2(7) of this bill, if enacted, would provide for retrospective effect from 1 January 1997 for the amendment proposed in item 3 of Schedule 2 and from 20 March 1977 for the amendments proposed by items 4 to 7 of Schedule 2.

The amendments appear to be for the purpose of correcting drafting errors not to adversely affect any social security client.

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

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

Taxation Laws Amendment Bill (No. 3) 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
 - provide small business taxpayers with an exemption from tax on capital gains made on the disposal of some or all of their active assets if the proceeds are used for retirement;
 - exempt certain income from income tax where the income is derived from the sale, transfer or assignment of rights to mine for gold or for any prescribed metal or prescribed mineral where the rights to mine were acquired before 7.30 pm on 20 August 1996;
 - allow taxpayers with exempt foreign earnings the proper amount of family tax assistance;
 - ensure that franking surpluses of taxable companies which are wholly owned by tax exempt entities are not able to be passed to third parties;
 - extend the principal residence exemption to alleviate hardship associated with the disposal of a deceased's principal residence by beneficiaries and trustees of deceased estates, and to reduce the compliance costs associated with the principal residence exemption;
 - give lessors entitlement to taxation depreciation allowances in respect of leased chattels that become a fixture on another person's land in circumstances where they would otherwise be so entitled had the leased item continued to be a chattel and not a fixture;
 - provide a rebate for a person contributing to superannuation on behalf of a low-income or non-working spouse;
 - reduce a capital gain or loss realised on the cancellation of shares in a company on dissolution of the company where assets are distributed *in specie* to another company which owns all of the shares in the transferee;
 - allow companies to offset capital losses against capital gains realised in the same year of income in certain circumstances where there has been a change of majority ownership of the company in that particular year of income;

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

- deal with the capital gains treatment of subvention payments;
- rectify anomalies in the loss and bad debt write-off provisions;
- include safeguards in capital loss provisions to prevent manipulation of a business in order to benefit from the same business test relief; and
- amend capital loss transfer provisions to give the Commissioner of Taxation unlimited time to amend the assessment of a transferee company where the loss was not in fact incurred by the transferor company;
- *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to provide for the taxation treatment of compensation payments made under the firearms surrender arrangements;
- *Fringe Benefits Tax Assessment Act 1986* to exempt from fringe benefits tax housing fringe benefits provided by primary producers in remote areas in respect of primary production employment;
- *Superannuation Guarantee (Administration) Act 1992* and *Small Superannuation Accounts Act 1995* to increase the age threshold from 65 to 70 years from which employers are no longer required to provide superannuation support for their employees;
- *Income Tax Assessment Act 1936* to:
 - apply the core technology deduction rules to certain companies in partnership; and
 - disallow deductions for companies registered jointly as syndicates where an extension of the joint registration has been granted and a certificate has been issued to the Commissioner of Taxation by the Industry Research and Development Board;
- *Taxation Laws Amendment Act (No. 3) 1996* to make consequential changes; and
- *Sales Tax (Exemptions and Classifications) Act 1992* to ensure that goods of a kind ordinarily used in providing telecommunications and audio visual services will not be exempt from sales tax as electrical fittings.

Retrospectivity

Subclauses 2(7) to 2(11) - Schedule 15

Subclauses 2(7) to 2(11) of this bill, if enacted, would provide for the amendments proposed in Schedule 15 to have retrospective effect from various dates.

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

It appears, however, that the amendments are designed solely to correct drafting errors and none will make any change to substantive law.

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

Retrospectivity Schedule 2

Schedule 2 of this bill, if enacted, would provide that the amendments it proposes have retrospective effect from 20 August 1996.

The explanatory memorandum, however, points out that the amendments are designed to do no more than give effect to an amendment made by the Senate on 12 December 1996 in respect of an earlier attempt to amend paragraph 23(pa) of the *Income Tax Assessment Act 1936*.

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

Retrospectivity Schedule 4

Schedule 4 of this bill, if enacted, would provide that the amendments it proposes have retrospective application from 2 July 1995. It is not clear to the committee whether the retrospectivity will adversely affect any taxpayer. Accordingly, 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.

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

Retrospectivity - Principal residence exemption from capital gains tax Schedule 5

Schedule 5 of this bill, if enacted, would provide for retrospective effect from 20 August 1996 for the amendments it proposes in relation to extending the exemption of a principal residence from capital gains tax. Not only were these measures announced in the Budget but they are also beneficial to taxpayers.

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

Retrospectivity Schedule 11

Schedule 11 of this bill, if enacted, would provide that some of the amendments it proposes would have retrospective application from 23 July 1996 and others from 13 December 1996. For the latter group, the date of application is that of the Treasurer's announcement in Parliament of a proposal to make those amendments.

In relation to the former group of amendments, it is not clear to the committee why the date of 23 July 1996 was chosen nor whether the amendments will adversely affect any taxpayer. Accordingly, the committee **seeks the Treasurer's advice** on these matters.

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.

Retrospectivity - legislation by press release Schedule 12

Schedule 12 of this bill, if enacted, would provide that the amendments it proposes would have retrospective effect from 7 November 1996, the date of the Treasurer's press release.

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

Although an example of legislation by press release, these amendments have been introduced within the 6 months allowed by the Senate resolution of 8 November 1988 which 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.

The explanatory memorandum also makes it clear that the purpose of the amendment is to prevent erosion of the sales tax base.

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

Retrospectivity

Item 2 of Schedule 13

Item 2 of Schedule 13 would provide that the amendments proposed by item 1 of Schedule 13 would 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.

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

Taxation Laws Amendment (Infrastructure Borrowings) Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Assessment Act 1936* and *Development Allowance Authority Act 1992* to abolish the infrastructure borrowings tax concession and provides transitional arrangements.

Retrospectivity - legislation by press release Proposed new subsections 93P(5) and 93PA(2)

Proposed new subsections 93P(5) and 93PA(2) to be inserted by this bill into the *Development Allowance Authority Act 1992* would have retrospective effect from 14 February 1997, the date of the Treasurer's press release.

Although an example of legislation by press release, these amendments have been introduced within the 6 months allowed by the Senate resolution of 8 November 1988 which 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.

The committee notes that the amendments will remove an existing tax concession and not impose any new tax or levy.

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

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

Therapeutic Goods Amendment Bill 1997

This bill was introduced into the Senate on 26 March 1997 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Health and Family Services]

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

- enable the Secretary to require sponsors to remove from the market only the batch, or those batches, of therapeutic goods that fail to meet applicable standards under the Act;
- implement the Agreement on Mutual Recognition in relation to Conformity Assessment, Certificates and Markings between Australia and the European Community; and
- make a minor amendment to clarify the terminology of “not unacceptable” to “acceptable”.

The committee has no comment on this bill.

Veterans' Affairs Legislation Amendment (Budget and Simplification Measures) Bill 1997

This bill was introduced into the House of Representatives on 26 March 1997 by the Minister for Veterans' Affairs. [Portfolio responsibility: Veterans' Affairs]

The bill proposes to amend the following Acts:

- *Veterans' Entitlements Act 1986* to:
 - remove provisions relating to child related payments, allowing payment of above family payment under the *Social Security Act 1991*; and
 - repeal the six existing rate calculators in the Act with a single rate calculator; and
- *Aged Care Act 1997* and *Aged Care Income Testing Act 1997* to make amendments consequential upon the replacement of the six rate calculators with one rate calculator.

The committee has no comment on this bill.

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 7 of 1997

28 May 1997

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

TERMS OF REFERENCE

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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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.

Aged Care (Compensation Amendments) Bill 1997

This bill was introduced into the House of Representatives on 15 May 1997 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

Consequent upon the Aged Care Bill 1997, the bill proposes to amend the *Health and Other Services (Compensation) Care Charges Act 1995* to reflect that nursing homes will become part of the new residential care system.

The committee has no comment on this bill.

Aged Care (Consequential Provisions) Bill 1997

This bill was introduced into the House of Representatives on 15 May 1997 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

Consequent upon the Aged Care Bill 1997, the bill proposes to amend the following Acts:

- *National Health Act 1953* and *Aged or Disabled Persons Care Act 1954* to:
 - repeal provisions no longer required;
 - limit sections to the period immediately before the commencement of the Aged Care Bill 1997; and
 - contain transitional provisions;
- *Social Security Act 1991* and *Veterans' Entitlements Act 1986* to stop payment of Residential Care Allowance (to be paid directly to providers of residential aged care rather than to residents).

The bill also proposes to:

- amend six Acts to make transitional and consequential amendments; and to
- repeal the *Aged Care Income Testing Act 1997*.

The committee has no comment on this bill.

Appropriation Bill (No. 1) 1997-98

This bill was introduced into the House of Representatives on 13 May February 1997 by the Treasurer. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$32,549.6 million) out of the Consolidated Revenue Fund to meet payments for the ordinary annual services of the government for the year ending on 30 June 1998.

The committee has no comment on this bill.

Appropriation Bill (No. 2) 1997-98

This bill was introduced into the House of Representatives on 13 May 1997 by the Minister for Finance. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$5,866.9 million) out of the Consolidated Revenue Fund to meet payments for capital works and services, payments to or for the States, the Northern Territory and the Australian Capital Territory; advances and loans, and for other services for the year ending on 30 June 1998.

The committee has no comment on this bill.

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

Appropriation (Parliamentary Departments) Bill 1997-98

This bill was introduced into the House of Representatives on 13 May 1997 by the Minister for Finance. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$138.4 million) out of the Consolidated Revenue Fund to meet recurrent expenditures of the parliamentary departments for the year ending on 30 June 1998.

The committee has no comment on this bill.

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

Australian National Railways Commission Sale Bill 1997

This bill was introduced into the House of Representatives on 14 May 1997 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to enable the sale of non-interstate mainline track rail assets of Australian National by amending the *Australian National Railways Commission Act 1983* to:

- provide arrangements for the transfer of assets, liabilities and contracts between the Commission, the Commonwealth and new rail operators;
- provides Ministerial authority to enter into agreements with relevant States to replace or amend specified rail agreements with the States to allow the sale to proceed;
- provides for the Minister for Finance to be authorised to sign agreements with purchasers of the Commission rail businesses;
- make provision to protect the Commonwealth from default by the Commission as a result of the loss of assets and revenue generating capacity;
- provide that liabilities of the Commission are met in order to protect parties which have contracted to the Commission in good faith;
- enable the Commission to assist the Commonwealth with the sale and to provide a Ministerial power of direction to facilitate disposal of the Commission's assets and liabilities;
- enable abolition of the Commission and the transfer of residual assets, liabilities and contracts to the Commonwealth after the sale has been completed and the Commission liabilities have been met.

Further, the bill allows for the eventual repeal of the *Australian National Railways Commission Act 1983*; repeals legislation covering agreements with South Australia and Tasmania after replacement agreements have been negotiated and taken effect; enables fixtures to be severed from railways land and to be sold to a rail operator; provides for access to railways for defence-related purposes and for emergency or disaster relief, and compensation for that access and amends 11 other Acts as a consequence of the abolition of the Commission.

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

Commencement by Proclamation

Subclauses 2(2), (3) and (5)

Subclause 2(2) of this bill provides:

- (2) Items 7 to 10 of Schedule 3 and items 8 and 9 of Schedule 4 commence on a day to be fixed by Proclamation. The day must not be earlier than the day on which the Minister gives the Governor-General a written certificate stating that the Minister is satisfied that the relevant Minister of South Australia has agreed to those items commencing.

Subclause 2(3) of this bill provides:

- (3) Item 11 of Schedule 3 commences on a day to be fixed by Proclamation. The day must not be earlier than the day on which the Minister gives the Governor-General a written certificate stating that the Minister is satisfied that the relevant Minister of Tasmania has agreed to that item commencing.

Subclause 2(5) of this bill provides:

- (5) The remaining items of Schedule 3 and Schedule 4 commence on a day to be fixed by Proclamation. The day must not be earlier than the later of the day proclaimed for the purposes of subsection (2) and the day proclaimed for the purposes of subsection (3).

The bill, therefore, does not specify a time within which the relevant provisions must either commence or 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).

The committee notes that paragraph 6 is applicable here as the commencement of the provisions in question requires the agreement of Ministers of State in South Australia and Tasmania.

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

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

Telecommunications (Interception) and Listening Devices Amendment Bill 1997

This bill was introduced into the House of Representatives on 14 May 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the following Acts:

- *Telecommunications (Interception) Act 1979* to:
 - enable the Police Integrity Commission to receive intercepted information where that information appears to relate to police conduct that the Commission may investigate;
 - permit the Commission to use intercepted information for investigating alleged police misconduct;
 - permit the Commission to obtain warrants to intercept telecommunications, provided certain authority has been given by the Attorney-General;
 - add to, and clarify, the categories of proceedings in which intercepted information can be given in evidence;
 - permit intercepted information to be used in making a decision whether to appoint, re-appoint, dismiss or retire a member or staff member of a police service;
- *Telecommunications (Interception) Act 1979, Australian Federal Police Act 1979 and Customs Act 1901* to permit the Minister to nominate specified members of the Administrative Appeals Tribunal to issue interception warrants for law enforcement purposes; and
- *Financial Transaction Reports Act 1988* to give the Australian Bureau of Criminal Intelligence and the Police Integrity Commission access to FTR information held by AUSTRAC, provided certain Information Privacy Principles have been complied with.

General Comment

This bill interferes with the privacy of a certain category of people. The committee is concerned at the extension of intrusive powers proposed by this bill. It allows a

further body, namely the Police Integrity Commission, to make use of the interception of telecommunications. It is again an extension of an intrusive power and, as such, a fresh example of legislative creep. The committee would respectfully **seek the Attorney-General's comments** on this matter.

The committee **asks the Attorney-General** whether the extension of power proposed by this bill should be subject to a sunset clause. The need to obtain Parliament's assent to renewing these powers would enable Parliament to review whether the granting of these powers has been appropriate and worthwhile.

The committee, therefore, **seeks the advice of the Attorney-General** whether a sunset clause would be appropriate.

Pending the Attorney-General's advice, the committee draws Senators' attention to this bill, 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.

Powers to non-judicial officers

Schedule 1, Item 19, Schedule 2 and Schedule 3

These provisions, if enacted, would enable the Minister to nominate certain members of the Administrative Appeals Tribunal to issue warrants in relation to telecommunication intercepts and the use of listening devices. The committee notes that only those members who, when appointed to the AAT, were enrolled as a legal practitioner for not less than 5 years, may be nominated.

The committee takes the view that the power to issue warrants should be confined to judicial officers. If the power is to be given to non-judicial officers, the reasons for doing so should be clearly set out in the explanatory memorandum. As the explanatory memorandum does not give any reasons for increasing the number of people who may issue warrants by including AAT members, the committee **seeks the advice of the Attorney-General** on this issue.

Pending the Attorney-General'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.

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 8 of 1997

18 June 1997

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

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☐ **The committee has commented on these bills**

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Australia New Zealand Food Authority Amendment Bill (No. 2) 1997

This bill was introduced into the Senate on 28 May 1997 by the Minister for Resources and Energy. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the *Australia New Zealand Food Authority Act 1991* to:

- enable the Australia New Zealand Food Authority (ANZFA) to be engaged in food education matters generally, whether related to safety or to some other issues such as food labelling or fair trading;
- enable the Authority to market its expertise and establish “arms length” commercial bodies;
- make various amendments relating to administrative procedures covering applications;
- permit the Authority to employ staff on its own terms and conditions, in addition to staff engaged under the *Public Service Act 1922*;
- provide a limited indemnity in relation to its public register service;
- expand existing regulations power to impose fees for ANZFA services by providing for specific power to impose a penalty for late payment, a discount for early payment and to make provision for the remission or refund of fees; and
- extend ANZFA’s immunity in relation to all foods and not just those for which a standard has been made.

The committee has no comment on this bill.

Child Support (Assessment) Amendment Bill 1997

This bill was introduced into the House of Representatives on 2 June 1997 by Mr Price as a Private Member's bill.

The bill proposes to amend the *Child Support (Assessment) Act 1989* to enact changes recommended by the Joint Select Committee on Certain Family Issues in relation to the calculation and arrangements concerning child support payments.

The committee has no comment on this bill.

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

Commonwealth Motor Vehicles (Liability) Amendment Bill 1997

This bill was introduced into the House of Representatives on 28 May 1997 by the Minister for Finance. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Commonwealth Motor Vehicles (Liability) Act 1959* to extend the Commonwealth's third-party liability to motor vehicles leased to the Commonwealth or a Commonwealth authority and not registered in a State or Territory. This measure is required as a consequence of the sale and leaseback of DASFLEET vehicles.

The committee has no comment on this bill.

Commonwealth Vehicles (Registration and Exemption from Taxation) Bill 1997

This bill was introduced into the House of Representatives on 28 May 1997 by the Minister for Finance. [Portfolio responsibility: Finance]

The bill, consequent upon the sale and leaseback of DASFLEET vehicles, proposes to:

- establish a Register of Commonwealth motor vehicles in which vehicles owned by or leased to the Commonwealth may be registered rather than being registered under State or Territory law; and
- exempt from State and Territory taxation:
 - the sale of DASFLEET assets that include the vehicle fleet;
 - leases of vehicles back to the Commonwealth and Commonwealth authorities; and
 - the registration under State or Territory laws of vehicles leased to the Commonwealth and Commonwealth authorities.

The committee has no comment on this bill.

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

Customs Tariff Amendment Bill (No. 2) 1997

This bill was introduced into the Senate on 26 May 1997 by Senator Cook as a Private Senator's bill.

The bill proposes to amend the *Customs Tariff Act 1995* to maintain the tariff on passenger motor vehicles and certain motor vehicle parts at 15% until 31 December 2004 and to maintain the export facilitation scheme until 31 December 2004.

The committee has no comment on this bill.

Customs Tariff Amendment Bill (No. 2) 1997 (No. 2)

This bill was introduced into the House of Representatives on 26 May 1997 by Mr Crean as a Private Member's bill.

The bill proposes to amend the *Customs Tariff Act 1995* to maintain the tariff on passenger motor vehicles and certain motor vehicle parts at 15% until 31 December 2004 and to maintain the export facilitation scheme until 31 December 2004.

The committee has no comment on this bill.

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

Family Court of Western Australia (Orders of Registrars) Bill 1997

This bill was introduced into the House of Representatives on 28 May 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill is a consequence of a the decision of the Full Court of Family Court of Australia in the matter of *Horne v Horne* 13 February 1997, Appeal No. WA 13/1996 that many consent orders made by Registrars in Western Australia are ineffective. It intends to enable affected people to obtain enforceable, statutory family law rights and liabilities that would have been created by valid Registrars' orders, without attempting to validate the invalid orders made.

Retrospectivity Subclause 5(1)

Subclause 5(1) of this bill, if enacted, would give the rights and liabilities created by this bill some retrospective effect.

Subclause 5(1) provides:

- (1) The rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, the same as if each ineffective order had been an order made by the Family Court of Western Australia in the exercise of its federal family jurisdiction in or in relation to the proceedings for the order.
- (2) Subsection (1) has effect in relation to an ineffective order of the kind referred to in subsection 4(3) subject to the same conditions and limitations as apply under the *Family Law Act 1975* in relation to provisions of registered parenting plans having effect as orders.

Note: See, for example, the conditions and limitations specified in sections 63F and 63G of the *Family Law Act 1975*.

The purpose of the bill, however, is to overcome a technical deficiency which has come to light in relation to various orders made by Registrars of the Family Court of Western Australia.

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

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

Higher Education Funding Amendment Bill (No. 1) 1997

This bill was introduced into the House of Representatives on 28 May 1997 by the Minister for Schools, Vocational Education and Training. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

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

- vary the maximum aggregate amount of financial assistance which may be granted for the 1998 funding year to:
 - higher education institutions for superannuation expenditure, in respect of their teaching hospitals, and for approved special capital projects; and
 - open learning organisations;
- vary the limit on total funds available to higher education institutions for certain grants under the Act in respect of the 1998 funding year;
- introduce the Rationalisation and Restructuring Program to allow the Minister to provide grants to higher education institutions to assist with the rationalisation and restructuring activities of the institution;
- introduce a 25% discount for partial up-front payments of \$500 or more under the HECS; and
- streamline arrangements for students applying for remission of HECS debts.

The committee has no comment on this bill.

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

International Monetary Agreements Amendment Bill 1997

This bill was introduced into the House of Representatives on 29 May 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *International Monetary Agreements Act 1947* to:

- enable the Commonwealth to make loans to the International Monetary Fund (IMF) in the event of calls under the New Arrangements to Borrow from the Consolidated Revenue Fund; and
- simplify the framework for conducting and recording certain transactions with the IMF (including receipt of interest on Special Drawing Right holdings and interest payments on the use of Special Drawing Rights).

The committee has no comment on this bill.

Migration Legislation Amendment Bill (No. 3) 1997

This bill was introduced into the House of Representatives on 28 May 1997 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to extend the sunset clause applying to the Migration Agents Registration Scheme from 21 September 1997 to 21 March 1998. This extension of time will enable the transitional move to industry self-regulation and the establishment of infrastructure by the Migration Institute of Australia to take on this function.

The committee has no comment on this bill.

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

Small Superannuation Accounts Amendment Bill 1997

This bill was introduced into the House of Representatives on 29 May 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to change the arrangements governing the early release of monies from the Superannuation Holding Accounts Reserve (SHAR) to individuals on whose behalf the monies are held by amending the *Small Superannuation Accounts Act 1995* to:

- abolish the current \$500 threshold;
- replace the “severe financial hardship” test with another test based on whether the individual has received specified Commonwealth payments for a certain period; and
- enable SHAR to release monies to a person who claims to be a non-resident only after that person has reached the preservation age, currently 55 years.

The committee has no comment on this bill.

Trade Practices Amendment (Better Business Conduct) Bill 1997

This bill was introduced into the House of Representatives on 26 May 1997 by Mr Beazley as a Private Member's bill.

The bill proposes to amend the *Trade Practices Act 1974* to prohibit harsh or oppressive conduct in circumstances where:

- two parties are in a pre-existing commercial relationship (which may or may not be based on contract);
- the nature of that relationship gives one party a significant advantage in bargaining power; and
- the stronger party knowingly exploits that advantage to engage in conduct or impose terms and conditions of a contract that are, subject to a reasonable person test, outside prevailing market conditions.

The committee has no comment on this bill.

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

Vocational Education and Training Funding Amendment Bill 1997

This bill was introduced into the House of Representatives on 4 June 1997 by the Minister for Schools, Vocational Education and Training. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to amend the *Vocational Education and Training Funding Act 1992* to:

- increase maximum general funding to the Australian National Training Authority (ANTA) in 1997 to a total of \$887.717 million;
- decrease maximum general funding to ANTA in 1998 to a total of \$869.039 million;
- allocate a maximum of \$869.039 million for general funding to ANTA for 1999; and
- allocate a maximum of \$21.546 million to ANTA in 1999 for eligible off-the-job training (funding for 1997 and 1998 remains the same).

The committee has no comment on this bill.

Wool International Amendment Bill 1997

This bill was introduced into the House of Representatives on 28 May 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the *Wool International Act 1993* to provide for the liquidation of Wool International once the wool stockpile has been disposed of and any associated debt retired. Before liquidation of Wool International takes place, provision is made for the allocation of entitlements and distribution of net assets to wool-tax payers.

The committee has no comment on this bill.

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

Workplace Relations (Unjust State Legislation) Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 May 1997 by Mr Beazley as a Private Member's bill.

The bill proposes to amend the *Workplace Relations Act 1996* to ensure that certain provisions included in Western Australian industrial relations legislation are invalidated by Federal provisions.

The committee has no comment on this bill.

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 9 of 1997

25 June 1997

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
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Senator A Murray

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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 and Torres Strait Islander Commission Amendment (TSRA) Bill 1997

This bill was introduced into the Senate on 17 June 1997 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Aboriginal and Torres Strait Islander Affairs]

The bill proposes to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* to remove the budget for the Torres Strait Regional Authority (TSRA) from the budget for the Aboriginal and Torres Strait Islander Commission effective from the 1997-98 budget. Further, it provides that a separate appropriation be made for TSRA.

The committee has no comment on this bill.

Aboriginal Land Rights (Northern Territory) Amendment Bill 1997

This bill was introduced into the House of Representatives on 18 June 1997 by the Minister representing the Minister for Aboriginal and Torres Strait Islander Affairs. [Portfolio responsibility: Aboriginal and Torres Strait Islander Affairs]

The bill proposes to amend the *Aboriginal Land Rights (Northern Territory) Act 1976* to prevent Aboriginal land claims over stock routes and stock reserves. The amendment fulfils the Commonwealth undertaking made as part of the Memorandum of Agreement in 1989 between the Northern Territory concerning the granting of community living areas to Aboriginal people in pastoral districts in the Northern Territory.

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

Subclause 2(2) of this bill provides:

- (2) Subject to subsection (3), Schedule 1 commences on a day to be fixed by Proclamation.

Subclause 2(3) of this bill provides:

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

The bill, therefore, may not commence until 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, 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
Any Senator who wishes to draw matters to the attention of the
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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 paragraph 4 is applicable here. The explanatory memorandum states that the reason for allowing a twelve month period is so that the amendments can commence at the same time as certain amendments to the Aboriginal Living Areas provisions of the Northern Territory Pastoral Land Act which have yet to be enacted.

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

Administrative Decisions (Effect of International Instruments) Bill 1997

This bill was introduced into the House of Representatives on 18 June 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to respond to the High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh* by providing a statutory indication that by entering into a treaty the Australian Government does not give rise to a “legitimate expectation” that could form the basis for challenge.

General Comment

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 take into account 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.

The fact that this bill is considered necessary demonstrates that, as things now stand, international instruments may have effect within Australia without being incorporated in legislation. The committee wonders whether this amounts to an exercise of power with insufficient parliamentary scrutiny or no Parliamentary scrutiny at all. The committee **seeks the advice of the Attorney-General** on this issue and on the process that has been put in place to enable Parliament to examine international instruments.

The committee understands that doubt has been expressed whether the joint statements of the Attorney-General and the Minister for Foreign Affairs are executive acts within the meaning of the High Court judgment.

If the joint statements of the Attorney-General and the Minister for Foreign Affairs are executive acts amounting to a contrary indication within the meaning of Teoh's case, no legitimate expectation has arisen since 10 May 1995. Accordingly,

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

legislation to be passed now cannot be said to trespass on personal rights and liberties and the issue whether the bill trespasses unduly, therefore, does not arise.

On the other hand, if those statements are not executive acts, then whether the bill trespasses unduly does remain a live issue. Accordingly, the committee **seeks the advice of the Attorney-General** on this issue.

Pending the advice of the Attorney-General, 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.

Aviation Legislation Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 18 June 1997 by the Parliamentary Secretary to the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the following Acts:

- *Air Navigation Act 1920* to:
 - transfer responsibility for passenger screening at sterile areas primarily to terminal operators;
 - establish an administrative scheme to allow the Department to designate an airline (or airlines) to be responsible for passenger screening at a sterile area where local circumstances would indicate that this would give a better security outcome;
 - enable the Department to designate sterile areas and impose conditions of operation on the sterile areas; and
 - amend the definitions of *bilateral agreement* and *another country*;
- *Airports Act 1996* to allow fees to be levied under regulations made for the purposes of environment protection at leased airports;
- *Air Services Act 1995* to include the promotion and fostering of civil aviation in Australia as an objective for Airservices Australia;
- *Civil Aviation (Carriers' Liability) Act 1959* to ensure that de facto spouses are included among the members of a passenger's family for the purposes of being eligible for compensation available under the Act in the event of a passenger's death or injury as a result of an air accident; and
- *International Air Services Commission Act 1992* to:
 - enable the Commission to allocate capacity available for Australian carriers to operate scheduled services between two countries with whom Australia has bilateral arrangements;
 - make amendments consequential upon the Commission allocating available capacity;
 - enable current "fifth freedom" operations by Australian carriers to be grandfathered for a period of five years;

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

- define blocked space arrangements, code sharing and joint international air services;
- remove definitions of new and shelf capacity which are now redundant; and
- allow the Commission to revoke a determination at the request of an Australian carrier to whom that determination relates.

Commencement by Proclamation Subclauses 2(1), 2(2) and 2(3)

Subclause 2(1) of this bill provides:

- (1) Subject to subsections 2(2) and (3), Schedule 1 (other than items 9, 10 and 11) and Schedule 5 commence on a day or days to be fixed by Proclamation.

Subclause 2(2) of this bill provides:

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

Subclause 2(3) of this bill provides:

- (3) If Schedule 5 does not commence under subsection (1) within 6 months after the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

Many of the amendments proposed by this bill, therefore, may not commence for up to 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, 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.

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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 paragraph 4 is applicable here. The explanatory memorandum states the reason for allowing up to twelve months for commencement:

The relatively lengthy (12 months) maximum period for implementation of the security screening amendments allows the option of a transitional period in case this becomes necessary. For example, Australia's civil aviation industry may need a reasonable time period in which to transfer the administration of sterile areas at airports. These arrangements will need to cover practical aspects such as the transfer of existing contracts with security firms for the conduct of passenger security screening and acquisition of screening equipment.

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

Strict Liability - reversal of the onus of proof

Items 18 and 19 of Schedule 1

Items 18 and 19 of Schedule 1 of this bill provide for the new administrative scheme for sterile area passenger screening and consequential amendments to provide for screening other than via a sterile area. In doing so they provide for strict liability offences in subsections 20A(10), 21B(3) and 21C(4) as well as providing for reversal of the onus of proof in subsections 20A(2), 20A(4), 20A(9), 21B(2) and 21C(3).

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

This new administrative scheme for passenger screening replaces the existing scheme which was inserted in the *Air Navigation Act 1920* by the *Transport Legislation Amendment Act (No. 2) 1995*. When the bill (the 1995 bill) for the latter Act was introduced the committee noted the strict liability and reversal of the onus of proof provisions which it contained and which were similar in content and purpose to those of the present bill.

On examination of the reasons put forward in the explanatory memorandum of the 1995 bill, the then committee was persuaded that the provisions did not unduly trespass on personal rights and liberties in the light of the need to maintain airport safety. In particular the committee noted that part of the explanatory memorandum which stated:

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.

Given the importance of the matters attended to by this legislation, the reality that the people to whom it is to apply are members of a confined class who can reasonably be expected to be fully aware of the crucial nature of the issues with which it deals, the fact that imprisonment is not a sanction for its breach and the high level of public benefit it seeks to achieve, the committee considers it does not unduly trespass on personal rights.

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

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

Carriage of Goods by Sea Amendment Bill 1997

This bill was introduced into the House of Representatives on 18 June 1997 by the Parliamentary Secretary to the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the *Carriage of Goods by Sea Act 1991*.

The *Carriage of Goods by Sea Act 1991* ("the COGSA") gives effect in Australia to an international convention ("the amended Hague Rules") relating to carrier liability for loss or damage to marine cargoes. The Act contains an automatic trigger (at subsection 2(3)) which will bring an alternative international regime, commonly known as the Hamburg Rules, into force in Australia on 20 October 1997.

The amendments of COGSA will:

- remove the trigger for implementing the Hamburg Rules and replace it with a mechanism for regular review by the Minister for the desirability of bringing the Rules into force in Australia;
- clarify that arbitration in Australia does not offend section 11 of the Act; and
- include a regulation making power intended to be used to implement changes relating to:
 - coverage of a wider range of contracts of carriage, including electronic documents ;
 - coverage for importers in some circumstances;
 - coverage of cargo agreed to be carried on deck, in certain circumstances;
 - extending coverage from the current "hook-to-hook" coverage to "terminal-to-terminal coverage"; and
 - limited recompense for shippers' losses due to delays.

Henry VIII clauses

Item 7 - proposed subsections 7(2) and (3)

Proposed subsections 7(2) and (3) of this bill, if enacted, would enable both the Schedule to, and substantive provisions in, the Principal Act to be amended by regulation.

The committee notes that the explanatory memorandum puts forward arguments in favour of allowing these Henry VIII type clauses. On page 6 the explanatory memorandum states:

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

Item 7 repeals section 7 of the COGSA and replaces it with a new section which sets out the modified meaning of the term "amended Hague Rules" to reflect the changes to be made by regulations to implement elements of the industry-endorsed package concerned with the type of sea carriage documents to which the COGSA applies, deck cargo, importer coverage, duration of liability, and liability for losses due to delay.

The concepts behind these changes can be simply expressed. However, given the nature of international conventions, the modifications to the amended Hague Rules to make these changes are technically complex and lengthy. Given the need not to overburden Parliament's business agenda and recognising that the resources of the Office of Parliamentary Counsel are under pressure, it is quite appropriate that such technical matters be handled by regulation.

Accordingly, the Bill includes a very precise regulation making power which will enable the subsequent drafting and making of regulations to implement these changes. This might be regarded as an "Henry VIII clause", which is a clause that permits the making of regulations which have the effect of amending the operation of an Act.

Such clauses are used in Commonwealth laws regularly, and enable the expeditious passage of legislation. The regulations are, of course, subject to disallowance, and will be required by the Act to be made only after consultation with relevant industry stakeholders.

The committee does not accept that a busy Parliamentary agenda or insufficient resources in the Office of Parliamentary Counsel are valid reasons for inappropriately delegating the legislative function of Parliament to the executive. Further, the committee notes that the subject matter of the proposed regulations amending the Act includes extending the liability of carriers.

In these circumstances the committee **seeks the advice of the Minister** on these matters.

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

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

Communications Legislation Amendment Bill (No. 1) 1997

This bill was introduced into the Senate on 18 June 1997 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Communications and the Arts]

The bill proposes to amend the following Acts:

- *Broadcasting Services Act 1992* to create the temporary community broadcasting licence which will authorise the licensee to provide a community broadcasting service in a designated area for a maximum period of 12 months; and
- *Radiocommunications Act 1992* to allow the Australian Communications Authority to issue transmitter licences to temporary community broadcasting licensees.

The committee has no comment on this bill.

Copyright Amendment Bill 1997

This bill was introduced into the House of Representatives on 18 June 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Copyright Act 1968* to:

- introduce moral rights provisions for authors of copyright works and directors and producers of films (with reference to international standards set by the Berne Convention for the Protection of Literary and Artistic Works);
- provide that newspaper and magazine publishers have all electronic and residual rights in journalists' works and a right to object to photocopies of more than 15 per cent of a newspaper or magazine other than those pages containing full-page advertisements;
- prevent the owner of copyright in packaging and labelling of goods not protected by copyright from using that copyright to stop anyone from importing the goods;
- give the courts discretion in awarding the remedy of conversion damages for copyright infringement;
- introduce a sampling scheme for copying done by governments to determine the amount of equitable remuneration to be payable to a relevant collecting society;
- make minor amendments to provisions relating to:
 - the Copyright Tribunal;
 - border interception of infringing imported copyright material; and
 - statutory licences for copying by educational institutions and institutions assisting people with disabilities; and
- make consequential and updating amendments.

The committee has no comment on this bill.

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

Indigenous Education (Supplementary Assistance) Amendment Bill 1997

This bill was introduced into the House of Representatives on 18 June 1997 by the Parliamentary Secretary to the Minister for Employment, Education, Training and Youth Affairs. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to amend the *Indigenous Education (Supplementary Assistance) Act 1989* to:

- remove the requirement for at least 10 per cent of enrolled students to be indigenous before a non-government non-systemic preschool or school or a non-government vocational education and training institution can be funded under the Act; and
- permit the adjustment of grants under the Indigenous Education Strategic Initiatives Programme in line with cost increases for the period up to 30 June 2000.

The committee has no comment on this bill.

Student and Youth Assistance (Sex Discrimination Amendment) Bill 1997

This bill was introduced into the House of Representatives on 18 June 1997 by the Parliamentary Secretary to the Minister for Employment, Education, Training and Youth Affairs. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to provide a permanent exemption for the AUSTUDY and ABSTUDY schemes from the operation of the marital status discrimination provisions of the *Sex Discrimination Act*.

The committee has no comment on this bill.

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 10 of 1997

27 August 1997

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

TERMS OF REFERENCE

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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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
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☐ **The committee has commented on these bills**

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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.

Child Care Payments Bill 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to:

- enable the Commonwealth Services Delivery Agency to pay childcare assistance and the childcare rebate from January 1998;
- provide for a review and appeals system so families can challenge decisions about their entitlement to child care subsidies;
- provide a new rate of childcare assistance for school age care;
- limit childcare assistance to 20 hours a week for non-work related care;
- introduce a planning system for private sector long day care places and a limit on the number of new private sector child care places eligible for childcare assistance in each of 1998 and 1999; and
- introduce immunisation as a criterion for eligibility for childcare assistance and the childcare rebate.

Tax file numbers

Clause 34 and point C2 of Schedule 2

Clause 34 and point C2 of Schedule 2, if enacted, would provide that child care assistance would not be payable if the applicant has not provided the tax file number of the applicant and (where relevant) his or her partner. The committee recognises that these clauses may be included in the bill in order to prevent fraud against the Commonwealth. The committee, however, notes that this is one more example of tax file numbers being used more as a means of identification and as an aid to income testing rather than as a part of the tax laws.

In these circumstances, 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.

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

Vicarious liability and reversal of the onus of proof
Subclauses 246(1) and (2)

Subclauses 246(1) and (2) provide:

- (1) If, in proceedings for an offence against this Act in respect of conduct engaged in by a person other than a body corporate, it is necessary to establish the state of mind of the person, it is sufficient to show that:
 - (a) the conduct was engaged in by an employee or agent of the person within the scope of his or her actual or apparent authority; and
 - (b) the employee or agent had that state of mind.
- (2) If:
 - (a) conduct is engaged in on behalf of a person other than a body corporate 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.

These subclauses, 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 they constitute the effective mind and heart of the company. The company, in effect, thinks and makes decisions through them. 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 primary issue is whether imposing criminal liability vicariously on an employer who is a natural person unduly trespasses on that person's personal

rights and liberties. Accordingly, the committee **seeks the Minister's advice** on this matter.

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.

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

Customs and Excise Legislation Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of seven bills which relate to the minimisation of fuel substitution. This bill proposes to introduce offences and penalties that will apply to a person who enters marked fuel as unmarked fuel and to a person who enters unmarked fuel as marked fuel. Further, it makes amendments consequential upon the remainder of the bills in the package.

Strict liability

Schedule 1 items 2 and 15 - Proposed subsections 234(6) and (7) of the *Customs Act 1901* and proposed subsections 120(6) and (7) of the *Excise Act 1901*

Proposed subsections 234(6) and (7) of the *Customs Act 1901* and proposed subsections 120(6) and (7) of the *Excise Act 1901*, if enacted, would create offences of strict liability in relation to substituting clean fuel for designated fuel for home consumption and vice versa. Other proposed provisions create offences for intentionally or recklessly performing these actions.

A bill creates a strict liability offence when it provides that people are to be punished for doing something or alternatively for failing to do something whether they have a guilty intent to do so or not. They are held to be legally liable for their conduct no matter what their moral responsibility might be.

The committee notes that the penalties for these offences are considerably less than for the same acts being done intentionally or recklessly. The committee, however, questions whether the imposition of criminal liability is warranted in the absence of any guilty knowledge, lack of care or intention to contravene the law.

Accordingly the committee **seeks the advice of the Minister** on this matter.

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.

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

Customs Legislation (Anti-Dumping) Amendment Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the following Acts:

- *Anti-Dumping Authority Act 1988* to make a minor technical amendment; and
- *Customs Act 1901* to:
 - provide for a case by case approach for determining normal values of allegedly dumped goods from countries that are in the process of transition to a market economy; and
 - clarify provisions which relate to the manner in which interim dumping and countervailing duties are collected.

Retrospectivity Subclause 2(3)

Subclause 2(3) of this bill, if enacted, would provide that various provisions of the bill would commence retrospectively on 1 January 1993.

The committee notes that the explanatory memorandum states:

The Bill also contains amendments which, in combination with those in the Customs Tariff (Anti-Dumping) Amendment Bill 1997, clarify the operation of the provisions of the Customs Act and the *Customs Tariff (Anti-Dumping) Amendment Act 1975* which relate to the manner in which interim dumping and countervailing duties are collected. The amendments make it clear that such interim duties can be imposed, pending final assessment of any dumping or countervailing duties, notwithstanding that the actual export price and normal value, or the fact that a countervailable subsidy has been received, have not yet been ascertained.

Although these amendments are to be taken to have commenced on 1 January 1993, the date on which the interim dumping and countervailing duties were introduced, they will not require importers to pay an amount of dumping duty beyond that which has previously been demanded. The amendments merely seek to ensure that approximately \$12 million in interim duties collected since 1 January 1993 is not subject to legal challenge.

It appears that no judicial interpretation of the meaning of the 1992 amendments has been made and that the changes proposed in this bill would not therefore take away any rights that have been declared by a Court.

There may be cases pending, however, which have prompted the decision to seek these amendments. The committee, therefore, **seeks the advice of the Minister** on these matters.

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 Tariff Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Tariff Act 1995* to:

- make an administrative amendment to correct the current listing of subheading 8527.19.00;
- remove the Canadian margin of preference on certain petrochemicals of Chapter 39 of the customs tariff;
- accord developing country preferences to imports from the territories administered by the Palestinian Authority’;
- abolish customs duty on import sugar and certain sugar by-products;
- implement Australia’s tariff obligations under the Information Technology Agreement;
- reinstate tariff assistance for surgical drapes;
- clarify tariff classifications of certain types of lamps and power supply units for computers which were recently the subject of Administrative Appeals Tribunal decisions; and
- to close-up tariff subheadings, where possible.

Retrospectivity Subclauses 2(2) to 2(4)

Subclauses 2(2) to 2(4) of this bill, if enacted, would provide for various provisions of this bill to have retrospective effect.

The committee, notes, however, that the amendments either make a drafting correction without adversely affecting anyone or have been the subject of Customs Tariff Proposals made in the House of Representatives.

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

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 (Anti-Dumping) Amendment Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Tariff (Anti-Dumping) Act 1975* to clarify provisions which relate to the manner in which interim dumping and countervailing duties are collected.

Retrospectivity Subclause 2(1)

Subclause 2(1) of this bill, if enacted, would provide that various provisions of the bill would commence retrospectively on 1 January 1993.

The committee notes that these amendments relate to those discussed earlier in this Alert Digest with respect to the Customs Legislation (Anti-Dumping) Amendment Bill 1997.

For the same reasons, therefore, 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 Tariff (Fuel Rates Amendments) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of seven bills which relate to the minimisation of fuel substitution. This bill proposes to amend the *Customs Tariff Act 1995* to:

- restructure those subheadings of Chapter 27 of Schedule 3 to the Customs Tariff which apply to petroleum products; and
- introduce the requirement that petroleum products on which a concessional rate or a “free” rate of customs duty is payable, must contain a chemical marker, which must be added to the product prior to its entry into home consumption.

The committee has no comment on this bill.

Excise Tariff (Fuel Rates Amendments) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of seven bills which relate to the minimisation of fuel substitution. This bill proposes to amend the *Excise Tariff Act 1921* to:

- restructure item 11 of the Schedule to the Excise Tariff which sets out the petroleum products which are subject to duties of excise; and
- introduce the requirement that petroleum products on which a concessional rate or a “free” rate of excise duty is payable, must contain a chemical marker, which must be added to the product prior to its entry into home consumption.

The committee has no comment on this bill.

Foreign Affairs and Trade Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Foreign Affairs. [Portfolio responsibility: Foreign Affairs and Trade]

The bill proposes to amend the following Acts:

- *Chemical Weapons (Prohibition) Act 1994* to allow for privileges and immunities for observers to “challenge inspections” which may be conducted under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction;
- *International Organizations (Privileges and Immunities) Act 1963* to:
 - restrict the definition of an international organisation which can be eligible for privileges and immunities;
 - limit to 12 months the life of any regulation under which standard diplomatic privileges and immunities can be conferred on persons who are engaged on specified missions or attending specified conferences in Australia;
 - allow for the simultaneous entry into force of both the treaty establishing an international organisation and the regulations relating to that organisation;
 - allow privileges and immunities to be conferred on international law tribunals, their members and staff and persons appearing before them;
 - allow for exemptions from sales tax on goods sold to international organisations with their headquarters in Australia;
 - make a minor amendment (to change Organization to Organisation);
- *Nuclear Non-Proliferation (Safeguards) Act 1987* to implement provisions of a Protocol to the Agency Agreement between the International Atomic Energy Agency and Australia to strengthen safeguards;
- *Passports Act 1938* to add the concept of recklessness as a mental element in the offence of making a false statement in a passport application or in support of an application;

- *Consular Privileges and Immunities Act 1972, Administrative Decisions (Judicial Review) Act 1977, Fringe Benefits Tax Assessment Act 1986, Income Tax Assessment Act 1936 and Migration Act 1958 to change Organization to Organisation.*

Commencement of regulations

Item 8 of Schedule 1

Item 8 of Schedule 1 of this bill, if enacted, would provide for the insertion of a new subsection 13(2) in the *International Organizations (Privileges and Immunities) Act 1963*. Proposed subsection 13(2) would allow regulations made under that Act to commence in Ministerial determination in derogation of paragraph 48(1)(b) of the *Acts Interpretation Act 1901*.

The committee is satisfied with the reasons for doing so contained in the explanatory memorandum at page 7:

The effect of Part XII of the *Acts Interpretation Act 1901* on the regulations under the *International Organisations Act* is twofold. Firstly, it requires that the commencement of any regulation must either be expressed to occur on a date certain or take place on gazettal of the regulation, but not on the happening of a specified event such as the coming into force for Australia of an international agreement, even though the regulations are for the purpose of discharging Australia's obligations under the agreement.

This has created problems, particularly in relation to multilateral treaties. Entry into force of these treaties is often stipulated to depend on the fulfilment of the condition that a certain number of ratifications be deposited. In such situations Australia has had the choice of either refraining from becoming an original party or enacting the necessary regulations after the entry into force of the treaty, so putting Australia technically in breach of the treaty until this is done.

Secondly, a reference in a regulation to another document, such as an international agreement, may only be to an instrument that has actually come into existence, not one that is in merely in draft form and may, at least in theory, never enter into force. This could lead

to a logical deadlock, each part of the process requiring the prior fulfilment of the other, unless entry into force of the regulations is set for a date well into the future and the Commonwealth somehow contrives to have the agreement itself enter into force for Australia on that date.

The previous options as to commencement dates in paragraph 48(1)(b) of the *Acts Interpretation Act 1901* are contained in subclause 9(1) of the *Legislative Instruments Bill 1997*, as before Parliament on the date of introduction of this Bill. However, these options are now expressly stated in subclause (2) to yield to any contrary provision in another enabling Act. New subsection 13(2) constitutes such a provision. It will be possible for regulations granting privileges and immunities to an international organisation to be expressed to enter into force on a day fixed by Ministerial determination. This day will generally be the date on which the relevant treaty comes into force for Australia. It may not be an earlier date.

This will allow regulations to be made as soon as Australia's obligations are known but to come into force only when the treaty itself does. The date fixed by the determination cannot precede the entry into force of the treaty for Australia. This eliminates the possibility that the regulations would be invalid because the membership condition in section 5 has not yet been fulfilled.

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

Fuel Blending (Penalty Surcharge) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of seven bills which relate to the minimisation of fuel substitution. This bill proposes to impose a penalty surcharge on the blending of marked fuel and unmarked fuel which results in a blend that is itself marked fuel. The proposed surcharge will be payable by the person owning the fuel immediately after that blending.

The committee has no comment on this bill.

Fuel Misuse (Penalty Surcharge) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of seven bills which relate to the minimisation of fuel substitution. This bill proposes to impose a penalty surcharge on the use of marked fuel in an internal combustion engine. The proposed surcharge will be payable by the person owning the fuel at the time of its use and is payable before the fuel is used.

The committee has no comment on this bill.

Fuel (Penalty Surcharges) Administration Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of seven bills which relate to the minimisation of fuel substitution. This bill proposes to:

- specify the times at which the penalty surcharges will become payable;
- impose record creation and record keeping obligations to persons dealing in petroleum products;
- set out the notification requirements in relation to the sale or disposal of marked fuel;
- set out the audit powers of authorised officers to ensure compliance with the requirements of the Act and to obtain evidential material concerning any breaches; and
- include a range of offences and appropriate penalties related to failure to comply with the requirements of the Act, including penalties for failing to pay the penalty surcharge when required and failing to comply with the record creation and keeping obligations.

Strict liability

Subclauses 9(2), (5) and (9) and 48(2)

Subclauses 9(2), (5) and (9) and 48(2), if enacted, would create offences which by reason of subclauses 9(3), 9(6) and 9(10) and 48(3) are offences of strict liability. These offences relate to failing to pay in advance the penalty surcharge imposed by the various Penalty Surcharge Bills included in this package of legislation. Other proposed provisions create offences for intentionally or recklessly failing to pay the surcharge in advance.

A bill creates a strict liability offence when it provides that people are to be punished for doing something or alternatively for failing to do something whether they have a guilty intent to do so or not. They are held to be legally liable for their conduct no matter what their moral responsibility might be.

The committee notes that the penalties for these offences are considerably less than for the same acts being done intentionally or recklessly. The committee, however, questions whether the imposition of criminal liability is warranted in the absence of any guilty knowledge, lack of care or intention to contravene the law.

Accordingly the committee **seeks the advice of the Minister** on this matter.

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.

Fuel Sale (Penalty Surcharge) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of seven bills which relate to the minimisation of fuel substitution. This bill proposes to impose a penalty surcharge on the sale of marked fuel for use in an internal combustion engine. The proposed surcharge will be payable by the person owning the fuel immediately before its sale.

The committee has no comment on this bill.

Health Insurance Commission (Reform and Separation of Functions) Bill 1997

This bill was introduced into the House of Representatives on 27 June 1997 by the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes the transfer of Medibank Private from the Health Insurance Commission to a new company, the Medibank Private corporation. The new company will initially be Commission-owned, but after a transitional period, company ownership will be transferred to the Commonwealth.

The committee has no comment on this bill.

Health Insurance (Pathology Services) Amendment Bill 1997

This bill was introduced into the House of Representatives on 27 June 1997 by the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the *Health Insurance Act 1973* to effect several changes in relation to Medicare benefits for pathology services:

- backdating of approvals for accredited pathology laboratories, approved pathology practitioners and approved pathology authorities in limited circumstances, allowing Medicare benefits to be paid for services rendered from the commencement of the backdated approval;
- requiring licensed collection centres to display a notice advising that the centre is licensed; and
- enabling the Health Insurance Commission to directly impose penalties for minor pathology offences.

The committee has no comment on this bill.

Migration Legislation Amendment Bill (No. 4) 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the following Acts:

- *Migration Act 1958* to:
 - merge the Migration Internal Review Office and the Immigration Review Tribunal into a new body to be called the Migration Review Tribunal (MRT);
 - provide the principal members of the MRT and the Refugee Review Tribunal (RRT) with clear authority to apply efficient processing practices;
 - prevent MRT and RRT hearings from being unnecessarily delayed where a prescribed notice of a personal hearing has been provided;
 - provide that personal hearings are to be at the discretion of the president MRT or RRT member(s);
 - give the MRT and RRT authority to use telephone or other media to conduct personal hearings or for people to appear before them;
 - provide for the publication of tribunal decisions of interest at the discretion of principal members;
 - apply a code of procedure to the MRT and RRT in relation to decisions on entry and stay of non-citizens;
 - provide for the “no further stay” condition on temporary visas to be waived in prescribed circumstances;
 - enable more effective cancellation of visas which were granted on the basis of incorrect information; and
 - clarify existing provisions and make amendments of a technical nature;
- *Migration Act 1958* and *Administrative Decisions (Judicial Review) Act 1977* to:
 - introduce a new judicial review scheme;
 - apply the new judicial review scheme to both the Federal Court and the High Court; and

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- allow specified decisions to be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*;
- *Australian Citizenship Act 1948* to bring the penalty provision into line with similar offences under Commonwealth law; and
- *Immigration (Education) Act 1971*, the *Migration Reform Act 1992* and the *Migration Legislation Amendment Act (No. 5) 1995* to make minor technical amendments.

Retrospectivity Subclauses 2(7) to 2(11)

Subclauses 2(7) to 2(11) of this bill, if enacted, would provide for various provisions of this bill to have retrospective effect.

The committee, notes, however, that the amendments are technical only and make no change to the existing law.

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

Non-reviewable decisions and insufficiently defined administrative powers

Item 10 of Schedule 1 - proposed section 339

Proposed section 339 to be inserted by item 10 of Schedule 1 of this bill, if enacted, would give the Minister a wide power to certify that some decisions not be reviewable by the Migration Review Tribunal.

Proposed section 339 provides:

The Minister may issue a conclusive certificate in relation to the decision if the Minister thinks that:

- (a) it would be contrary to the public interest to change the decision, because any change in the decision would prejudice the security, defence or international relations of Australia; or
- (b) it would be contrary to the public interest for the decision to be reviewed because such review would require consideration

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by the Tribunal of deliberations or decisions of the Cabinet or of a committee of the Cabinet.

The committee notes that the proposed section appears to limit to some extent the type of decisions which may be so certified. Several issues arise, however.

- Is the conclusiveness of the certificate amenable to challenge in the Federal Court? If so, upon what grounds? It appears that the Minister has only to 'think' that the prejudice would arise or 'think' that it would involve consideration by the Tribunal of Cabinet deliberations or decisions to found the issue of a conclusive certificate. (Does this mean that the Minister could prevent review of a decision by putting a submission to Cabinet on an issue related to it?).
- Does the unfettered nature of the Minister's power make rights liberties or obligations unduly dependent upon insufficiently defined administrative powers?
- Does the clause makes rights, liberties and obligations unduly dependent upon non-reviewable decisions?

The committee **seeks the advice of the Minister** on these issues.

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 upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference and as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

No entitlement to be heard

Proposed new sections 360 and 425

This bill proposes to repeal the present sections 360 and 425 of the *Migration Act 1958* and substitute new sections the effect of which is to take from applicants their present right to be heard by the Migration Review Tribunal and

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the Refugee Review Tribunal. In place of that right, each Tribunal may invite the applicant to appear to give evidence and present arguments. Unless so invited, the applicant is not entitled to appear before the Tribunal.

Other proposed new sections provide for the Tribunal to give relevant information to the applicant and to seek comments and/or further information from the applicant.

The committee notes that the *Migration Legislation Amendment Act (No. 1) 1995* made some changes to the procedures of the Tribunal the purpose of which was described in the relevant explanatory memorandum as 'to enhance the non-adversarial nature' of the Tribunal. The committee notes these and other changes which deprived the applicant of legal representation before these Tribunals together with the proposals in this bill not only to revoke the ability of an applicant to appear, as of right, but also to deprive the applicant of appealing to the Federal Court for review of the Tribunal decision. All these changes represent a major diminution of the rights of these applicants to ensure a fair hearing according to law. The Courts have held that the individual components that make up natural justice, such as the right to cross examination, to be represented, do not all have to be present. But when so many are taken away the fabric of natural justice is left in tatters, and the question is rightly raised whether natural justice is being denied.

The committee, therefore, **seeks the Minister's reconsideration** of these changes.

Pending the Minister's reconsideration, 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.

Ousting of judicial review

Item 7 of Schedule 4 - Proposed new Part 8 - Judicial Review

Proposed new Part 8 of the *Migration Act 1958* to be inserted by item 7 of Schedule 4 would impose severe limitations on the ability of those affected by various decisions to seek judicial review of those decisions.

Ousting of judicial review is not a matter to be undertaken lightly by the Parliament. It has the potential to upset the delicate arrangement of checks and

balances upon which our constitutional democracy is based. We ignore the doctrine of separation of powers at our peril. It is the function of the courts within our society to ensure that executive action affecting those subject to Australian law is carried out in accordance with law. It is cause for the utmost caution when one arm of government (in this case the Executive) seeks the approval of the second arm of government (the Parliament) to exclude the third arm of government (the Judiciary) from its legitimate role whatever the alleged efficiency, expediency or integrity of programs is put forward in justification.

The committee **seeks the advice of the Minister** on this issue.

For these reasons, 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.

Native Title Amendment (Tribunal Appointments) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Native Title Act 1993* to:

- amend the qualifications for appointment of presidential members of the National Native Title Tribunal (NNTT) so that persons who have been admitted to legal practice for at least five years can be appointed; and
- provide that the President may appoint an acting Registrar to the NNTT, instead of the Governor-General.

The committee has no comment on this bill.

Plebiscite for an Australian Republic Bill 1997

This bill was introduced into the Senate on 26 June 1997 by Senators Bolkus and Kernot as a Private Senators' bill.

The bill proposes that a plebiscite be held at any time between now and the next Federal election on whether Australia should become a republic. The bill further proposes that a Joint Parliamentary Committee be established to determine the form of the question to be put at the plebiscite and to promote debate on the matter.

The committee has no comment on this bill.

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

Public Employment (Consequential and Transitional) Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Minister Assisting the Prime Minister for the Public Service. [Portfolio responsibility: Prime Minister]

The bill proposes to deal with consequential and transitional matters arising from the repeal of the *Public Service Act 1992* and the enactment of replacement legislation, the *Public Service Act 1997*. Primarily, the bill proposes to:

- set in place conversion arrangements for those who work in the Australian Public Service;
- make transitional arrangements for some conditions covered by the *Public Service Act 1992* because they will no longer be regulated in the same way;
- provide for the continuation of processes already in progress, eg. appointments, promotions, suspensions, transfers and advancements, as well as appeals, grievances and other reviews of employment decisions;
- deal with the consequences of devolving the arrangements for setting the salaries of the Senior Executive Service; and
- make consequential amendments to amend or repeal numerous Acts.

Delegation of legislative power Subclauses 14(4) and (5)

Subclauses 14(4) and (5) of this bill, if enacted, would permit the making of regulations which may prevail over existing legislation or amend existing legislation.

The committee notes, however, that such regulations may be made only for the purpose of providing for the transition from the present Public Service Act to the new one.

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

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

Regulations with retrospective effect
Subclause 14(7)

Subclause 14(7) of this bill, if enacted, would permit the making of regulations which might have retrospective effect, in that it would be possible for the regulations to take effect from a date prior to that on which they were made. Such regulations, however, would be subject to the *Acts Interpretation Act 1901*. Any regulations made under this subclause which retrospectively affected adversely any person other than the Commonwealth would, therefore, be invalid.

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

Public Service Bill 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Minister Assisting the Prime Minister for the Public Service. [Portfolio responsibility: Prime Minister]

The bill proposes to replace the current legislative framework for the establishment and management of the Australian Public Service.

The committee has no comment on this bill.

Radiocommunications Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to enable the collection of a licence tax in relation to spectrum licences and to make amendments to three Acts and one proposed Act consequential upon the imposition of the tax.

The committee has no comment on this bill.

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

Radiocommunications (Spectrum Licence Tax) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to impose an annual spectrum licence tax on spectrum licences issued under the *Radiocommunications Act 1992* to recover spectrum maintenance costs.

Inappropriate delegation of legislative power Clause 7

Clause 7 would allow the amount of the tax to be imposed by this bill to be set by the Australian Communications Authority, with no upper limit on that tax being specified in the primary legislation. This raises the issue of whether the clause inappropriately delegates the legislative power of the Parliament. An inappropriate delegation enables the Executive, by regulation, to make laws that ought be made by Parliament.

For this reason, the committee has consistently drawn attention to legislation which provides for a rate of tax to be set by regulation. It is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so.

The committee notes the paragraph on page 3 of the explanatory memorandum dealing with the reasons for not including a maximum limit on the amount of licence tax:

The Spectrum Licence Tax bill does not include a maximum limit on the amount of licence tax that can be imposed on a holder of a licence under a determination. It is considered inappropriate to impose a limit on the licence tax that can be determined by the ACA because of the nature of spectrum licensing and the possibility of a single licensee holding a large proportion of the spectrum in a given band and therefore paying a proportionally larger amount of spectrum maintenance charge. However, the amount of tax payable

by a single licensee is not calculated solely by reference to the amount of spectrum held by that licensee. The licence tax will be calculated as a sum divided by all licensees in a given band having regard to the licensee's share on a "Megahertz/population" basis on a given date.

The committee is not convinced that these reasons warrant the delegation by Parliament of an unfettered power to tax.

The committee also points out that, although the determination of the amount of the tax may be disallowed by either House of Parliament, disallowance is an all-or-nothing mechanism which allows no scope for either house to make a positive input (by making an amendment) on the determination.

The committee further points out that disallowance is effective only from the date it occurs. The taxation liability would either accrue at the determined amount during the period from commencement to disallowance or those whose licence tax fell due during that period would be required to pay it at the rate determined without any alleviation by subsequent disallowance.

For these reasons the committee **seeks the Minister's reconsideration** of this issue.

The committee has had to deal with a similar issue where a bill has proposed the setting of a levy or a charge, not purporting to be a tax, by regulation. If a compelling case can be made out for the level of a charge or a levy to be set by subordinate legislation the committee seeks to have the enabling Act prescribe a maximum figure above which the relevant regulations cannot fix the levy or alternatively a formula by which such an amount can be calculated. The vice to be avoided is taxation by non-primary legislation.

The committee notes that it appears from the explanatory memorandum, on page 3, that the elements contributing to the amount of the tax are known. It may be that they are capable of being reduced to a formula which could be incorporated in the primary legislation.

The committee, accordingly, **seeks the consideration by the Minister** of doing so.

The committee also **seeks the advice of the Minister** on whether a review process of the operation of the tax might be included 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.

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

Snowy Hydro Corporatisation Bill 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to reform the Snowy Mountains Hydro-electric Authority and establish Snowy Hydro Limited to replace the Authority as the corporate body to operate and maintain the Snowy Mountains Scheme. Specifically, the bill:

- creates the Snowy Hydro Company;
- replaces existing rights of the Commonwealth, New South Wales and Victoria in the Scheme with an initial issue of equity in Snowy Hydro Company;
- enables the environmental, planning and other laws of New South Wales to be applied to the operations of the Scheme;
- facilitates the refinancing and repayment of the debt to the Commonwealth under the Scheme; and
- provides for the establishment of a public water inquiry with respect to environmental issues arising from current water flows in the Scheme and implementation of the outcomes of that inquiry agreed by New South Wales and Victoria.

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

Subclause 2(2) would allow parts of this bill to commence on a day or days to be fixed by Proclamation. Subclause 2(3) provides that the repeal of the *Snowy Mountains Hydro-electric Power Act 1949* will not take effect by Proclamation until the Minister is satisfied that the Governments of New South Wales and Victoria have agreed to a specific date.

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

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

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 commencement of various provisions by Proclamation in accordance with subclauses 2(2) and (3) appears to fall within paragraph 6 of the Drafting Instruction as commencement is dependent on the passage of complementary legislation in New South Wales and Victoria and on intergovernmental agreement the timing of which is uncertain.

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

Cessation of rights

Clause 46

Clause 46 of this bill, if enacted, would provide for the cessation of mobility rights to which certain employees of the Snowy Mountains Authority may currently be entitled under either the *Public Service Act 1922* or the *Officers' Rights Declaration Act 1928*.

The committee notes that the explanatory memorandum at paragraph 63 says that this clause 'restates the current position of the Public Service Act 1922 under which mobility rights of those employees are extinguished when those employees cease to be employed by a statutory authority.'

The committee understands, however, that employees would be in the same position of losing entitlements to rights upon ceasing to be employed by a relevant statutory authority under the *Maternity Leave (Commonwealth Employees) Act 1973* and the *Defence Force Retirement and Death Benefits Act 1973*. The committee notes, however, that this bill (by clauses 37 to 41) preserves rights accruing under those Acts from extinguishment.

The committee, accordingly, **seeks the advice of the Minister** on the different treatment of the rights of various groups of employees.

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.

Delegation of legislative power

Clause 52

Clause 52 would allow regulations to be made which would modify the application of the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to the Snowy Hydro Company.

It appears to the committee that the purpose of any such modifications would be solely for ensuring the smooth transition to corporate status and, thus, not an inappropriate delegation of legislative power.

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

Retrospective regulations

Item 1 of Schedule 2

Item 1 of Schedule 2, if enacted, would allow regulations to be made which might take effect from a date prior to their notification in the *Gazette*. The clause, however, specifically provides that any retrospectivity does not operate to affect adversely any person other than the Commonwealth.

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

Snowy Hydro Corporatisation (Consequential Amendments) Bill 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes amendments consequential upon the proposed repeal of the *Snowy Mountains Hydro-electric Power Act 1949*. It proposes to repeal the *Blowering Water Storage Works Agreement Act 1963*, the *Loan (International Bank for Reconstruction and Development) Act 1962*, and the *Snowy Mountains Hydro-electric Authority Act 1960* and make consequential amendments to seven other Acts.

The committee has no comment on this bill.

Social Security Amendment (Entry Payments) Bill 1997

This bill was introduced into the Senate on 26 June 1997 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Social Security]

The bill proposes to amend the *Social Security Act 1991* to abolish the employment entry payment for all social security customers and restrict the availability of the education entry payment to social security pensioner customers, from 1 January 1998.

The committee has no comment on this bill.

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

Social Security and Veterans' Affairs Legislation Amendment (Family and Other Measures) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the following Acts:

- *Social Security Act 1991, Income Tax Assessment Act 1936 and Income Tax Assessment Act 1997* to provide for the introduction of a maternity immunisation allowance payable in respect of children born on or after 1 January 1998;
- *Social Security Act 1991* to:
 - remove a requirement that the Secretary make a determination that an event is an assumed notifiable event for the purpose of the family payment income test;
 - amend the method statement for working out how a person's maintenance income affects the person's rate of family payment by excluding certain children from the operation of the maintenance income test;
 - remove an anomaly that allows an approved care organisation to be paid family payment in respect of a child who is a family payment child of a natural person, but that person does not meet the qualification criteria for family payments;
 - allow above the minimum rate family payment to be paid when a family payment child and/or the family payment recipient is outside Australia for up to 8 weeks;
 - exclude families with both a moderately high assets value and a moderately high income or availability of liquid assets from existing family payment hardship provisions;
 - extend the range of employer provided fringe benefits currently taken into account in the income test for family payment, maternity allowance and childcare assistance;
 - provide a mechanism for the resumption of family payment following automatic termination of the payment;

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- enable the payment of parenting allowance to continue for 14 weeks after the death of the last parenting allowance child if either the parenting allowance recipient or the recipient's partner were receiving more than the minimum rate of family payment for the child;
- amend the early lodgement provisions that relate to family payment, maternity allowance and parenting allowance so that the provisions will not apply where qualification for payment is dependent on the birth of a child;
- ensure that a refugee who is permanently blind will not be disqualified from receiving disability support pension because they do not have 10 years' qualifying Australian residence;
- enable newstart allowance to be paid at the rate specified for a single person with a dependent child to lone parents receiving newstart allowance who have children over 16 and under 18 living with them and to whom a disability support pension is being paid;
- remove the requirement that all disability support pensioner claimants must be examined by a medical practitioner;
- subsume the disability wage supplement within the disability support pension from 1 January 1998;
- introduce a revised set of Impairment Tables for use in the assessment of disability support pension;
- introduce a new method of determining the value of a payment received by a customer in a foreign currency;
- clarify that any amounts regarded as entry contributions to retirement villages are not 'rent' for rent assistance purposes; and
- provide the Secretary of the Department of Social Security with a discretion to pay newstart allowance to a person who has claimed disability support pension, while the disability support pension claim is being determined;
- *Social Security Act 1991 and Student and Youth Assistance Act 1973 to:*
 - add to the qualifications for rent assistance the requirement that a person's standard family payment rate must exceed the minimum family payment rate;
 - ensure that certain persons and allowees are entitled to rent assistance as an adjunct to their pension or allowance, as was provided under the former family payment regime; and
 - allow the backdating of certain payments, through the deemed earlier lodgement of a claim, in circumstances where the person makes an

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inquiry about claiming payment (either by telephone, facsimile or computer) and then formally lodges a claim and qualifies for payment;

- *Social Security Act 1991* and *Veterans' Entitlements Act 1986* to remove the entitlement to rent assistance of any person who pays rent for living in premises for which a public housing tenant receives subsidised accommodation;
- *Student and Youth Assistance Act 1973* to provide the Secretary to the Department of Social Security with a discretion to pay youth training allowance to a person who has claimed disability support pension, while the disability support pension claim is being determined;
- *Data-matching Program (Assistance and Tax) Act 1990* to enable the inclusion in the Data-matching Program of the family tax initiative, comprising family tax assistance and family tax payment.

Retrospectivity

Subclauses 2(4), (5) and (9)

Subclauses 2(4), (5) and (9) would provide for various provisions of this bill to commence retrospectively. The amendments, however, referred to in these subclauses are beneficial to Social Security recipients.

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

Retrospectivity

Subclauses 2(7) and (15)

Subclauses 2(7) and (15) would provide for various provisions of this bill to commence retrospectively. The amendments, however, referred to in these subclauses are technical only, make no change to the law and do not adversely affect any social security recipient.

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

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

States Grants (General Purposes) Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to provide for general revenue assistance to the States and Territories in 1997-98; for the Commonwealth to make National Competition Payments to the States and Territories in 1997-98; and provide for the States and Territories to make fiscal contributions to the Commonwealth in 1997-98 by way of deductions from general revenue assistance.

The committee has no comment on this bill.

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

Sun Fund Bill 1997

This bill was introduced into the Senate on 25 June 1997 by Senator Brown as a Private Senator's bill.

The bill proposes to amend the *Customs Act 1901* and the *Excise Act 1901* to establish the Sun Fund which would consist of a sum equal to the amount paid in 1996-97 as diesel fuel rebate for electricity generation. Grants from the Sun Fund would be made to persons eligible for the diesel fuel rebate but who apply instead to install photovoltaic, wind or solar thermal systems.

The committee has no comment on this bill.

Taxation Laws Amendment Bill (No. 4) 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
 - amend the thin capitalisation rules to ensure that an appropriate amount of profit is derived in Australia in respect of foreign controlled Australian enterprises;
 - address tax avoidance arrangements involving eligible finance shares and widely distributed finance shares;
 - remove the general requirement that employers must provide an employee with a group certificate within seven days of that employee's termination of employment;
 - ensure deductions are allowed or disallowed in certain circumstances when tax exempt entities become taxable;
 - address tax avoidance arrangements through the use of tax exempt bodies distributing funds offshore;
- *Income Tax Assessment Act 1997* to include rewritten provisions of the 1936 Act which treat a lessor of depreciable plant under a chattel lease as the owner for taxation depreciation purposes where the plant has become a fixture on another person's land, and makes consequential amendments to the *Income Tax Assessment Act 1936*;
- *Income Tax Assessment Act 1936*, *Taxation Administration Act 1953* and *Fringe Benefits Tax Assessment Act 1986* to provide for electronic lodgment of returns, applications for amendment and other documents provided to the Commissioner;
- *Taxation (Deficit Reduction) Act (No. 2) 1993* to retain at 33% for the 1997-98 and 1998-99 years the rate of tax imposed on the eligible insurance business of friendly societies and other registered organisations;
- *Income Tax Assessment Act 1997* and *Income Tax Assessment Act 1936* to make consequential amendments in relation to luxury car leasing rules continuing to have application to the 1997-98 and later income years.

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

**Retrospectivity
Subclause 2(4)**

Subclause 2(4) would provide for amendments proposed in Schedule 8 of this bill to commence retrospectively. The amendments, however, are beneficial to taxpayers.

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

**Retrospective application - legislation by press release
Schedule 2**

The amendments proposed in Schedule 2 of this bill would apply retrospectively from 3 February 1997. Although this is an example of legislation by press release, the amendments have been introduced within the six months period referred to in the resolution of the Senate of 8 November 1988 which 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.

**Retrospective application
Schedule 4**

The amendments proposed in Schedule 4 of this bill would apply retrospectively from 2 July 1995. Item 9 of the schedule, however, makes transitional provisions for those who would otherwise be affected by the retrospective application of the amendments.

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

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

Retrospective application Schedule 5

The amendments proposed in Schedule 4 of this bill would apply retrospectively from either 1 July 1996 or from the date of the 1996 budget speech (20 August 1996). The amendments are for the purpose of preventing the avoidance of tax and may, therefore, be seen as properly applying from the dates as announced.

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

Retrospective application Items 18 and 19 of Schedule 6

The amendments proposed in items 18 and 19 of Schedule 6 of this bill would apply retrospectively from 1 July 1996. The amendments, however, are technical only and are beneficial to taxpayers.

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

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

Telecommunications Amendment (Prohibition of B-Party Charging of Internet Service Providers) Bill 1997

This bill was introduced into the Senate on 26 June 1997 by Senator Allison as a Private Senator's bill

The bill proposes to prevent telecommunications carriers from charging receivers a timed levy for receiving calls for the purposes of connecting to the Internet.

The committee has no comment on this bill.

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

Trade Practices Amendment (Fair Trading) Bill 1997

This bill was introduced into the Senate on 24 June 1997 by Senator Murray as a Private Senator's bill.

The bill proposes to amend the *Trade Practices Act 1974* to widen the protection for small business against unfair trading practices and to widen the choice of remedies available to parties and the Australian Competition and Consumer Commission for breaches.

The committee has no comment on this bill.

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

Transport Legislation Amendment (Search and Rescue Service) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Parliamentary Secretary to the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the following Acts:

- *Australian Maritime Safety Authority Act 1990*, the *Air Services Act 1995* and *Civil Aviation Act 1988* to amalgamate the coordination of maritime and aviation search and rescue functions into one national coordination centre, to be known as AusSAR, the Australian Search and Rescue Organisation; and
- *Australian Maritime Safety Authority Act 1990* to increase the number of ordinary Board members and to make the appointment of a departmental officer to the Board discretionary.

The committee has no comment on this bill.

Veterans' Affairs Legislation Amendment (Budget and Compensation Measures) Bill 1997

This bill was introduced into the House of Representatives on 25 June 1997 by the Minister for Veterans' Affairs. [Portfolio responsibility: Veterans' Affairs]

The bill proposes to amend the following Acts:

- *Veterans' Entitlements Act 1986* to:
 - extend eligibility for benefits to certain Australian Defence Force personnel who served in one of several overseas deployments;
 - extend availability of a lump sum advance of person to all disability pensioners and war widow/er pensioners;
 - simplify the way in which the maximum amount of a lump sum advance is determined;
 - prevent the Repatriation Commission from accepting liability for any incapacity or death where the only link with relevant service is the use of a tobacco product that commenced on or after 1 January 1998 or the use increased after 1 January 1998; and
 - make minor amendments;
- *Defence Services Homes Act 1918* to extend eligibility for benefits to certain Australian Defence Force personnel who served in one of several overseas deployments; and
- *Safety, Rehabilitation and Compensation Act 1988* to make amendments consequential upon changes to eligibility provisions.

Retrospectivity

Subclause 2(2)

Subclause 2(2) would provide that many amendments proposed in this bill would commence retrospectively from 13 May 1997. The amendments, however, are beneficial to certain defence force personnel.

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

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

Wheat Marketing Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend enable the restructure of the Australian Wheat Board from a statutory marketing authority to a grower owned company from July 1999.

The committee has no comment on this bill.

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

Workplace Relations Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Minister for Industrial Relations. [Portfolio responsibility: Industrial Relations]

The bill proposes to amend the *Workplace Relations Act 1996* to exclude new employees of small business from the operation of the Federal unfair dismissal provisions.

The committee has no comment on this bill.

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

Workplace Relations and Other Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 June 1997 by the Minister for Industrial Relations. [Portfolio responsibility: Industrial Relations]

The bill proposes to amend the following Acts:

- *Workplace Relations Act 1996* and *Workplace Relations and Other Legislation Amendment Act 1996* to clarify the:
 - Australian Industrial Relations Commission's (AIRC) capacity to exercise its arbitral powers in relation to safety net wage adjustments during a bargaining period;
 - status of awards made under section 170MX of the Act;
 - status of 'incidental and necessary' provisions in awards simplified by the AIRC during the award simplification process;
- *Workplace Relations Act 1996* to:
 - clarify the time limit allowed for applications to be lodged for the certification of an agreement;
 - clarify that the 14 day period to be provided to employees to consider a certified agreement is not affected by new staff commencing work within the period;
 - strengthen the right of entry and powers of authorised officers of the Employment Advocate,
 - amend the penalty provisions relating to Australian Workplace Agreements (AWAs);
 - extend the time allowed for filing AWAs from 14 to 21 days;
 - permit certain authorised persons to provide information to the Employment Advocate;
 - expand the definition of *AWA official* to include all staff of the Office of the Employment Advocate;
 - clarify provisions relating to the publication of AWA determinations;

- allow the Employment Advocate to waive technical filing requirements in relation to AWAs in certain circumstances;
- amend the process by which designated awards can be determined by the Commission and the Employment Advocate for the purpose of applying the no-disadvantage test to agreements;
- clarify the application of State laws in relation to termination of employment of an employee covered by a federal award or agreement;
- clarify the time limits for making of applications in respect of termination of employment;
- provide for the maximum amount of compensation which may be awarded in respect of unfair dismissal or unlawful termination of employment;
- ensure that an agreement may not be certified when it includes a preference provision inconsistent with Part XA of the Act;
- provide for the removal of void preference clauses from existing awards and agreement;
- correct a limitation on the circumstances in which a constituent unit of a registered organisation can apply to withdraw from an amalgamation and clarify how such applications can be made;
- define *ancillary document*;
- clarify the provision dealing with access to AWAs for Victorian employees;
- clarify the successor provisions for certified agreements and AWAs binding on Victorian employees;
- remove and amend some obsolete or outdated provisions; and
- clarify the reference to *relevant award* in section 152; and
- *Navigation Act 1912, Safety, Rehabilitation and Compensation Act 1988, Seafarers Rehabilitation and Compensation Act 1992, Superannuation Act 1976 and Superannuation Act 1990 to make consequential amendments arising from the removal of agreements from the definition of **award** in the Act.*

The committee has no comment on this bill.

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 11 of 1997

3 September 1997

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator M Forshaw
Senator S Macdonald
Senator A Murray

TERMS OF REFERENCE

Extract from Standing Order 24

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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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.

Child Care Payments (Consequential Amendments and Transitional Provisions) Bill 1997

This bill was introduced into the House of Representatives on 28 August 1997 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

Complementary to the Child Care Payments Bill 1997, this bill proposes to provide transitional arrangements to facilitate the transfer to the new payment arrangements set out in the main bill. Consequential amendments include the repeal of the *Childcare Rebate Act 1993*.

The committee has no comment on this bill.

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

Customs Tariff Amendment Bill (No. 3) 1997

This bill was introduced into the House of Representatives on 28 August 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Tariff Act 1995* to increase the rates of customs duty on tobacco, certain tobacco products and certain petroleum products. This bill is one of several introduced as a response to a request from the States and Territories to introduce measures to protect revenue following the 5 August 1997 High Court decision that business franchise fees on tobacco in New South Wales were invalid under section 90 of the Constitution. This decision also cast doubt on other franchise fees imposed by the States and Territories collected on tobacco, petroleum and liquor.

Retrospectivity **Subclause 2(2)**

By virtue of subclause 2(2) of this bill, Schedule 1 is to be taken to have commenced on 7 August 1997. The purpose of this retrospectivity, however, is to allow the Commonwealth to levy duties in order to replace the business franchise fees formerly levied by the States and Territories which were found to be invalid by the High Court in the *Ha* and *Hammond* cases.

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

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

Excise Tariff Amendment Bill (No. 3) 1997

This bill was introduced into the House of Representatives on 28 August 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Excise Tariff Act 1921* to increase the rates of excise duty on tobacco, certain tobacco products and certain petroleum products. This bill is one of several introduced as a response to a request from the States and Territories to introduce measures to protect revenue following the 5 August 1997 High Court decision that business franchise fees on tobacco in New South Wales were invalid under section 90 of the Constitution. This decision also cast doubt on other franchise fees imposed by the States and Territories collected on tobacco, petroleum and liquor.

Retrospectivity Subclause 2(2)

By virtue of subclause 2(2) of this bill, Schedule 1 is to be taken to have commenced on 7 August 1997. The purpose of this retrospectivity, however, is to allow the Commonwealth to levy duties in order to replace the business franchise fees formerly levied by the States and Territories which were found to be invalid by the High Court in the *Ha* and *Hammond* cases.

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

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

Franchise Fees Windfall Tax (Collection) Bill 1997

This bill was introduced into the House of Representatives on 28 August 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to provide for the determination, collection and administration of the franchise fees windfall tax which will apply to claims for refunds of business franchise fees paid before 5 August 1997. The windfall tax is proposed to protect revenue collected prior to 5 August 1997 by the State and Territories which may be lost as a result of the High Court decision that business franchise fees on tobacco in New South Wales were invalid under section 90 of the Constitution. This decision also cast doubt on other franchise fees imposed by the States and Territories collected on tobacco, petroleum and liquor.

Retrospectivity Clause 2

By virtue of clause 2, this bill is to be taken to have commenced on 5 August 1997. The purpose of this retrospectivity, however, is to protect revenue collected prior to 5 August 1997 through the business franchise fees formerly levied by the States and Territories which were found to be invalid by the High Court in the *Ha* and *Hammond* cases.

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

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

Franchise Fees Windfall Tax (Consequential Amendments) Bill 1997

This bill was introduced into the House of Representatives on 28 August 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to make consequential amendments to the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* as a result of the windfall tax to apply to claims for refunds of business franchise fees paid before 5 August 1997. The windfall tax is proposed to protect revenue collected prior to 5 August 1997 by the State and Territories which may be lost as a result of the High Court decision that business franchise fees on tobacco in New South Wales were invalid under section 90 of the Constitution. This decision also cast doubt on other franchise fees imposed by the States and Territories collected on tobacco, petroleum and liquor.

Retrospective application Subclause 4(1)

By virtue of subclause 4(1), the amendments made by this bill to the *Income Tax Assessment Act 1936* apply retrospectively to the 1996-97 year of income. The purpose of this retrospective application, however, is to cover amounts which may arise from a late balancing company whose balancing date for the 1996-97 year is after 5 August 1997. These are consequential amendments made necessary by the mechanism of windfall tax which will protect revenue collected prior to 5 August 1997 through the business franchise fees formerly levied by the States and Territories which were found to be invalid by the High Court in the *Ha* and *Hammond* cases.

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

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

Franchise Fees Windfall Tax (Imposition) Bill 1997

This bill was introduced into the House of Representatives on 28 August 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to impose the windfall tax at a rate of 100 per cent. The windfall tax is proposed to protect revenue collected prior to 5 August 1997 by the State and Territories which may be lost as a result of the High Court decision that business franchise fees on tobacco in New South Wales were invalid under section 90 of the Constitution. This decision also cast doubt on other franchise fees imposed by the States and Territories collected on tobacco, petroleum and liquor.

Retrospectivity Clause 2

By virtue of clause 2, this bill is to be taken to have commenced on 5 August 1997. The purpose of this retrospectivity, however, is to protect revenue collected prior to 5 August 1997 through the business franchise fees formerly levied by the States and Territories which were found to be invalid by the High Court in the *Ha* and *Hammond* cases.

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

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

Sales Tax Assessment Amendment Bill 1997

This bill was introduced into the House of Representatives on 28 August 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Sales Tax Assessment Act 1992* to:

- ensure that the increase in the rate of sales tax on alcoholic beverages does not force taxpayers over the small business exemption and quarterly remittance thresholds;
- ensure that any refund, rebate or similar payment made by a State or Territory to a sales tax payer in relation to alcoholic beverages does not reduce the taxable value of the goods;
- limit the entitlement to a credit so that a credit is not available for the additional 15 per cent sales tax paid on alcoholic beverages; and
- provide for the limited disclosure of information to State and Territory officers to facilitate the State and Territory franchise fee rebate schemes.

This bill is one of several introduced as a response to a request from the States and Territories to introduce measures to protect revenue following the 5 August 1997 High Court decision that business franchise fees on tobacco in New South Wales were invalid under section 90 of the Constitution. This decision also cast doubt on other franchise fees imposed by the States and Territories collected on tobacco, petroleum and liquor.

Retrospectivity Clause 2

By virtue of clause 2, this bill is to be taken to have commenced on 6 August 1997. The purpose of the retrospectivity of this bill and the other bills amending sales tax legislation, however, is to raise additional wholesale tax on alcoholic beverages to replace the liquor franchise fees which would have been collected after 5 August 1997. The committee notes that these measures will

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protect the revenue which may be lost as a result of the High Court's judgement in the *Ha* and *Hammond* cases.

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

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

Sales Tax (Customs) (Alcoholic Beverages) Bill 1997

This bill was introduced into the House of Representatives on 28 August 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill amends the *Sales Tax (Exemptions and Classifications) Act 1992* to the extent that the Act deals with tax imposed by the *Sales Tax Imposition (Customs) Act 1992* to increase the rate of sales tax applicable to alcoholic beverages by 15 per cent. This bill is one of several introduced as a response to a request from the States and Territories to introduce measures to protect revenue following the 5 August 1997 High Court decision that business franchise fees on tobacco in New South Wales were invalid under section 90 of the Constitution. This decision also cast doubt on other franchise fees imposed by the States and Territories collected on tobacco, petroleum and liquor.

Retrospectivity Clause 2

By virtue of clause 2, this bill is to be taken to have commenced on 6 August 1997. The purpose of the retrospectivity of this bill and the other bills amending sales tax legislation, however, is to raise additional wholesale tax on alcoholic beverages to replace the liquor franchise fees which would have been collected after 5 August 1997. The committee notes that these measures will protect the revenue which may be lost as a result of the High Court's judgement in the *Ha* and *Hammond* cases.

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

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

Sales Tax (Excise) (Alcoholic Beverages) Bill 1997

This bill was introduced into the House of Representatives on 28 August 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill amends the *Sales Tax (Exemptions and Classifications) Act 1992* to the extent that the Act deals with tax imposed by the *Sales Tax Imposition (Excise) Act 1992* to increase the rate of sales tax applicable to alcoholic beverages by 15 per cent. This bill is one of several introduced as a response to a request from the States and Territories to introduce measures to protect revenue following the 5 August 1997 High Court decision that business franchise fees on tobacco in New South Wales were invalid under section 90 of the Constitution. This decision also cast doubt on other franchise fees imposed by the States and Territories collected on tobacco, petroleum and liquor.

Retrospectivity Clause 2

By virtue of clause 2, this bill is to be taken to have commenced on 6 August 1997. The purpose of the retrospectivity of this bill and the other bills amending sales tax legislation, however, is to raise additional wholesale tax on alcoholic beverages to replace the liquor franchise fees which would have been collected after 5 August 1997. The committee notes that these measures will protect the revenue which may be lost as a result of the High Court's judgement in the *Ha* and *Hammond* cases.

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

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

Sales Tax (General) (Alcoholic Beverages) Bill 1997

This bill was introduced into the House of Representatives on 28 August 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill amends the *Sales Tax (Exemptions and Classifications) Act 1992* to the extent that the Act deals with tax imposed by the *Sales Tax Imposition (General) Act 1992* to increase the rate of sales tax applicable to alcoholic beverages by 15 per cent. This bill is one of several introduced as a response to a request from the States and Territories to introduce measures to protect revenue following the 5 August 1997 High Court decision that business franchise fees on tobacco in New South Wales were invalid under section 90 of the Constitution. This decision also cast doubt on other franchise fees imposed by the States and Territories collected on tobacco, petroleum and liquor.

Retrospectivity Clause 2

By virtue of clause 2, this bill is to be taken to have commenced on 6 August 1997. The purpose of the retrospectivity of this bill and the other bills amending sales tax legislation, however, is to raise additional wholesale tax on alcoholic beverages to replace the liquor franchise fees which would have been collected after 5 August 1997. The committee notes that these measures will protect the revenue which may be lost as a result of the High Court's judgement in the *Ha* and *Hammond* cases.

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

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 12 of 1997

24 September 1997

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

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.

Customs Tariff Amendment Bill (No. 4) 1997

This bill was introduced into the House of Representatives on 3 September 1997 by the Parliamentary Secretary to the Minister for Health and Family Services. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Tariff Act 1995* to maintain the increases in the rates of customs duty on tobacco, certain tobacco products and certain petroleum products proposed by the Customs Tariff Amendment Bill (No. 3) 1997. This measure is required as the Customs Tariff (Fuel Rates Amendment) Bill 1997 (still before Parliament) would displace the revised increased rates included in the Customs Tariff Amendment Bill (No. 3) 1997.

The committee has no comment on this bill.

Excise Tariff Amendment Bill (No. 4) 1997

This bill was introduced into the House of Representatives on 3 September 1997 by the Parliamentary Secretary to the Minister for Health and Family Services. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Excise Tariff Act 1921* to maintain the increases in the rates of excise duty on tobacco, certain tobacco products and certain petroleum products proposed by the Excise Tariff Amendment Bill (No. 3) 1997. This measure is required as the Excise Tariff (Fuel Rates Amendment) Bill 1997 (still before Parliament) would displace the revised rates included in the Excise Tariff Amendment Bill (No. 3) 1997.

The committee has no comment on this bill.

Migration Legislation Amendment Bill (No. 5) 1997

This bill was introduced into the House of Representatives on 3 September 1997 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* and *Administrative Decisions (Judicial Review) Act 1977* to:

- introduce a new judicial review scheme;
- apply the new judicial review scheme to both the Federal Court and the High Court; and
- allow specified decisions to be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

These provisions were originally included in the Migration Legislation Amendment Bill (No. 4) 1997 as Schedule 4. They have now been removed from that legislation and included in this separate bill as Schedule 1.

The committee commented on these provisions in Alert Digest No. 10 of 1997. For the convenience of Senators, the committee repeats those comments on the new bill with appropriate numbering change from Schedule 4 to Schedule 1.

Ousting of judicial review

Item 7 of Schedule 1 - Proposed new Part 8 - Judicial Review

Proposed new Part 8 of the *Migration Act 1958* to be inserted by item 7 of Schedule 1 would impose substantial limitations on the ability of those affected by various decisions, which are currently subject to judicial review, to seek judicial review of those decisions. For example, the bill precludes judicial review of decisions taken during the process of reviewing, on the merits, decisions affecting visas and refugee status as well as putting a twenty-eight day time limit on the right to apply for mandamus and the other prerogative writs in respect of certain other decisions.

Ousting of judicial review is not a matter to be undertaken lightly by the Parliament. It has the potential to upset the delicate arrangement of checks and balances upon which our constitutional democracy is based. We ignore the doctrine of separation of powers at our peril. It is the function of the courts within our society to ensure that executive action affecting those subject to Australian law is carried out in accordance with law. It is cause for the utmost caution when one arm of

government (in this case the Executive) seeks the approval of the second arm of government (the Parliament) to exclude the third arm of government (the Judiciary) from its legitimate role whatever the alleged efficiency, expediency or integrity of programs is put forward in justification.

The committee **seeks the advice of the Minister** on this issue.

For these reasons, 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.

Native Title Amendment Bill 1997

This bill was introduced into the House of Representatives on 4 September 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Prime Minister]

The bill proposes to amend the following Acts:

- *Native Title Act 1993* to:
 - deal with certain acts done on or before 23 December 1996 (the date of the High Court's decision in *Wik*) concerning the interaction between native title rights and other rights and interests in land or waters;
 - confer new functions on representative Aboriginal/Torres Strait Islander bodies and deal with the selection, funding, accountability and administration of representative bodies; and
 - explain how the new future acts processes will apply to processes already underway when the amendments commence, what will happen to applications already made to the National Native Title Tribunal (NNTT) and the Federal Court and how the new registration test will apply to claims already on the Register of Native Title Claims; and
- *Native Title Act 1993, Federal Court of Australia Act 1976 and Human Rights and Equal Opportunity Commission Act 1986* to:
 - explain how applications concerning native title issues are to be made and dealt with by the Federal Court, the NNTT and State or Territory bodies which have been approved under the *Native Title Act 1993* in relation to applications about native title matters; and
 - amend the way in which the Register of Native Title Claims and the National Native Title Register are to be kept and, in particular, the new registration test that is to be applied to claims for native title.

Commencement by Proclamation/effluxion of time Subclauses 2(2) to (6)

Subclauses 2(2) to (6) of this bill provide that the substantive amendments made by the bill will commence at various times after Royal Assent. The subclauses state:

- (2) Subject to subsection (3), Part 1 of Schedule 3 commences on a day to be fixed by Proclamation.

- (3) If Part 1 of Schedule 3 does not commence within the period of 9 months beginning on the date on which this Act receives the Royal Assent, that Part commences on the first day after the end of that period.
- (4) Part 2 of Schedule 3 commences:
 - (a) on the first day after the end of the period of 12 months after the commencement of Part 1 of Schedule 3; or
 - (b) if, before the end of that period, a later day is fixed by Proclamation—on that later day.
- (5) Subject to subsection (6), the remaining provisions of this Act commence on a day or days to be fixed by Proclamation.
- (6) If a provision referred to in subsection (5) does not commence within the period of 9 months beginning on the day on which this Act receives the Royal Assent, that provision commences on the first day after the end of that period.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. 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

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commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

With respect to subclauses (3) and (6), the committee notes that paragraph 4 of the Drafting Instruction is applicable. The explanatory memorandum does not appear to give a reason for using a nine month period rather than a 6 month period for automatic commencement.

With respect to subclause (4), the committee notes that the explanatory memorandum at paragraph 1.13 suggests that the change from the present system for recognising and regulating representative bodies to the new system will need a transition period sufficiently long to enable the necessary preparatory work to be completed. The mechanism chosen, however, will result in a date for commencement that is not limited to any particular time. Paragraph 6 of the Drafting Instruction suggests that such a method should be used only in unusual circumstances.

The committee, therefore, **seeks the advice of the Minister** on the reasons for choosing the mechanisms in subclauses 2(3), (4) and (6).

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.

Retrospective effect -validation of intermediate period acts Schedule 1 item 9 - Proposed Division 2A

The provisions of the proposed Division 2A, to be inserted by item 9 of Schedule 1, will have some retrospective effect in that they provide for the validation of certain acts which took place between 1 January 1994 and 23 December 1996. Proposed new sections 22D and 22G, however, provide for compensation for native title holders adversely affected by that validation. This is the same process which was used in the *Native Title Act 1993* to provide for the validation of, and compensation for, past acts adversely affecting native title.

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

Vicarious liability and reversal of the onus of proof
Subclause 203FH(4)

Subclause 203FH(4) provides:

- (4) Any conduct engaged in on behalf of a person other than a body corporate by an employee or agent of the person within the scope of his or her actual or apparent authority is taken, for the purposes of this Part, to have been engaged in also by the person unless the person establishes that the person took reasonable precautions and exercised due diligence to avoid the conduct.

This subclause, if enacted, would impose vicarious liability on a person for the criminal acts of his or her employee or agent. It would also 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 they constitute the effective mind and heart of the company. The company, in effect, thinks and makes decisions through them. 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 primary issue is whether imposing criminal liability vicariously on an employer who is a natural person unduly trespasses on that person's personal rights and liberties. Accordingly, the committee **seeks the Minister's advice** on this matter.

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.

Plebiscite for an Australian Republic Bill 1997 [No. 2]

This bill was introduced into the House of Representatives on 3 September 1997 by Mr Beazley as a Private Member's bill.

The bill proposes that a plebiscite be held at any time between now and the next Federal election on whether Australia should become a republic. The bill further proposes that a Joint Parliamentary Committee be established to determine the form of the question to be put at the plebiscite and to promote debate on the matter.

The committee has no comment on this bill.

Taxation Laws Amendment (Foreign Income Measures) Bill 1997

This bill was introduced into the House of Representatives on 4 September 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Assessment Act 1936* to:

- create a list of broad-exemption countries for accruals taxation purposes;
- introduce measures to reduce compliance costs under controlled foreign company measures;
- modify the exemption for amounts derived by an Australian company through a branch to allow the exemption to apply to amounts derived through a branch in a limited-exemption listed country;
- repeal the exemption for approved country funds from foreign investment fund measures;
- add the Bogota, Colombo, Zimbabwe and Bratislava stock exchanges to the list of approved stock exchanges used for the purposes of obtaining market values for foreign investment fund interests; and
- make consequential and transitional changes.

Retrospectivity Item 127 of Schedule 1

Item 127 of Schedule 1 of this bill, if enacted, would permit the making of regulations which come into force retrospectively, even though those regulations may adversely affect some taxpayers. The item specifically expresses the contrary intention which is required to oust those provisions in the *Acts Interpretation Act 1901* and in the yet to be passed Legislative Instruments Bill 1996 which would normally preclude such retrospectivity.

The committee notes, however, that it appears from paragraph 6.70 of the explanatory memorandum that the reason for the retrospectivity is to allow the substantive provisions proposed by this bill to apply from 1 July 1997.

The committee has generally taken the view that it is not an undue trespass on personal rights and liberties where amendments to tax laws, that first apply during the course of the financial year in which they become law, have a date of application which precedes the date of Royal Assent.

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 13 of 1997

1 October 1997

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

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

Ballast Water Research and Development Funding Levy Bill 1997

This bill was introduced into the House of Representatives on 24 September 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to impose a levy on bulk carriers and certain other ships to fund the research and development of effective means of treating ballast water and ships' hulls to render them incapable of transporting exotic marine species between ports.

The committee has no comment on this bill.

Ballast Water Research and Development Funding Levy Collection Bill 1997

This bill was introduced into the House of Representatives on 24 September 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to enable the collection of the levy proposed to be imposed by the Ballast Water Research and Development Funding Levy Bill 1997. The levy collected will be paid into the Strategic Ballast Water Research and Development Fund out of the Consolidated Revenue Fund and will cease once \$2 million has been collected.

The committee has no comment on this bill.

Customs Tariff Amendment Bill (No. 5) 1997

This bill was introduced into the House of Representatives on 22 September 1997 by the Hon. Simon Crean as a Private Member's bill.

The bill proposes to amend the *Customs Tariff Act 1995* to maintain textiles, clothing and footwear tariff rates at the levels reached by 1 July 2000 until 31 December 2004.

The committee has no comment on this bill.

National Firearms Program Implementation Bill 1997

This bill was introduced into the House of Representatives on 24 September 1997 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to enable the Attorney-General to certify that the surrender, during the amnesty period, of certain firearms and other weapons, which have historically been prohibited from possession, has been consistent with the spirit of the national firearms program and therefore compensation becomes payable.

The committee has no comment on this bill.

National Road Transport Commission Amendment Bill 1997

This bill was introduced into the House of Representatives on 25 September 1997 by the Acting Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the *National Road Transport Commission Act 1991* to extend its operation for another 12 months after its current sunset of 14 January 1998.

The committee has no comment on this bill.

Privacy Amendment Bill 1997

This bill was introduced into the Senate on 25 September 1997 by Senator Stott Despoja as a Private Senator's bill.

The bill proposes to amend the *Privacy Act 1988* to establish a national legislative scheme to extend privacy protection to the private sector, corporations and trading and financial corporations by extending the operation of Information Privacy Principles and the Privacy Commissioner developing codes of practice subject to parliamentary approval.

The committee has no comment on this bill.

Sydney Airport Demand Management Bill 1997

This bill was introduced into the House of Representatives on 25 September 1997 by the Acting Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to set a maximum limit of 80 aircraft movements in any one hour at Kingsford Smith Airport and provide for the development of a Slot Management Scheme to administer the movements at Kingsford Smith Airport.

The committee has no comment on this bill.

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 14 of 1997

22 October 1997

ISSN 1329-668X

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

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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.

Australian Meat and Live-stock Industry Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to effect a restructuring in the red meat industry so that the provision of industry policy, planning, marketing and promotion, and research and development services in both domestic and export markets are provided by a producer owned service delivery company. The new service company will be funded by statutory levies contributed by beef, wool, sheepmeat and goat producers. Supplementary funding will be provided from non-statutory contributions made by the processing and live-stock export sectors. The bill further proposes for the continuation of export licensing, export quota management and related enforcement provisions under the control of the Department of Primary Industries and Energy.

Commencement by Proclamation Subclause 2(3)

Subclause 2(3) of this bill provides that the substantive provisions of the bill may commence at any time up to nine months after Royal Assent.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. 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).

With respect to subclause (3), the committee notes that paragraph 4 of the Drafting Instruction is applicable. The explanatory memorandum does not appear to give a reason for using a nine month period rather than a six month period for automatic commencement.

The committee, therefore, **seeks the advice of the Minister** on the reasons for choosing a nine month period.

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.

Australian Meat and Live-stock Industry (Repeals and Consequential Provisions) Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to:

- amend the *Australian Meat and Live-stock (Quotas) Act 1990* and the *Meat and Live-stock Industry Act 1995* to make provision for the transfer of the powers to administer the meat and live-stock export quota and the export licensing systems from the Australian Meat and Live-stock Corporation (AMLC) to the Secretary of the Department of Primary Industries and Energy and to allow for administrative costs to be recovered;
- make consequential amendments to four Acts to reflect the new meat and live-stock industry structural arrangements and the industry's levy arrangements regarding producers and processors;
- repeal eight Acts; and
- make provision for transitional, saving and consequential provisions relating to the functions of the Meat Industry Council, the AMLC and the Meat Research Corporation, the control of meat and live-stock exports, the transfer of assets and liabilities, staffing matters and other consequential provisions.

The committee has no comment on this bill.

Beef Production Levy Amendment Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the *Beef Production Levy Act 1990* to redirect slaughter levies to the prescribed marketing and research bodies and provide that regulations may be made so that the levy rate may be set at zero once satisfactory non-statutory funding arrangements are in place.

The committee has no comment on this bill.

Broadcasting Services Amendment Bill (No. 2) 1997

This bill was introduced into the Senate on 1 October 1997 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Communications, the Information Economy and the Arts]

The bill proposes to amend the *Broadcasting Services Act 1992* to:

- prohibit programs that have been refused classification or have been classified as “X” on subscription television narrowcasting services and also on open narrowcasting services;
- apply to open narrowcasting services the same restrictions regarding “R” rated programs as currently apply to commercial television broadcasting services; and
- apply to the development of codes of practice in relation to community standards and the protection of children from exposure to harmful program material by industry groups representing providers of open television narrowcasting services the same requirements applicable to commercial television broadcasting licensees and community television broadcasting licensees.

The committee has no comment on this bill.

Buffalo Export Charge Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the continued imposition of a charge on the export of live buffaloes by replacing provisions for the imposition of the charge contained in the *Live-stock Export Charge Act 1997* (which will be repealed). The charge will be payable to the Rural Industries Research and Development Corporation to be used to fund the research program for the buffalo industry and to the National Cattle Disease Eradication Trust Account which funds the Brucellosis and Tuberculosis Eradication Campaign.

The committee has no comment on this bill.

Buffalo Slaughter Levy Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the continued imposition of a levy on the slaughter at an abattoir of buffaloes for human consumption by replacing provisions for the imposition of the levy contained in the *Live-stock Slaughter Levy Act 1964* (which will be repealed). The levy will be paid by the owner of the buffaloes at slaughter. The levy will be payable to the Rural Industries Research and Development Corporation to be used to fund the research program for the buffalo industry and to the National Cattle Disease Eradication Trust Account which funds the Brucellosis and Tuberculosis Eradication Campaign.

The committee has no comment on this bill.

Cattle (Exporters) Export Charge Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the continued imposition of a charge on the export of live cattle from Australia by replacing provisions for the imposition of the charge contained in the *Cattle Export Charges Act 1990* (which will be repealed). The charge will be paid by the person who exports the cattle from Australia and will be directed to the prescribed research and marketing bodies. The bill further proposes that regulations may be made to provide that the charge rate be set at zero once satisfactory non-statutory funding arrangements are in place.

The committee has no comment on this bill.

Cattle (Producers) Export Charges Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the continued imposition of a charge on the export of cattle from Australia by replacing provisions for the imposition of the charge contained in the *Cattle Export Charges Act 1990* (which will be repealed). The charge will be paid by the producer who is the owner of the cattle immediately prior to the export of the cattle and will be directed to the prescribed research and marketing bodies, the National Cattle Disease Eradication Trust Account and Australian Animal Health Council Limited.

The committee has no comment on this bill.

Cattle Transactions Levy Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the continued imposition of a levy on transactions and other dealings involving cattle and leviable bobby calves by replacing provisions for the imposition of the levy contained in the *Cattle Transactions Levy Act 1995* (which will be repealed). The levy will be directed to the prescribed research and marketing bodies, the National Cattle Disease Eradication Trust Account and Australian Animal Health Council Limited.

The committee has no comment on this bill.

Family Trust Distribution Tax (Primary Liability) Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to impose family trust distribution tax at the highest marginal rate applying to individuals plus Medicare levy (currently 48.5 per cent) on an amount or value of income or capital where a family trust gives income or capital to persons who are not members of the family group.

The committee has no comment on this bill.

Family Trust Distribution Tax (Secondary Liability) Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to impose family trust distribution tax equal to the full amount of unpaid family trust distribution tax of certain non-resident entities imposed under the proposed *Family Trust Distribution Tax (Primary Liability) Act 1997*.

The committee has no comment on this bill.

Farm Household Support Amendment (Restart and Exceptional Circumstances) Bill 1997

This bill was introduced into the House of Representatives on 2 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the following Acts:

- *Farm Household Support Act 1992* to effect a new scheme called the Farm Family Restart Scheme and a new payment called the exceptional circumstances relief payment (to replace the Drought Relief Payment);
- *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to provide for the tax treatment of the Farm Family Restart Scheme in similar terms to Newstart and for exceptional circumstances relief payment in similar terms to the Drought Relief Payment;
- *Health Insurance Act 1973* to classify recipients of Farm Family Restart Scheme and exceptional circumstances relief payment as disadvantaged persons so they may receive a Health Care Card;
- *Bankruptcy Act 1966* to protect Farm Family Restart Scheme re-establishment grants from creditors in the event of bankruptcy; and
- *Social Security Act 1991* to make reference to an “exceptional circumstances certificate” for the Sickness Allowance rate calculator and to correct an error in a reference to the *Farm Household Support Act 1992*.

The committee has no comment on this bill.

Health Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the following Acts:

- *Health Insurance Commission Act 1973* to remove doubts that hedging contracts made incidental to the borrowings or investments of the Health Insurance Commission require Ministerial approval;
- *Health Insurance Act 1973* to:
 - provide for the claiming and payment of Medicare benefits by means of electronic transmission;
 - eliminate unnecessary consideration by a Specialist Recognition Advisory Committee of questions relating to the continued recognition of a specialist or consultant physician;
 - specify the very limited circumstances in which optometrists might be permitted to charge more than the Schedule fee; and
 - permit the Commonwealth to offset the Medicare benefit which is recoverable from a person because of a false or misleading statement made in connection with the claims against the payment of other Medicare benefits payable to that person;
- *National Health Act 1953* to:
 - introduce a system to enable a private hospital or residential care facility to be reimbursed for the administration of some pharmaceutical benefits to its patients or residents from the institution's own stock;
 - provide for the appointment of an additional member of the Pharmaceutical Benefits Advisory Committee to represent the interests of consumers; and
 - amend the secrecy provisions to correct an anomaly which inhibits the necessary transmission of confidential information in certain circumstances; and
- *Social Security Legislation Amendment (Family Measures) Act 1995* to correct a technical drafting error.

Retrospectivity
Subclauses 2(2), (3) and (5)

Subclauses 2(2), (3) and (5) would provide for various provisions of this bill to commence retrospectively. The amendments, however, referred to in these subclauses are solely for the purpose of correcting drafting errors and make no substantive change to the law.

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

Live-stock (Exporters) Export Charge Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the continued imposition of a charge on the export of live sheep, lambs and goats from Australia by replacing provisions for the imposition of the charge contained in the *Live-stock Export Charge Act 1977* (which will be repealed). The charge will be paid by exporters and will be directed to the prescribed research and marketing bodies. The bill further proposes that regulations may be made to provide that the charge rate be set at zero once satisfactory non-statutory funding arrangements are in place.

The committee has no comment on this bill.

Live-stock (Producers) Export Charges Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the continued imposition of charges on the export of live sheep, lambs and goats from Australia by replacing provisions for the imposition of the charges contained in the *Live-stock Export Charge Act 1977* (which will be repealed). The charge will be paid by producers and will be directed to the prescribed research and marketing bodies, will fund membership of the Australian Animal Health Council Limited and contributions to animal health programs.

The committee has no comment on this bill.

Live-stock Slaughter (Processors) Levy Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the continued imposition of a levy on the slaughter of sheep, lambs and goats by replacing provisions for the imposition of the levy contained in the *Live-stock Slaughter Levy Act 1964* (which will be repealed). The levy will be paid by processors and will be directed to the prescribed research and marketing bodies. The bill further proposes that regulations may be made to provide that the levy rate be set at zero once satisfactory non-statutory funding arrangements are in place.

The committee has no comment on this bill.

Live-stock Transactions Levy Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the continued imposition of a levy on transactions and other dealings involving sheep, lambs and goats by replacing provisions for the imposition of the levy contained in the *Live-stock Slaughter Levy Act 1964* (which will be repealed). The levy will be directed to the prescribed research and marketing bodies, will fund membership of the Australian Animal Health Council Limited and contributions to animal health programs.

The committee has no comment on this bill.

Medicare Levy Consequential Amendment (Trust Loss) Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Medicare Levy Act 1986* to make a consequential amendment to provide that the taxable income of a person for certain purposes includes an amount that is exempt from income tax because family trust distribution tax has been paid in relation to it.

The committee has no comment on this bill.

Migration Agents Registration Application Charge Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to impose a charge on applications by individuals for registration as migration agents as part of a statutory-based self-regulatory scheme to regulate the conduct of migration agents.

The committee has no comment on this bill.

Migration Agents Registration Renewal Charge Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to impose a charge on renewals of registration as migration agents as part of a statutory-based self-regulatory scheme to regulate the conduct of migration agents.

The committee has no comment on this bill.

Migration Legislation Amendment (Migration Agents) Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to:

- amend the *Migration Act 1958* to:
 - create a Migration Agents Registration Authority (MARA) to administer the scheme for regulation of the immigration assistance industry;
 - empower the Minister to appoint an industry body, the Migration Institute of Australia, as the MARA;
 - amend procedures for making initial application for registration as a migration agent;
 - clarify the criteria to be met by persons seeking registration as migration agents;
 - require that, from 21 March 1999, registered agents apply for registration each year and demonstrate they have met continuing professional development requirements;
 - enable the MARA to refer parties in dispute to mediation;
 - enable the MARA to refer lawyers' conduct to an authority responsible for disciplining lawyers;
 - update offence provisions;
 - include a sunset provision on the statutory self-regulatory scheme; and
 - provide transitional arrangements; and
- repeal the *Migration Agents Registration (Application) Levy Act 1992* and the *Migration Agents Registration (Renewal) Levy Act 1992*.

Abrogation of the right against self-incrimination Item 48 of Schedule 1 - proposed section 308

Part 3 of the *Migration Act 1958* deals with migration agents and immigration assistance. Under the proposals in this bill, a Migration Agents Registration

Authority will administer the scheme for regulation of the immigration assistance industry, including matters relating to the registration and continuing registration of agents. Proposed section 308 deals with the requirement for registered agents to give information to the Migration Agents Registration Authority by the production of documents and answering questions in writing and in person. The registered agent is not excused from doing so on the grounds that it may incriminate him or her.

To protect the registered agent, however, proposed subsection 308(4), would make inadmissible in evidence against the person, in any criminal proceedings, any information or thing (including a document) obtained as a direct or indirect result of producing a document or answering a question. This inadmissibility is subject to an exception with respect to a proceeding for an offence against section 487. That section makes it an offence to hinder, obstruct, deceive or mislead a person exercising powers or performing duties under this Act or the regulations. The committee has no concern with such an exception.¹

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

¹ Section 487 carries with it a penalty of imprisonment for 6 months. The committee is currently conducting an inquiry into the appropriateness of imprisonment as a penalty for failing to give information.

National Residue Survey (Buffalo Slaughter) Levy Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the funding of the National Residue Survey by the continued imposition of a levy on the slaughter at an abattoir of buffaloes for human consumption by replacing provisions for the imposition of the levy contained in the *National Residue Survey (Livestock Slaughter) Levy Act 1992*. The levy will be paid by the owner of the buffaloes at slaughter.

The committee has no comment on this bill.

National Residue Survey (Cattle Export) Levy Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the funding of the National Residue Survey by the continued imposition of a levy on the export of cattle from Australia by replacing provisions for the imposition of the levy contained in the *National Residue Survey (Cattle Export) Levy Act 1995* (which will be repealed). The levy will be paid by the cattle producer.

The committee has no comment on this bill.

National Residue Survey (Cattle Transactions) Levy Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the funding of the National Residue Survey by the continued imposition of a levy on transactions and other dealings involving cattle by replacing provisions for the imposition of the levy contained in the *National Residue Survey (Cattle Transactions) Levy Act 1995* (which will be repealed).

The committee has no comment on this bill.

National Residue Survey (Sheep, Lambs and Goats Export) Levy Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the funding of the National Residue Survey by the continued imposition of a levy on the export of live sheep, lambs and goats by replacing provisions for the imposition of the levy contained in the *National Residue Survey (Livestock Slaughter) Levy Act 1992*. The levy will be paid by the producers.

The committee has no comment on this bill.

National Residue Survey (Sheep, Lambs and Goats Transactions) Levy Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for the funding of the National Residue Survey by the continued imposition of a levy on transactions and other dealings involving sheep, lambs and goats by replacing provisions for the imposition of the levy contained in the *National Residue Survey (Livestock Slaughter) Levy Act 1992*.

The committee has no comment on this bill.

Social Security Legislation Amendment (Parenting and Other Measures) Bill 1997

This bill was introduced into the House of Representatives on 2 October 1997 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the following Acts:

- *Social Security Act 1991* to:
 - introduce, from 20 March 1998, a new income support payment, parenting payment, that will replace the sole parent pension and the parenting allowance;
 - change the qualification provisions for child disability allowance; and
 - apply consistent hardship rules to ordinary waiting periods, the liquid assets waiting periods and the income maintenance periods;
- *Health Insurance Act 1973* to:
 - maintain eligibility for a health care card for children whose parent or guardian will no longer qualify for child disability allowance; and
 - extend the period over which a person's income is assessed for the purpose of determining whether they are a low income, disadvantaged person who is eligible for a health care card; and
- *Data-matching Program (Assistance and Tax) Act 1990* to:
 - make reference changes;
 - provide that a matching agency may return tax file number data to an assistance agency; and
 - allow data to be transferred between agencies by secure on-line computer connections.

Tax file numbers

Item 86 of Schedule 1 - proposed sections 500N and 500P

Item 86 of Schedule 1 inserts Part 2.10 in the *Social Security Act 1991*. Part 2.10 contains proposed sections 500N and 500P. These sections, if enacted, would provide that the parenting payment would not be payable if the applicant has not

provided the tax file number of the applicant and (where relevant) his or her partner. The committee recognises that these clauses may be included in the bill in order to prevent overpayments and fraud against the Commonwealth. The committee, however, notes that this is one more example of tax file numbers being used more as a means of identification and as an aid to income testing rather than as a part of the tax laws.

In these circumstances, 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.

Social Security Legislation Amendment (Youth Allowance) Bill 1997

This bill was introduced into the House of Representatives on 2 October 1997 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the *Social Security Act 1991* to give effect to the new social security payment to be known as youth allowance. Youth allowance will commence on 1 July 1998.

Tax file numbers

Item 6 of Schedule 1 - proposed sections 551A and 551B

Item 6 of Schedule 1 inserts Part 2.11 in the Act. Part 2.11 contains proposed sections 551A and 551B. These sections, if enacted, would provide that the youth allowance would not be payable if the applicant has not provided the tax file number of the applicant and (where relevant) his or her partner. The committee recognises that these clauses may be included in the bill in order to prevent overpayments and fraud against the Commonwealth. The committee, however, notes that this is one more example of tax file numbers being used more as a means of identification and as an aid to income testing rather than as a part of the tax laws.

In these circumstances, 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.

Superannuation Contributions and Termination Payments Taxes Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 2 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to make consequential amendments to nine Acts as a result of the introduction of the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Bill 1997 and the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Bill 1997. The bill also proposes to make amendments to clarify the operation of the related surcharge Acts and to make some technical corrections.

Retrospectivity Subclauses 2(2) to 2(5)

Subclauses 2(2) to 2(5) of this bill, if enacted, would provide that most of the substantive provisions of the bill commence retrospectively on 5 June 1997.

It is not clear to the committee whether the retrospectivity of any of these provisions adversely affect persons other than the Commonwealth. Accordingly, the committee **seeks the advice of the Treasurer** on this issue.

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.

Superannuation Contributions Tax Imposition Amendment Bill 1997

This bill was introduced into the House of Representatives on 2 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Superannuation Contributions Tax Imposition Act 1997* to round the rate of superannuation contributions surcharge imposed under that Act to 5 decimal places and to make technical amendments relating to the actions the Commissioner of Taxation must take where a member has not provided his tax file number.

Retrospectivity Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would provide that most of the substantive provisions of the bill commence retrospectively on 5 June 1997.

It is not clear to the committee whether the retrospectivity of any of these provisions adversely affect persons other than the Commonwealth. Accordingly, the committee **seeks the advice of the Treasurer** on this issue.

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.

Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Bill 1997

This bill was introduced into the House of Representatives on 2 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to provide for the assessment and collection of the superannuation contributions surcharge from members of constitutionally protected superannuation funds.

Retrospective application Clause 8 and subclause 12(3)

Clause 8 of this bill, if enacted, would impose the surcharge on surchargeable contributions for the financial year that began on 1 July 1996. The committee is aware that the imposition of a surcharge on superannuation contributions was announced as a budget measure in the 1996 budget. The committee notes that subclause 9(4) provides transitional arrangements that limit the application of the Act to contributions made after the announcement in the Budget on 20 August 1996. Subclause 12(3) has a consequential retrospective application with respect to payments made by a superannuation provider to a member since that date.

With respect to measures stemming from budget announcements the committee is usually prepared to accept some retrospectivity. 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.

On the other hand, the present bill has been introduced more than twelve months after the announcement. As it relates to the imposition of a tax, the committee bears in mind the resolution of the Senate of 8 November 1989. That 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.

While a distinction may be able to be drawn between a budget announcement and a press release, the principle behind the resolution remains: that legislation containing a retrospective tax should be introduced quickly after it is announced.

Given the delay, the committee **seeks the advice of the Treasurer** on why the delay occurred and whether it would be appropriate that the provisions of the bill should apply only to the current financial year.

Pending the advice of the Treasurer, 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.

Power of entry and search without warrant

Subclause 31(1)

Subclause 31(1) of this bill provides:

For the purposes of this Act, an authorised officer:

- (a) may, at any reasonable time, enter and remain on any land or premises; and
- (b) is entitled to full and free access at any reasonable time to all documents; and
- (c) may inspect, examine, make copies of, or take extracts from, any documents.

This power of entry and search is not subject to any requirement that the officer obtain a judicially sanctioned search warrant before entering the premises.

The committee recognises that in this respect subclause 31(1) does not differ from similar provisions in other taxation laws. For example, the *Income Tax Assessment*

Act 1936 contains a similar provision (section 263) and an identical provision occurs in the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*.

There would appear, however, to be no basis in principle for giving officers enforcing revenue laws greater powers than officers enforcing criminal law where a judicially sanctioned warrant is generally required.

Accordingly, the committee **seeks the advice of the Treasurer** on this issue.

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

Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Bill 1997

This bill was introduced into the House of Representatives on 2 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to impose the superannuation contributions surcharge for members of constitutionally protected superannuation funds and declares the rate of surcharge.

The committee has no comment on this bill.

Superannuation Industry (Supervision) Amendment Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Superannuation Industry (Supervision) Act 1993* to:

- allow the trustee of a superannuation fund 60 days, or such further period as the Insurance and Superannuation Commissioner allows, from the date the fund came into existence to elect that the fund become regulated under the Act;
- allow the trustee of a superannuation fund 28 days, or such further period as the Commissioner allows, to rectify an invalid election to be regulated under the Act, from the date of a notice from the Commissioner or the date the trustee finds out about the invalid election;
- provide the Commissioner with a discretion to extend the time limit for the trustee of a superannuation fund established prior to the commencement of the Act to elect that the fund be regulated under the Act; and
- allow a superannuation fund whose trustee has not chosen that the fund be regulated under the Act to be treated as a regulated superannuation fund where the trustee of the fund had previously notified the Commissioner that it intended not to elect because it was in the process of winding up the fund.

Retrospectivity Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would provide that the amendments made by Schedule 1 of the bill would commence retrospectively from 1 July 1996.

The committee notes, however, that the amendments are beneficial in character. The General Outline of the explanatory memorandum states:

The amendments will enable superannuation funds who would otherwise be deprived of concessional taxation treatment in certain income years to obtain access to such treatment, without compromising the security of members' benefits or fund compliance with the retirement income purpose of superannuation.

In effect, the amendments permanently reinstate certain arrangements set out in a number of Temporary Modification Declarations, made

pursuant to section 333 of the SIS Act, that were in place up until 30 June 1996. It is intended that the amendments will take effect retrospectively from 1 July 1996 to ensure that a superannuation fund's eligibility for concessional taxation treatment in the period prior to the amendments is not jeopardised.

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

Superannuation Legislation Amendment **(Superannuation Contributions Tax) Bill 1997**

This bill was introduced into the House of Representatives on 2 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend nine Acts to provide superannuation arrangements for Federal parliamentarians, the Governor-General, certain Judges and tribunal members, certain Defence Force personnel and Commonwealth civilian employees to ensure that the surcharge tax legislation applies to high income-earning members of those schemes and to provide for reductions in the benefits payable to members of those schemes when a surcharge debt has been paid in respect of them for the relevant scheme.

Retrospectivity **Subclause 2(2)**

Subclause 2(2) of this bill, if enacted, would provide that the amendments made by Schedule 9 of the bill would commence retrospectively from 5 June 1997.

It is not clear to the committee from the explanatory memorandum why the retrospectivity is limited only to Schedule 9 nor whether the retrospectivity adversely affects members of the schemes.

Accordingly, the committee **seeks the advice of the Treasurer** on these issues.

Pending the advice of the Treasurer, 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 of regulations **Item 77 of Schedule 1**

Item 77 of Schedule 1 of this bill, if enacted, would provide that regulations may commence retrospectively where:

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

- they are made within one year after the commencement of the provision;
- they are made for purposes arising from any amendment of the *Superannuation Act 1976* made by Schedule 1;

but they may not commence earlier than the day on which the bill receives Royal Assent.

As the retrospectivity is substantially circumscribed, the committee makes no further comment on the provision.

Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Assessment Act 1936* and three other Acts to set out rules that have to be satisfied by trusts before a deduction is allowed for prior year and current year losses and certain debt deductions.

Retrospectivity- legislation by public announcement

The measures contained in this bill will generally take effect from 9 May 1995 the date they were announced in the 1995 budget.

The committee notes that the present Government announced in the 1996 budget that it intended to proceed with the previous Government's 1995 budget announcement that trust loss rules would be introduced into income tax law. At the same time, the Government made it clear that several significant changes would be made to the previous Government's draft legislation. Further modifications of the proposals were contained in the 1997 Budget.

With respect to measures stemming from budget announcements the committee is usually prepared to accept some retrospectivity. 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.

On the other hand, the present bill has been introduced more than twelve months after its original announcement. As it relates to the imposition of a tax, the committee bears in mind the resolution of the Senate of 8 November 1989. That 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.

While a distinction may be able to be drawn between a budget announcement and a press release, the principle behind the resolution remains: that legislation amending taxation law retrospectively from a date so announced should be introduced quickly after it is announced.

The committee has consistently opposed legislation by press release. In its 1986-87 Annual Report the committee stated:

...the practice of 'legislation by press release' carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement.

The committee went on to say:

Moreover, quite apart from the debilitating effect of the practice on the Parliament, it leaves the law in a state of uncertainty. Persons such as lawyers and accountants who must advise their clients on the law are compelled to study the terms of the press release in an attempt to ascertain what the law is. As the Committee has noted on two occasions, one press release may be modified by subsequent press releases before the Minister's announcement is translated into law. The legislation when introduced may differ in significant details from the terms of the announcement. The Government may be unable to command a majority in the Senate to pass the legislation giving effect to the announcement or it may lose office before it has introduced the relevant legislation, leaving the new Government to decide whether to proceed with the proposed change to the law.

The history of the present bill demonstrates what the committee warned about as long ago as 1987.

Given the delay, the committee **seeks the advice of the Treasurer** whether the provisions of the bill should apply only from the current financial year.

Pending the advice of the Treasurer, 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.

Telecommunications Legislation Amendment Bill 1997

This bill was introduced into the Senate on 2 October 1997 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Communications, the Information Economy and the Arts]

The bill proposes to amend the following Acts:

- *Telecommunications Act 1997* to:
 - apply new arrangements to procedures for establishing an interception capability for telecommunications services in Australia and the funding of this interception capability; and
 - provide for labelling requirements for customer equipment and customer cabling;
 - empower the Minister to direct the Australian Communications Authority (ACA) in relation to the preparation of periodic reports as well as special reports on particular matters as they arise;
 - make technical amendments dealing with carriers' powers and immunities;
 - clarify that the ACA can issue a facility installation permit for non-designated overhead lines infrastructure where either the landowner or the relevant authority refuse or withhold consent;
 - require all carriers to have a current industry development plan at all times;
 - require that the Minister approve amended industry development plans;
 - require the Minister to notify carriers and applicants for carrier licences of government policies he wishes them to take into account in preparing their plans; and
 - makes minor and technical amendments to the *Telecommunications Act 1997*, the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* and the *Trade Practices Act 1974*.

Retrospectivity

Subclauses 2(2) to (4)

Subclauses 2(2) to (4) would provide for the amendments proposed in items 25 to 31 of Schedule 2 to commence retrospectively. The amendments, however, referred to in these subclauses are solely for the purpose of correcting drafting errors and make no substantive change to the law.

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

Termination Payments Tax Imposition Amendment Bill 1997

This bill was introduced into the House of Representatives on 2 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Termination Payments Tax Imposition Act 1997* to round the rate of termination payments surcharge imposed under that Act to five decimal places.

Retrospectivity Subclause 2(2)

Subclause 2(2) would provide for the amendments proposed in the bill to commence retrospectively from 5 June 1997. The amendments will round to five decimal places the percentage which constitutes the rate of termination payments surcharge and make no substantive change to the law.

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

Trade Practices Amendment (Fair Trading) Bill 1997

This bill was introduced into the House of Representatives on 30 September 1997 by the Minister for Workplace Relations and Small Business. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Trade Practices Act 1974* to allow for industry codes of practice to be prescribed and enforced and to prohibit unconscionable conduct in relation to certain small business transactions.

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

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Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

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

Airports Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Minister for Finance. [Portfolio responsibility: Finance]

The bill proposes to enable the sale of remaining Federal airports by amending the following Acts:

- *Airports (Transitional) Act 1996* to:
 - allow certain freehold disposals of Federal airport sites to occur; and
 - make amendments of a minor, technical or clarification nature;
- *Airports Act 1996* to:
 - repeal the requirement for the Minister to approve airport-management companies and give the Minister authority to make approvals and determinations in relation to airport-management agreements;
 - provide that decisions of the Minister in relation to master plans, major development plans and environment strategies are not subject to Administrative Appeals Tribunal review (the Minister is required to table a statement about these decisions in both Houses of Parliament);
 - enable the Department of Defence, if it considers it appropriate in the future, to cease to control the operational part of Canberra Airport; and
 - enable the Australian Competition and Consumer Commission, by disallowable instrument, to determine whether a particular service is or is not taken to be an “airport service” and therefore a declared service; and
- *Federal Airports Corporation Act 1986* to enable the Federal Airport Corporation to assist in the disposal of its assets by freehold sale.

Non -reviewable decisions Item 25 of Schedule 2

Item 25 of Schedule 2 of this bill, if enacted, would make certain decisions of the Minister under the *Airports Act 1996* no longer subject to review by the Administrative Appeals Tribunal.

These decisions concern the approval of master plans, major development plans and environmental strategies and variations to any of these.

The committee notes that the explanatory memorandum asserts that 'such decisions are not appropriate for merits review'. The explanatory memorandum, however, does not indicate why the opposite view was taken last year when the *Airports Act 1996* was passed. The committee does not necessarily accept that multiple opportunities for public comment in the consultative process preliminary to the decision is a viable alternative to review of the decision itself.

Further, the committee notes that the Second Reading Speech makes the comment that '[t]his will also bring these provisions into line with planning processes under State law'.

The committee understands, however, that under State law development and planning decisions are generally subject to review by a specialist judicial body, whereas under these proposals the decisions will not be subject to any sort of judicial review (except the rather cumbersome and not entirely appropriate review under the *Administrative Decisions (Judicial Review) Act 1977*).

Accordingly, the committee **seeks the advice of the Minister** on these matters.

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

Civil Aviation Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 22 October 1997 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the following Acts:

- *Civil Aviation (Carriers' Liability) Act 1959* to:
 - authorise the Civil Aviation Safety Authority (CASA) to directly administer both the Act and complementary State legislation, rather than under delegation from Commonwealth and State Ministers responsible for transport;
 - allow Australian governments to self-insure their risks under the Act, instead of requiring them to take out commercial insurance; and
 - impose conditions upon Air Operators' Certificates (AOCs) which require operators continue to hold the mandatory non-voidable passenger liability insurance required by the Act, and empowering CASA to suspend or cancel AOCs for breach of these conditions; and
- *Civil Aviation Act 1988* to impose conditions upon Air Operators' Certificates (AOCs) which require operators continue to hold the mandatory non-voidable passenger liability insurance required by the Act, and empowering CASA to suspend or cancel AOCs for breach of these conditions; and
- *Civil Aviation Legislation Amendment Act 1995* and *Competition Policy Reform Act 1995* to make technical and minor corrections.

Retrospectivity

Subclauses 2(2) and (3)

Subclauses 2(2) and (3) would provide for the amendments proposed in two items of this bill to commence retrospectively. The amendments, however, referred to in these subclauses are solely for the purpose of correcting drafting errors and make no substantive change to the law.

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

Retrospectivity
Subclause 2(4)

Subclause 2(4) would provide for the amendment contained in Schedule 4 of this bill to commence retrospectively on 6 November 1995. The amendment, however, in the words of the explanatory memorandum, 'repeals amendments that had no effect because the provisions that were purported to be amended had previously been repealed'.

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

Customs Tariff Amendment Bill (No. 5) 1997

This bill was introduced into the House of Representatives on 22 October 1997 by the Minister for Customs and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Tariff Act 1995* to introduce a new method of calculating the safety net surcharge component of the customs duty on certain tobacco and tobacco products.

Retrospectivity Subclause 2(2)

Subclause 2(2) would provide for the amendments contained in Schedule 1 of this bill to commence retrospectively on 17 September 1997.

The amendments, however, stem from the High Court's judgments in the *Ha* and *Hammond* cases which held that the business franchise fees were invalid. The legislative package protecting State and Territory revenues increased customs and excise duties on certain tobacco products.

The amendments, in the words of the Second Reading speech, 'will ensure that the effect of the safety net on the manufacturers of the different tobacco products is as close as possible to effect of the business franchise fees' which applied prior to the High Court judgments.

The committee also notes that the date of effect of 17 September 1997 is in accordance with the procedure laid down in section 273EA of the *Customs Act 1901*, by which duty variations are tabled in Parliament and are legislated to have effect retrospectively - a practice which the committee has always found acceptable.

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

Defence Service Homes Amendment Bill 1997

This bill was introduced into the House of Representatives on 22 October 1997 by the Minister for Veterans' Affairs. [Portfolio responsibility: Veterans' Affairs]

The bill proposes to amend the *Defence Service Homes Act 1918* to:

- introduce a guaranteed minimum subsidy to ensure that the Defence Services Home Loans Scheme (DSHLS) interest rates retain their concessional status in a low interest rate market;
- simplify DSHLS interest rate arrangements;
- reduce the interest rate on additional advances and advances for essential repairs; and
- enable changes to the administrative arrangements between the Westpac Banking Corporation and the Commonwealth in relation to the DSHLS.

The committee has no comment on this bill.

Excise Tariff Amendment Bill (No. 5) 1997

This bill was introduced into the House of Representatives on 22 October 1997 by the Minister for Customs and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Excise Tariff Act 1921* to introduce a new method of calculating the safety net surcharge component of the excise duty on certain tobacco and tobacco products.

Retrospectivity Subclause 2(2)

Subclause 2(2) would provide for the amendments contained in Schedule 1 of this bill to commence retrospectively on 17 September 1997.

The amendments, however, stem from the High Court's judgments in the *Ha* and *Hammond* cases which held that the business franchise fees were invalid. The legislative package protecting State and Territory revenues increased customs and excise duties on certain tobacco products.

These amendments in the words of the Second Reading speech 'will ensure that the effect of the safety net on the manufacturers of the different tobacco products is as close as possible to effect of the business franchise fees' which applied prior to the High Court judgments.

The committee also notes that the date of effect of 17 September 1997 is in accordance with the procedure laid down in section 273EA of the *Customs Act 1901*, by which duty variations are tabled in Parliament and are legislated to have effect retrospectively - a practice which the committee has always found acceptable.

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

National Environment Protection Measures (Implementation) Bill 1997

This bill was introduced into the Senate on 21 October 1997 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Environment, Sport and Territories]

The bill proposes to provide for the implementation of national environment protection measures (NEPMs) in respect of certain activities by or on behalf of the Commonwealth and Commonwealth authorities by:

- extending the application of certain provisions of applied State laws to Commonwealth activities in Commonwealth places;
- extending the application of certain provisions of States or Territory laws to Commonwealth activities;
- making regulations;
- implementing environmental audits and environment management plans;
- Administrative Appeals Tribunal review of any reviewable decisions made under an applied provision of an applied State law or applied provision of a State or Territory law;
- providing that certain persons must not disclose information obtained during their presence while searching premises occupied by the Commonwealth or a Commonwealth authority;
- providing that regulations may declare premises to be *exempt premises* in relation to premises the Environment Minister considers to be of national interest and to which access into, or search or, should be restricted or prohibited;
- enabling the Commonwealth or a Commonwealth authority to pay a fee or charge to a State or Territory or a State or Territory authority in certain circumstances;
- enabling the Environment Minister to make an arrangement with an appropriate Minister of a State or Territory in relation to the exercise of a power, or the performance of a duty or function by a State or Territory, a State or Territory authority or by one of their officers;
- requiring the preparation and tabling of an annual report on the implementation of NEPMs; and
- application of the Criminal Code to certain provisions.

The committee has no comment on this bill.

Parliamentary Service Bill 1997

This bill was introduced into the House of Representatives on 23 October 1997 by the Speaker. [Portfolio responsibility: Prime Minister]

The bill proposes to provide for the establishment and administration of the Australian Parliamentary Service.

The committee has no comment on this bill.

Parliamentary Service (Consequential Amendments) Bill 1997

This bill was introduced into the House of Representatives on 23 October 1997 by the Speaker. [Portfolio responsibility: Prime Minister]

The bill proposes to amend five Acts as a consequence of the provisions of the Parliamentary Service Bill 1997.

The committee has no comment on this bill.

States Grants (General Purposes) Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 23 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to alter the States and Territories' shares of revenue replacement payments for tobacco under the safety net arrangements, following the High Court decision of 5 August 1997 which affected State business franchise fees.

The committee has no comment on this bill.

Taxation Laws Amendment Bill (No. 5) 1997

This bill was introduced into the House of Representatives on 23 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to extend the capital gains tax small business roll-over relief to the disposal of certain shares in companies and units in unit trusts;
- *Sales Tax Assessment Act 1992* to require suppliers of personal computers and related goods to be accredited and dealings to be authorised if goods are to be obtained free of sales tax;
- *Income Tax Assessment Act 1997* to:
 - provide a rebate of tax on interest derived by a lender to an approved road or rail infrastructure project; and
 - remove the income tax exemption of the rebates payable to employers under the Commonwealth rebate for apprentice full-time training (CRAFT) scheme; and
- *Income Tax Assessment Act 1997, Income Tax Assessment Act 1936, Airports (Transitional) Act 1996, Civil Aviation Legislation Amendment Act 1995 and Federal Airports Corporation Act 1986* to ensure that the rewrite of the income tax law reflects recent legislation and that recent legislation reflects the tax law improvement rewrites.

Retrospectivity

Subclause 2(2) (second occurring)

Subclause 2(2) (second occurring) would provide for the amendments proposed in Schedule 8 of this bill to commence retrospectively. The amendments, however, referred to are solely for the purpose of correcting drafting errors and make no substantive change to the law.

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

Commencement by regulations

Item 25 of Schedule 2

Item 25 of Schedule 2 of this bill provides that Divisions 3 and 4 of Part 7A, to be inserted by this bill, apply to dealings on or after a date to be prescribed by regulation. It seems to the committee that such a process is akin to commencing legislation by proclamation.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. 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).

Item 25 of Schedule 2 leaves a completely open ended commencement date for these provisions. In view of paragraphs 3 and 4 of the Drafting Instruction the committee **seeks the advice of the Treasurer** whether the provisions referred to should come into effect 6 months after Royal Assent, or after a longer period if there is some good reason for choosing a longer period.

Pending the Treasurer's advice, the committee draws Senators' attention to the provisions, as they may be considered to delegate

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legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 16 of 1997

12 November 1997

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

TERMS OF REFERENCE

Extract from Standing Order 24

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

Appropriation Bill (No. 3) 1997-98

This bill was introduced into the House of Representatives on 29 October 1997 by the Minister for Finance and Administration. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$1,173 million) out of the Consolidated Revenue Fund, additional to those made by Appropriation Act (No. 1) 1997-98, to meet payments for the ordinary annual services of the government for the year ending on 30 June 1998.

The committee has no comment on this bill.

Appropriation Bill (No. 4) 1997-98

This bill was introduced into the House of Representatives on 29 October 1997 by the Minister for Finance and Administration. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$510 million) out of the Consolidated Revenue Fund, additional to those made by Appropriation Act (No. 2) 1997-98, to meet payments for capital works and services, payments to or for the States, the Northern Territory and the Australian Capital Territory; advances and loans, and for other services for the year ending on 30 June 1998.

The committee has no comment on this bill.

Appropriation (Parliamentary Departments) Bill (No. 2) 1997-98

This bill was introduced into the House of Representatives on 29 October 1997 by the Minister for Finance and Administration. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$416,000) out of the Consolidated Revenue Fund, additional to those made by Appropriation (Parliamentary Departments) Act 1997-98, to meet recurrent expenditures of the parliamentary departments for the year ending on 30 June 1998.

The committee has no comment on this bill.

Medicare Levy Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 29 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Medicare Levy Act 1986* to raise the Medicare levy low income exemption thresholds for individuals (to \$13,389) and families (to \$22,594).

Retrospectivity Clause 2

Clause 2 of this bill would provide that the amendments proposed in the Schedule would have effect from 1 July 1997 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 also notes that the amendments are beneficial to low income individuals and families.

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

Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997

This bill was introduced into the House of Representatives on 30 October 1997 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to increase control over the entry into, and presence in, Australia of non-citizens who have a criminal background or have criminal associations and to strengthen the procedures used in dealing with such people.

Commencement by Proclamation Clause 2

Clause 2 of this bill provides that the substantive provisions of the bill would commence on Proclamation, with no date being specified within which such a Proclamation must be made.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Drafting Instruction provides, in part:

3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:

- (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation: or
- (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the

commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The committee notes that the explanatory memorandum does not appear to give any reasons for not imposing some restriction on the open ended power to bring the legislation into force.

The committee, therefore, **seeks the advice of the Minister** on the reasons for this.

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.

Insufficiently defined administrative powers

Items 12 and 13 of Schedule 1 - proposed section 339 and proposed subsection 411(3)

In Alert Digest No. 10 of 1997, the committee commented on a proposal in Migration Legislation Amendment Bill (No. 4) 1997 to substitute a new section 339. The committee noted that, if enacted, the amendment would give the Minister a wide power to certify that some decisions not be reviewable by the Migration Review Tribunal. The proposed grounds upon which the Minister could issue a certificate were:

if the Minister thinks that:

- (a) it would be contrary to the public interest to change the decision, because any change in the decision would prejudice the security, defence or international relations of Australia; or
- (b) it would be contrary to the public interest for the decision to be reviewed because such review would require consideration by the Tribunal of deliberations or decisions of the Cabinet or of a committee of the Cabinet.

The committee noted that the proposed section appeared to limit to some extent the type of decisions which may be so certified. The committee noted that several issues arose among which was whether the characteristics of the Minister's power to

issue a certificate resulted in rights and liberties becoming unduly dependent upon an insufficiently defined administrative power. Consequently the committee sought the advice of the Minister on this matter.

The Minister responded as follows:

Insufficiently defined administrative powers

Whilst the power in section 339 is discretionary, its exercise is limited in two broad areas. First, to the circumstances outlined in subsections 339(a) and (b) and secondly, by its susceptibility to judicial review.

The current power has been used infrequently and I expect this will continue to be the case. There have been no situations where submissions have been made to Cabinet in an attempt to justify use of the power.

Were a Minister to attempt to use this power by putting the matter to Cabinet, judicial review of the bona fides of such decision under section 339 would be available: privative clauses have been interpreted by the High Court as not excluding acting in bad faith as a ground of judicial review.

In its Thirteenth Report of 1997 the committee thanked the Minister for explaining the limiting and inhibiting factors on the exercise of this administrative power.

The present bill, however, would reduce the range of factors which may inform the Minister's decision to issue a conclusive certificate and thereby prevent merits review of the decision the subject of the certificate. In place of the relatively precise grounds of prejudicing the security, defence or international relations of Australia and the possibility of exposing Cabinet deliberations to review, items 12 and 13 would allow the Minister to issue a certificate merely because he or she believes that it would be contrary to the national interest that a decision be changed or reviewed. In the committee's view, this reduction of grounds widens the discretion in the use of this administrative power and the issue of whether it constitutes an insufficiently defined administrative power arises. Accordingly, the committee **seeks the Minister's advice** on this matter.

Pending the Minister's advice, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Insufficiently defined administrative powers

Item 23 of Schedule 1 - proposed subsections 501(3) to (5) and 501A (3) and (4)

Proposed subsections 501(3) to (5), if enacted, would allow the Minister, acting personally, either to refuse to grant a visa or to cancel one that had been granted without hearing any representations which the affected person may wish to make and therefore in derogation of the rules on natural justice and the codes of procedure set out in the Act. The Minister may use this power where he or she reasonably suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in the national interest.

As noted above, the use of this power solely on the grounds of 'the national interest' raises the issue of an insufficiently defined administrative power.

Further, the same issue arises with respect to proposed new subsections 501A(3) and (4) which allow the Minister to overturn a favourable decision of his delegate or the Administrative Appeals Tribunal on the character test.

Accordingly, the committee **seeks the Minister's advice** on these matters and, within that context, whether there would be grounds for judicial review.

Pending the Minister's advice, the committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the committee's terms of reference.

Natural justice?

Item 23 of Schedule 1 - proposed subsections 501(3) to (5) and 501A (3) and (4)

With respect to the same provisions the issue of natural justice arises. The committee notes, however, that proposed new section 501C provides that the Minister must invite the person affected by the decision to make representations showing why the Minister should revoke the earlier decision. This appears to restore a right to be heard. On the other hand, allowing a right to be heard only after the initial decision or after the initial overturning of an earlier decision may not sufficiently safeguard natural justice. Accordingly, the committee **seeks the Minister's advice** on this issue.

Subsections 501C(4) and (11) add a further factor to these considerations. Subsection (4) provides that the Minister may revoke the original decision if the representations satisfy the Minister that the person passes the character test. Subsection (11), however, raises the possibility that the Minister may decide not to exercise the power conferred by subsection (4). This may mean that the Minister must take the representations into account but still decide not to revoke his decision. If, however, it means that the Minister is not required to consider the representations, natural justice is completely denied. Accordingly, the committee **seeks the Minister's advice** on the meaning of subsection (11).

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.

Inappropriate delegation of legislative power? proposed new subsection 501C(10)

Proposed new subsection 501C(10) would allow the making of regulations which would deny any right to be heard in relation to a decision of the Minister under the provisions discussed above to refuse to grant or to cancel a visa on the grounds of failing to pass the character test.

Proposed new subsection 501C(10) provides:

The regulations may provide that, for the purposes of this section:

- (a) a person; or
- (b) a person included in a specified class of persons;

is not entitled to make representations about revocation of an original decision unless the person is a detainee.

The committee notes that although the regulations would be disallowable by either House of the Parliament, they could come into force as soon as they were gazetted and might not be considered for disallowance for a considerable time later.

The committee also notes paragraph 81 of the explanatory memorandum which states:

New subsection 501C(10) provides that regulations may be made, for the purposes of section 501C, which prevent a person, or a person within a specified class of persons, from making representations about

revocation of the original decision, unless the person is a detainee. This amendment enables the Minister to exercise greater control over unlawful non-citizens who would, if the regulation making power was exercised, have to become detainees before they are able to make representations to the Minister to have the original decision revoked.

The committee cannot follow this reasoning and **seeks further clarification from the Minister** on the purpose of the subsection and on whether this is an appropriate delegation of legislative power.

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.

National Transmission Network Sale Bill 1997

This bill was introduced into the House of Representatives on 30 October 1997 by the Minister representing the Minister for Communications, the Information Economy and the Arts. [Portfolio responsibility: Communications, the Information Economy and the Arts]

The bill proposes to enable the sale of the national transmission network (by the sale of shares in one or more Commonwealth-owned companies) and to set in place a regulatory framework for the provision of national broadcasting and other transmission services after the sale.

The committee has no comment on this bill.

National Transmission Network Sale (Consequential Amendments) Bill 1997

This bill was introduced into the House of Representatives on 30 October 1997 by the Minister representing the Minister for Communications, the Information Economy and the Arts. [Portfolio responsibility: Communications, the Information Economy and the Arts]

The bill proposes to amend the following Acts, as a consequence of the provisions of the National Transmission Network Bill 1997:

- *Australian Broadcasting Corporation Act 1983* and *Special Broadcasting Service Act 1991* to make amendments relation to the provision of transmission services, annual reporting requirements and a mechanism for dealing with complaints about the degradation of signal quality; and
- *Radiocommunications Act 1992* to make minor amendments relating to licensing provisions of the Act.

The committee has no comment on this bill.

Quarantine Amendment (Ministerial Approval) Bill 1997

This bill was introduced into the Senate on 28 October 1997 by Senator Neal as a Private Senator's bill.

The bill proposes to amend the *Quarantine Act 1908* to empower the responsible Minister to approve or deny applications to import products such as cooked chicken meat, salmon, apples and pears into Australia.

The committee has no comment on this bill.

Taxation Laws Amendment Bill (No. 6) 1997

This bill was introduced into the House of Representatives on 29 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
 - deny the ability to offset against capital gains certain capital losses created by an arrangement entered into before 3pm on 29 April 1997 and to prevent companies using capital losses artificially created through an arrangement entered into after that time;
 - allow instalment taxpayers classified as small to pay their likely tax on 15 December following their income year and the balance, if any, of their tax liability on the following 15 March, and make consequential amendments;
 - prevent franking credits or debits arising from the payment or refund of tax where those amounts are attributable to the retirement savings account business of a life assurance company;
 - ensure that taxpayers must reduce the cost base or indexed cost base of an asset to the extent of any net deductions allowable for expenditures included in the cost base;
 - replace the formulae used to determine the passive income of the controlled foreign companies of life and general insurance companies;
 - require life companies to use average calculated liabilities, rather than calculated liabilities at the end of the year of income as the basis for determining exempt income that relates to immediate annuity business and apportioning income and capital gains; and
 - clarify the operation of the depreciation provisions in circumstances when an entity the income of which is exempt becomes, for any reason, subject to tax on any part of its income under the provisions of the Act;
- *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to extend to companies two concessional tracing rules which are available to trusts under trust loss measures;
- *Fringe Benefits Tax Assessment Act 1986*, *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to extend the existing exemption for taxi travel beginning or ending at an employee's place of work and to introduce a new

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

exemption from FBT for car parking benefits for certain small business owners; and

- *Sales Tax Assessment Act 1992* to ensure that goods imported into Australia under a temporary importation exemption, used in Australia, exported and then re-imported are subject to sales tax at the time of the later importation.

Retrospective application - legislation by press release

Item 14 of Schedule 1

Item 14 of Schedule 1 to this bill, if enacted, would allow the amendments proposed by Part 2 of that Schedule to apply retrospectively from 3pm on 29 April 1997.

The explanatory memorandum points out that those amendments had been the subject of an announcement by the Treasurer by a press release on that day.

The present bill, however, has been introduced within six months of the announcement referred to in the resolution of the Senate of 8 November 1989. That 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 this provision.

Retrospective application

Subitem 12(1) of Schedule 3

Subitem 12(1) of Schedule 3, if enacted, would permit the amendments made by items 1, 2 and 3 of that Schedule to apply retrospectively from 1 April 1997.

The committee notes, however, that the amendments are beneficial to taxpayers.

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

Retrospective application

Item 3 of Schedule 10

Item 3 of Schedule 10 to this bill, if enacted, would provide that the amendments made by this Schedule would apply to entities which became taxable earlier than 3 July 1995 but not earlier than the start of the year of income in which 1 July 1998 occurs.

The committee notes that paragraph 10.9 of the explanatory memorandum suggests that the Commissioner's interpretation and administration of section 61 has been subject to challenge and that the purpose of these amendments is to retrospectively change the law to avert further challenge.

Accordingly, the committee **seeks the Treasurer's advice** on whether personal rights may be adversely affected by this change.

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.

Taxation Laws Amendment (Part-Time Students) Bill 1997

This bill was introduced into the Senate on 30 October 1997 by Senator Stott Despoja as a Private Senator's bill.

The bill proposes to amend the *Income Tax Assessment Act 1936* to extend the exemption from taxation to part-time scholarships which satisfy all the same criteria as tax exempt full-time scholarships.

The committee has no comment on this bill.

Taxation Laws Amendment (Trust Loss and Other Deductions) Bill 1997

This bill was introduced into the House of Representatives on 1 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Assessment Act 1936* and three other Acts to set out rules that have to be satisfied by trusts before a deduction is allowed for prior year and current year losses and certain debt deductions.

The committee dealt with this bill in Alert Digest No. 14 of 1997. A letter was forwarded to the Treasurer on 23 October 1997 inviting a response to concerns the committee had with regard to retrospectivity. A response has not been received to date. Submissions, however, have been received from the Law Institute of Victoria, from Mr Joff Macleod, Boyd Partners Limited, Chartered Accountants and from Mr Norman Moore, Chartered Accountant, expressing concerns about certain aspects of the bill. Copies of those submissions are attached to this Digest.

The submissions raise issues in relation to the retrospective effect of the legislation and, particularly, with regard to:

a failure in the drafting of the Bill to properly distinguish between two fundamentally different legislative outcomes:

- . the **prevention of tax avoidance schemes** for trafficking in trust losses; and
- . the introduction of **a regime to restrict the carry forward of legitimate losses** by trusts as ordinary taxpayers which are not engaged in trafficking.

Accordingly the committee **seeks the Treasurer's advice** on the issues raised in these submissions.

For the information of Senators we repeat our original comments on this bill:

Extract from Alert Digest No. 14 of 1997

Retrospectivity - legislation by public announcement

The measures contained in this bill will generally take effect from 9 May 1995 the date they were announced in the 1995 budget.

Extract (continued)

The committee notes that the present Government announced in the 1996 budget that it intended to proceed with the previous Government's 1995 budget announcement that trust loss rules would be introduced into income tax law. At the same time, the Government made it clear that several significant changes would be made to the previous Government's draft legislation. Further modifications of the proposals were contained in the 1997 Budget.

With respect to measures stemming from budget announcements the committee is usually prepared to accept some retrospectivity. 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.

On the other hand, the present bill has been introduced more than twelve months after its original announcement. As it relates to the imposition of a tax, the committee bears in mind the resolution of the Senate of 8 November 1989. That 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.

While a distinction may be able to be drawn between a budget announcement and a press release, the principle behind the resolution remains: that legislation amending taxation law retrospectively from a date so announced should be introduced quickly after it is announced.

The committee has consistently opposed legislation by press release. In its 1986-87 Annual Report the committee stated:

...the practice of 'legislation by press release' carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement.

The committee went on to say:

Moreover, quite apart from the debilitating effect of the practice on the Parliament, it leaves the law in a state of uncertainty. Persons such as lawyers and accountants

Extract (continued)

who must advise their clients on the law are compelled to study the terms of the press release in an attempt to ascertain what the law is. As the Committee has noted on two occasions, one press release may be modified by subsequent press releases before the Minister's announcement is translated into law. The legislation when introduced may differ in significant details from the terms of the announcement. The Government may be unable to command a majority in the Senate to pass the legislation giving effect to the announcement or it may lose office before it has introduced the relevant legislation, leaving the new Government to decide whether to proceed with the proposed change to the law.

The history of the present bill demonstrates what the committee warned about as long ago as 1987.

Given the delay, the committee **seeks the advice of the Treasurer** whether the provisions of the bill should apply only from the current financial year.

Pending the advice of the Treasurer, 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. 17 of 1997

26 November 1997

ISSN 1329-668X

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

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.

Copyright Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 20 November 1997 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Copyright Act 1968* to allow the importation of legitimate copies of sound recordings without the licence of the copyright owners and to make copyright piracy penalties uniform for all categories of copyright materials and to increase the maximum penalties.

The committee has no comment on this bill.

Corporations Law Amendment (ASX) Bill 1997

This bill was introduced into the Senate on 18 November 1997 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to amend the Corporations Law to enable the demutualisation of the Australian Stock Exchange (ASX) and to:

- clarify the responsibilities of the ASX as a self-regulatory organisation;
- ensure accountability to the Australian Securities Commission and government;
- require the ASX to establish certain arrangements for overseeing stockbrokers, for the settlement of transactions, and for investigating complaints by investors about business transacted;
- empower the Minister to direct the ASX to attend to matters the Minister believes will promote compliance;
- require the ASX to report annually;
- provide for the Australian Securities Commission to undertake the supervision of the ASX's compliance with Listing Rules; and
- impose a statutory limit of 5 percent on individual shareholdings in the ASX.

The committee has no comment on this bill.

Judiciary Amendment Bill 1997

This bill was introduced into the House of Representatives on 20 November 1997 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Judiciary Act 1903* to:

- establish the Australian Government Solicitor (AGS) as a separate statutory authority to provide legal and related services for government purposes;
- set out the rights, duties and obligations of lawyers in the Attorney-General's Department and the AGS;
- provide for the appointment and terms and conditions of a CEO and staff for the AGS;
- provide for the position regarding taxation and corporate governance of the AGS;
- confer on the Attorney-General the power to issue Legal Services Directions relating to the performance of Commonwealth legal work;

and amends 10 portfolio Acts to make consequential and transitional amendments.

Insufficient Parliamentary scrutiny Proposed new Part VIIC

Under proposed new Part VIIC, the Attorney-General may issue Legal Services Directions which must be complied with by a variety of persons or bodies, not all of whom are otherwise under the control of the Commonwealth.

It appears that these Directions may be legislative in character but there is no provision for them to be disallowable instruments for the purposes of the *Acts Interpretation Act 1901*. The committee, therefore, **seeks the advice of the Attorney-General** on whether these Directions should be subject to review by Parliament.

Pending the Attorney-General's advice, the committee draws Senators' attention to the provisions, as they 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.

Exemption from judicial review and from compliance with freedom of information requirements
Schedule 3, items 5, 18, 19 and 20

Item 5 of Schedule 3 would exempt decisions made by the new Australian Government Solicitor from the *Administrative Decisions (Judicial Review) Act 1977*. Items 18, 19 and 20 of Schedule 3 would exempt the new AGS from compliance with the *Freedom of Information Act 1982*.

The committee notes, however, that the explanatory memorandum on page 11 states that the exemption of government business enterprises from the operation of administrative law requirements is consistent with Government policy. The committee also notes that this approach has been adopted since the inception of both Acts.

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

Legal professional privilege
Clause 55ZH

Clause 55ZH of this bill, if enacted, would enable a Legal Services Direction to require a person to give information or documents to another person in circumstances that, apart from that clause, would be in breach of legal professional privilege.

The committee is concerned that this may prejudice the operation of the legal system and result in unfairness to clients.

Clause 55ZF enables the Attorney-General to issue Legal Services Directions that are to apply, *inter alia*, to Commonwealth legal work being performed in relation to a particular matter. That clause has a definition of Commonwealth legal work which, in part, includes 'any legal work performed by a person for ... a company in which the Commonwealth has a controlling interest'.

It seems to the committee that unfairness could result for, say, a group of private shareholders in Telstra where they have given confidential information to the solicitor acting for Telstra (either AGS or a private solicitor) and clause 55ZH is used to force the disclosure of that otherwise privileged information to the Commonwealth where there is litigation, either then or later, in which the Commonwealth and Telstra (or those private shareholders) are opposed.

The committee notes that subclauses (3) and (4) deem that no breach of legal professional privilege has occurred nor the privilege waived. The question arises as to what use the information obtained may be put.

The committee, accordingly, **seeks further clarification from the Attorney-General** on the purpose of clause 55ZH and on whether there may be implications which may trespass unduly on the rights and liberties of individuals.

Pending the Attorney-General's advice, the committee draws Senators' attention to the provisions, as they 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.

Taxation Laws Amendment Bill (No. 6) 1997

This bill was introduced into the House of Representatives on 29 October 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
 - deny the ability to offset against capital gains certain capital losses created by an arrangement entered into before 3pm on 29 April 1997 and to prevent companies using capital losses artificially created through an arrangement entered into after that time;
 - allow instalment taxpayers classified as small to pay their likely tax on 15 December following their income year and the balance, if any, of their tax liability on the following 15 March, and make consequential amendments;
 - prevent franking credits or debits arising from the payment or refund of tax where those amounts are attributable to the retirement savings account business of a life assurance company;
 - ensure that taxpayers must reduce the cost base or indexed cost base of an asset to the extent of any net deductions allowable for expenditures included in the cost base;
 - replace the formulae used to determine the passive income of the controlled foreign companies of life and general insurance companies;
 - require life companies to use average calculated liabilities, rather than calculated liabilities at the end of the year of income as the basis for determining exempt income that relates to immediate annuity business and apportioning income and capital gains; and
 - clarify the operation of the depreciation provisions in circumstances when an entity the income of which is exempt becomes, for any reason, subject to tax on any part of its income under the provisions of the Act;
- *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to extend to companies two concessional tracing rules which are available to trusts under trust loss measures;
- *Fringe Benefits Tax Assessment Act 1986*, *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to extend the existing exemption for taxi travel beginning or ending at an employee's place of work and to

introduce a new exemption from FBT for car parking benefits for certain small business owners; and

- *Sales Tax Assessment Act 1992* to ensure that goods imported into Australia under a temporary importation exemption, used in Australia, exported and then re-imported are subject to sales tax at the time of the later importation.

The committee dealt with this bill in Alert Digest No. 16 of 1997. A letter was forwarded to the Treasurer on 13 November 1997 inviting a response to concerns the committee had with regard to retrospectivity. A response has not been received to date. A submission, however, has been received from KPMG, Chartered Accountants expressing concerns about certain aspects of the bill. A copy of that submission is attached to this Digest.

Retrospectivity KPMG submission

In Alert Digest No. 16 of 1997, the committee made various comments. An extract of those comments is reproduced below for the information (and convenience) of Senators. In that Digest, the committee noted the retrospectivity associated with the press release of the Treasurer but was under the impression that the retrospectivity was limited to the date of the press release, 29 April 1997.

The KPMG submission, however, raises issues in relation to the retrospective effect of the legislation which escaped the committee's notice. In particular, the submission suggests that :

- the bill would deny the use of certain capital losses that were incurred, but not utilised, at any time after 19 September 1995;
- the circumstances differ from 'the bottom of the harbour schemes' in that there has been no illegal evasion of tax;
- early balancing companies may be unfairly treated

The committee notes that the KPMG submission has been forwarded to the Treasurer. Nevertheless, the committee **seeks the Treasurer's advice** on the issues raised in this submission.

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.

For the information of Senators we repeat our original comments on this bill:

Extract from Alert Digest No. 16 of 1997

**Retrospective application - legislation by press release
Item 14 of Schedule 1**

Item 14 of Schedule 1 to this bill, if enacted, would allow the amendments proposed by Part 2 of that Schedule to apply retrospectively from 3pm on 29 April 1997.

The explanatory memorandum points out that those amendments had been the subject of an announcement by the Treasurer by a press release on that day.

The present bill, however, has been introduced within six months of the announcement referred to in the resolution of the Senate of 8 November 1989. That 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 this provision.

Extract from Alert Digest No. 16 of 1997 (continued)

**Retrospective application
Subitem 12(1) of Schedule 3**

Subitem 12(1) of Schedule 3, if enacted, would permit the amendments made by items 1, 2 and 3 of that Schedule to apply retrospectively from 1 April 1997.

The committee notes, however, that the amendments are beneficial to taxpayers.

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

Retrospective application
Item 3 of Schedule 10

Item 3 of Schedule 10 to this bill, if enacted, would provide that the amendments made by this Schedule would apply to entities which became taxable earlier than 3 July 1995 but not earlier than the start of the year of income in which 1 July 1998 occurs.

The committee notes that paragraph 10.9 of the explanatory memorandum suggests that the Commissioner's interpretation and administration of section 61 has been subject to challenge and that the purpose of these amendments is to retrospectively change the law to avert further challenge.

Accordingly, the committee **seeks the Treasurer's advice** on whether personal rights may be adversely affected by this change.

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.

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 18 of 1997

3 December 1997

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator J Ferris
Senator S Macdonald
Senator A Murray
Senator J Quirke

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.

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ANL Sale Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Minister for Workplace Relations and Small Business. [Portfolio responsibility: Workplace Relations and Small Business]

The bill proposes to facilitate the sale of the Commonwealth's shares in ANL Limited.

Commencement Subclause 2(2)

Subclause 2(2) of this bill provides that the substantive provisions of the bill will commence at some uncertain time.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. 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).

Subclause 2(2) of the bill provides for the commencement to take place on the sale day. Clause 5 provides that the sale day is tied to the sale of the majority of shares in ANL Limited to a person or persons other than the Commonwealth.

As such a date is necessarily a matter of some uncertainty paragraph 6 of the Drafting Instruction is applicable.

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

Cessation of rights

Division 3 of Part 3 and clause 36

Under Division 3 of Part 3 certain benefits under the *Defence Force Retirement and Death Benefits Act 1973* will continue to be available to employees of ANL Limited after it is privatised whereas continued participation in the various Commonwealth Superannuation schemes will cease. Clause 36 would provide for cessation of mobility rights to those employees of ANL Limited who continue in employment with the company after it is privatised.

The committee notes, however, that provisions along these lines are standard in all legislation concerning the privatisation of Commonwealth businesses and may be regarded as no more than an aspect of the terms of employment.

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

Chemical Weapons (Prohibition) Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Parliamentary Secretary to the Minister for Foreign Affairs. [Portfolio responsibility: Foreign Affairs]

The bill proposes to amend the *Chemical Weapons (Prohibition) Act 1994* to:

- provide for applications, notifications or reports under the Act to be made in electronic format;
- provide regulation making power to:
 - define **consumption**, **processing** and **production** of chemicals;
 - prescribe methods by which quantities of chemicals are to be calculated;
 - prescribe the timing of permit applications and to allow for late applications;
 - clarify the practical meaning of the exemption for production of hydrocarbons and explosives;
 - prescribe rules for determining when an international compliance inspection or a challenge inspection starts and ends;
 - prescribe privileges and immunities for a wider class of persons;
- provide for certain one year permits to be automatically renewed at the end of each year, up to a maximum of four times;
- enable permit holders to renew permits once every five years rather than annually;
- require permit holders to notify the Minister if they are no longer operators of a permit facility;
- provide for the possibility of an international compliance inspection taking place in the year before that when above-threshold activities are to take place in respect to Schedule 2 and Schedule 3 chemicals;
- clarify the functions of national and international inspectors during an international compliance inspection and a challenge inspection;
- streamline secrecy provisions; and
- make consequential and transitional amendments.

The committee has no comment on this bill.

Classification (Publications, Films and Computer Games) Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill, consequent upon the Classification (Publications, Films and Computer Games) Charges Bill 1997, proposes administrative provisions relating to the collection of charges and the waiver of charges and prescribes time limits for the making of classification decisions.

The committee has no comment on this bill.

Classification (Publications, Films and Computer Games) Charges Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to impose charges for the classification of publications, films and computer games and for related services.

Setting a charge by regulation Clause 13

Clause 13 of this bill, if enacted, would provide for the various charges set out in the Schedules to this bill to be amended by regulation with no limit on such charges being prescribed by the bill. This raises the question of whether this clause may be considered to delegate the legislative power of Parliament inappropriately.

An inappropriate delegation enables the executive, by regulation, to make laws that ought be made by Parliament.

For this reason, the committee has consistently drawn attention to legislation which provides for the level of a 'charge' to be set by regulation. This creates a risk that the charge may in fact become a tax. It is for Parliament to set a tax rate and not for the makers of subordinate legislation to do so. Where the level of a charge needs to be changed frequently and expeditiously the question arises as to whether this can best be done by regulation rather than by statute. If a compelling case can be made out for the level to be set by subordinate legislation the committee seeks to have the enabling Act prescribe a maximum figure above which the relevant regulations cannot fix the charge or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is taxation by non-primary legislation.

Accordingly, the committee **seeks the advice of the Attorney-General** on these issues.

Pending the advice of the Attorney-General, 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.

Crimes (Superannuation Benefits) Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Attorney-General. [Portfolio responsibility: Justice]

The bill proposes to:

- amend the Crimes (Superannuation Benefits) Act 1989 and the Australian Federal Police Act 1979 to:
 - allow the tracing of amounts that have been paid to superannuation providers (eg. rolled-over amounts) and enable their recovery under a superannuation order;
 - provide a mechanism by which Commonwealth employees charged with or convicted of corruption offences may have their employer-funded superannuation benefits temporarily suspended;
 - enable the Official Trustee to take custody and control of restrained property and to sell or otherwise dispose of it in satisfaction of a superannuation order;
 - facilitate the provision of information to the Commonwealth by superannuation entities concerning Commonwealth employees;
 - simplify the way in which information is provided to a court that certifies the amount of a person's superannuation benefits in superannuation order proceedings;
- and makes a consequential amendment to the *Income Tax Assessment Act 1936*.

The committee has no comment on this bill.

Customs Legislation (Economies in Transition) Amendment Bill 1997

This bill was introduced into the Senate on 24 November 1997 by Senator Cook as a Private Senator's bill.

The bill proposes to amend the *Customs Act 1901* to provide for the determination of normal values of allegedly dumped goods from developing countries that are in the process of transition to a market economy.

The committee has no comment on this bill.

Customs Legislation (Economies in Transition) Amendment Bill 1997 [No. 2]

This bill was introduced into the House of Representatives on 24 November 1997 by Hon Simon Crean MP as a Private Member's bill.

The bill proposes to amend the *Customs Act 1901* to provide for the determination of normal values of allegedly dumped goods from developing countries that are in the process of transition to a market economy.

The committee has no comment on this bill.

Customs Legislation (Willetts Review of Anti-Dumping Measures) Amendment Bill 1997

This bill was introduced into the Senate on 24 November 1997 by Senator Murphy as a Private Senator's bill.

The bill proposes to:

- amend the Customs Act 1901 to:
 - provide for a reduction from 215 days to 155 days for dealing with anti-dumping applications;
 - introduce new requirements and timetable for the provision of information and submissions by interested parties;
 - establish a Review Panel to review draft final findings in relation to anti-dumping applications;
 - maintain the continuance of dumping notices; and
 - make consequential amendments; and
- proposes to repeal the *Anti-Dumping Authority Act 1988*.

The committee has no comment on this bill.

Customs Legislation (Willett Review of Anti-Dumping Measures) Amendment Bill 1997 [No. 2]

This bill was introduced into the House of Representatives on 24 November 1997 by the Hon Simon Crean MP as a Private Member's bill.

The bill proposes to:

- amend the Customs Act 1901 to:
 - provide for a reduction from 215 days to 155 days for dealing with anti-dumping applications;
 - introduce new requirements and timetable for the provision of information and submissions by interested parties;
 - establish a Review Panel to review draft final findings in relation to anti-dumping applications;
 - maintain the continuance of dumping notices; and
 - make consequential amendments; and
- proposes to repeal the *Anti-Dumping Authority Act 1988*.

The committee has no comment on this bill.

Customs Tariff Amendment Bill (No. 6) 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Minister for Customs and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Tariff Act 1995* to:

- reduce the rate of customs duty on aviation gasoline by 0.6 cents per litre from \$0.18003 per litre to \$0.17403 per litre from 3 July 1997;
- insert a phase-down of customs duty rates from 15 per cent to 10 per cent for passenger motor vehicles and certain passenger motor vehicle components from 1 January 2005; and
- insert a phase-down of customs rates of duty for textiles, clothing and footwear articles from 1 January 2005.

Retrospectivity Subclause 2(2)

Subclause 2(2) of this bill, if enacted would provide for the amendments proposed in Schedule 1 to have retrospective effect from 3 July 1997. The amendments, however, are beneficial to aviation operators.

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

Retrospectivity Subclause 2(3)

Subclause 2(3) of this bill, if enacted would provide for the amendments proposed in Schedule 2 to commence retrospectively on 1 September 1997. Most of the amendments, however, would not have any effect until 1 January 2005.

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

Gas Pipelines Access (Commonwealth) Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to implement the national third party access regime for natural gas pipelines and amends the following Acts, as a consequence:

- *Australian Capital Territory (Self-Government) Act 1988* to allow the Australian Capital Territory to confer concurrent jurisdiction on the Federal Court;
- *Moomba-Sydney Pipeline System Sale Act 1994* to enable the national scheme to apply to this pipeline when it is enacted by New South Wales and South Australia;
- *Petroleum (Submerged Lands) Act 1967* to apply the national scheme to areas of Commonwealth jurisdiction beyond States and Territories territorial waters and in external territories; and
- *Trade Practices Act 1974* to ensure that the national competition bodies can exercise powers and carry out functions conferred on them by the other scheme participants; and
- provides for the *Administrative Decisions (Judicial Review) Act 1977* to apply to any decisions of a Code body under the Commonwealth law or regulations.

Commencement Subclause 2(1)

Subclause 2(1) of this bill provides that the substantive provisions of this bill will commence at some uncertain time.

With respect to commencement provisions, the committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. 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

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

- (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).

Subclause 2(1) of the bill provides that the commencement is tied to commencement of certain legislation to be passed by the South Australian Parliament.

As such a date is necessarily a matter of some uncertainty paragraph 6 of the Drafting Instruction is applicable.

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

Health Legislation Amendment Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 27 November 1997 by the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the following Acts:

- *National Health Act 1953* to:
 - broaden a definition to capture products clearly designed to avoid the regulatory framework of private health insurance;
 - require health funds to make available to members of the public copies of agreements entered into by the fund with hospitals and doctors and also agreements entered into between hostiles and doctors which have been given to them;
 - remove the need for registered health benefit organisations to establish and maintain a separate Reinsurance Account, although there will still be a requirement to keep records relating to reinsurance;
 - restructure the Private Health Insurance Administration Council with a new board independent of the Department of Health and Family Services and the industry;
 - change the name of the Private Health Insurance Complaints Commissioner to the Private Health Insurance Ombudsman and streamline the operations of the Health Insurance Ombudsman;
 - extend the waiting period for benefits for obstetrics from 9 to 12 months;
 - clarify the rights of members transferring from one fund to another to receive benefits under comparable benefits arrangements;
 - enable for-profit organisations to apply for registration as health funds and enable not-for-profit funds to change their status to a for-profit health fund;
 - extend the minimum time for health funds to give notice to the Secretary of the Department of Health and Family Services of premium increases from 7 to 14 days; and
 - make technical amendments;

- *Health Insurance Act 1973* to:
 - provide for the assignment of Medicare benefits by the patient to approved billing agents for in-hospital medical treatment; and
 - allow visitors to Australia who are from a country that has a Reciprocal Health Care Agreement with Australia to claim under their Australian overseas health insurance for benefits above the Medicare rebate for out-of-hospital services;
- *Health Insurance Act 1973, National Health Act 1953, Social Security Act 1991 and Veterans' Entitlements Act 1986* to extend the definition of health insurance business to include insurance with respect to an occurrence that ordinarily requires hospitalisation or relevant health services even though payment of benefits may not be contingent on hospitalisation or treatment actually occurring, or on the insured actually requiring such treatment or on fees and charges being payable by the insured in relation to such treatment; and
- *Health Insurance Act 1973* and the *National Health Act 1953* to make technical amendments.

Retrospectivity

Subclauses 2(3) to (8)

Subclauses 2(3) to (8) of this bill, if enacted, would provide for the amendments proposed in Schedule 1 to have retrospective effect from various dates. It seems to the committee, however, that the amendments are technical only and make no substantive change to the law.

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

Higher Education Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Minister for Employment, Education, Training and Youth Affairs. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to amend the following Acts:

- *Higher Education Funding Act 1988* to:
 - set the maximum grant amount for operating purposes for higher education institutions for the funding years 1999 and 2000;
 - vary the maximum total financial assistance payable for the funding year 1998 and set the maximum total amount of financial assistance for the funding years 1999 and 2000 to higher education institutions for superannuation expenditure and for their teaching hospitals;
 - set the maximum aggregate amount of financial assistance which may be granted to open learning organisations for the funding years 1999 and 2000;
 - vary the limit on total funds available for higher education institutions for certain grants under the Act in respect of the funding years 1998 and 1999 and set the limit on total funds for the funding year 2000;
 - vary the maximum aggregate which may be granted to higher education institutions for approved special capital projects for the 1998 funding year and set the maximum aggregate amount for the funding years 1999 and 2000;
 - specify how a notice of decision by the Secretary in relation to an application to remit either an HEC semester debt or an Open Learning study period debt is to be given; and
 - make minor technical amendments to vary the limit on total funds available to higher education institutions for certain grants under the Act in respect of the 1998 funding year; and
- *Maritime College Act 1978* to link the College's ability to charge fees to the conditions of grants specified in the *Higher Education Funding Act 1988*.

Insufficient parliamentary scrutiny

Item 1 of Schedule 2

Item 1 of Schedule 2 to this bill, if enacted would enable the Minister to issue guidelines in relation to courses to be offered at the Maritime College without, however, any provision for these guidelines to be subject to parliamentary scrutiny.

The committee notes that the explanatory memorandum points out that the amendment proposed by this item would bring the Maritime College legislation into conformity with that for all other tertiary education institutions. In respect of these, section 13 of the *Higher Education Funding Act 1988* enables the Minister to issue guidelines but although the guidelines are apparently legislative in character, they are not subject to disallowance by Parliament.

Accordingly, the committee **seeks the advice of the Minister** on whether consideration should be given to making the guidelines proposed in this item and the guidelines issued under section 13 of the *Higher Education Funding Act 1988* subject to disallowance by Parliament.

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

Intellectual Property Laws Amendment Bill 1997

This bill was introduced into the House of Representatives on 26 November 1997 by the Minister for Customs and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the following Acts:

- *Patents Act 1990* to:
 - provide for an extension (of up to five years) of term scheme for pharmaceutical patents;
 - make arrangements relating to Patent Office employees and record keeping and access;
 - revise procedures for the payment of certain fees; and
- *Copyright Act 1968, Designs Act 1906, Patents Act 1990* and the *Trade Marks Act 1995* to create the Professional Standards Board for Patent and Trade Marks Attorneys and allows for changes to the registration system.

Non-reviewable decision

Item 3 of Schedule 1 - proposed new section 74

Item 3 of Schedule 1 to this bill, if enacted, would insert proposed new section 74 in the *Patents Act 1990*. The proposed new section would provide for the Commissioner to accept or refuse an application for an extension of a patent. Acceptance or refusal is to depend on whether the Commissioner is satisfied that the requirements of proposed new sections 70 and 71 have been complied with in relation to the application.

As proposed in the bill, the Commissioner's decision to refuse the application is non-reviewable.

Where, however, the Commissioner accepts the application, the process of granting the extension is reviewable. The Commissioner, before deciding to grant the extension, must ascertain whether there is opposition to the grant and, if so, give reasonable opportunity to the applicant and the opponent(s) to be heard. Appeal to the Federal Court will lie against the Commissioner's subsequent decision to grant or refuse the extension.

As the proposed legislation does not grant any avenue of appeal should the Commissioner make an initial decision not to accept the application, the

committee **seeks the Minister's advice** on whether that initial decision to refuse the application should also be subject to review.

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 upon non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

Superannuation Legislation Amendment Bill 1997

This bill was introduced into the House of Representatives on 27 November 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Bankruptcy Act 1966* to ensure that members of exempt public sector superannuation schemes within the meaning of the Superannuation Industry (Supervision) Act are afforded the same protection in respect of their superannuation entitlement as members of regulated superannuation funds from creditors;
- *Superannuation Industry (Supervision) Act 1993* to:
 - insert a definition of invest;
 - amend the definition of governing rules;
 - permit a trustee of a superannuation fund to amend the governing rules of the fund to enable the acceptance of binding death benefit nominations from certain members;
 - apply the ‘in-house asset’ rules to individual sub-funds;
 - treat unrelated groups of associated employer-sponsors separately for the purposes of the ‘in-house asset’ rules;
 - apply alternative ‘in-house asset’ rules to certain defined benefit funds with large accumulated surpluses;
 - improve the operation of gazettal requirements for orders disqualifying a person from being an approved auditor under the Act;
 - remove an anomaly with the operation of the trust account provisions;
 - clarify to whom contributions should be refunded when a member withdraws from a public offer fund during the cooling-off period;
 - extend from 5 June 1997 to 5 June 1998 the transitional period during which tax file numbers already quoted for superannuation purposes may be taken to have also been quoted for surcharge purposes;
 - amend the definitions of protected information and protected document to clarify they do not apply to internally generated ISC documents;
 - enable the Insurance and Superannuation Commissioner to revoke an approval of a trustee without ministerial approval where the revocation is requested by the trustee;

- clarify that the ISC can only provide information to the Australian Taxation Office for superannuation and not other purposes;
- enable superannuation benefits to be recovered under the *Australian Federal Police Act 1979* and the *Crimes (Superannuation Benefits) Act 1989*;
- improve the operation of the Insurance and Superannuation Commissioner's monitoring and investigative powers;
- remove the right of a body corporate to claim privilege against self-incrimination in respects of certain issued notices; and
- *Superannuation (Resolution of Complaints) Act 1993* to:
 - enable the Superannuation Complaints Tribunal to be constituted by one, two or three members and to confer responsibility for the operation and administration for the Tribunal on the Tribunal Chairperson;
 - ensure that certain provisions apply to complaints about trustees decisions to admit persons to life policies made prior to 12 December 1995; and
 - clarify the scope of a trustee, insurer or RSA provider's duty to notify potential persons who may have an interest in the payment of death benefits and to reduce the penalty for failure to provide notification.

Retrospectivity

Subclause 2(3)

Subclause 2(3) of this bill, if enacted, would provide for the amendments proposed in Part 3 of Schedule 2 to have retrospective effect from 5 June 1997. It seems to the committee, however, that the retrospectivity will not disadvantage any person. The retrospectivity merely allows more time for employers and trustees of superannuation funds to seek the tax file numbers of members of a fund and thereby possibly avoid the imposition of the charge levied under the superannuation contribution tax legislation.

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

Tax Law Improvement Bill (No. 2) 1997

This bill was introduced into the House of Representatives on 27 November 1997 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to rewrite further provisions of the *Income Tax Assessment Act 1936* in relation to:

- capital gains and loss provisions;
- the income tax consequences of changing ownership or control of a company and tax benefits from bad debt deductions;
- deductions for intellectual property;
- deductions for capital expenditure for horticultural plants;
- averaging primary producers' tax liability from year-to-year;
- allowing deductions for environmental impact assessment and environmental protection expenditure;
- above-average special professional income; and
- explains definitions and cross references provisions in the *Income Tax Assessment Act 1997* with the *Income Tax Assessment Act 1936* and vice versa.

The committee has no comment on this bill.

Workplace Relations Amendment Bill 1997 [No. 2]

This bill was introduced into the House of Representatives on 26 November 1997 by the Minister for Workplace Relations and Small Business. [Portfolio responsibility: Industrial Relations]

The bill proposes to amend the *Workplace Relations Act 1996* to exclude new employees of small business from the operation of the Federal unfair dismissal provisions.

The committee has no comment on this bill.