

**Senate Standing Committee  
for the  
Scrutiny of Bills**



**Alert Digest**

**No. 8 of 2000**

**21 June 2000**

**Senate Standing Committee**  
**for the**  
**Scrutiny of Bills**

**Alert Digest No. 8 of 2000**

**21 June 2000**

**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 T Crossin  
Senator J Ferris  
Senator B Mason  
Senator A Murray

## Terms of Reference

Extract from **Standing Order 24**

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



## TABLE OF CONTENTS

---

Defence Legislation Amendment (Flexible Career Practices) Bill 2000	5
• Migration Legislation Amendment (Parents and Other Measures) Bill 2000	6
Migration (Visa Application) Charge Amendment Bill 2000	8
• Trade Practices Amendment (Unconscionable Conduct—Saving of State and Territory Laws) Bill 2000	9
Tabled document	10

- **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.



## **Defence Legislation Amendment (Flexible Career Practices) Bill 2000**

This bill was introduced into the House of Representatives on 7 June 2000 by the Minister assisting the Minister for Defence. [Portfolio responsibility: Defence]

The bill proposes to amend the *Defence Act 1903* and the *Naval Defence Act 1910* to assist with the implementation of flexible employment practices for members of the Australian Defence Force. Specifically, the bill proposes to:

- extend the Limited-Tenure Promotion scheme to the promotion of Army officers to the rank of Lieutenant-Colonel, and to the promotion of Navy officers to the rank of Commander;
- allow rejection of an officer's resignation tendered during an initial minimum period of service; and
- allow members to volunteer to change the nature of their appointment (in the case of officers) or enlistment (in the case of enlisted members) from open-ended to fixed.

Corresponding changes to the conditions of service for members of the Air Force are to be dealt with by amendment of the Air Force Regulations.

*The Committee has no comment on this bill.*



## **Migration Legislation Amendment (Parents and Other Measures) Bill 2000**

This bill was introduced into the House of Representatives on 7 June 2000 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill was introduced with the Migration (Visa Application) Charge Amendment Bill 2000.

The bill proposes to amend the *Health Insurance Act 1973* and the *Migration Act 1958* to enable an increase in parent migration while minimising costs by restricting access to Medicare services.

Schedule 1 proposes to amend the definition of 'Australian resident' in the *Health Insurance Act 1973* to remove Medicare entitlements for certain visa applicants during the processing of their applications, and to ensure that temporary protection visa holders are entitled to Medicare benefits.

Schedule 2 proposes a technical amendment to the note to subsection 45B(1) of the *Migration Act 1958* to clarify that the visa application charge limit is determined under the *Migration (Visa Application) Charge Act 1997*.

Schedule 3 proposes amendments to the *Migration Regulations 1994* to:

- replace existing entry options for parents with new visa classes;
- increase the assurance of support bond and period of effect in relation to applicants for the new parent visa classes; and
- offset health costs of parent entry by requiring applicants for the new visa classes to arrange suitable and approved private health insurance cover for 10 years, or to pay a one-off \$25 000 health services charge per person.

### **Commencement**

#### **Subclause 2(6) and Schedule 3**

Subclause 2(5) of this bill provides that, subject to subclauses 2(6) and (7), Schedule 3 is to commence on Proclamation, but not before assent to the *Migration (Visa Application) Charge Amendment Act 2000*.

Subclause 2(7) provides that, if the *Migration (Visa Application) Charge Amendment Act 2000* has not received assent within 6 months of assent to this bill, then Schedule 3 is repealed.

Subclause 2(6) provides that, subject to subclause 2(7), if Schedule 3 does not commence under subclause 2(5) within a period of 7 months from the date of assent to the bill, then Schedule 3 commences on the first day after the end of that period.

This is a departure from the usual 6 month period referred to in *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel. That Drafting Instruction states that an explanation should be provided whenever a period longer than 6 months after assent is chosen.

In the case of this bill, the Explanatory Memorandum simply notes that “the effect of subclauses 2(5), (6) and (7) is to ensure that Schedule 3 to this Act does not commence before the *Migration (Visa Application) Charge Amendment Act 2000*”. Given this abbreviated explanation, the Committee **seeks the Minister’s advice** as to the reason for the extended time within which this bill might commence.

*Pending the Minister’s advice, the Committee draws Senators’ attention to this provision, as it may be considered to inappropriately delegate legislative power, in breach of principle 1(a)(iv) of the Committee’s terms of reference.*

## **Migration (Visa Application) Charge Amendment Bill 2000**

This bill was introduced into the House of Representatives on 7 June 2000 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill was introduced with the Migration Legislation Amendment (Parents and Other Measures) Bill 2000.

The bill proposes to amend the *Migration (Visa Application) Charge Act 1997* to provide that the visa application charge for the two new parent visa classes does not exceed the visa application charge limit of \$30 000 as specified in the Act, and to provide a mechanism for indexing the new visa application charge limit in accordance with annual movements of the Consumer Price Index. These amendments will only apply to visa applications made on or after 1 November 2000.

*The Committee has no comment on this bill.*

## **Trade Practices Amendment (Unconscionable Conduct—Saving of State and Territory Laws) Bill 2000**

This bill was introduced into the House of Representatives on 5 June 2000 by Mr Fitzgibbon as a Private Member's bill.

The bill proposes to insert a new section 51AAC in the *Trade Practices Act 1974* to expressly preserve the operation of State or Territory laws concurrently with Part IVA of that Act unless those laws are directly inconsistent with that Part.

The bill has apparently been introduced in response to amendments made in 1998 by the New South Wales Parliament to that State's Retail Leases Act. These amendments attempted to provide small business tenants with additional protection against unconscionable conduct. However, the amendments have not yet commenced, apparently because of concerns that they might be challenged under section 109 of the Constitution (which provides that State laws which are inconsistent with Commonwealth laws are invalid to the extent of that inconsistency).

In relation to this bill, the Committee notes that it has not had the benefit of an accompanying Explanatory Memorandum. The Committee, therefore, **seeks the advice of the member sponsoring the bill** as to the relevant head of Constitutional power under which this bill is proposed to be enacted. The Committee also **seeks the member's advice** as to whether an Explanatory Memorandum was prepared and, if not, whether one could be provided. Traditionally, Explanatory Memoranda are the most useful source for information about the background to, and the need for, specific legislation, and the most useful method of making that legislation accessible to the public.

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

**TABLED DOCUMENT**

At its meeting on 21 June 2000, the Committee authorised the tabling of the attached letter from the Minister for Financial Services and Regulation, the Hon Joe Hockey MP, concerning the Financial Sector Legislation Amendment Bill (No 1) 2000.

As required by the Senate's Standing Orders, the Committee will report on the letter, and the bill itself, when the bill is introduced into the Senate. However, the tabling of the Minister's letter at this time may assist the Senate in determining when the bill should be introduced.

RECEIVED

25 MAY 2000

Senate Standing C'ttee  
for the Scrutiny of Bills



24 MAY 2000

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

The HON. Joe Hockey MP  
Minister for Financial Services  
& Regulation

Parliament House  
Canberra ACT 2600  
Australia

Telephone (61 2) 6277 7230  
Facsimile (61 2) 6273 4075

www.joehockey.com  
joe@joehockey.com

Dear Senator ~~Cooney~~ *Barney*

**FINANCIAL SECTOR LEGISLATION AMENDMENT BILL (NO. 1) 2000 ('THE BILL')**

I refer to the letter of 11 May 2000 from the Secretary of your Committee, James Warmenhoven, addressed to the Senior Adviser to the Treasurer, seeking advice in relation to amendments contained in Division 1 of Part 2 of Schedule 3 to the Bill, which are referred to in the Scrutiny of Bills Alert Digest No. 6 of 2000 ('the Digest').

I am responsible for the measures contained in the Bill, and am happy to provide further information on the amendments referred to in the Digest.

The amendments relate to certain offence provisions in the *Superannuation Industry (Supervision) Act 1993* ('SIS Act'). As noted in the Digest, many of the offence provisions in the SIS Act are currently fault liability offences, which require the prosecution to prove a mental element, such as intention or recklessness. The amendments in the Bill will convert some existing fault liability offences into strict liability offences, and others into 'two-tier' fault and strict liability offences.

I would like to note that not all fault liability offences in the SIS Act will be amended by the Bill. The majority of fault liability offences will remain so.

Justification for the proposed amendments comes primarily from the experiences of the former Insurance and Superannuation Commission (ISC), and the current prudential regulator of superannuation, the Australian Prudential Regulation Authority (APRA), who have encountered considerable difficulty in prosecuting contraventions of the SIS Act, due in large part to the difficulties in establishing the mental elements of fault liability offences. In effect, this has meant these offences are close to unenforceable.

Many contraventions of the SIS Act occur when a trustee (or another party such as an auditor) fails to perform specified obligations, many of which go to the heart of the prudent operation of a superannuation fund. Examples include advising members of a significant event, keeping accounts of the fund, having the fund audited by an approved auditor, lodging annual returns with APRA, and keeping minutes of trustee meeting.



As the legislation presently stands, it would be difficult to successfully prosecute alleged breaches of regulatory offences which involve an act of omission (such as offences relating to those obligations mentioned above), as evidence of mental elements such as intention or recklessness is almost impossible to obtain in the absence of admissions or independent evidence.

For example, a case has arisen where the Director of Public Prosecutions (DPP) rejected the former ISC's recommendation to prosecute a trustee that had flagrantly breached the rules relating to the provision of information to members, because of difficulties of obtaining evidence of intention in the absence of an admission by a responsible officer of the corporate trustee, or of recklessness in the absence of evidence from an independent person.

In particular, the DPP has advised that for regulatory offences relating to the lodgement of documents or the provision of documentary information, it would be more appropriate if the legislation imposed a strict liability.

I should point out that although strict liability offences do not require proof of a mental element, they are nevertheless subject to statutory defences of mistake of fact, intervening conduct or event, duress, sudden or extraordinary emergency, and self defence under the *Criminal Code Act 1995*.

The pool of superannuation savings in Australia is currently well over \$400 billion and continues to grow rapidly. The difficulty in obtaining convictions for offences against the SIS Act has the potential to seriously undermine the safety of this pool of savings. If it became widely known that offences under the Act were difficult to enforce, this may encourage disreputable practices in the superannuation industry.

Given the sheer number and diversity of participants in the superannuation industry, an effective enforcement regime is a crucial part of the prudential framework. The amendments to the SIS Act proposed in the Bill represent an appropriate response to the difficulty experienced in bringing enforcement actions. In light of the importance of ensuring the safety of superannuation savings, I believe that the proposed amendments are fully justified, and will not unduly trespass on personal rights and liberties.

Thank you for the opportunity to explain the amendments. If you require further information, please don't hesitate to contact me.

Yours sincerely



## STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2000

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE SOUGHT RECEIVED	REPORT NUMBER
		HOUSE	SENATE			
<b>Bills Carried over from 1999</b>						
Convention on Climate Change (Implementation) Bill 1999	14(22.9.99)		2.9.99	Senator Brown	23.9.99	
Copyright Amendment (Digital Agenda) Bill 1999	14(22.9.99)	2.9.99		Attorney-General	23.9.99	
Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999	19(1.12.99)	24.11.99		Justice and Customs	2.12.99	15.3.00
Fair Prices and Better Access for All (Petroleum) Bill 1999	14(22.9.99)	30.8.99		Mr Fitzgibbon	23.9.99	23.12.99 DC 3.4.00
Fisheries Legislation Amendment Bill (No. 1) 1999	14(22.9.99)	1.9.99	14.10.99	Agriculture, Fisheries and Forestry	23.9.99	14.2.00 1(16.2.00) Act No. 143
<i>Migration Legislation Amendment Act (No. 1) 1999</i>	1(15.2.99)	30.6.99	3.12.98	Immigration and Multicultural Affairs	16.2.99	23.3.99 4(24.3.99)
(previous citation: Migration Legislation Amendment Bill (No. 2) 1998)					25.3.99	22.6.99 10(23.6.99)
					24.6.99	20.12.99 1(16.2.00)
						7.2.00
<i>Telecommunications (Interception) Amendment Act 1999</i>	14(22.9.99)	2.9.99	14.10.99	Attorney-General	23.9.99	19.10.99 17(20.10.99)
					21.10.99	16.3.00 3(5.4.00)



NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE SOUGHT		REPORT NUMBER
		HOUSE	SENATE		RECEIVED	RECEIVED	
<b>Bills being dealt with during 2000</b>							
A New Tax System (Family Assistance and Related Measures) Bill 2000	3(15.3.00)	9.3.00	5.4.00	Family and Community Services	16.3.00	4.4.00	5(12.4.00)
Broadcasting Services Amendment Bill (No. 3) 1999	1(16.2.00)	6.12.99	9.12.99	Communications, Information and the Arts	17.2.00	4.5.00	Act No.198 7(7.6.00)
Broadcasting Services Amendment Bill (No. 4) 1999	1(16.2.00)	9.12.99		Communications, Information and the Arts	17.2.00	4.5.00	
Criminal Assets Recovery Bill 2000	4(5.4.00)	13.3.00		Mr Kerr, ALP	6.4.00	17.5.00	
Customs Legislation Amendment (Criminal Sanctions and Other Measures) Bill 2000 (previous citation: Customs Legislation Amendment (Criminal Sanctions and Other Measures) Bill 1999	*19(1.12.99) 2(8.3.00)	24.11.99	13.3.00	Justice and Customs	9.3.00		Act No. 23
Dairy Industry Adjustment Bill 2000	2(8.3.00)	16.2.00	15.3.00	Agriculture, Fisheries and Forestry	9.3.00	14.3.00	2(15.3.00)
Family and Community Services Legislation Amendment Bill 2000	3(15.3.00)	9.3.00	13.4.00	Family and Community Services	16.3.00	4.4.00	6(10.5.00)
Financial Management and Accountability Amendment Bill 2000	7(7.6.00)	10.5.00	8.6.00	Finance and Administration	8.6.00	20.6.00	8(21.6.00)
Financial Sector Legislation Amendment Bill (No. 1) 2000	6(10.5.00)	13.4.00		Treasurer	11.5.00	25.5.00	
Jurisdiction of Courts Legislation Amendment Bill 2000	3(15.3.00)	8.3.00	11.4.00	Attorney-General	16.3.00	30.3.00 13.4.00	5(12.4.00) 6(10.5.00)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Migration Legislation Amendment Bill (No. 2) 2000	4(5.4.00)	14.3.00		Immigration and Multicultural Affairs	6.4.00	26.4.00	
National Crime Authority Amendment Bill 2000	4(5.4.00)	13.3.00		Mr Kerr	6.4.00	17.5.00	
New Business Tax System (Miscellaneous) Bill (No. 2) 2000	6(10.5.00)	13.4.00		Treasurer	11.5.00	8.6.00	
Pooled Development Funds Amendment Bill 1999	1(16.2.00)	8.12.99	13.4.00	Industry, Science and Resources	17.2.00	2.3.00	6(10.5.00)
Postal Services Legislation Amendment Bill 2000	5(12.4.00)	6.4.00		Communications, Information Technology and the Arts	13.4.00		
Privacy Amendment (Private Sector) Bill 2000	6(10.5.00)	12.4.00		Attorney-General	11.5.00		
Product Grants And Benefits Administration Bill 2000	6(10.5.00)	12.4.00	11.5.00	Treasurer	11.5.00	5.6.00	7(7.6.00)
Sales Tax (Industrial Safety Equipment) (Transitional Provisions) Bill 2000	7(7.6.00)	11.5.00	5.6.00	Treasurer	8.6.00	20.6.00	8(21.6.00)
Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000	4(5.4.00)	13.3.00		Mrs Macklin	6.4.00		
Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000 [No. 2]	4(5.4.00)		14.3.00	Senator Crossin	6.4.00		
Sydney Harbour Federation Trust Bill 1999	1(16.2.00)		8.12.99	Environment and Heritage	17.2.00	22.3.00	4(5.4.00)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Taxation Laws Amendment Bill (No. 11) 1999	1(16.2.00) 2(8.3.00)	9.12.99	10.5.00	Treasurer	17.2.00 9.3.00	30.3.00 5.4.00	7(7.6.00)
Telecommunications (Consumer Protection and Service Standards) Amendment Bill (No. 1) 2000	7(7.6.00)	10.5.00		Communications, Information Technology and the Arts	8.6.00		
Telecommunications (Interception) Legislation Amendment Bill 2000	3(15.3.00)	16.2.00	13.3.00	Attorney-General	16.3.00	27.4.00	6(10.5.00)