SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

# ALERT DIGEST

NO. 1 OF 1994

2 FEBRUARY 1994

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

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

### TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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

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

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## AGRICULTURAL AND VETERINARY CHEMICALS BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to enable the new Agricultural and Veterinary Chemicals Code (the Agvet Code) to have effect in the Australian Capital Territory. The Code is then to be adopted by the State and Northern Territory legislatures as a law of those jurisdictions. This Bill also proposes to repeal the *Agricultural and Veterinary Chemicals Act 1988*.

### Commencement by proclamation
### Clause 2

Clause 2 of the Bill provides:

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

The Committee notes that, by virtue of clause 2, this Bill could commence outside a period of six months from the date of Royal Assent. This would be contrary to the preference expressed in paragraph 4 of the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. That paragraph provides:

> 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.

Although no reason for choosing a longer period is set out in the Explanatory Memorandum, the Committee notes that the scheme requires complementary adoptive

legislation by all States and the Northern Territory. The Committee, therefore, seeks the Minister's advice on whether the longer period is needed for that legislation to be passed.

In the meantime, 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.

## Inappropriate delegation of legislative power
## Clause 10(3)(b)

Clause 10(3)(b) provides that regulations may be made under this proposed Act to modify the Agricultural and Veterinary Chemicals Code (the 'Agvet Code') and its regulations. Clause 10(3)(b), therefore, delegates the power to modify the provisions of an Act of Parliament by regulation. The Committee notes, however, in clause 10(2) that the purpose of this delegation is to avoid or resolve inconsistencies between the Code and the laws of a participating Territory.

Accordingly the Committee makes no further comment on this Bill.

## AGRICULTURAL AND VETERINARY CHEMICALS CODE BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to enable the National Registration Authority for Agricultural and Veterinary Chemicals (NRA) to evaluate and, if satisfied on certain grounds, to approve the active constituents to agvet chemicals products, to register the products enabling their lawful possession and sale, and to approve the label which must be affixed to the container holding the chemical products. The Bill also enables the NRA to licence manufacturers of those chemicals.

### Inappropriate delegation of legislative power
### Clause 6(3)(a)

Clause 6 provides for matters relating to making regulations under the proposed Act. The Committee notes that paragraph 6(3)(a) allows regulations to adopt rules and codes of other bodies and institutions, as changed from time to time. The effect would be to enable such a body or institution to amend regulations made by the Executive without reference to, or oversight by, either House of Parliament. The Committee considers that this may be regarded as an inappropriate delegation of legislative power.

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.

### Strict liability - reversal of onus of proof
### Regulation of the supply of active constituents for chemical products and the supply of chemical products
### Clauses 74-89

Part 4 contains a regime of control of chemical products by means of imposing offences of strict liability. It also provides in some clauses specific defences, in others the general defence of reasonable excuse.

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. The defence arises where the accused entertains an honest belief in the existence of facts which, if true, would make the act charged innocent. 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.

In the context of justifying reversing the onus of proof, the Explanatory Memorandum suggests a reason which is relevant to the issue of strict liability:

. the very serious implications which the misuse of these materials could have on public health, occupational health and safety, the environment, and trade and commerce.

The Committee accepts that some contraventions of these provisions could have very serious implications and so warrant offences of strict liability. An examination of individual provisions, however, shows that in some circumstances suppliers are able to sell off remaining stocks of chemicals or active constituents of chemical products which are no longer to be approved or registered; that A may continue to supply an unregistered chemical product under permit but B may not. In such cases dire consequences to the environment or public health are not so apparent to the Committee and so the justification for strict liability may be lacking.

As the code itself recognises a range of circumstances which justify continuing to supply otherwise unapproved or unregistered materials, the Committee seeks the Minister's advice on whether the code should reflect that range of circumstances by a system of offences only some of which are of strict liability. For example, strict liability would attach only to offences in respect of active constituents or chemical products where under no circumstances would it be justified to continue to supply under exemption or permit or to sell off current stocks. This would better relate the serious consequences with the creation of strict liability.

While awaiting 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.

## Commencement by regulation

**Subclause 120(3)**

Subclause 120(3) of the Bill provides:

> **(3)** Section 121 does not come into force until a date to be prescribed by regulations that is not later than 12 months after the date of commencement of this Code.

The Committee notes that, by virtue of subclause 120(3), clause 121 of this Bill could commence outside a period of six months from the date of Royal Assent. Indeed, this Bill commences on the same day as the proposed Agricultural and Veterinary Chemicals Act 1993 which is subject to commencement by proclamation for up to twelve months after it receives Royal Assent. Section 121, therefore, may not commence for up to two years. This would be contrary to the preference expressed in paragraph 4 of the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. That paragraph provides:

> 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.

As the Explanatory Memorandum does not indicate the reason for delaying commencement, the Committee seeks the Minister's advice on this matter.

In the meantime, 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.

## AGRICULTURAL AND VETERINARY CHEMICALS (CONSEQUENTIAL AMENDMENTS) BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the following Acts:

- *Agricultural and Veterinary Chemicals (Administration) Act 1992* to:
  - incorporate the functions of the National Registration Authority for Agricultural and Veterinary Chemicals (NRA) into the Act following the proposed repeal of the *Agricultural and Veterinary Chemicals Act 1988*; and
  - provide for certain controls over the importation, manufacture and exportation of agvet chemicals by enabling the NRA to monitor the import, manufacture and export of unregistered agvet chemicals and unapproved active constituents; and
- *Copyright Act 1968* to confirm that the reproduction of a label for an agvet chemical product is not an infringement of any copyright subsisting under Part III or section 92 of the Copyright Act.

The Committee has no comment on this Bill.

## AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS (COLLECTION OF LEVY) BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to allow for the assessment and collection of levies with regard to agricultural and veterinary products registered for use in Australia. It further provides certain powers of entry, inspection and seizure to determine the amount of levy, if any, that is payable and contains provisions for an appeal and review process where a person is dissatisfied with an assessment.

### Imposition of charges by regulation
### Paragraphs 10(2)(b), 11(2)(b), 12(2)(b) and 14(1)(b) - Rate of levy

Part 2 of this Bill includes a basic formula for the various levies that it imposes. The rate of levy is left to be prescribed by regulation, subject to an annual limit. Such a method would generally be acceptable to the Committee. Part 2, however, extends the method of arriving at a maximum amount, by providing an unfettered power to determine a higher maximum amount by regulation.

Each of the paragraphs noted provides in respect of the maximum amount set out in the legislation:

> (b) if another amount is prescribed by the regulations for the purposes of this paragraph in respect of that year - that other amount.

This allows the maximum amount of the various levies to be set by regulation and the maximum amount is not necessarily limited to the amount specified in the primary legislation. The Explanatory Memorandum indicates that ultimately the National Registration Authority will be fully funded by the levies and other charges to be imposed under this regime.

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

either a maximum rate of levy or a method of calculating the maximum rate. In the present Bill, there is, in effect, no maximum levy (nor method of calculation thereof).

The Committee is concerned that the legislation purports to set a maximum amount but in effect gives an unfettered discretion for the regulations to increase the levy without limit.

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

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.

## AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS LEVY IMPOSITION (CUSTOMS) BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to allow for the imposition of a levy on agricultural and veterinary chemical products imported into Australia and sold wholesale.

The Committee has no comment on this Bill.

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## AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS LEVY IMPOSITION (EXCISE) BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to allow for the imposition of a levy on agricultural and veterinary chemical products manufactured in Australia.

The Committee has no comment on this Bill.

## AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS LEVY IMPOSITION (GENERAL) BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Primary Industries and Energy.

The Bill proposes to allow for the imposition of a levy on agricultural and veterinary chemical products imported into Australia which are not sold wholesale.

The Committee has no comment on this Bill.

## AUSTRALIAN SPACE COUNCIL BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to replace the existing Australian Space Board with an Australian Space Council (as recommended by the report *An Integrated National Space Program*). The functions and powers of the Council are set out in the Bill as well as the details of the rolling five year strategic plan to be prepared by the Council.

The Committee has no comment on this Bill.

## AUSTRALIAN SPORTS DRUG AGENCY AMENDMENT BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to ensure that all competitors tested by the Agency under complementary State or Territory legislation have access to the same appeal provisions as those tested directly under the Act.

The Committee has no comment on this Bill.

## CHEMICAL WEAPONS (PROHIBITION) BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to effect Australia's obligations as a party to the Convention on the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Australia signed the Convention on 13 January 1993 and will ratify the Convention after the enactment of this legislation.

### Commencement by proclamation
### Clause 2

By virtue of clause 2, most of the provisions of this Bill are to commence on proclamation without any time specified for automatic commencement or repeal. The Committee notes, however, that the Bill must commence, at the latest, on the day that the Convention on the Prohibition of Chemical Weapons comes into force.

The Committee also notes from the Minister's second reading speech that the Convention will enter into force 180 days after the 65th ratification, but not before 13 January 1995. In effect, subject to sufficient countries ratifying the Convention, the Bill provides for automatic commencement, albeit at an uncertain date.

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

> 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).

Accordingly, the Committee makes no further comment on this provision.

## CORPORATE LAW REFORM BILL 1993

This Bill was introduced into the House of Representatives on 15 December 1993 by the Attorney-General.

The Bill replaces the Corporate Law Reform Bill (No. 2) 1992 introduced into the Senate on 26 November 1992. It proposes to:

- enable the enhanced disclosure scheme to apply to listed and unlisted 'disclosing' entities;
- streamline prospectus requirements;
- relax present restrictions on companies which wish to insure or indemnify their officers and auditors; and
- enable ASC's database to be admissible in court proceedings as prima facie evidence, without document certification.

The Committee dealt with the Corporate Law Reform Bill (No. 2) 1992 in Alert Digest No. 18 of 1992, in which it made several comments on the Bill. Those comments were reproduced in Alert Digest No. 1 of 1993 after it had been restored to the Notice Paper by a resolution of the Senate on 5 May 1993. The Attorney-General responded to those comments in a letter dated 6 October 1993. A copy of that letter is attached to this digest. Relevant parts of the response are also discussed below.

### Inappropriate delegation of legislative power
### Schedule 1 item 26 - proposed new section 111AJ of the Corporations Law

Item 26 proposes to insert 'Part 1.2A - Disclosing Entities' into the Corporations Law. The proposed new Part would deal, inter alia, with 'enhanced disclosure securities' which are referred to in the Bill as 'ED securities'. The concept of 'ED securities' is defined in the proposed new Part.

Proposed new section 111AJ provides:

> **Regulations may declare securities not to be ED securities**
>
> 111AJ.(1) The regulations may declare specified securities of bodies not to be ED securities.
>
> (2) Regulations in force for the purposes of subsection (1) have effect accordingly, despite anything else in this Division.

If enacted, this provision would allow the making of regulations to exclude certain types of securities from the definition of 'ED securities'. As such, it would permit, in effect, the amendment of the definition, by the exclusion of certain securities which would otherwise be covered. Given the importance of this definition to the operation of the proposed new Part, this may be considered to be a matter which is more appropriately dealt with in primary rather than subordinate legislation.

## Inappropriate delegation of legislative power
## Schedule 1 item 26 - proposed new sections 111AS and 111AT of the Corporations Law

Item 26 of the Bill proposes to insert a new Part 1.2A into the Corporations Law. The proposed new Part would deal, inter alia, with 'continuous disclosure', which is a system of enhanced statutory disclosure that is to be applied to corporations covered by the Corporations Law.

Proposed new section 111AS provides:

> **Exemptions by regulations**
>
> 111AS.(1) The regulations may exempt specified persons from all or specified enhanced disclosing entity provisions:
>
> (a) either generally or as otherwise specified; and
>
> (b) either unconditionally or subject to specified conditions.
>
> (2) Without limiting subsection (1), an exemption may relate to specified securities.

If enacted, this provision would allow the Governor-General (acting on the advice of the Federal Executive Council) to make regulations to exclude 'specified persons' from any or all of the requirements of the disclosing entity provisions. This may be considered to be an inappropriate delegation of legislative power, as it would allow the Executive to alter (and, perhaps, overturn) the effect of the primary legislation.

Similarly, proposed new section 111AT provides:

> **Exemptions by the Commission**
>
> 111AT.(1) The Commission may, by writing, exempt specified persons from all or specified disclosing entity provisions:
>
> (a) either generally or as otherwise specified; and

(b) either unconditionally or subject to specified conditions.

(2) Without limiting subsection (1), an exemption may relate to specified securities.

(3) The Commission must cause a copy of an exemption to be published in the *Gazette.*

If enacted, this clause would, similarly, give the Australian Securities Commission the power to exempt 'specified' persons from any or all of the requirements of the disclosing entity provisions. This may also be considered to be an inappropriate delegation of legislative power.

Proposed sections 111AJ, 111AS, and 111AT substantively repeat proposed sections 22H, 1084J and 1084K respectively of the Corporate Law Reform Bill (No. 2) 1992.

The Committee at that time drew Senators' attention to these sections for the reasons given above. The Attorney-General responded on 6 October 1993 noting:

> The comments which the Committee has made will, of course, be taken into account in the re-drafting of the Bill.
>
> In this regard, I should point out that the Corporations Law already contains a number of provisions similar to those referred to by the Committee, mostly based on predecessors under the co-operative companies and securities legislation. For example, section 1084 of the Law enables the ASC to exempt a particular person or class of persons from the provisions relating to fund raising. In addition, section 633 of the Law provides that the usual restrictions on the acquisition of shares do not apply to acquisitions made in a manner or in circumstances prescribed by the Regulations or with the ASC's written approval.
>
> The effective operation of the Corporations Law depends on provisions like these. Because new investment vehicles are constantly being developed, and business practices differ and are subject to change, such provisions are necessary to enable the alteration of the Law in a timely manner where a strict application may otherwise cause hardship or may be inappropriate. Such provisions provide a safeguard against any unintended consequences of new wide-ranging rules. The effectiveness of the regulatory regime would be seriously

compromised if it were necessary to seek Parliamentary approval for every minor modification of the Corporations Law.

It does not appear to the Committee that our earlier comments have had any effect on the re-drafting of the Bill. Accordingly, 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.

**Inappropriate delegation of legislative power**
**Schedule 1Item 26 - Proposed new section 111AV**
**Item 92 - Proposed new section 1001A**

Proposed new section 111AV provides:

> **Modifications by regulations**
> 111AV.(1) The regulations may make modifications of all or specified disclosing entity provisions.
>
> (2) Without limiting subsection (1), a modification may relate to specified securities.

This section, if enacted, would permit the provisions referred to in proposed new section 111AR to be amended by regulation rather than by primary legislation. This may be regarded as an inappropriate delegation of legislative power.

Proposed new section 1001A, if enacted, would impose criminal liability for failing (intentionally or recklessly) to comply with the listing rules of the Australian Stock Exchange. The effect of this proposed new section is to enable the rules of a private organisation to create criminal liability in respect of which citizens can be charged and penalties applied. It also follows that the protection of the general public who may want to become shareholders is left to this same private organisation. The rules of the Australian Stock Exchange are not legislation of the Parliament, either primary or delegated. Hence the proposed new section may be regarded as a further inappropriate delegation of legislative power.

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

## EVIDENCE BILL 1993

This Bill was introduced into the House of Representatives on 15 December 1993 by the Minister for Justice.

The Bill replaces the Evidence Bill 1991 introduced in the House of Representatives for comment on 15 October 1991. Like the 1991 Bill, this Bill is based substantially on the recommendations of the Law Reform Commission report on *Evidence*. It proposes to reform the law of evidence applying in the High Court, the Federal Court, the Family Court and the courts of the ACT.

### Commencement by Proclamation
### Clause 2

Clause 2 of the Bill provides:

> Commencement
>
> **2.(1)** This Part and the Dictionary at the end of this Act commence on the day on which this Act receives the Royal Assent.
>
> **(2)** Subject to subsection (3), the remaining provisions of this Act commence on a day or days to be fixed by Proclamation.
>
> **(3)** If a provision referred to in subsection (2) does not commence under that subsection before 1 January 1995, it commences on that day.

By virtue of clause 2, this Bill is to commence on proclamation or at least on 1 January 1995. Hence the substantive provisions of the Bill could commence outside a period of six months from the date of Royal Assent. This would be contrary to the preference expressed in paragraph 4 of the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. That paragraph provides:

> 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.

Although no reason for choosing a longer period is set out in the Explanatory Memorandum, the Committee notes that the scheme requires complementary legislation in New South Wales.

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

> 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).

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

**Cessation by Proclamation**
**Subclause 4(3)**

Subclause 4(3) of the Bill provides:

> **(3)** On a day fixed by Proclamation, the provisions of this Act (other than sections 185, 186 and 187) cease to apply in relation to proceedings in an ACT court, except so far as the provisions apply to proceedings in all Australians courts.

Since there is no limit on the time within which such a Proclamation must be made, this provision is contrary to the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 (though the Committee acknowledges that that drafting instruction applies explicitly to commencement by Proclamation). The Committee, however, notes that the Explanatory Memorandum states:

> 12. The Act applies in all proceedings in federal courts and, until a day to be fixed by Proclamation, in courts of the Australian Capital Territory. A Proclamation will enable evidence legislation enacted by the Australian Capital Territory Legislative Assembly to apply in ACT courts.

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

**Abolition of the privilege against self-incrimination**
**Clause 187**

Clause 187 provides:

> **Abolition of the privilege against self-incrimination for bodies corporate**
>
> **187.(1)** This section applies if, under a law of the Commonwealth or the Australian Capital Territory or in a proceeding in a federal court or an ACT court, a body corporate is required to:
>
> (a) answer a question or give information; or
> (b) produce a document or any other thing; or
> (c) do any other act whatever.
>
> **(2)** The body corporate is not entitled to refuse or fail to comply with the requirement on the ground that answering the question, giving the information, producing the document or other thing or doing that other act, as the case may be, might tend to incriminate the body or make the body liable to a penalty.

Subclause 187(2), if enacted, would abolish the privilege against self-incrimination for a body corporate. This provision conforms with the tentative view of the Australian Law Reform Commission in its Interim Report on Evidence (ALRC 26, 1985, Vol 1, para 862):

> *Natural persons/Corporations*. The law at present in England is that the privilege against self-incrimination applies to an answer tending to incriminate a corporation. The High Court has yet to rule on this question. Expressions of opinion on the subject have not yet been received by the Commission ... The Commission's view, however, is that the rationale for the privilege does not warrant its extension to corporations.

The Committee notes that the High Court has now taken the view that the privilege against self-incrimination does not extend to corporations. (See *Environment Protection Authority v Caltex Refining Company Pty Limited*, 24 December 1993 -unreported)

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

## FOREIGN EVIDENCE BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to:

- re-enact, with minor changes, parts of the *Evidence Act 1905* which relate to enabling evidence from other countries for use in Australian proceedings and preventing, for national security reasons, certain evidence being obtained in Australia for use in foreign proceedings;
- provide new procedures for enabling authenticated foreign testimony, and exhibits to such testimony, to be admissible, subject to appropriate safeguards, in certain criminal and civil proceedings; and
- provide for the implementation of the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents so Australia is in a position to accede to the Convention.

The Committee has no comment on this Bill.

AD1/94

## FOREIGN EVIDENCE (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to make transitional arrangements for the Foreign Evidence Bill 1993 and make consequential amendments to the *Evidence Act 1905*.

The Committee has no comment on this Bill.

## HEALTH LEGISLATION (POWERS OF INVESTIGATION) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to give the Health Insurance Commission powers to obtain evidence where it has grounds to believe that a person has committed fraud. The Bill also includes a provision that the providers of pathology services must retain records and produce them to the Commission, if requested.

The Committee draws Senators' attention to the fact that the Privacy Commissioner has yet to report on whether he has concerns with the terms of this Bill.

## HIGHER EDUCATION FUNDING AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 15 December 1993 by the Minister for Employment, Education and Training.

The Bill proposes to provide funding of $12.9 million in 1996, rising to $35.2 million in 1999, for an additional 1500 undergraduate student places and adjust funding to cover the areas of superannuation, supporting offers of redundancy payments to excess staff and Open Learning Initiative. Further, the Bill proposes to improve the administration of tax file numbers under HECS and the Open Learning Deferred Payment Scheme.

### Further use of tax file numbers
### Clause 13 - Insertion of sections 41B and 41C

The effect of proposed new sections 41B and 41C is to cancel the enrolment of a student in a course where the student who has deferred payment of the higher education contribution has not provided his or her tax file number to the institution.

The Committee maintains that, although tax file numbers may be considered necessary to prevent persons defrauding the system, they may also be considered to be unduly intrusive into a person's private life. The Committee, therefore, is generally concerned at the extension of the use of tax file numbers.

In this instance, however, a student who defers payment of the higher education contribution enters into an arrangement for the deferred payments to be made through the taxation system. The provision of the tax file number in these circumstances is therefore acceptable.

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

## IMMIGRATION (GUARDIANSHIP OF CHILDREN) AMENDMENT BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to preclude the Minister for Immigration and Ethnic Affairs from assuming guardianship of non-citizen children who enter Australia for the purposes of being adopted under relevant State or Territory adoption legislation.

The Committee has no comment on this Bill.

## INDUSTRY, TECHNOLOGY AND REGIONAL DEVELOPMENT LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

An omnibus Bill, it proposes to amend the following Acts:

- *Designs Act 1906* to:
  - make changes consequent on the incorporation of the Patent, Trade Marks and Designs Offices into the Australian Industry Property Organisation (AIPO);
  - allow certain amendments in the Register of Designs to be made by the Registrar;
  - clarify the definition of "Convention countries";
- *Patents Act 1990* to make minor changes consequent on the incorporation of the Patent, Trade Marks and Designs Offices into the AIPO;
- *Trade Marks Act 1955* to:
  - make minor changes consequent on the incorporation of the Patent, Trade Marks and Designs Offices into the AIPO;
  - clarify the definition of "Convention countries";
- *Industry, Research and Development Act 1986* to change the termination date for the Discretionary and Generic Technology Grants schemes from 30 June 1994 to 31 December 1995.

The Committee has no comment on this Bill.

## INSURANCE LAWS AMENDMENT BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to amend the following Acts:

- *Insurance Act 1973* to:
  - remove anomalies involving the valuation of shares in related insurance companies and investments in related unit trusts;
  - provide flexibility in directions made by the Commissioner relating to certain assets of insurers; and
  - update provisions relating to an insurer's principal banker; and
- *Insurance (Agents and Brokers) Act 1984* to:
  - introduce a maximum 37 day period in which agents may hold premium moneys;
  - clarify that insurers have joint and several liability for agents who deal with more than one insurer;
  - require a no avoidance of claims clause and a 3 year run-off cover in compulsory professional indemnity insurance contracts entered into by clients of brokers and unauthorised foreign insurers;
  - provide that the Commissioner determines the type and form of audited accounts furnished by registered intermediaries;
  - increase the power of the Commissioner to inspect documents and obtain information about the activities of intermediaries;
  - extend from one to three years the time allowed to the Commissioner to prosecute offences under the Act;
  - update penalty provisions;
  - lower the threshold at which there is considered to be an association between an insurer and a broker from a test of 50 per cent ownership to one of 25 per cent ownership or control; and
  - make minor technical amendments; and
- *Insurance Laws Amendment Act 1991* to ensure that phasing-in provisions dealing with the capital and solvency requirements of registered life offices apply only to those life offices registered

under the Life Insurance Act at the date of the original amendment.

**Retrospectivity**
**Subclause 2(2)**

By virtue of subclause 2(2), if enacted, clause 41 would be taken to have commenced on 6 January 1992. This retrospectivity is needed to correct a drafting error to clarify that the phasing in provisions for new capital and solvency requirements for registered life offices apply only to life offices already registered at the date of the original amendment.

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

## INSURANCE LAWS AMENDMENT BILL (NO. 2) 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to amend the following Acts:

- *General Insurance Supervisory Levy Act 1989* and *Life Insurance Supervisory Levy Act 1989* to raise the statutory upper limit of levy which may be collected for general insurers (from $15,000 to $17,000) and for life insurers (from $28,000 to $70,000); and
- *Insurance Contracts Act 1984* to:
  - give responsibility for the general administration of the Act to the Insurance and Superannuation Commissioner;
  - require pre-sale, point-of-sale and post-sale notices to be given by insurers to purchasers of consumer credit insurance products;
  - provide a 14 day cooling-off period for purchasers of consumer credit insurance products; and
  - clarify right of access of insureds in relation to unconscionable conduct (also repeal subsection 87(1E) of the Trade Practices Act).

The Committee has no comment on this Bill.

## MILITARY COMPENSATION BILL 1993

This Bill was introduced into the House of Representatives on 15 December 1993 by the Parliamentary Secretary to the Minister for Defence.

The Bill proposes to establish a Military Compensation Scheme to provide members, cadets, non-members with honorary rank, philanthropic representatives and ex-members on discharge training with compensation and rehabilitation benefits available under the Safety Rehabilitation and Compensation Act and additional benefits.

The Committee has no comment on this Bill.

## MINERALS (SUBMERGED LANDS) (ROYALTY) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Resources.

The Bill amends the *Minerals (Submerged Lands)(Royalty) Act 1981* to fit it into the language of the new offshore minerals legislation and renames it the *Offshore Minerals (Royalty) Act 1981.*

The Committee has no comment on this Bill.

## OFFSHORE MINERALS BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Resources.

This Bill, and associated Bills, replace the existing *Minerals (Submerged Lands) Act 1981* and its associated Acts. The Bill is a consequence of a Commonwealth-State Governments agreement (the Offshore Constitutional Settlement) which provides that Commonwealth legislation alone applies to the mineral resources of that area of Australia's continental shelf beyond the three nautical miles limit from the territorial sea baselines.

### Abrogation of the privilege against self-incrimination
### Subclause 372(2)

Subclause 372(2) provides:

> **Obligation to comply with request under section 367, 368, 370 or 371**
>
> **(2)** A person is not excused from complying with the request on the ground that complying with the request might tend to incriminate the person or make the person liable to a penalty.
> Note: Section 373 provides immunity for the response to the request.

Subclause 372(2), if enacted, would abrogate the privilege against self-incrimination.

Clause 373, however, provides (in part):

> **Immunity from use of information etc. given in response to request under section 367, 368, 370 or 371**
>
> **373.(1)** If a person gives the Designated Authority information in response to a request under section 367 or 368, the following are not admissible in evidence against the person in any proceedings:
>
> (a) the information given in response to the request;
>
> (b) any information, document or thing obtained as a direct or indirect consequence of the giving of the

information.

Subclauses 373(3) and (4) are in similar terms with respect to complying with a request under sections 370 and 371 respectively. These subclauses are in a form which the Committee has previously been prepared to accept, as it contains a limit on the use to which any information obtained can be put. The Committee notes in particular that the **indirect** as well as the direct use of such information would be precluded. This is, therefore, a 'use/derivative use' indemnity. Accordingly, the Committee makes no further comment on these provisions.

**Strict liability - Reversal of onus of proof**
**Subclauses 404(4) and (5)**

Division 5 of Part 4.2 contains provisions in accordance with the 1958 *Convention on the Continental Shelf* to establish and regulate a safety zone around a structure or equipment in an offshore area. Subclauses 404(3) - (5) provide:

> **(3)** The owner of a vessel and the person in command or in charge of a vessel are each guilty of an offence against this section if the vessel enters or remains in a safety zone in contravention of subsection (1) or (2).
> Maximum penalty: Imprisonment for 5 years.
>
> **(4)** It is a defence to a prosecution of a person for an offence against subsection (3) if the person satisfies the court that:
> (a) an unforeseen emergency made it necessary for the vessel to enter or remain in the safety zone to attempt to secure the safety of:
> (i) a human life; or
> (ii) the vessel; or
> (iii) another vessel; or
> (iv) a well, pipeline, structure or equipment; or
> (b) the vessel entered or remained in the safety zone in circumstances beyond the control of the person who was in command or in charge of the vessel (for example, adverse weather).
>
> **(5)** It is a defence to a prosecution of the owner of a vessel for an offence against subsection (3) if the owner satisfies the court that the owner:
> (a) did not aid, abet, counsel or procure the vessel's entering or remaining in the safety zone; and

(b) was not in any way, directly or indirectly, knowingly concerned in, or party to, the vessel's entering or remaining in the safety zone.

These subclauses, if enacted, would impose an offence of strict liability and reverse the onus of proof by providing specific defences.

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. The defence arises where the accused entertains an honest belief in the existence of facts which, if true, would make the act charged innocent. 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 Explanatory Memorandum does not offer any reason for establishing the offence as one of strict liability. Nor does the Explanatory Memorandum indicate why the owner of a vessel which has entered a safety zone should automatically be guilty of an offence. Subclause 404(5) offers the owner a defence which involves proving a series of negatives to show that the owner was not 'conspiring' to have the ship enter the safety zone. The Committee is of the view that it should be a matter for the prosecution to prove a 'conspiracy'. Accordingly the Committee seeks the Minister's advice on the reasons for the imposition of strict liability and the need for the owner to be included in the regime, and especially for the owner to be required to disprove that he/she was even indirectly a party to the vessel's entering or remaining in the safety zone.

While awaiting 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.

## Delegation of power
## Subclause 419(1)

Subclause 419(1), if enacted, would enable a Designated Authority to delegate all or any of the powers or functions of the Designated Authority to a person. The Committee notes

that there is no limitation as to the persons or classes of persons to whom the Designated Authority can delegate these various powers and functions. Neither the Bill nor the Explanatory Memorandum indicates the need for a power of such width.

Since its establishment the Committee has consistently drawn attention to provisions which allow for the delegation of significant and wide-ranging powers to 'a person'. Generally, the Committee has taken the view that it would prefer to see a limit on either the sorts of powers that can be delegated in this way or the persons to whom the powers can be delegated. If the latter course is adopted, the Committee prefers that the limit should be to the holders of a nominated office, to members of the Senior Executive Service or by reference to the qualifications of the person to be delegated the powers.

Accordingly, the Committee seeks the Minister's advice whether some limitation could be imposed or, if not, the reasons for such an unlimited power.

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

## OFFSHORE MINERALS (CONSEQUENTIAL PROVISIONS) BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Resources.

The Bill proposes to repeal the *Minerals (Submerged Lands) Act 1981* when the Offshore Minerals Bill 1993 receives the Royal Assent and commences operation and to amend the associated money Acts. The main substantive amendment to the Acts is the provision for the levels of fees to be set by regulations.

### Imposing charge by regulation

The Schedule of this Bill makes consequential amendments to various Acts as a result of the transition to the *Offshore Minerals Act 1993.* The amendment of each of the Acts provides for fees to be set by regulation. In each case, however, the primary legislation either sets the maximum amount or prescribes a method for calculating that amount.

In these circumstances, the Committee makes no further comment on this Bill.

## OFFSHORE MINERALS (EXPLORATION LICENCE USER CHARGE) BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Resources.

The Bill proposes to impose an annual user charge on all offshore minerals exploration licence holders.

### Imposing charge by regulation
### Subclause 4(2)

Subclause 4(2), if enacted, would allow a charge to be set by regulation. Subclause 4(3), however, sets a maximum for the charge.

In these circumstances, the Committee makes no further comment on this Bill.

## OFFSHORE MINERALS (RETENTION LICENCE FEES) BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Resources.

The Bill proposes to introduce a new form of title called a retention licence for which an annual fee will be payable for each licence. The fee amount will be set by regulation.

### Imposing charge by regulation
### Subclause 4(2)

Subclause 4(2), if enacted, would allow a charge to be set by regulation. Subclause 4(3), however, prescribes a method for calculating the maximum amount.

In these circumstances, the Committee makes no further comment on this Bill.

## OFFSHORE MINERALS (RETENTION LICENCE USER CHARGE) BILL 1993

This Bill was introduced into the House of Representatives on 16 December 1993 by the Minister for Resources.

The Bill proposes to impose an annual user charge on all offshore minerals retention licence holders.

### Imposing charge by regulation
### Subclause 4(2)

Subclause 4(2), if enacted, would allow a charge to be set by regulation. Subclause 4(3), however, sets a maximum for the charge.

In these circumstances, the Committee makes no further comment on this Bill.

## OLYMPIC INSIGNIA PROTECTION AMENDMENT BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to:

- provide for the protection of the olympic torch and flame designs for a limited time around each Olympic Games;
- prohibit registration of trade marks that contain or consist of the English version of the olympic motto;
- provide for remedies to be available under the *Trade Practices Act 1974* in relation to conduct generally that is misleading and deceptive, and in relation to false or misleading representations as to sponsorship, affiliations and approval;
- reflect the name change of the Australian Olympic Federation to the Australian Olympic Committee; and
- ensure application fees for registering designs under the Act and for extending their protection periods remain pegged to the corresponding fees of the *Designs Act 1906*.

The Committee has no comment on this Bill.

## PRIME MINISTER AND CABINET (MISCELLANEOUS PROVISIONS) BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to amend the following Acts:

- *Archives Act 1983* to make Cabinet notebooks subject to that Act and allow public access after 50 years;
- *Australian Science and Technology Council Act 1978* to transfer responsibility of ASTEC staff to the Department of Prime Minister and Cabinet and make a number of technical amendments;
- *Freedom of Information Act 1982* to exclude Cabinet notebooks from the operation of the Act;
- *Merit Protection (Australian Government Employees) Act 1984* to clarify appeal, review and grievance rights of certain employees and provide the MPRA with a discretion to transfer a decision or action to the Ombudsman for investigation;
- *Ombudsman Act* to implement the Government's response to the Senate Standing Committee on Finance and Public Administration report on the Review of the Office of the Ombudsman and make other minor amendments;
- *Public Service Act 1922* to:
  - address certain aspects of the discipline process relating to unattached officers,
  - clarify the application of the appeal mechanism as it relates to excess officers,
  - allow for the use of a Joint Selection Committee order of merit in filling identical and subsequent vacancies,
  - implement new remuneration arrangements for Secretaries and statutory office holders; and
  - make minor technical amendments;
- *Royal Commissions Act 1902* to include the Australian Bureau of Criminal Intelligence as a body to which a Royal Commission can communicate information;
- *Superannuation Act 1976* as a consequence of the decision to appoint Secretaries and holders of certain statutory offices for a limited tenure with new remuneration arrangements; and
- *Council for Aboriginal Reconciliation Act 1991* to correct a drafting error.

**Retrospectivity**
**Subclause 2(2)**

Subclause 2(2), if enacted, would give retrospective operation to subclause 15(1) from 25 June 1984, the date of the commencement of section 3 of the *Merit Protection (Australian Government Employees) Act 1984*. The Explanatory Memorandum indicates the reason for this retrospectivity, at pages 6 and 7:

> The full bench of the Australian Industrial Relations Commission has expressed the view that the definition of "enactment" in section 3 of the Merit Protection Act may not be sufficiently broad to include an industrial award.
>
> Subclause 15(1) would ... substitute a new definition which would remove any doubt that the Agency has jurisdiction over Commonwealth employees employed by a statutory authority under an industrial award.
>
> By subclause 2(2), the amendment made by this subclause would be taken to have commenced on the date that the Merit Protection Act received Royal Assent (25 June 1984). This will preserve the status of matters already dealt with by the Agency.

As the retrospectivity is beneficial to those Government employees who have used, or may use, the merit protection legislation, the Committee makes no further comment on this provision.

## SOCIAL SECURITY (HOME CHILD CARE AND PARTNER ALLOWANCES) LEGISLATION AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 15 December 1993 by the Parliamentary Secretary to the Minister for Social Security.

The Bill proposes to introduce the home child care allowance and partner allowance, effective from September 1994. Consequential amendments to the *Data-matching Program (Assistance and Tax) Act 1990* relating to these allowances are also included.

### Further use of tax file numbers
### Clauses 3 and 5 - Insertion of Parts 2.18 and 2.15A

These new Parts provide for the home child care allowance and the partner allowance respectively. They include proposed sections 913, 914, 771HD and 771HE. The effect of these proposed new sections is to preclude the payment of the respective allowances where recipients have not responded to a request to provide their own and their partner's tax file numbers to the Department.

The Committee continues to maintain that, although tax file numbers may be considered necessary to prevent persons defrauding the system, they may also be considered to be unduly intrusive into a person's private life.

The Committee seeks the Minister's advice on why the provision of tax file numbers is necessary, as it appears that the tax file number is being used as a method of identification.

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

## TAXATION LAWS AMENDMENT BILL (NO. 4) 1993

This Bill was introduced into the House of Representatives on 14 December 1993 by the Minister for Schools, Vocational Education and Training.

The Bill proposes to amend the:

- *Fringe Benefits Assessment Act 1986* to:
  - generally exempt a travel benefit provided by an employer for an employee to enable the employee to obtain suitable medical treatment;
  - amend the definitions of 'all-day parking' and 'commercial parking station';
  - qualify certain non-government schools as rebatable employers;
- *Income Tax Assessment Act 1936* to:
  - allow tax-exempt infrastructure borrowings to be used to finance interest falling due on direct infrastructure borrowings during the construction phase and the construction of infrastructure facilities constructed on land leased from the Crown under a commercial lease;
  - extend the rebate that applies to superannuation pensions and roll-over annuities paid from a taxed source;
  - ensure lessors of luxury cars cannot use the 'finance method' of returning lease income to avoid luxury car depreciation limits;
  - exempt from income tax bereavement payments made in relation to certain entitlements to pension, allowance and benefit;
  - amend company tax instalment arrangements rules in relation to the grouping of instalment taxpayers and the penalty provision;
  - amend the penalty for deliberate overfranking of dividends;
  - provide a 20 cents in the dollar rebate for approved expenditure on conservation work on buildings listed in Commonwealth, State or Territory heritage registers;
  - remove the exemption from income tax and withholding tax for certain savings banks;
  - amend provisional tax provisions to exclude entitlement to the low income rebate from provisional tax calculations; and

. the *Superannuation Guarantee (Administration) Act 1992* to make certain technical amendments and clarify certain aspects of the legislation.

**Retrospectivity**
**Subclause 2(2)**

Subclause 2(2), if enacted, would give retrospective effect to Subdivision A of Division 5 of Part 3 of this Bill from 1 July 1993. The effect of this subdivision is to exempt from income tax bereavement payments in respect of certain entitlements to pension, allowance and benefit under the *Social Security Act 1991*.

As the retrospectivity is beneficial to taxpayers, the Committee makes no further comment on this provision.

**Retrospectivity**
**Clauses 6, 18 and 23**

These clauses allow for various provisions of this Bill to apply to events and circumstances existing prior to Royal Assent. In each case, however, the provisions which will have retrospective application are beneficial to taxpayers. In these circumstances, the Committee makes no further comment on these clauses.

**Retrospectivity**
**Clause 51**

Clause 51, if enacted, would allow the amendments to be made by clause 50 to apply from 14 December 1993, the date of the introduction of the Bill.

The Explanatory Memorandum indicates at page 59 that the provisions will ensure the proper application of the penalty for deliberate overfranking of dividends in cases where franking deficit tax is able to be offset by an initial payment of company tax.

The Committee notes that the Senate, for practical reasons, has previously been prepared to accept a degree of retrospectivity in relation to taxation legislation, as is evident from the resolution of the Senate of 8 Nov 1988 (see *Journals* of the Senate, No. 109, 8 November 1988, pp 1104-5).

As the retrospectivity will date from the introduction of the Bill, it falls within the parameters of the Senate resolution. Accordingly, the Committee makes no further

comment on this clause.

## TRAINING GUARANTEE (ADMINISTRATION) AMENDMENT BILL 1993

This Bill was introduced into the House of Representatives on 14 December 1993 by the Minister for Schools, Vocational Education and Training.

The Bill proposes to:

- allow excess eligible expenditure incurred in one year to be carried forward to the next year;
- make provision for employers who have a training expenditure shortfall in one year to make it up through additional training expenditure the following year;
- double the 'deemed amount';
- remove the requirement that students must be under the age of 21 when undertaking work experience for expenditure related to the work experience to be included as eligible expenditure;
- widen the opportunity for organisations to group for the purposes of the Act;
- clarify the requirements of who is able to design and approve an eligible training program;
- allow rental, hire, lease or depreciation expenses on property or equipment to be included as eligible training expenditure; and
- update provisions relating to liquidators.

The Committee has no comment on this Bill.

## TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL (NO. 3) 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to amend the following Acts:

- *Air Navigation Act 1920* to ensure any Australian carrier seeking designation or already designated on an international route can demonstrate its compliance with bilateral requirements; and
- *Australian and Overseas Telecommunications Corporation Act 1991* to change the name of the Act to the *Telstra Corporation Act 1991* and make consequential amendments to this change; and
- *Navigation Act 1912* to consolidate into one section a number of provisions that allow exemptions to be granted from the requirement to comply with the Act; and
- *Occupational Health and Safety (Maritime Industry) Act 1993* to allow the Governor-General to make regulations; and
- *Protection of the Sea (Civil Liability) Act 1981* to provide for the recovery of the amount of any loss, damages, cost or expenses incurred by the Australian Maritime Safety Authority in performing its obligations to combat pollution in the marine environment; and
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to provide for the detention of any foreign vessel suspected of causing marine pollution in a port, the territorial sea or the exclusive economic zone; and
- *Telecommunications Act 1991* to provide that the same standard of access to the standard telephone service will not be required to be provided to prescribed external Territories as is required to be provided to the rest of Australia.

The Committee has no comment on this Bill.

## WET TROPICS OF QUEENSLAND WORLD HERITAGE AREA CONSERVATION BILL 1993

This Bill was introduced into the Senate on 16 December 1993 by the Minister for Family Services.

The Bill proposes to establish the Wet Tropics Management Authority to undertake permanent management arrangements for the protection of the Wet Tropics of Queensland World Heritage Property. This implements the Commonwealth's obligations under the *Convention for the Protection of the World Cultural and Natural Heritage*.

The Committee has no comment on this Bill.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

# ALERT DIGEST

NO. 2 OF 1994

23 FEBRUARY 1994

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

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

### TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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*** The Committee has commented on this Bill**

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

## ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL 1994

This Bill was introduced into the House of Representatives on 2 February 1994 by the Minister for Aboriginal and Torres Strait Islander Affairs.

The Bill proposes to amend Schedule 1 of the *Aboriginal Land Rights (Northern Territory) Act 1976* to grant the Wampana Land Claim area to traditional owners by inclusion in the Schedule. This follows a settlement agreement between the Northern Territory Government, Gambamora Industries Pty Ltd and the Central Land Council.

The Committee has no comment on this Bill.

## APPROPRIATION BILL (NO. 3) 1993-94

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

The Bill proposes to appropriate $542.1 million out of the Consolidated Revenue Fund, additional to the sums appropriated by the *Appropriation Act (No. 1) 1993-94,* to meet payments for the ordinary annual services of the government.

The Committee has no comment on this Bill.

## APPROPRIATION BILL (NO. 4) 1993-94

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

The Bill proposes to appropriate $165.9 million out of the Consolidated Revenue Fund, additional to the sums appropriated by the *Appropriation Act (No. 2) 1993-94,* 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.

The Committee has no comment on this Bill.

## APPROPRIATION (PARLIAMENTARY DEPARTMENTS) BILL (NO. 2) 1993-94

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

The Bill proposes to appropriate $2 million out of the Consolidated Revenue Fund, additional to the sums appropriated by the *Appropriation (Parliamentary Departments) Act 1993-94,* for recurrent expenditures of the parliamentary departments.

The Committee has no comment on this Bill.

## EXCISE TARIFF AMENDMENT BILL 1994

This Bill was introduced into the House of Representatives on 9 February 1994 by the Parliamentary Secretary to the Minister for Industry, Technology and Regional Development.

The Bill proposes to:

. decrease the excise duty payable for gasoline for use in aircraft (AVGAS) by 3.013 cents per litre; and
. impose an excise duty on AVGAS and kerosene for use in aircraft (AVTUR) of 0.264 cents per litre.

### Retrospectivity
### Subclauses 2(2) and (3)

Subclause 2(2) provides for a decrease in excise duty retrospective to 1 July 1993. Subclause 2(3) provides for an increase of duty retrospective to 1 September 1993.

The decrease in excise duty (subclause 2(2)) is beneficial to persons other than the Commonwealth and is therefore acceptable to the Committee. The increase in duty (subclause 2(3)) was tabled in the House of Representatives prior to its introduction.

The Committee notes that such retrospectivity is standard in relation to changes in rates of duty.

The Committee has no further comment on this Bill.

## INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

This Bill was introduced into the Senate on 10 February 1994 by the Minister for Veterans' Affairs.

The Bill proposes to enable Australia to comply with binding international obligations which were imposed by the United Nations Security Council on 25 May 1993 when adopting resolution 827. That resolution established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and adopted the Statute of the International Tribunal. In particular, the bill provides for the following matters:

. the arrest and surrender of persons to the Tribunal;
. other forms of assistance to the Tribunal;
. the sitting of the Tribunal in Australia;
. enforcement of forfeiture orders made by the Tribunal; and
. search and seizure and arrest provisions.

The Committee has no comment on this Bill.

## INTERNATIONAL WAR CRIMES TRIBUNAL (CONSEQUENTIAL AMENDMENTS) BILL 1994

This Bill was introduced into the Senate on 10 February 1994 by the Minister for Veterans' Affairs.

The Bill proposes to amend the following Acts:

. *Administrative Decisions (Judicial Review) Act 1977*
. *Director of Public Prosecutions Act 1983*
. *Migration Act 1958*
. *Proceeds of Crime Act 1987*, and
. *Telecommunications (Interception) Act 1979*

consequential upon the enactment of the International War Crimes Tribunal Bill 1994.

The Committee has no comment on this Bill.

## MINISTERS OF STATE AMENDMENT BILL 1994

This Bill was introduced into the House of Representatives on 9 February 1994 by the Parliamentary Secretary to the Minister for Administrative Services.

The Bill proposes to increase the appropriation from the Consolidated Revenue Fund relating to ministerial salaries. The increases proposed total $50,000 in financial year 1993-94 and $77,000 in financial year 1994-95.

The Committee has no comment on this Bill.

## TELECOMMUNICATIONS (PERFORMANCE STANDARDS) AMENDMENT BILL 1994

This Bill was introduced into the Senate on 10 February 1994 by Senator Alston as a Private Senator's Bill.

The Bill proposes to amend the Telecommunications Act 1991 to provide comparable standards of telecommunications services across Australia by:

. amending the definition of **"standard telephone service"** and provide that a definition set by regulation must ensure certain standards;
. setting certain indicative performance standards; and
. allowing the Minister to give directions to AUSTEL about the performance of its functions in relation to section 246 of the Act.

The Committee has no comment on this Bill.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

# ALERT DIGEST

NO. 3 OF 1994

2 MARCH 1994

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

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

### TERMS OF REFERENCE

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(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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*** The Committee has commented on this Bill**

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## MIGRATION LEGISLATION AMENDMENT BILL 1994

This Bill was introduced into the Senate on 24 February 1994 by the Parliamentary Secretary to the Minister for Primary Industries and Energy.

The Bill proposes to deal with consequential amendments arising from the commencement (on 1 September 1994) of most provisions of the *Migration Reform Act 1992*. In addition to these, further amendments are proposed to:

- create three new classes of visas (special purpose, absorbed person and ex-citizen);
- provide for only one decision making process leading to the grant of a visa;
- allow protection visas to be granted as permanent visas;
- the *Australian Citizenship Act* to:
  - ensure New Zealand citizens resident in Australia and parents of Australian-born children continue to be regarded as permanent residents for the purpose of acquiring citizenship;
  - allow deferral of consideration of citizenship applications for 12 months while a person is under investigation which may lead to visa cancellation or to criminal charges; and
  - amend the discretionary power to grant citizenship to spouses and widow(er)s of Australian citizens to ensure citizenship is granted only to permanent residents; and
- make other technical amendments.

### Retrospectivity
### Subclause 2(2)

By virtue of subclause 2(2) the amendments to the *Migration Reform Act 1992* to be made by Schedule 2 of this Bill will be taken to have commenced on 7 December 1992, the date on which that Act received Royal Assent. The amendments correct drafting oversights in the transitional provisions of the 1992 Act. It does not appear that the retrospectivity will be to the detriment of any individual. In these circumstances, the Committee makes no further comment on the Bill.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

# ALERT DIGEST

NO. 4 OF 1994

16 MARCH 1994

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

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

### TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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**The Committee has no comment on these Bills as they raise no issues in relation to the Committee's terms of reference**

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 FORCE (HOME LOANS ASSISTANCE) AMENDMENT BILL 1994

This Bill was introduced into the House of Representatives on 2 March 1994 by the Parliamentary Secretary to the Minister for Defence.

The Bill proposes to amend the *Defence Force (Home Loans Assistance) Act 1990* so that special introductory home loan interest rates apply only for new borrowers and for the period that those rates are available to the public.

The Committee has no comment on this Bill.

## EMPLOYMENT, EDUCATION AND TRAINING LEGISLATION AMENDMENT BILL 1994

This Bill was introduced into the House of Representatives on 2 March 1994 by the Minister for Employment, Education and Training.

The Bill proposes to amend the:

- the *Higher Education Funding Act 1988* to make adjustments to:
  - financial amounts flowing from the transfer of responsibilities for funding the Institute of Arts of the Australian National University from the ACT Government to the Commonwealth; and
  - funding as a result of the removal of provisions doubling the rate of the Higher Education Contribution Scheme for undergraduate students undertaking a second degree at the same or lower level; and

- the *Maritime College Act 1978* to:
  - make the Chairperson of the Academic Board of the College an ex officio member of the Council of the College, and
  - amend a number of gender references;

and repeal the following Acts, which are no longer required:

- *States Grants (Advanced Education Assistance) Act 1976*,
- *States Grants (Tertiary Education Assistance) Act 1987*, and the
- *States Grants (Technical and Further Education Assistance) Act 1989*.

The Committee has no comment on this Bill.

## INDUSTRIAL RELATIONS AMENDMENT BILL 1994

This Bill was introduced into the Senate on 2 March 1994 by the Minister for Veterans' Affairs.

The Bill proposes to amend the *Industrial Relations Act 1988* to provide that:

. a Judge of a Court created by Parliament can hold the office of President of the Australian Industrial Relations Commission and retain office of Judge; and

. the next President of the Commission may have a fixed term of office (this will only apply to the forthcoming appointment of Justice O'Connor to the position).

The Committee has no comment on this Bill.

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

# ALERT DIGEST

NO. 5 OF 1994

23 MARCH 1994

# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

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

## TERMS OF REFERENCE

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**The Committee has no comment on this Bill as it raises no issues in relation to the Committee's terms of reference.**

## INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY AMENDMENT BILL 1994

This Bill was introduced into the Senate on 16 March 1994 by the Minister for Veterans' Affairs.

The Bill proposes to amend the *Inspector-General of Intelligence and Security Act 1986* consequent upon the issue of Letters Patent to the Honourable Gordon Samuels AC QC and to Mr Michael Codd AC to conduct an inquiry into the operation and management of the Australian Secret Intelligence Service.

The Government has asked that inquiry to report, if possible, by 30 September 1994 and, in any case, by 31 December 1994. The amendment to the Act will permit current and former Inspectors-General and their staffs to give evidence to the inquiry without risking prosecution.

The Committee has no comment on this Bill.

**SENATE STANDING COMMITTEE**

**FOR**

**THE SCRUTINY OF BILLS**

# ALERT DIGEST

**NO. 6 OF 1994**

**4 MAY 1994**

# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

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

## TERMS OF REFERENCE

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**ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION AMENDMENT BILL 1994**

This bill was introduced into the Senate on 24 March 1994 by the Minister for Veterans' Affairs.

The bill proposes to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* to:

- enable the Prime Minister to confer departmental functions, and for the Minister to confer functions previously exercised by ATSIC on the Torres Strait Regional Authority (TSRA);
- enable the TSRA to negotiate, cooperate and enter into agreements with other Commonwealth bodies and with State, Territory and local government bodies and to make grants and loans to the State of Queensland and its authorities including local government authorities;
- give the Minister discretion to make rules for the conduct of elections in the Torres Strait area or parts of the area by a system of wards including the power to prescribe the maximum number of members per ward;
- allow monies in the TSRA Land and Resources Fund to be used for development and ongoing maintenance of property and marine resources;
- make consequential amendments;
- require the Minister to consult with the TSRA rather than ATSIC before making rules prescribing the manner in which elections for the TSRA are to be conducted and in the manner in which casual vacancies in the TSRA are to be filled; and
- streamline provisions relating to the conduct of zone elections.

The Committee has no comment on this bill.

**ABORIGINAL LAND (LAKE CONDAH AND FRAMLINGHAM FOREST) AMENDMENT BILL 1994**

This bill was introduced into the Senate on 24 March 1994 by the Minister for Veterans' Affairs.

Part V of the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* regulates mining operations which may be carried out on certain land in this area, in accordance with Victorian legislation. The Victorian legislation has been repealed and replaced by the Victorian *Mineral Resources Development Act 1990*. This amendment bill is consequential upon the Victorian amendments.

The Committee has no comment on this bill.

**BANKING (STATE BANK OF SOUTH AUSTRALIA AND OTHER MATTERS) BILL 1994**

This bill was introduced into the Senate on 24 March 1994 by the Minister for Veterans' Affairs.

The bill proposes to facilitate South Australia's compliance with some of the principal conditions attached to special assistance being provided by the Commonwealth to South Australia over a three year period. The conditions relate to: the sale of the State Bank of South Australia (SBSA); subjecting the bank to Commonwealth taxation, and transfer by legislation of prudential supervision powers over the bank to the Reserve Bank of Australia. The bill also proposes to make a number of other minor amendments to streamline the transfer of assets from the SBSA to the corporatised bank. Amendments are also made to the *Banking Act 1959* and *Reserve Bank Act 1959*.

**Commencement on proclamation**
**Clause 2**

Clause 2 of the bill provides:

> 2.(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
>
> (2) Part 2.1 (other than subsections 5(2) and 6(2)) commences on a day to be fixed by Proclamation. The day must not be earlier than the day on which the *State Bank (Corporatisation) Act 1994* of South Australia commences.
>
> (3) If the provisions referred to in subsection (2) do not commence within the period of 6 months beginning on the day on which the *State Bank (Corporatisation) Act 1994* of South Australia commences, they commence on the first day after the end of that period.
>
> (4) Subsections 5(2) and 6(2) commence on a day to be fixed by Proclamation.

By subclause 2(4), proposed subsections 5(2) and 6(2) will come into effect on a day to be fixed by Proclamation, with no provision for automatic commencement or repeal being specified.

The Committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

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

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

The Committee notes that, although the Explanatory Memorandum suggests that the

Reserve Bank must fulfil certain requirements before these provisions can be proclaimed, it is not explained why automatic commencement or repeal would not be appropriate.It may be that the circumstances of this bill would make paragraph 6 applicable in that the commencement depends on an event whose timing is uncertain. The Committee seeks the Minister's advice whether this is the reason.

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.

**BOUNTY (FUEL ETHANOL) BILL 1994**

This bill was introduced into the Senate on 23 March 1994 by the Parliamentary Secretary to the Minister for Primary Industries and Energy.

This bill proposes to introduce the payments of bounty on the production of certain fuel ethanol in Australia from 1 July 1994 to 30 June 1997.

**Unreviewable decisions**
**Subclauses 13(1), 15(4), 17(1), 19(4) and 21(1)**

The relevant subclauses give the Minister the discretion to decide whether a person may be registered for the bounty scheme established by this bill and to decide the production allocation for the person so registered. Although each clause requires the Minister, if the person is refused registration or production allocation, to give the person reasons for the refusal, the bill does not provide for review of such a decision. The Committee notes, however, that under proposed paragraph 61(1)(a)the Minister's decision to cancel a person's registration is subject to review by the Administrative Appeals Tribunal. Accordingly the Committee seeks the Minister's advice on the matter.

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

**Abrogation of the privilege against self-incrimination**
**Proposed new section 52**

This proposed section, if enacted, would abrogate the privilege against self-incrimination for a person required to answer questions or produce documents under section 50.

It is, however, in a form which the Committee has previously been prepared to accept, as it contains a limit on the use to which any information can be put. The Committee notes in particular that the **indirect** as well as the direct use of such information would be precluded. This is, therefore, a 'use/derivative use' indemnity. Accordingly, the Committee makes no further comment on the clause.

**COMMONWEALTH RECIPROCAL RECOVERY LEGISLATION AMENDMENT BILL 1994**

This bill was introduced into the House of Representatives on 24 March 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Social Security Act 1991*, the *Student Assistance Act 1973* and *Veterans' Entitlements Act 1986* to authorise certain deductions from benefits for the purpose of debt recovery when beneficiaries fail to repay an overpayment.

The Committee has no comment on this bill.

**CORPORATIONS LEGISLATION AMENDMENT BILL 1994**

This bill was introduced into the House of Representatives on 24 March 1994 by the Attorney-General.

The bill proposes to:

- confer on lower courts in each State and Territory civil jurisdiction in respect of corporate law claims relating to debt recovery or monetary compensation;
- enable the Australian Stock Exchange to introduce a new Clearing House Electronic Subregister System (CHESS) through the establishment of an approved Securities Clearing House and support of business rules;
- allow the implementation of rationalisation between the national companies and securities scheme laws;
- regulate certain activities of the Corporations and Securities Panel;
- exclude certain decisions made under the Corporations Law and the ASC Law from the requirements of subsection 27A(1) of the *Administrative Appeals Tribunal Act 1975*. This section requires a person who makes reviewable decisions to take all reasonable steps to give any person whose interests are affected by that decision notice of the making of the decision and of the right to have the decision reviewed;
- introduce penalty units rather than dollar value units;
- transfer the unclaimed property functions and powers of the Minister to the ASC;
- provide for the establishment of stock markets in unquoted prescribed interests on which the interests may be traded by means of an electronic trading facility;
- recognise that in a futures transaction involving a chain of intermediaries, monies can be identified as client monies and continue to be treated as such; and
- amend the definitions of 'securities' and 'futures contract'.

**Commencement on proclamation**

**Subclause 2(3)**

By subclause 2(3), the items, and paragraphs of items, of Schedules 1 and 3 will come into effect on a day, or days, to be fixed by Proclamation, with no provision for automatic commencement or repeal being specified.

The Schedules contain amendments to the Corporations Act and Corporations Law relating to the civil jurisdiction of lower courts under the Corporations Law and relating to financial institutions.

The Committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
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> > (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, as outlined in paragraphs 45 and 46 of the Explanatory Memorandum, that the commencement of these provisions depends on the passage of complementary State and Territory legislation. This would make paragraph 6 of the Drafting Instruction applicable. Accordingly, the Committee makes no further comment on this subclause.

**Procedural fairness/inappropriate delegation of legislative power**
**Schedule 4, items 19 and 20**

Schedule 4, if enacted, would amend the *Australian Securities Commission Act 1989* and the Corporations Law to introduce a new structure to enable the Australian Securities Commission (ASC) to examine takeover conduct. The present structure, according to the Explanatory Memorandum, was 'found to be ineffective'. The proposed structure would change the adversarial hearing into an inquisitorial inquiry. Items 19 and 20, in particular, would remove the right of legal representation and the right to have the rules of natural justice apply. Item 19 would substitute a right to have another person present to assist a person before an inquiry without the assistant being able to address the Panel. Item 20 would substitute a regulation making power to prescribe what will constitute 'procedural fairness'.

At paragraph 320, the Explanatory Memorandum states the dilemma:

> The crux of the problem which the Panel has encountered with the conduct of its hearings is how it is to provide procedural fairness to parties while at the same time coming to a timely decision concerning the acceptability fo commercial takeover conduct.

The Committee is concerned that the proposal may be an overreaction to the difficulties experienced in the first application. The Explanatory Memorandum itself stresses the flexibility of the principles of procedural fairness. The Explanatory Memorandum also notes in paragraph 325 that delay in coming to a quick decision is less likely to be a problem with the interim order powers available to the Panel through sections 773A and 733B. The Committee is also concerned that an argument should be put forward that quick decisions are necessary because the peer group members who will conduct the inquiry will want to be off attending to their own business interests and may not be able to devote the time necessary to come to a proper decision.

The Committee is of the view that

> the changes proposed may be considered to trespass unduly on personal rights and liberties in taking away the right to a public hearing of an adversarial nature with legal representation which would enable the exercise of the wide powers of the Panel to be challenged and tested; and
>
> the proposal to alter the principles of procedural fairness by regulation in the interests of getting quick decisions may constitute an inappropriate delegation of the legislative power of Parliament in that the Committee would prefer to see any alteration in primary legislation.

Accordingly, the Committee seeks the Attorney-General's advice on these matters.

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) and to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

**Notification of reviewable decisions**
**Schedule 5**

A person who makes a reviewable decision is required to take all reasonable steps to give any person who may be affected by the decision notice of the decision and of the right to have the decision reviewed. Schedule 5, if enacted, would limit the requirement of the ASC to give notice of certain decisions.

The Committee notes that the Explanatory Memorandum states, in paragraphs 353 and 354, that Schedule 5 will implement the results of an examination by the Administrative Review Council, in conjunction with the ASC and the Attorney-General's Department of all the categories of decisions of the ASC which assessed the extent to which exemption from giving notification of making the decision and review rights may be justified. The Committee also notes that absence of a notice will be declared to be 'special circumstances' which will allow the AAT to exercise its discretion to entertain an application for review of the decision that is made out of time.

Accordingly, the Committee makes no further comment on this Schedule.

**Inappropriate delegation of legislative power**
**Schedule 8, items 4 - 8**

The Committee has received a submission from Michael G Hains which is attached to this Digest, expressing concern at 'the delegation of substantial powers to modify the Corporation Law as it applies to derivative financial products'.

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

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

Pending the Attorney-General'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.

## CRIMES (CHILD SEX TOURISM) AMENDMENT BILL 1994

This bill was introduced into the House of Representatives on 23 March 1994 by the Minister for Justice.

The bill proposes to create offences aimed at Australian nationals and residents who engage in sexual relations with children overseas and at those involved in the organisation and promotion of child sex tourism.

### Reversal of the onus of proof
### Division 3 - Defences

In line with similar State legislation, such as section 46 of the *Crimes Act 1958 (Vic)*, Division 3, if enacted, would provide statutory defences to some of the offences created by this legislation. The matters which the defence would have to prove are peculiarly within the defendant's knowledge, for example, that the defendant believed that the alleged victim was 16 or over or was consenting. In these circumstances the Committee is of the opinion that it is acceptable that the defendant should be offered the chance of proving these matters. Accordingly, the Committee makes no further comment on this bill.

**CUSTOMS TARIFF AMENDMENT BILL 1994**

This bill was introduced into the Senate on 23 March 1994 by the Parliamentary Secretary to the Minister for Primary Industries and Energy.

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

- designate Eritrea as a developing country to accord goods from that country concessional tariff treatment;
- increase the customs duty on aviation gasoline and aviation kerosene by 0.264 cents per litre;
- allow the automatic flow-on of CPI increases to aviation kerosene;
- creates a new policy item for reference materials which are used as standards against which like materials, processes and apparatus are calibrated;
- imposes a 5 per cent tariff duty on textile yarns; and
- makes administrative and technical amendments.

**Retrospectivity**
**Clause 2**

Under subclauses 2(3), 2(4) and 2(5), Schedules 1, 2 and 3 would have retrospective effect. The purpose of these provisions is either to update the legislation or to give effect to a measure announced in the 1993/94 Budget. Accordingly the Committee makes no further comment on this bill.

**EVIDENCE (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1994**

This bill was introduced into the House of Representatives on 24 March 1994 by the Parliamentary Secretary to the Attorney-General.

The bill proposes to:

. repeal the *State and Territorial Laws and Records Recognition Act 1901* and most provisions of the *Evidence Act 1905*;
. amend the *Acts Interpretation Act 1901*, *Crimes Act 1914*, *Federal Court of Australia Act 1976* and *Judiciary Act 1903* consequent upon the Evidence Bill 1993; and
. amends 16 Acts in consequence of repeal of the *Evidence Act 1905*.

**Commencement on Proclamation**
**Subclause 2(3)**

By subclause 2(3), subsection 9(1) will come into effect on a day to be fixed by Proclamation, with no provision for automatic commencement or repeal being specified.

The Committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
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> (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that

time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

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

The Committee notes that the commencement of these provisions depends on the passage of complementary State and Territory legislation. This would make paragraph 6 of the Drafting Instruction applicable. Accordingly, the Committee makes no further comment on this subclause.

**FINANCIAL AGREEMENT BILL 1994**

This bill was introduced into the House of Representatives on 23 March 1994 by the Parliamentary Secretary to the Treasurer.

The bill proposes to approve the *Financial Agreement Between the Commonwealth, States and Territories*. The original Agreement (made in 1927) established the Loan Council. The 1994 Agreement provides for the continued existence of the Loan Council which has agreed to:

- abolish the restriction on States borrowing in their own names;
- remove the Commonwealth's explicit power to borrow on behalf of the States;
- remove the requirement for future Commonwealth and States borrowings to be approved under the provisions of the Agreement;
- remove references to the National Debt Sinking Fund; and
- include the Territories as members of the Loan Council and as parties to the Financial Agreement.

The Committee has no comment on this bill.

**HUMAN SERVICES AND HEALTH LEGISLATION AMENDMENT BILL 1994**

This bill was introduced into the House of Representatives on 24 March 1994 by the Parliamentary Secretary to the Minister for Housing, Local Government and Human Services.

The bill proposes to amend the:

- *Disability Services Act 1986* to:
  - enable early notices to be issued for repayment of the cost of a rehabilitation program to be considered as part of negotiations prior to the settlement of a compensation claim,
  - require the person liable to pay compensation to make no payment to the compensable person until the Commonwealth has been paid, and
  - require written notice to be given to certain persons of reviewable decisions and appeal rights;
- *Health Insurance Commission Act 1973* relating to the childcare cash rebate functions of the Health Insurance Commission; and
- amends the above Acts to make technical and drafting amendments.

**Retrospectivity**
**Subclauses 2(2) and (3)**

Subclauses 2(2) and (3) of this bill, if enacted, would give retrospective effect to certain provisions of the bill. Although the Explanatory Memorandum does not directly give reasons for the retrospectivity, the relevant amendments are apparently for the purposes only of correcting drafting errors and oversights with respect to the operation of the *Childcare Rebate Act 1993*. Accordingly, the Committee makes no further comment on this bill.

**INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 1994**

This bill was introduced into the House of Representatives on 23 March 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Industrial Relations Act 1988* to abolish the industrial relations machinery for the stevedoring industry following the industry's move to enterprise employment. Consequently, the Stevedoring Industry Acts (Termination) Act 1977 is to be repealed. The *Stevedoring Industry Finance Committee Act 1977* is amended to change the composition and functions of the committee. These changes will allow the committee to finalise a financial commitment to the Australian Industry Development Committee. Once this obligation has been discharged this Act will cease to have effect. The *Stevedoring Industry Levy Act 1977* and *Stevedoring Industry Levy Collection Act 1977* will also cease to have effect when the Finance Committee Act ceases to have effect.

The Committee has no comment on this bill.

**INDUSTRY, TECHNOLOGY AND REGIONAL DEVELOPMENT LEGISLATION AMENDMENT BILL (NO. 2) 1994**

This bill was introduced into the Senate on 24 March 1994 by the Minister for Veterans' Affairs.

The portfolio bill proposes to amend the following:

- *Australian Industry Development Corporation Act 1970* to facilitate the reduction in Australian Industry Development Corporation's equity in its major subsidiary, the AIDC Ltd, to a minimum of 51 per cent. Incidental amendments are also made to this Act;
- *National Measurement Act 1960* to:
  - increase the number of members of the National Standards Commission from 8 to 10;
  - increase the limit of contracts which the Commission may make without Ministerial approval from $100,000 to $250,000;
  - give the Commission power to invest its money; and
  - give the Commission power to make grants and provide other financial assistance;
- *Patents Act 1990* to make minor technical amendments which are consequent to the amendments made to the *Seas and Submerged Lands Act 1973* by the *Maritime Legislation Amendment Act 1994*;
- *Pooled Development Funds Act 1992* to extend, from 12 to 18 months, the period to which the most recent audited accounts of an investee company must relate, for the purpose of determining the value of the total assets of the company before a Pooled Development Fund invests in the company.

The Committee has no comment on this bill.

**LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1994**

This bill was introduced into the Senate on 24 March 1994 by the Minister for Veterans' Affairs.

The portfolio bill proposes to amend the following:

- *Acts Interpretation Act 1901* to ensure a delegation to a class of offices will include offices created after the instrument of delegation was made;
- *Cheques and Payment Orders Act 1986* to improve procedures for the physical and electronic presentment of cheques;
- *Family Law Act 1975* to correct a drafting error in section 22;
- *Federal Court of Australia Act 1976* to:
  - widen the powers of a single judge in appeal procedures;
  - give the Court power to take evidence by video link, telephone or other appropriate means;
  - provide the Court with a discretion to take unsworn evidence by video link, telephone or other appropriate means from a person in another country; and
  - enable Rules of Court to be made to overcome the rule in *Weldon v Neal* (1887) 19 QBD 394;
- *Financial Transaction Reports Act 1988* to provide the Director of the Australian Transaction Reports and Analysis Centre with certain powers of a Secretary under the *Public Service Act 1922*;
- *Freedom of Information Act 1982* to:
  - extend the requirement of an agency to give reasons and other particulars of decisions;
  - extend the protection given by sections 91 and 92 of the Act to situations where third parties are consulted;
  - amend section 27A to reinsert the precondition for consultation but subject to guidelines;
  - further standardise time limits for various actions under the Act at 30 days;
  - update Schedules to include exemptions for specified documents of certain organisations and make a technical amendment;
  - clarify the requirement that agencies publish a statement of the categories of documents that are in their possession;
  - confirm the right of an applicant to internal review and appeal

to the AAT where an agency claims that it has given access to all the documents that the applicant has requested;

- extend the exemption from applications under the Act for documents identifying confidential informants to documents relating to persons who are protected under the National Witness Protection Program;
- apply the Act to official documents of a Parliamentary Secretary;
- provide for service of notices and documents by post; and
- *Judiciary Act 1903* to provide that a judgment of the Full Court of the High Court may be delivered by one Justice.

**Retrospectivity**
**Subclause 2(4)**

Subclause 2(4) of this bill, if enacted, would give retrospective effect to the amendment to be made by Part 4 of this bill. As the relevant amendment merely renumbers a subsection in the *Family Law Act 1975*, the Committee makes no further comment on this provision.

**Retrospective application**
**Clause 74**

Clause 74, if enacted, would allow the amendments made to the *Freedom of Information Act 1982* by clauses 72 and 73 to apply to a decision made before the commencement of clause 74. The retrospectivity, however, is beneficial to persons seeking a review of decisions. Accordingly, the Committee makes no further comment on this clause.

**MOOMBA-SYDNEY PIPELINE SYSTEM SALE BILL 1994**

This bill was introduced into the House of Representatives on 24 March 1994 by the Minister for Finance.

The bill proposes to facilitate a 51 per cent purchase of the Moomba-Sydney Pipeline System (currently owned by the Pipeline Authority) by The Australian Gas Light Company. It provides for the sale of assets and liabilities, other than debt, of the Pipeline Authority and continuing employment for staff who accept employment offers from the purchasers.

**Commencement**
**Subclause 2(2)**

Subclause 2(2), if enacted, would allow most of the provisions of this bill to commence on the 'sale day' which, by virtue of subclause 4(1), would either be 30 June 1994 or such other day as is agreed by the Commonwealth and AGL.

The Committee is of the view that, under its term of reference in respect of inappropriate delegation of legislative power, it ought to draw to Senators' attention any legislation which, if passed, would allow the commencement of legislation to be determined other than by Parliament. In the circumstances of this bill, however, the Committee recognises that legislation needs to be in place to facilitate the sale of the Moomba-Sydney Pipeline System but that the sale date may not be able to be determined with certainty sufficiently in advance to enable a definitive date to be included in the legislation.

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

**NATIONAL DEBT SINKING FUND REPEAL BILL 1994**

This bill was introduced into the House of Representatives on 23 March 1994 by the Parliamentary Secretary to the Treasurer.

The bill proposes to repeal the *National Debt Sinking Fund Act 1966*, thereby abolishing the National Debt Sinking Fund and its controlling body, the National Debt Commission. Consequential amendments are also made to other Acts.

The Committee has no comment on this bill.

**PARLIAMENTARY PRIVILEGES AMENDMENT (ENFORCEMENT OF LAWFUL ORDERS) BILL 1994**

This bill was introduced into the Senate on 23 March 1994 by Senator Kernot as a Private Senator's bill.

The bill proposes to provide for the enforcement by the courts through normal legal processes of the orders of the Houses of Parliament and their committees.

The Committee has no comment on this bill.

**PLANT BREEDER'S RIGHTS BILL 1994**

This bill was introduced into the Senate on 24 March 1994 by the Minister for Veterans' Affairs.

The bill proposes to replace and repeal the *Plant Variety Rights Act 1987* and provide for the granting of proprietary rights to breeders of certain new varieties of plants and fungi. It will conform with the 1991 Act of the Convention of the International Union for the Protection of New Varieties of Plants. The bill will also establish the position of Registrar of Plant Breeder's Rights, provide for the delegation of the Secretary's powers to the Registrar and establish a Plant Breeder's Rights Advisory Committee.

The Committee has no comment on this bill.

**PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL 1994**

This bill was introduced into the Senate on 24 March 1994 by the Minister for Veterans' Affairs.

The portfolio bill proposes to amend the following:

- *Quarantine Act 1908* to:
  - provide legislative support for quarantine compliance agreements between the Commonwealth and importers;
  - provide legislative support for electronic processing of imports for quarantine purposes; and
  - give effect to recommendations of the Auditor-General's Report No 35 of 1991-92 on quarantine fees and charges; and
- *Agricultural and Veterinary Chemicals Act 1988* to:
  - extend the sunset provision from 30 June 1994 to 30 June 1996;
  - repeal the Act upon commencement of the *Agricultural and Veterinary Chemicals Act 1994*; and
  - make minor amendments of a drafting nature;
- *Snowy Mountains Hydro-electric Power Act 1949* to:
  - remove gender specific terminology; and
  - enable the appointment of an Acting Commissioner and of an Acting Associate Commissioner for the authority for an indefinite period; and
- *Rural Adjustment Scheme Act 1992* to amend annual reporting arrangements for the Rural Adjustment Scheme Advisory Council.

**Retrospectivity and insufficiently defined administrative powers**
**Amendment of the *Rural Adjustment Act 1992***

Subclause 2(5), if enacted, would give retrospective effect from I July 1993 to the repeal of section 20 of the *Rural Adjustment Act 1992* and the substitution of a new section. The new section provides for an annual report on the operation of the Rural Adjustment Scheme and of the Advisory Council's operations which must be given to the Minister and tabled in each House of the Parliament.

What is proposed to be repealed, however, is the application of Division 3 of Part IX of

the *Audit Act 1901* to the Council. The application of that Division already requires the tabling in Parliament of the annual report. The net effect of the proposed amendment would appear to be to remove the Council and the Scheme from auditing by the Auditor-General and the opportunity for the Auditor's report on the operations of the Scheme to be tabled in Parliament.

The Committee notes the absence of auditing and the absence of any explanation of the need to make the amendment retrospective. Accordingly, the Committee seeks the Minister's advice on these matters.

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

**SOCIAL SECURITY LEGISLATION AMENDMENT BILL (NO.2) 1994**

This bill was introduced into the House of Representatives on 24 March 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following:

- *Social Security Act 1991* to:
  - introduce the disability wage supplement, from 1 July 1994;
  - increase the maximum rate of additional family payment payable in respect of children who have not turned 16 by $1 a week per child, from 1 January 1995;
  - impose a rate of return for shares and managed investments for ordinary income assessment purposes;
  - allow the Minister for Social Security to take account of migration law changes by way of disallowable instrument;
  - increase the pension age for women from 60 to 65, to be phased in from 1 July 1995 over a 20-year period;
  - prevent payments to persons refusing to obtain and provide a tax file number to the Department;
  - modify the definition of 'compensation'; and
  - make minor amendments consequent upon the new home child care and partner allowances;
- *Data-matching Program (Assistance and Tax) Act 1990* to make minor amendments consequent upon the introduction of the disability wage supplement; and the
- *Veterans' Entitlements Act 1986* and *Farm Household Support Act 1992* to make minor amendments consequent upon the introduction of the partner allowance.

**Retrospectivity**
**Subclause 2(2)**

Subclause 2(2) of this bill, if enacted, would give retrospective effect to some of the provisions of the bill. As the relevant amendments are beneficial to social security recipients, the Committee makes no further comment on this provision.

**Tax file numbers**

**Clause 5 - Insertion of Part 2.9**
**Clauses 34-37: Response to AAT decision**

Clause 5, if enacted, would insert Part 2.9 to provide for a new payment: the disability wage supplement. It includes proposed sections 416 and 417. The effect of these proposed new sections is to preclude the payment of the supplement where recipients have not responded to a request to provide their own and their partner's tax file numbers to the Department.

Clauses 34-37 are proposed because of the decision of the Administrative Appeals Tribunal in *Re Malloch and Secretary, Department of Social Security*. The Explanatory Memorandum states that the AAT held 'that the Principal Act does not prevent payment to a person who does not provide a tax file number to the Department because he or she has no tax file number and has no intention of getting one'.

The Committee continues to maintain that, although tax file numbers may be considered necessary to prevent persons defrauding the system, they may also be considered to be unduly intrusive into a person's private life.

The Committee seeks the Minister's advice on why the provision of tax file numbers is necessary, as it appears that the tax file number is being used as method of identification.

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.

**STUDENT ASSISTANCE AMENDMENT BILL 1994**

This bill was introduced into the House of Representatives on 24 March 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend:

- the *Student Assistance Act 1973* to:
  - establish a legislative basis for the ABSTUDY and Assistance for Isolated Children schemes;
  - extend the debt management regime to include certain schemes;
  - index the dependent spouse allowance under AUSTUDY to the CPI;
  - recover certain overpayments;
  - change the requirement for persons receiving student assistance to advise the Department of any changed circumstances that may affect their entitlement from within seven days to within 14 days;
  - give the Minister power to issue guidelines for repayment of supplement loans obtained by fraud;
  - introduce an offence where persons receive student assistance when not entitled to do so;
  - vary the taxable income thresholds for the compulsory repayment of financial supplement debts;
  - reduce the financial supplement payable to students in certain circumstances; and
  - minor amendments;
- the *Student Assistance Amendment Act 1992* to make minor amendments.

**Retrospectivity**
**Subclause 2(2)**

Subclause 2(2) of this bill, if enacted, would give retrospective effect to clause 5 of the bill. The relevant amendment is apparently for the sole purpose of correcting a drafting error. Accordingly, the Committee makes no further comment on this provision.

**Inappropriate delegation of legislative power**
**Regulations to govern Schemes**
**Schedule, items 13 and 14**

Proposed new sections 9 and 10A of the *Student Assistance Act 1973*, if enacted, would give a legislative backing to the Assistance for Isolated Children Scheme and the ABSTUDY scheme. The proposed sections, however, provide only the barest minimum in respect of the schemes, leaving virtually everything to be prescribed by regulation. For example, section 9, of itself, does not require a person to be isolated to be granted a benefit.

The Committee is of the view that a proper balance of the functions of primary and secondary legislation would require more content to be included in the Act. Accordingly, the Committee seeks the Minister's advice on how an appropriate balance could be achieved.

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.

**Offence of strict liability/reversal of onus of proof**
**Schedule, Items 50 and 53**

Items 50 and 53 together with items 48 and 49 introduce a significant change in the system of criminal and civil sanctions which relate to the payment of student assistance. The Committee is concerned that the new arrangement is a retrograde step, imposing a more onerous level of obligation on recipients under the threat of what, in the circumstances appears to be an inappropriate penalty - one year's imprisonment.

To put the changes in context:

. Section 48 of the *Student Assistance Act 1973* currently imposes an obligation on a recipient of a student assistance payment to notify the Department of the happening of any event which has been prescribed by regulation. The student is not required to know the law in detail but is given a list of events to notify. Upon notification, the Department adjusts or cancels payments.

. Section 49 currently provides for a series of five offences with a penalty of imprisonment for a year. Four of them require the person to act knowingly or recklessly in connection with obtaining a payment or deceiving an officer. Currently the fifth (which this bill proposes to omit) forbids a person, without

reasonable excuse, to fail to notify an event prescribed under section 48.

. The bill proposes, in place of the failure-to-notify offence, to substitute an offence of strict liability of receiving a payment that is not payable (whether in whole or part) subject to certain statutory defences which,of course, reverse the onus of proof.

Offences are categorised as of strict liability where it is immaterial whether the person had the 'guilty knowledge' which at common law is an integral part of any statutory offence, unless the statute itself or its subject matter rebuts that presumption. At common law offences of strict liability are subject to the defence of honest and reasonable mistake of fact. In such cases the accused must raise the defence, though the prosecution has the ultimate onus of proving the elements which constitute the offence. In a statute, a strict liability offence may also be made subject to a specific defence or defences.

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

The Committee 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. But receiving $10 too much because some change in circumstances was not notified does not, in the opinion of the Committee, warrant strict liability. The Committee notes that the offence attaches to each receipt of an overpayment. The Committee is not convinced that strict liability is needed because overpayments total some millions of dollars. A single oil spill may cause serious damage but no single overpayment is so serious in itself to justify strict liability. Fraudulent schemes to obtain payments may result in larger losses but that is already an offence under paragraph 49(1)(c). Not even Social Security with overpayments of the order of $250 million (according to advice received by the Committee from the Parliamentary Secretary last year) has a strict liability offence in these circumstances. Neither failure to notify nor receipt of an amount that is not payable is an offence under the *Social Security Act 1991*.

There are two elements in the proposed offence: the offence will be 'committed' where first there has been an amount received in a person's bank account and, secondly, the amount was not payable (whether in whole or part).

Whether or not an amount is payable under the student assistance scheme requires a detailed knowledge of the law and the regulations. In some cases, this question has taxed the finest legal minds in the land. Under the present scheme, the student can be given a list of events and has the relatively simple obligation to notify if any of those events occurs.

The Committee is concerned that, under the proposed amendment, the student will not know if he/she has committed a crime without a detailed knowledge of the law and the many regulations made under the law.

In respect of the defences, the committee is equally concerned at the imposition of a new and onerous level of obligation.

It would not be unusual for the decision to prosecute to be made many months after the discovery of an overpayment. The discovery itself may not occur for some months after the payment is received. At such a distance in time, it may be impossible for the student to prove any of the defences which the statute would offer.

The defences (to be proved by the defendant) are:

. the event was notified in accordance with section 48. (The Committee notes that the Explanatory Memorandum suggests that this does not require notification within the 14 days specified in the section. If this was the intention, the Committee suggests that the drafting of proposed paragraph 49(1A)(a) does not achieve this.)

. a reasonable and timely effort was made to notify the Department of the receipt of the payment and of the fact that the payment was not payable **or may not have been payable.**

. because of circumstances beyond the persons's control he or she has been unable to make a reasonable and timely effort to notify the Depart as mentioned in the second defence.

Several points could be made. It would not be prudent for a student to notify an event by telephone. The student would have no record of such a conversation and it is not unknown that either no record is made by the Department or that such a record is later not able to be found. It would be prudent to keep a certified copy of any notification sent to the Department and to send it by certified mail.

The second defence itself (by suggesting that recipients should notify the Department where there is doubt about a payment or the amount) underlines the inappropriateness of the scheme: perhaps the logical corollary would be that the prudent student ought to notify the Department of the receipt of every payment in case it may not have been payable in whole or in part. As was noted above whether a payment is payable and what the correct rate is where an income test applies may require a knowledge of the system well beyond the competence of many students.

The Committee is of the view that the defences put too onerous a burden of proof on the recipient and that the proposal to make the bare receipt of an overpayment a criminal offence, and one of strict liability, is both unprecedented and unwarranted. Accordingly the Committee seeks the Minister's reconsideration of the scheme.

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 LEGISLATION AMENDMENT BILL 1994

This bill was introduced into the Senate on 23 March 1994 by the Parliamentary Secretary to the Minister for Primary Industries and Energy.

The bill proposes to amend the *Superannuation Act 1976*, the *Superannuation Legislation Amendment Act 1990*, the *Superannuation Act 1990* and the *Superannuation Benefits (Supervisory Mechanisms) Act 1990*. The amendments to these Acts are mainly changes to allow the Commonwealth superannuation arrangements to comply with the *Superannuation Industry (Supervision) Act 1993* and associated legislation. Changes of a technical nature are also proposed.

### Retrospectivity
### Subclauses 2(3), (4) and (5)

These subclauses would allow various provisions of the bill to have retrospective effect. Paragraphs 182-184,187-189 and 214 of the Explanatory Memorandum make it clear that the retrospectivity is necessary to bring preservation rules into alignment and correct minor drafting errors or oversights without detriment to members of the superannuation schemes. Accordingly, the Committee makes no further comment on these provisions.

### Retrospectivity
### Clauses 72 and 90

These clauses provide for some retrospectivity to ensure continuity of membership for some members whose employment status changed with the intention that membership in the fund would continue but where certain legal formalities to achieve this were overlooked. The matter has been explained in some detail in a letter from the Minister for Finance which is attached to this Digest. The Committee thanks the Minister for his explanation and makes no further comment on this bill.

**TAXATION LAWS AMENDMENT BILL (NO. 2) 1994**

This bill was introduced into the House of Representatives on 24 March 1994 by the Minister for Development Co-operation and Pacific Island Affairs.

The bill proposes to amend the:

- *Fringe Benefits Tax Assessment Act 1986* to:
  - amend the definition of 'benchmark interest rate'; and
  - reduce the taxable value of benefits paid by employers to employees making payment/reimbursement to cover expenses incurred in entertaining clients on behalf of the employer; and the
- *Income Tax Assessment Act 1936* to:
  - require that returns from indexed securities and other variable return securities be taxed on a compounding accruals basis;
  - amend capital gains tax provisions relating to:
    - payment of rebateable dividends from certain share premium accounts and revaluation reserves;
    - rebateable dividends out of pre-acquisition profits;
    - share value shifting arrangements;
    - change in ownership of assets;
    - prerequisite for roll-over relief for transfer of assets within company groups;
    - transfer of assets within company subgroups;
    - group company capital loss transfers;
    - assets used by non-residents in Australian permanent establishments;
    - Division 19A and liquidators' distributions;
    - application to Government incentive schemes;
    - amendment of assessments; and
  - amend foreign investment funds measures relating to holding companies and construction activities;
  - amend provisions relating to development and general investment allowances;
  - include a Higher Education Contribution assessment debt in provisional tax calculations;
  - exempt from tax all income derived by certain State public sector superannuation funds;
  - ensure the concessional rate of depreciation for employee

amenities is available in certain circumstances;

- extend the meaning of 'borrowing or lending activity' to include gold borrowing and gold loans;
- allow gifts made to the "Weary" Dunlop Statue Appeal and the Sandakan Memorials Trust Fund to be tax deductible for a limited period;
- allow certain information to be provided by the Commissioner of Taxation to the Health Insurance Commission relating to the childcare rebate scheme;
- ensure technical accuracy of references to relevant provisions of United States income tax law;
- amends the operation of the non-compulsory uniform/ wardrobe provisions; and
- amend provisions relating to entertainment expense payments.

**Retrospectivity**
**Subclauses 2(2) to (7)**

These subclauses would allow various provisions of this Bill to have effect retrospectively for various lengths of time. In each case, however, the amendment is either technical or beneficial to taxpayers. Accordingly the Committee makes no further comment on these provisions.

**Retrospectivity**
**Division 2 of Part 3**
**Subdivisions A, B and J of Division 3 of Part 3**

These amendments, if enacted, will apply retrospectively from 27 January 1994 and 12 February 1994.

The Explanatory Memorandum points out that the commencement dates have been chosen because they were the dates of the press releases of the Treasurer and the Assistant Treasurer respectively announcing the changes.

As the legislation has been introduced into Parliament within 6 months of the press release, the amendments do not breach the terms of the Senate resolution of 8 November 1988. Accordingly the Committee makes no further comment on this bill.

**TELECOMMUNICATIONS AMENDMENT BILL 1994**

This bill was introduced into the House of Representatives on 23 March 1994 by the Minister for Communications and the Arts.

The bill proposes to:

. allow AUSTEL to determine whether charging options offered by dominant carriers are discriminatory, and therefore, in breach of the Telecommunications Act; and
. enable AUSTEL to disallow tariffs that materially and adversely affect the development and/or maintenance of commercial sustainable competition.

**Retrospectivity**
**Clause 2**

Clause 2, if enacted, would provide for this bill to take effect retrospectively from 15 March 1994, the date on which the Government announced the changes embodied in this bill.

The Committee notes that this is another example of legislation by press release, subject to the inherent drawback of such a practice: the inability to predict whether the law as announced will be in the same terms as the law that is passed. The uncertainty this creates is generally unacceptable and may be considered to trespass unduly on personal rights and liberties. In the circumstances of this bill, however, its expeditious introduction and the fact that the retrospectivity appears to affect only Telstra Corporation Ltd lead the Committee not to make further comment on the bill.

**TRADE PRACTICES AMENDMENT (ORIGIN LABELLING) BILL 1994**

This bill was introduced into the House of Representatives on 23 March 1994 by the Minister for Consumer Affairs.

The bill proposes to amend the *Trade Practices Act 1974* to introduce a scheme to govern representations about the origin of consumer goods. The scheme will focus on representations about Australian origin carried on consumer goods supplied in Australia.

The Committee has no comment on this bill.

**WITNESS PROTECTION BILL 1994**

This bill was introduced into the Senate on 23 March 1994 by the Parliamentary Secretary to the Minister for Primary Industries and Energy.

The bill proposes to establish a National Witness Protection Program to be operated by the Australian Federal Police. Consequential amendments are made to the *Administrative Decisions (Judicial Review) Act 1977*, the *Australian Federal Police Act 1979* and the *Marriage Act 1961*.

**Non reviewable decisions**
**Schedule**

The first item in the Schedule, if enacted, would amend the *Administrative Decisions (Judicial Review) Act 1977* (ADJR) to preclude the application of that Act to decisions under this bill and decisions under proposed subsection 60A(2B) of the *Australian Federal Police Act 1979.*

The Committee is concerned that these arrangements would allow the Commissioner unfettered discretions without those discretions being reviewable for legality under ADJR.

The Commissioner would have an unfettered discretion as to who may be included in the witness protection program and to authorise the divulging of information relating to the program.

It would not be expected that the decision to include someone in the program would be challenged as the person must agree to be included and the Commissioner must terminate protection if requested to do so. The preclusion of ADJR, however, not only prevents judicial review but also denies access to reasons for decisions under that Act. So a person refused inclusion could not challenge the decision or obtain reasons for it.

The Explanatory Memorandum suggests that the Commissioner would be able to authorise information relating to the program to be given to the Ombudsman where the Ombudsman is investigating a complaint against the police. But the Commissioner has to be of the opinion that it is in the interests of the due administration of justice to disclose the information. It appears that the Ombudsman would not be able to challenge the Commissioner's decision nor seek reasons for the formation of that opinion. Accordingly, the Committee seeks the Attorney-General's advice on the necessity for granting such unfettered discretions.

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

SENATE STANDING COMMITTEE

FOR

THE SCRUTINY OF BILLS

# ALERT DIGEST

NO. 7 OF 1994

11 MAY 1994

# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

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

## TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

# CONTENTS



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

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

## AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS (COLLECTION OF INTERIM LEVY) BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Veterans' Affairs.

The bill is one of six to give effect to interim cost recovery arrangements for the operation of the National Registration Scheme for Agricultural and Veterinary Chemicals. It allows for the assessment and collection of interim levies in regard to agricultural and veterinary products. Further, it allows for certain powers of entry, inspection and seizure to determine the amount of levy payable, and an appeal and review process where a person is dissatisfied with an assessment made.

### Inappropriate delegation of legislative power: Imposition of amount of penalty by regulation Paragraph 11(1)(b)

Proposed subsection 11 provides:

> Late payment penalty
>
> 11.(1) If any levy payable by a person is not wholly paid on or before the prescribed date for payment of the levy, the person immediately becomes liable to pay a late payment penalty of:
>
> (a) subject to paragraph (b), $200; or
>
> (b) if another amount is prescribed by the regulations for the purposes of this section and is applicable in respect of that prescribed date for payment, that other amount.

The effect of subsection 11(1), if enacted, would be to provide an unfettered power to determine any amount as the late payment penalty.

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

In the present bill, no maximum amount for the late payment penalty is prescribed.

In Alert Digest No. 1 of 1994, the committee drew the attention of Senators to a similar provision (clause 14) in the then Agricultural and Veterinary Chemical Products (Collection of Levy) Bill 1993 which has since passed into law.

In that bill the committee was considering several provisions setting rates of levies by regulation together with the late payment penalty provision. The committee pointed out that, although the committee accepted that the regulations would be disallowable by either House of Parliament, it should be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the amount of the levy (or the penalty).

In response to the committee's comments, the Minister stated in a letter dated 24 February 1994:

> As you have indicated, the regulations could be disallowed by either House of Parliament but not amended. I emphasise that in the event of disallowance, the levy payable would revert to the previous levy, thereby avoiding a vacuum in the cost recovery arrangements. This of course would also apply in-principle to clause 14.

Disallowance, however, is effective only from the date it occurs. Non payment by the due date would have automatically attracted the penalty set out in the regulation from the date the regulation was made. Disallowance would not have the retrospective effect of cancelling an obligation already incurred during the period the regulation was in force.

The committee seeks the Minister's advice on whether an appropriate maximum penalty or a method of calculating it can be specified in the bill.

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

## AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS (COLLECTION OF LEVY) AMENDMENT BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Veterans' Affairs.

The bill is one of six to give effect to interim cost recovery arrangements for the operation of the National Registration Scheme for Agricultural and Veterinary Chemicals. It amends the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* to ensure that when that Act commences the 1993 levy is not duplicated by the collection of levy under the Agricultural and Veterinary Chemical Products (Collection of Interim Levy) Bill.

The committee has no comment on this bill.

## AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS INTERIM LEVY IMPOSITION (CUSTOMS) BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Veterans' Affairs.

The bill is one of six to give effect to interim cost recovery arrangements for the operation of the National Registration Scheme for Agricultural and Veterinary Chemicals. It proposes to allow for the imposition of an interim levy on agricultural and veterinary chemical products imported in Australia and sold wholesale.

The committee has no comment on this bill.

## AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS INTERIM LEVY IMPOSITIONS (EXCISE) BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Veterans' Affairs.

The bill is one of six to give effect to interim cost recovery arrangements for the operation of the National Registration Scheme for Agricultural and Veterinary Chemicals. It proposes to allow for the imposition of an interim levy on agricultural and veterinary chemical products manufactured in Australia.

The committee has no comment on this bill.

## AGRICULTURAL AND VETERINARY CHEMICAL PRODUCTS INTERIM LEVY IMPOSITION (GENERAL) BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Veterans' Affairs.

The bill is one of six to give effect to interim cost recovery arrangements for the operation of the National Registration Scheme for Agricultural and Veterinary Chemicals. It allows for the imposition of an interim levy on those agricultural and veterinary products which are imported in Australia and not sold wholesale.

The committee has no comment on this bill.

## AGRICULTURAL AND VETERINARY CHEMICALS (ADMINISTRATION) AMENDMENT BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Resources.

The bill is one of six to give effect to interim cost recovery arrangements for the operation of the National Registration Scheme for Agricultural and Veterinary Chemicals. It proposes to amend the *Agricultural and Veterinary Chemicals (Administration) Act 1992* to provide that relevant levy or late payment penalties are payable to the National Registration Authority for Agricultural and Veterinary Chemicals via the Consolidated Revenue Fund.

The committee has no comment on this bill.

## PETROLEUM (SUBMERGED LANDS) FEES BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Resources.

The bill proposes to consolidate provisions contained in the Acts repealed by the Petroleum (Submerged Lands) Legislation Amendment Bill 1994.

### Inappropriate delegation of legislative power: Imposition of amount of fee by regulation Paragraph 4(2)(b)

Proposed paragraph 4(2)(b), if enacted, would provide that the fee to be charged under this bill is to be calculated in accordance with the regulations, with no maximum amount set by the primary legislation. Its effect is to give an unfettered power to determine any amount as the fee.

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

In the present bill, no maximum amount for the fee, nor method of calculating it, is prescribed. It seems to the committee that flexibility in setting the fee is not an issue. From 1967 to 1990 the fees in connection with offshore petroleum exploration and production were specified in the relevant Acts. Regulations have been used since 1990 to set fees in some but not all of the Acts to be repealed upon the commencement of this bill. But once set by regulation, the fees do not appear to have been altered.

Although the committee accepts that the regulations would be disallowable by either House of Parliament, it should be remembered that disallowance is an all-or-nothing mechanism and that there would be no scope for either House to make a positive input (ie by making an amendment) on the regulations and on the amount of the fee. Disallowance, however, is effective only from the date it occurs. Any fee becoming payable under subsection 4(3) would attract the rate set out in the regulation from the date the regulation was made. Disallowance would not have the retrospective effect of cancelling an obligation already incurred during the period the regulation was in force.

The committee seeks the Minister's advice on whether an appropriate maximum fee or a method of calculating it can be specified in the bill.

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

## PETROLEUM (SUBMERGED LANDS) LEGISLATION AMENDMENT BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Resources.

The bill proposes to amend the:

- *Petroleum (Submerged Lands) Act 1967* to:
  - remove two inconsistencies resulting from previous amendments;
  - allow cancellation of exploration permits/retention leases if charges are not paid within three months of the due date;
  - remove a specific need for consultation where prior agreement has been reached;
  - ensure persons/bodies seeking approval of plans or proposals under the Act, regulations or directions under the Act, are liable for any deficiencies in those plans or proposals;
  - allow user charge funds paid into the Consolidated Revenue Fund to be appropriated for use by the Australian Geological Survey Organisation (AGSO) for research and survey activities;
  - allow the Commonwealth to recover user charge debts;
- *Offshore Minerals Act 1994* to allow user charge funds paid into the Consolidated Revenue Fund under the *Offshore Minerals (Exploration Licence User Charge) Act 1994* and the *Offshore Minerals (Retention Licence User Charge) Act 1994* to also be used by the AGSO for research and survey activities; and
- proposes to repeal the following Acts:
  - *Petroleum (Submerged Lands) (Exploration Permit Fees) Act 1967;*
  - *Petroleum (Submerged Lands) (Production Licence Fees) Act 1967;*
  - *Petroleum (Submerged Lands) (Pipeline Licence Fees) Act 1967;* and
  - *Petroleum (Submerged Lands) (Retention Lease Fees) Act 1985.*

The committee has no comment on this bill.

## PETROLEUM (SUBMERGED LANDS) (USER CHARGE) BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Veterans' Affairs.

The bill proposes to impose an annual user charge on all offshore petroleum exploration permit and retention lease holders. The intention of the charge is to raise approximately $10 million annually to contribute to the cost of work undertaken by the Australian Geological Survey Organisation in its Continental Margins Program.

The committee has no comment on this bill.

## SALES TAX (EXEMPTIONS AND CLASSIFICATIONS)(TWO WHEEL DRIVE VEHICLES WITH JEEP, PLATFORM, PICK-UP OR UTILITY BODY) AMENDMENT BILL 1994

This bill was introduced into the Senate on 5 May 1994 by Senator Watson as a Private Senator's bill.

The bill proposes to amend the *Sales Tax (Exemptions and Classifications) Act 1992* to exempt from tax two wheel drive utility-type vehicles used in the agricultural industry.

The committee has no comment on this bill.

## SUPERANNUATION INDUSTRY (SUPERVISION) LEGISLATION AMENDMENT BILL 1994

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

The bill proposes to amend:

- the *Superannuation Industry (Supervision) Act 1993* to:
  - allow certain non-bank financial institutions to offer guarantees required under the Act;
  - allow 'in-house' investments in certain non-bank financial institutions;
  - ensure the trustee cannot accept a person as a member of a public offer entity unless that person has applied in the appropriate manner and has received the relevant information regarding the entity before doing so;
  - ensure an excluded superannuation fund can only acquire business real property from a member if the property is business real property in the member's principal business;
  - allow public offer funds the option of either having an independent trustee or having equal numbers of employer and member representatives involved in the trusteeship of the fund;
  - ensure that the trustee retiring from an entity is not required to hold a meeting of beneficiaries before the management company takes over the role of trustee;
  - allow the Minister to approve disclosure of protected information (if in the public interest) to the public at large, rather than to particular members of the public;
  - ensure consistency between provisions of the Act dealing with the purposes for which an approved deposit fund may be maintained and payments to beneficiaries;
  - ensure custodians are subject to similar 'eligibility' requirements to those applying to trustees and investment managers;
  - prevent another party from trying to exert undue influence on a trustee by threatening to remove the trustee unless the trustee complies with that party's requests; and
- the *Superannuation (Resolution of Complaints) Act 1993* to amend the definition of "excluded subject matter".

**Retrospectivity**
**Subclause 2(2)**

Subclause 2(2) of this bill, if enacted, would give retrospective effect to various provisions of the bill from 1 December 1993.

It is clear, however, from paragraph 2 of the Explanatory Memorandum that the retrospectivity has effect from the date on which the relevant provisions of the *Superannuation Industry (Supervision) Act 1993* came into force. The Explanatory Memorandum suggests that 'the amendments are not considered to have any adverse effect on any person'.

In the light of these explanations the committee makes no further comment on this provision.

**Non reviewable decision**
**Clause 11**

Clause 11 amends the definition of "approved purposes" in section 10 of the *Superannuation Industry (Supervision) Act 1993*. Paragraph 11(d), if enacted, would allow the Insurance and Superannuation Commissioner to extend the purposes for which an approved deposit fund may be maintained by approving in writing any other purpose.

Although section 10 of the Act includes in its definition of "reviewable decision" every, or almost every, other discretion of the Commissioner under the Act, this amending bill does not include the discretion to be granted under proposed paragraph 11(d) in the list of reviewable decisions. Hence this discretion to give (or withhold) an approval to extend the purposes for which an approved deposit fund may be maintained will not be subject to review by the AAT. The committee seeks the Treasurer's advice on whether this discretion should be included in the list of reviewable decisions.

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 on non-reviewable decisions, in breach of principle 1(a)(iii) of the committee's terms of reference.

## Retrospective application
## Clause 16

Clause 16 of the bill provides:

> **Application**
>
> **16.** The amendments made by this Part apply to decisions made before or after the commencement of this section.

The Explanatory Memorandum suggests that the purpose of this clause is to enable the amendments made by **Division 6** of the bill to apply to decisions made before or after Royal Assent.

Given that Division 6 corrects some drafting errors to enable the definition of reviewable decisions to apply to the intended decisions, the committee accepts the need for retrospectivity.

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

## General Comment

The committee notes that by its express words clause 16 would give retrospective application to all decisions made under amendments in the 18 other Divisions in Part 2 of this bill not just those under Division 6. The Treasurer may care to consider whether clause 16 also may be inconsistent with the application clause (clause 46) in Division 19.

## VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL 1994

This bill was introduced into the House of Representatives on 4 May 1994 by the Minister for Veterans' Affairs.

This portfolio bill proposes the following changes:

- introduction of a seniors health card from 1 July 1994 for low income non-pensioner retirees or persons who do not meet residency requirements for the age service pension, access to certain health related Commonwealth concessions;
- restructure of the child related payments made to service pensioners;
- limitation of Commonwealth liability by adjusting the amount of disability pension payable to a person to take account of lump sum compensation paid for the same service related injury or death;
- clarification of the operation of the tax file number provisions in certain circumstances;
- simplification of current arrangements for withdrawing an application for qualifying service or a claim for service pension; and
- exemption, from the definition of income, of payments received from the New South Wales Medically-Acquired HIV Trust.

### Retrospectivity
### Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would give retrospective effect from 1 January 1994 to the amendments made by Part 3 of the bill in respect of child related payments.

Page 14 of the Explanatory Memorandum indicates that pension payment improvements have been available to Social Security clients since 1 January 1994 when their child related payments were integrated into the Social Security family payment system. The purpose of the amendments made by Part 3 of this bill is to extend to service pensioners the same improvements with effect from the same date.

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

# Senate Standing Committee

# for

# The Scrutiny of Bills

# ALERT DIGEST

No. 8 of 1994

1 June 1994

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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator **M Colston** (Chairman)
Senator **A Vanstone** (Deputy Chairman)
Senator **R Bell**
Senator **B Cooney**
Senator **M Forshaw**
Senator **J Troeth**

## TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

# CONTENTS



* The Committee has commented on these Bills.

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

# APPROPRIATION BILL (NO. 1) 1994

This bill was introduced into the House of Representatives on 10 May 1994 by the Minister for Finance.

The bill proposes to appropriate money ($29,810,722,000) out of the Consolidated Revenue Fund for the service of the year ending on 30 June 1995, and for related purposes.

*The Committee has no comment on this Bill.*

# APPROPRIATION BILL (NO. 2) 1994

This bill was introduced into the House of Representatives on 10 May 1994 by the Minister for Finance.

The bill proposes to appropriate money ($5,013,781,000) out of the Consolidated Revenue Fund for certain expenditure in respect of the year ending on 30 June 1995, and for related purposes.

*The Committee has no comment on this Bill.*

# APPROPRIATION (PARLIAMENTARY DEPARTMENTS) BILL 1994-95

This bill was introduced into the House of Representatives on 10 May 1994 by the Minister for Finance.

The bill proposes to appropriate money ($127,573,000) out of the Consolidated Revenue Fund for certain expenditure in relation to the Parliamentary Departments in respect of the year ending on 30 June 1995, and for related purposes.

*The Committee has no comment on this Bill.*

# AUSTRALIAN CAPITAL TERRITORY GOVERNMENT SERVICE (CONSEQUENTIAL PROVISIONS) BILL 1994

This bill was introduced into the House of Representatives on 12 May 1994 by the Special Minister of State.

The bill proposes changes to Commonwealth legislation required as a result of arrangements being put in place for the establishment of a separate public service for the Australian Capital Territory, to be called the Australian Capital Territory Government Service (ACTGS).

Included among the arrangements are provision for:

- certain classes of officers and employees to cease to be officers and employees of the Australian Public Service (APS);
- a 'reciprocal mobility' arrangement between the ACTGS and APS;
- delivery of personnel records between the two agencies when a person moves from one to the other;
- re-entry to the ACTGS when staff have been employed in other areas of the Commonwealth public sector;
- regulation making power to enable modification of legislation relating to matters arising from or consequential on the establishment of the ACTGS;

and amends the *A.C.T. Self-Government (Consequential Provisions) Act 1988*, *Public Service Act 1922* and *Privacy Act 1988* and various other Commonwealth legislation to enable the establishment of the ACTGS.

## Commencement on proclamation
## Clause 2

Clause 2 of the bill provides that this legislation will come into effect on a day to be fixed by Proclamation, with no provision for automatic commencement or repeal being specified.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

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

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

In its third paragraph, the explanatory memorandum indicates that the 'entire scheme of the Commonwealth legislation is dependent on the enactment of complementary legislation by the ACT and, for this reason, it is necessary to have the bill take effect on proclamation'.

The committee accepts that in the circumstances the legislation should commence on proclamation but questions whether the delegation of the power to bring the legislation into effect should be open-ended. The legislative power of the Parliament includes the control of the commencement of the legislation passed pursuant to that power. The

reasons for a clause delegating an open-ended power to bring legislation into effect must be carefully examined. The explanatory memorandum does not appear to address this matter.

Paragraph 6 of the Drafting Instruction suggests that an open-ended period for proclamation might be appropriate where commencement depends on an event whose timing is uncertain.

The committee notes, however, that:

- the Territory Public Sector Management Bill 1994 provides that the substantive provisions of the legislation will automatically commence six months from the day on which that bill becomes law, if the Minister has not brought them into effect sooner; and

- the A.C.T Self-Government legislation requires an election before the end of February 1995 with, consequentially, the lapse of any bill not passed before the Assembly dissolves.

Accordingly, the committee seeks the Minister's consideration of whether clause 2 ought also provide for automatic repeal, say, 12 months after Royal Assent.

*Pending the Minister's response, 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.*

## Inappropriate delegation of legislative power
## Subclause 23(1)

This subclause would permit regulations to be made which would modify other primary legislation, as it applies to matters relating to the ACT Government Service.
The committee has received a letter from the Minister on this issue which is attached to this Digest. The letter gives reasons for such a delegation of the legislative function of Parliament and also gives assurances on limiting the use of the power.

An express provision authorising the amendment of either the empowering legislation or any other Act by means of delegated legislation is what is regarded as a 'Henry VIII' clause. Subclause 23(1) is a classic example.

*The committee has concerns about regulatory powers of this*

*nature but in the light of the Minister's letter and on the assumption the Senate Standing Committee on Regulations and Ordinances will scrutinise any regulations made under this subclause, the committee makes no further comment on this aspect of subclause 23(1).*

## Retrospectivity of regulations under subclause 23(1)

The committee notes that the whole bill including the regulation making power in subclause 23(1) will commence on a day to be proclaimed. The Minister's letter indicates that a regulation making power to modify Commonwealth Acts is needed to avoid the necessity of retrospective legislation to make amendments which should have been in place from the commencement of the new public service. Subsection 48(2) of the *Acts Interpretation Act 1901*, however, precludes retrospectivity in a regulation where the rights of a person would be affected so as to disadvantage that person. It would seem therefore that not all amendments to legislation may be able to be achieved by use of the regulation making power.

## Loss of rights - Conditions of service

There are several issues about general conditions of service which do not appear to be covered under the proposed bill. The bill offers certain mobility rights between the Australian Public Service (APS) and the ACT Government Service (ACTGS). The bill, however, appears to be silent on whether sick leave and other accrued or accruing rights are transferable.

**The committee seeks the Minister's advice** on the position of a former APS officer with, say, twenty years service who transfers from the ACTGS to the APS under the new mobility provisions after the separate service is established. If that officer has accrued sick leave, would the officer retain those sick leave entitlements? The bill makes it clear that unused recreation leave would be paid out by the ACT Government, but there seems to be no provision for sick leave. A further example would be, where, after transferring to the APS, the officer becomes redundant: would the twenty years service be taken into account for redundancy payments?

Further, short term employees of the APS whose employment is extended beyond one year are deemed under section 82AD of the *Public Service Act 1922* to be continuing employees. The committee is unable to determine what the position will be for current short term employees in the ACT Branch of the APS who would have become continuing employees under section 82AD but for the commencement of this bill. There may be other issues but **the committee seeks the Minister's clarification** of these, as they may be considered to trespass unduly on personal rights and liberties.

*Pending the Minister's advice, the committee draws Senators'*

*attention to these issues, as the bill's failure to address them may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*

# AUSTRALIAN TRADE COMMISSION AMENDMENT BILL 1994

This bill was introduced into the Senate on 11 May 1994 by the Minister for Small Business, Customs and Construction.

The bill proposes to remove the age restriction on appointment of part time members to the Board of the Australian Trade Commission.

*The Committee has no comment on this Bill.*

# EXCISE TARIFF LEGISLATION AMENDMENT BILL 1994

This bill was introduced into the Senate on 11 May 1994 by the Minister for Defence.

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

- remove an anomaly that exists in the treatment of crude oil production for crude oil excise purposes;

and the *Excise Tariff Amendment Act (No. 2) 1993* to:

- correct cross references to the *Customs and Excise Legislation Amendment Act 1993*.

## Retrospectivity
## Subclauses 2(2) and (3)

These subclauses provide for the substantive provisions of this bill to have retrospective effect from 1 January 1994 and 24 December 1993, respectively.

Subclause 2(2) will give retrospective effect from 1 January 1994 to the incorporation of Tariff Proposal No. 4 of 1993 into the *Excise Tariff Act 1921* by proposed sections 4, 5 and 6 of this bill. That Tariff Proposal was tabled in the House of Representatives on 15 December 1993 and corrects an uncertainty caused by a drafting oversight to provide consistent treatment of exempt onshore and offshore oil. Accordingly, the committee accepts the retrospectivity.

Subclause 2(3) will give retrospective effect to proposed section 8 of the bill. That proposed section became necessary when consequential amendments were overlooked when clauses of the Customs and Excise Legislation Amendment Bill 1993 were re-numbered through amendments during the passage of that bill. The proposed section will have retrospective effect from 24 December 1993, the date of Royal Assent of the *Customs and Excise Legislation Amendment Act 1993*.

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

# EXPORT MARKET DEVELOPMENT GRANTS AMENDMENT BILL 1994

This bill was introduced into the Senate on 11 May 1994 by the Minister for Defence.

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

- extend the period for consideration of Approved Joint Venture and Consortium (AJVC) applications and Approved Trading House (ATH) applications from 30 to 60 days;
- limit the life of AJVC and ATH to three years with a discretion to extend the approval for subsequent three year periods;
- limit the maximum number of grants payable to any AJVC to five;
- provide for ongoing review of AJVC and ATH against guidelines existing at the time fo the review;
- tie the overseas visit allowance more directly to specifically promotional activity; and
- provide the power to establish an accreditation mechanism for EMDG consultants.

*The Committee has no comment on this Bill.*

# INDUSTRIAL RELATIONS AMENDMENT BILL (NO. 2) 1994

This bill was introduced into the House of Representatives on 11 May 1994 by the Minister for Industrial Relations.

The bill proposes to amend the *Industrial Relations Act 1988* to postpone until 22 June 1997 provisions of the Act that prevent age discrimination in certain awards and agreements. This will allow for the transition from junior wage rates to wage rates that are based on skill and competency rather than on age.

*The committee has no comment on this bill.*

# LOAN BILL 1994

This bill was introduced into the House of Representatives on 10 May 1994 by the Minister for Finance.

The bill proposes to provide for the financing of a prospective deficit in the Consolidated Revenue Fund (CRF) in 1994-95. It is customary to meet any prospective deficit in the CRF by charging defence and other CRF expenditure to, or reimburse the CRF from the Loan Fund.

*The committee has no comment on this bill.*

# PLANT BREEDER'S RIGHTS BILL 1994

This bill was introduced into the Senate on 24 March 1994 by the Minister for Veterans' Affairs.

The bill proposes to replace and repeal the *Plant Variety Rights Act 1987* and provide for the granting of proprietary rights to breeders of certain new varieties of plants and fungi. It will conform with the 1991 Act of the Convention of the International Union for the Protection of New Varieties of Plants. The bill will also establish the position of Registrar of Plant Breeder's Rights, provide for the delegation of the Secretary's powers to the Registrar and establish a Plant Breeder's Rights Advisory Committee.

Since the committee dealt with this bill in Alert Digest No. 6 of 1994, the committee has received a submission from Australian Gen-Ethics Network which also forwarded a copy of a submission from a Mr Baird to the Senate Standing Committee on Rural and Regional Affairs. Both these submissions are attached to this Digest as is a copy of advice from the Attorney-General's Department, tabled before the Rural and Regional Affairs Committee, in response to Mr Baird's submission.

## Inappropriate delegation of legislative power
## Subclause 17(2) - Farmers right to save seed

Clause 17 deals with the conditioning and use of farm saved seed and subclause (1) provides that such use will not infringe a plant breeder's right. Subclause 17(2), however, if enacted, would permit regulations to declare a particular taxon to be outside the exemption provided in subclause (1), that is, a farmer would not be permitted to save the seed.

The Gen-Ethics Network submission makes the point that the *Plant Variety Rights Act 1987* (which this bill, if enacted, would replace) does not qualify a farmer's right to save seed. **The committee seeks Minister's advice** on whether the proposed bill unduly trespasses on farmers' rights apparently unrestricted under the present law and why the wide power to remove any taxon from the scope of subclause (1), in effect to negate the principal Act, should not be regarded as an inappropriate delegation of legislative power.

> *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 as well as being considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

## Inappropriate delegation of legislative power
## Subclause 22(3) - Duration of a plant breeder's right

Clause 22 deals with the duration of a plant breeder's right and provides that the right will last for 25 years for trees and vines and 20 years for other plant varieties, subject to subclause 22(3). That subclause, if enacted, would enable the indefinite extension of the period by regulation.

The Gen-Ethics Network submission expresses a number of concerns with this open ended power. These concerns particularise the general concern of the committee where legislative power is delegated in such wide terms that the Act which grants the delegation can be nullified.

Accordingly, **the committee seeks the Minister's advice** on this matter.

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

## Rights under the *Native Title Act 1993 (NTA)*
## Mr Baird's submission/Attorney-General's advice

Mr Baird argues that the bill has the potential to extinguish or affect native title rights contrary to the NTA. The Attorney-General's Department's advice, however, suggests that it is doubtful that native title rights protected by the NTA would extend to the ownership of the genetic material in plants and concludes that it seems that the bill will not affect native title rights contrary to the NTA.

As at present advised, the committee does not consider that the bill trespasses unduly on personal rights in respect of this matter but includes the submission and the departmental response for the information of Senators.

# SALES TAX (LOW-ALCOHOL WINE) AMENDMENT BILL 1994

This bill was introduced into the House of Representatives on 10 May 1994 by the Assistant Treasurer.

The bill proposes to remove the current treatment of low-alcohol wines (not more than 1.15% by volume of alcohol) and return them to the concessional rate, ie. reducing the rate of sales tax from 12 per cent to 11 per cent.

## Retrospective application
## Clause

Although this bill will not commence until Royal Assent, the substantive operation will apply from 11 May 1994.

The committee notes that the bill will reduce the sales tax on low-alcohol wines, cider and similar beverages and will therefore be beneficial to persons other than the Commonwealth. The committee also notes that the retrospectivity will date only from the day after the bill was introduced and gives effect to the announcement of the decrease as part of the Budget package.

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

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

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

# Senate Standing Committee

# for

# The Scrutiny of Bills

# ALERT DIGEST

No. 9 of 1994

8 JUNE 1994

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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator **M Colston** (Chairman)
Senator **A Vanstone** (Deputy Chairman)
Senator **R Bell**
Senator **B Cooney**
Senator **M Forshaw**
Senator **J Troeth**

## TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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* The Committee has commented on these Bills.

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.

# Superannuation Laws Amendment Bill 1994

This bill was introduced into the House of Representatives on 1 June 1994 by the Minister for Finance.

The bill proposes primarily to amend the *Parliamentary Contributory Superannuation Act 1948*, and make consequential amendments to the *Parliamentary Contributory Superannuation Amendment Act 1981* and the *Parliamentary Contributory Superannuation Amendment Act 1983* and deals with superannuation for Commonwealth parliamentarians. The amendments allow the superannuation scheme established under the Act to comply with the *Superannuation Industry (Supervision) Act 1993* and associated Acts and Regulations in relation to vesting and preservation of members' benefits, and disclosure of information to members of the scheme. The amendments also propose to correct inequities in the scheme which relate to former members who hold offices of profit, invalidity retirement, transfers between the Commonwealth Parliament and State and Territory Parliaments, and to make a minor amendment to spouse benefits.

## Retrospectivity
## Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would give retrospective effect from 1 July 1990 to Division 8 of Part 2 of the bill. The object of that division is to update the definition of 'parliamentary allowance' in the *Parliamentary Contributory Superannuation Act 1948* to include a reference to an allowance by way of salary payable under the *Remunerations and Allowances Act 1990*.

Although the explanatory memorandum does not give the reason for the retrospectivity, it appears that it will give statutory force to the existing practice and is beneficial to Senators and Members.

> *Accordingly, the committee makes no further comment on this provision.*

## Inappropriate delegation of legislative power
## Clause 11 - Proposed new subsection 26B(3)

Proposed new subsections 26B(1) and (3) provide:

> **Preservation of benefits and disclosure of information to members**
>
> *Regulations to which section applies*
>
> "26B.(1) This section applies to the Superannuation Industry (Supervision) Regulations in so far as they deal with:
> (a) the preservation of benefits; or
> (b) the disclosure of information to members of regulated superannuation funds.
>
> ...
>
> *Regulations to prevail over inconsistent provisions of this Act*
>
> "(3) If those regulations are inconsistent with a provision of this Act, the regulations prevail and that provision, to the extent of the inconsistency, is of no effect."

Subsection 26B(3), if enacted, would permit regulations made under the *Superannuation Industry (Supervision) Act 1993* in so far as they deal with the preservation of benefits or disclosure of information to members of regulated superannuation funds to override inconsistent provisions in the *Parliamentary Contribution Superannuation Act 1948.*

An express provision authorising the amendment of either the empowering legislation or any other Act by means of delegated legislation is what is termed a 'Henry VIII' clause and is considered to be an inappropriate delegation of legislative power. The proposed subsection has a similar effect and the committee is concerned about regulatory powers of this nature.

In addition, the committee notes that the General Outline in the Explanatory Memorandum states that there are currently no provisions in the Act requiring disclosure of information to members and that there are no provisions in the Scheme which require benefits to be preserved. In the light of these statements, **the committee seeks the Minister's advice** on whether the provision is otiose but, if it is necessary, what reasons justify an apparently inappropriate 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.*

# Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 2 June 1994 by the Minister Veterans' Affairs.

The bill proposes to amend the *Veterans' Entitlements Act 1986* to:

- determine claims for pensions made on or after 1 June 1994 by referring to Statements of Principles;
- establish the Repatriation Medical Authority (responsible for preparing Statements of Principles);
- change the eligibility criteria for special and intermediate rate pensions;
- grant Australian World War 2 merchant mariners the same rights and benefits as those available to Australian World War 2 veterans under the Veterans' Entitlements Act;
- ensure existing service pensioners and claimants for service pensions take reasonable action to claim any overseas pension entitlements;
- allow for the payment of partner service pension to a person who is the widow, widower or separate spouse of an age or invalidity veteran service pensioner to be made at the higher 'single' rate; and
- enable war widows and widowers who receive an income support payment under the *Social Security Act 1991* to receive a new payment under the Veterans' Entitlements Act in lieu of their current social security payment.

## Retrospectivity
## Subclause 2(2) and clause 3

Subclause 2(2) of this bill, if enacted, would amend sections 23 and 24 of the *Veterans' Entitlements Act 1986* with retrospective effect from 1 June 1994. The object of the amendments is to provide that special or intermediate rates of disability pensions will not apply to veterans who are over the age of 65 years unless they had been engaged in remunerative work after that age and, when they stopped their last remunerative work, they had been engaged in that work for at least ten years.

The committee notes, however that the effect of the amendments was announced in the Budget and that, under clause 3, the amendments do not affect pensions in relation to which applications were made before 1 June 1994. The committee also notes the background reasons for the amendments given on page 20 of the explanatory memorandum:

> The special rate of pension was originally designed for severely disabled veterans of a relatively young age who could never go back to work and could never hope to support themselves or their families or put away money for their old age. It was never intended that the special rate would become payable to a veteran who, having enjoyed a full working life after war service, then retired from work with whatever superannuation or other retirement benefits the veteran might have available to him or her. Similar principles underlie the purpose of the intermediate rate of pension for people whose accepted conditions would limit work to no more than 20 hours per week.
>
> In a number of cases, although objectively the normal working life of the veteran had been completed, the special rate has been granted on the basis of claims that the veteran had an intention to commence a new business or occupation but had been prevented because of incapacity from war-caused disease or injury, and thereby had a loss of wages or salary, or earnings on his or her own account.
>
> Given the original purpose of the special and intermediate rates of pension, it is inappropriate for such cases to be eligible for pension at the special rate or intermediate rate, which, once granted, generally applies for the life of the veteran unless there is an improvement in the veteran's capacity to undertake remunerative work.

*In the light of these factors, the committee makes no further comment on this provision.*

## Retrospective operation

## Clause 9 - Determination of claims by reference to Statements of Principles

Clause 9, if enacted, would insert provisions in the *Veterans' Entitlements Act 1986*

concerning the way in which claims are to be decided by reference to Statements of Principles of the Repatriation Medical Authority or determinations of the Repatriation Commission. These provisions will apply to certain claims made on or after 1 June 1994, although the provisions will not come into effect until the bill receives Royal Assent.

As the amendments are part of the package announced in the Budget, the committee accepts the retrospectivity.

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

# Senate Standing Committee

# for

# The Scrutiny of Bills

# ALERT DIGEST

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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator **M Colston** (Chairman)
Senator **A Vanstone** (Deputy Chairman)
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*** The Committee has commented on these Bills.**

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# Automotive Industry Authority Repeal Bill 1994

This bill was introduced into the Senate on 6 June 1994 by the Minister for Small Business, Customs and Construction.

The bill proposes to enable the abolition of the Automotive Industry Authority. Activities relating to automotive policy development and implementation, consideration of strategic issues, delivery of generic programs to automotive firms and monitoring will be consolidated within the Department of Industry, Science and Technology.

*The Committee has no comment on this bill.*

# Coarse Grains Levy Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 June 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Coarse Grains Levy Act 1992* to change the basis on which research levies are imposed on barley and triticale from a flat rate per tonne to an ad valorem rate.

*The Committee has no comment on this bill.*

# Environment, Sport and Territories Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 June 1994 by the Minister for Development Co-operation and Pacific Island Affairs.

The bill proposes to amend the :

- *Urban and Regional Development (Financial Assistance) Act 1974* to:
  - remove obsolete provisions; and
  - remove the authority for the National Estates Grants Program from this Act (this program now operates under Part VA of the *Australian Heritage Commission Act 1975*);
- *Christmas Island Act 1958* and the *Cocos (Keeling)Island Acts 1955* to enable the Parliamentary Secretary or another Minister to exercise the powers of the Minister;
- *Endangered Species Protection Act 1992* and the *National Parks and Wildlife Conservation Act 1975* to make various minor corrections.

The bill also proposes to repeal the following Acts:

- *Seat of Government (Administration) Act 1930;*
- *Seat of Government (Administration) Act 1933*; and
- *National Fitness Act 1941.*

*The Committee has no comment on this bill.*

# Grain Legumes Levy Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 June 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Grain Legumes Levy Act 1985* to ensure that grain legumes used by a producer on-farm for commercial purposes are not exempt for the purpose of research levy payment.

*The Committee has no comment on this bill.*

# Horticultural Export Charge Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 June 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Horticultural Export Charge Act 1987* to specify that an export charge is not payable on horticultural products upon which a levy has been paid under the *Horticultural Levy Act 1987*.

*The Committee has no comment on this bill.*

# Horticultural Levy Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 June 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Horticultural Levy Act 1987* to enable a levy to be imposed on an amount of leviable horticultural products or a class of products that is presumed to be produced in Australia. It also provides that the maximum rate of levy of a horticultural industry in the current year does not exceed five percent of the average gross value of production of the first three years of the immediate past four financial years.

*The Committee has no comment on this bill.*

# Industrial Relations Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 11 May 1994 by the Minister for Industrial Relations.

The bill proposes to amend the *Industrial Relations Act 1988* to postpone until 22 June 1997 provisions of the Act that prevent age discrimination in certain awards and agreements. This will allow for the transition from junior wage rates to wage rates that are based on skill and competency rather than on age.

The committee dealt with the bill in Alert Digest No. 8 of 1994 and made no comment on the bill.

The bill, however, was amended during its passage in the House of Representatives, by the addition of clauses 5 to 10 in the bill as read a third time in that House.

The added clauses propose to amend the *Industrial Relations Act 1988* (the Act) with respect to the termination of employment.

## Reversal of the onus of proof
## Clause 7

Clause 7, if enacted, would regulate the onus of proof where an application for a remedy is made to the Court under section 170EA of the Act by an employee whose contract of employment has been terminated. The application may allege that the termination was not valid or, if otherwise valid, was harsh, unjust or unreasonable within the meaning of section 170DE of the Act. The application may also allege that a termination contravened subsection 170DF(1) of the Act which forbids termination for a number of discriminatory reasons which are listed. The clause would provide that, in these cases, the employer has the onus of proving, in the one case, that there was a valid reason for the termination or, in the other case, that the employment was not terminated for the particular discriminatory reason alleged or was terminated for reasons that did not include such a reason.

The committee notes that this is not a criminal offence provision. The committee also notes that the effect of the proposed section is to place the onus of proof of justifying the termination of a contract of employment on the person who initiates the termination and on the one who is better placed to show what the reasons for termination were. The committee recognises that under contract law the person who alleges an improper termination of a contract must prove the allegation. In the circumstances of this legislation, however, the committee is prepared to accept that if the reason for the

termination is other than one which would make the reason invalid or discriminatory, the true reason is a matter peculiarly within the knowledge of the employer. Accordingly, the committee is prepared to accept the shifting of the onus in these cases.

*The committee makes no further comment on these provisions.*

## Retrospective application
## Clause 7 - proposed new subsection 170EDA(3)

This subsection, if enacted, would define 'termination of employment' for the purposes of the section. It would give a retrospective operation to the section in that onus of proof provisions would also apply to terminations of employment which occurred before the commencement of the section except where the Court has pronounced final judgment on an application before the section commences.

The committee notes, however, that subsection 170EA(3) requires an application to be made within 14 days after the employee receives written notice of the termination. So any retrospectivity would be slight.

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

# Migration Legislation Amendment Bill (NO. 2) 1994

This bill was introduced into the Senate on 8 June 1994 by the Minister for Foreign Affairs.

The bill proposes to amend the *Migration Act 1958* to clarify certain provisions following recent High Court challenges to the legislation. The bill proposes, from 1 November 1989 to:

- ensure the Act authorises custody for a finite time period of a person who arrives in Australian unlawfully on board a vessel that subsequently is unable to depart Australia for various reasons;

- ensure that an officer may, to prevent a person from entering Australia unlawfully, require a vessel to enter a port and require persons who are on board the vessel to remain on board until the vessel arrives at the port; and

- to insert a "reading down" provision similar to, and consistent with, provisions contained in certain other Commonwealth legislation.

## Retrospectivity
## Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would give retrospective effect from 1 November 1989 to clauses 5, 6 and 7 of the bill. The explanatory memorandum and clause 4, which states the object of the amendments, show that the purpose of the retrospectivity is to limit the effect of recent Court decisions.

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

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

The issue is whether making the amendments retrospective unduly trespasses on personal rights and liberties. To assist the Senate to decide this, the committee needs to examine the

rationale put forward to justify the retrospectivity.

## The background

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

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

In the *Chu Kheng Lim* case, six of the seven judges of the High Court discussed the meaning of section 36 of the *Immigration Act 1958*, the section into which clause 7 of the present bill will insert significant subsections. The section as it stood on 1 November 1989 authorized the detention of the particular person in custody only until the departure of the vessel from Australia or 'until such earlier time as an authorized officer directs'. All six judges had no difficulty with the plain meaning of the section. It was not considered ambiguous or doubtful or open to other interpretations. Justices Brennan, Deane and Dawson in their joint judgment concluded that the view apparently taken by the Minister's Department was a mistaken approach to the construction of that section: the view that, in a case where a vessel can never leave because it has been destroyed, temporary custody can continue indefinitely was mistaken. They also concluded that 'the continued detention of each plaintiff in custody after the destruction of the boat on which he or she arrived in Australia was unlawful'(at p. 22).

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

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

the damages payable to $1 per day.

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

## Rationale justifying retrospectivity

It seems to the committee that the explanatory memorandum contains three elements justifying retrospectivity:

- the amendments need to be retrospective to prevent a possible windfall through substantial awards of damages;

- because the Minister and the Department thought that the law gave them the power to detain these people in custody, it ought to be changed retrospectively so that it will be taken to have meant from 1 November 1989 what the Minister and the Department understood it to mean; and

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

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

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

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

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

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

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

> *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.*

# National Environment Protection Council Bill 1994

This bill was introduced into the Senate on 6 June 1994 by the Minister for Small Business, Customs and Construction.

The bill proposes to implement Schedule 4 of the Intergovernmental Agreement on the Environment endorsed by the Council of Australian Governments in May 1992. The legislation gives effect to the:

- establishment of the National Environment Protection Council (NEPC) for the purpose of making national environment protection measures;
- establishment of the NEPC Service Corporation and appointment of an NEPC Executive Officer;
- establishment of the NEPC Standing Committee of Officials and other committees as NEPC requires; and
- annual Parliamentary reporting process on the implementation and effectiveness of measures to be followed by the parties and NEPC.

## Commencement on proclamation
## Clause 2

Clause 2 of this bill provides that the legislation will come into effect on a day to be fixed by Proclamation, with no provision for automatic commencement or repeal being specified.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:

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

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

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

The committee notes that Preamble to the bill states that an intergovernmental agreement provides that:

> the Commonwealth, the States, the Australian Capital Territory and the Northern Territory will make joint legislative provision for the establishment of a body to determine national environment protection measures.

Although it appears that paragraph 6 of the Drafting Instruction is applicable, the committee considers that the commencement of this legislation should not in effect be open-ended.

It might be preferable for the legislation to be automatically repealed if it has not been proclaimed within, say, 12 months of Royal Assent.

> *Accordingly, the committee seeks the Minister's advice on whether this would be appropriate. 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.*

# Oilseeds Levy Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 June 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Oilseeds Levy Act 1977* to ensure oilseeds used by a producer on-farm for commercial purposes are not exempt for the purpose of research levy payment.

*The Committee has no comment on this bill.*

# Pooled Development Funds Amendment Bill 1994

This bill was introduced into the Senate on 6 June 1994 by the Minister for Small Business, Customs and Construction.

The bill proposes to effect changes to operational rules applying to Pooled Development Funds, a mechanism for channelling long-term equity capital to small and medium sized enterprises. Changes to the rules include:

- enabling a PDF to invest in companies with total assets up to $50 million (an increase of $20 million);
- no longer restricting PDFs in investments in start-up businesses;
- allowing PDFs to invest up to 30 per cent of their raised capital in any one investee business (an increase of 10 per cent);
- allowing the PDF Registration Board a discretionary power to allow PDFs to invest more than the prescribed 30 per cent in any one SME investment under conditions agreed by the Board; and
- raising from 20 per cent to 30 per cent the individual ownership in PDFs, except for banks and life offices; and
- increasing the percentage of raised capital that a PDF must invest in investee companies from 50 per cent to 65 per cent.

*The Committee has no comment on this bill.*

# Primary Industries Levies and Charges Collection Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 June 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Primary Industries Levies and Charges Collection Act 1991* to give effect to amendments to the *Horticultural Levy Act 1987*. The bill amends the definition of producers to include the producer of a product presumed to be produced in Australia. This will enable the levy to be collected under *Horticultural Levy Act 1987* on a presumed level of production of a horticultural product.

## Retrospectivity
## Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would give retrospective effect to clause 5 of the bill. The committee notes, in paragraph 14 of the explanatory memorandum, that the amendment is for the purpose only of correcting a minor drafting error.

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

# Tobacco Advertising Prohibition (Broadcasting and Tobacco Advertising Legislation) Amendment Bill 1994

This bill was introduced into the Senate on 7 June 1994 by Senator Lees as a Private Senator's bill.

The bill proposes to amend the:

- *Broadcasting Act 1942* to prohibit incidental broadcasting of tobacco advertising; and
- *Tobacco Advertising Prohibition Act 1992* to end the discretion to grant exemptions for certain sporting and cultural events.

*The Committee has no comment on this bill.*

# Training Guarantee (Suspension) Bill 1994

This bill was introduced into the Senate on 6 June 1994 by the Minister for Small Business, Customs and Construction.

The bill proposes to remove any requirement on employers to pay any training guarantee charge for the two financial years commencing 1 July 1994 and 1 July 1995.

*The Committee has no comment on this bill.*

# Vocational Education and Training Funding Amendment Bill 1994

This bill was introduced into the House of Representatives on 8 June 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Vocational Education and Training Fund Act 1992* to:

- appropriate vocational and training funds for ANTA in 1996, including a further $70 million to help achieve the Finn participation targets for young people;
- provide funding to ANTA for off-the-job training provider assistance under the Australian Traineeship System and Career Start Traineeships;
- provide additional funding to ANTA in 1995 and 1996 for additional trainees under the Australian Traineeship System and Career Start Traineeships;
- include, from July 1994, ACT in the national TAFE infrastructure program managed by ANTA; and
- provide normal cost supplementation for price increases.

*The Committee has no comment on this bill.*

# Senate Standing Committee

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# The Scrutiny of Bills

# ALERT DIGEST

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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator **M Colston** (Chairman)
Senator **A Vanstone** (Deputy Chairman)
Senator **R Bell**
Senator **B Cooney**
Senator **M Forshaw**
Senator **J Troeth**

## TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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**The Committee has no comment on this Bill as it raises no issues in relation to the Committee's terms of reference.**

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.

# Flags Amendment Bill 1994

This bill was introduced into the Senate on 20 June 1994 by Senator Kemp as a Private Senator's bill.

The bill was first introduced by Senator Durack on 5 September 1984 and passed the Senate on 28 February 1985. It was reintroduced on 9 November 1987 and debated on 23 March 1988. It was again introduced by Senator Short on 9 November 1987 and debated on 23 March 1988. Senator Parer reintroduced it on 23 August 1990 and it was passed by the Senate on 30 April 1993. The bill proposes that:

- other flags or ensigns be appointed by the Governor-General, by regulation, so that the Parliament has the opportunity to review;

- there be a prohibition of the appointment, upon the advice of the government, of other flags or ensigns as the standard for the Commonwealth of Australia; and

- the Australian flag may not be altered or changed without a referendum.

*The Committee has no comment on this bill.*

# Senate Standing Committee

# for

# The Scrutiny of Bills

# ALERT DIGEST

No. 12 of 1994

24 AUGUST 1994

ISSN 0729-6851

# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator **M Colston** (Chairman)
Senator **A Vanstone** (Deputy Chairman)
Senator **R Bell**
Senator **B Cooney**
Senator **M Forshaw**
Senator **J Troeth**

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# Aboriginal Councils and Associations Legislation Amendment Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to amend the *Aboriginal Councils and Associations Act 1976* to:

- create a new authority, the Australian Indigenous Corporations Commission (AICC), to replace the Registrar of Aboriginal Corporations;

- improve standards of accountability of bodies incorporated under the Act including enabling action to be taken when these bodies do not fulfil their statutory obligations; and

and amend the *Aboriginal and Torres Strait Islander Commission Act 1989* to give the Office of Evaluation and Audit responsibility for preparing the AICC annual report.

## Offence of strict liability/reversal of onus of proof
## Subclause 31(d)

Subclause 31(d), if enacted, would involve creating an offence of strict liability and reversing the onus of proof. The bill proposes to omit subsection 59A(2) and to replace it with a series of new subsections which would impose a more onerous regime than exists under the present subsection with respect to preparing and filing statements concerning the financial affairs of an Aboriginal Association. At present, a penalty of $200 will attach to an Incorporated Aboriginal Association which fails to comply with the requirements imposed under the subsection with respect to accounts, records and financial statements. The proposed subsections would make all members of the Governing Committee of an Association automatically guilty (with a similar penalty) where the Committee fails without reasonable excuse to prepare and file such statements as are required. Proposed subsection 59A(4), however, would provide that in a prosecution for such an offence:

> ...it is a defence if the person proves that the person:
>
> (a) did not aid, abet, counsel or procure the contravention; and
>
> (b) was not in any way, by act or ommission, directly or indirectly, knowingly concerned in, or a party to, the contravention.

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 grounds exist which would justify the imposition of strict liability.

The committee can understand a desire to ensure that financial reporting provisions are complied with so that the executives of the associations are more accountable for the manner in which they carry out their duties. The committee also acknowledges that a similar section (section 59) has previously been amended to impose strict liability and reverse the onus of proof in respect of the reporting requirements of that section. There are several reasons, however that indicate that strict liability should not be imposed in either section.

First, the committee is concerned that this proposal imposes strict liability on the executives of Aboriginal Associations but the Corporations Law does not impose strict liability on the directors of companies with respect to similar duties of keeping accounts and preparing financial statements - see, for example, subsection 318(1) of the Corporations Law.

Secondly, the committee is concerned at the burden of proving a negative which is imposed on the defence. The only form that the contravention can take is one of failure to prepare and file statements. The defence, in effect, is required to prove that the accused had nothing to do with the doing of nothing.

Thirdly, the committee would question the legitimacy of the administrative convenience of prosecuting all members of a Committee. The Crown ought to have the responsibility of checking that the person charged was not out of the country or ill in hospital at the time of the alleged offence.

It seems to the committee that the purpose of obtaining the required reports could be achieved if new subsection 59A(3) imposed liability only on those members of a Governing Committee who were knowingly concerned in, or a party to, the contravention. **The committee seeks the Minister's consideration** of such a regime.

*Pending the Ministers 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.*

## Abrogation of the privilege against self-incrimination
## Proposed new subsection 70G(4) and new section 79AA

These proposed provisions, if enacted, would abrogate the privilege against self-incrimination for a person required:

- to answer questions or produce documents under section 39, 60 or 68; or,

- under subsection 70G, as well as answering questions or producing documents, to make statements or provide other assistance.

The committee notes that both provisions preclude the act of self-incrimination from being admissible in evidence 'in any criminal proceedings or proceeding for the imposition of a penalty'. The committee is concerned, however, that the form of the preclusion is less protective than the form which the committee has previously been prepared to accept, as it does not contain a limit on the indirect use to which any information can be put. The committee notes in particular that sections 39, 60 and 68 in their present form all contain a prohibition on the **indirect** as well as the direct use of self-incriminating acts. Subclauses 10(f), 32(f) and 38(b) of the bill would repeal the relevant subsections that provide for the prohibition on **indirect** use. 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.*

# Aboriginal Education (Supplementary Assistance) Amendment Bill 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Aboriginal Education (Supplementary Assistance) Act 1989* to amend the funding level supporting tertiary education of Aboriginal and Torres Strait Islander students. It proposes to appropriate $84.131m for the period 1 January 1995 to 30 June 1996 and $256,00 for 1 January 1996 to 30 June 1997.

*The committee has no comment on this bill.*

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

This bill was introduced into the House of Representatives on 30 June 1994 by the Minister for Finance.

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

*The committee has no comment on this bill.*

# Auditor-General Bill 1994

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

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

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

## Abrogation of the privilege against self-incrimination
## Proposed new section 32

This proposed section, if enacted, would abrogate the privilege against self-incrimination for a person required to answer questions or produce documents under section 29.

It is, however, in a form which the committee has previously been prepared to accept, as it contains a limit on the use to which any information can be put. The committee notes in particular that the **indirect** as well as the direct use of such information would be precluded. This is, therefore, a 'use/derivative use' indemnity.

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

# Australian Postal Corporation Amendment Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Immigration and Ethnic Affairs.

The bill proposes to amend the *Australian Postal Corporation Act 1989* to:

- amend the exceptions to Australia Post's reserved services by:
  - lowering the level of price and weight protection,
  - exempting certain specialist services,
  - removing exceptions on the carriage of outgoing international mail,
  - permitting companies to collect letters overseas and lodge them with Australia Post for delivery in Australia, at domestic mail rates;
- authorise Australia Post to exercise Government treaty rights to return incoming international mail in accordance with treaty arrangements;
- establish interconnection arrangements;
- empower the Minister to make regulations so the Trade Practices Commission can inquire into and make recommendations where there is a dispute about the rate of reduction offered by Australia Post in respect of a particular bulk interconnection service;
- require the Minister to have regard to CPI movements when notified of proposed changes in the rate of postage for the carriage of standard articles by ordinary post;
- require that certain Ministerial directions be required to be laid before Parliament for 15 sitting days;
- require the Corporation to publish disaggregated financial information relating to its reserved and non-reserved services;
- align certain Australia Post operations with current commercial practice;
- insert in the Act existing regulations dealing with the opening and examination of mail by authorised personnel;

- detail the circumstances where postal information may be disclosed by current or former employees of Australia Post or by other persons;

- detail the circumstances where an Australia Post employee may open or examine mail; and

- amend the *Crimes Act 1914* to:

  - ensure consistency between legislation relating to carriage of dangerous goods by surface post and air, and

  - clarify that postal offences are limited to offences in the course of Australia Post's mail network.

*The committee has no comment on this bill.*

# Classification (Publications, Films and Computer Games) Bill 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Attorney-General.

The bill proposes to provide for the classification of publications, films and computer games for the Australian Capital Territory. When enacted the Act will form part of a national scheme for classification and the enforcement of those classifications. The bill establishes the Classification Board and the classification Review Board. Classification decisions are to be made in accordance with the National Classification Code and Guidelines to help apply the Code.

## Commencement on proclamation
## Clause 2

Clause 2 of the Bill provides:

> **2.(1)** Sections 1 and 2 commence on the day on which this Act Receives the Royal Assent.
>
> **(2)** Subject to subsection (3), the remaining provisions of this Act commence on a day to be fixed by Proclamation.
>
> **(3)** If the provisions referred to in subsection (2) do not commence under that subsection within the period of 12 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.

By subclauses 2(3) and (4), this bill will come into effect on a day to be fixed by Proclamation, with automatic commencement if the bill has not been proclaimed within twelve months of Royal Assent.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be

accompanied by either:

(a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or

(b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

Paragraph 4 of the Drafting Instruction suggests that, preferably, the time for proclamation should not be longer than 6 months and that the reason for a longer period should be contained in the explanatory memorandum.

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

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

## Inappropriate delegation of legislative power/Insufficient parliamentary scrutiny
## Amendment of the National Classification Code

Clause 9 of the bill provides that material is to be classified in accordance with the Code and the classification guidelines. The Code is contained in the schedule to the bill. Clause 6, however, provides for the code to be amended simply by the agreement of the Minister

and his or her State counterparts without reference to Parliament. To enable the legislation of the Parliament to be amended in this way may be regarded as an inappropriate delegation of the legislative power of the Commonwealth. Further, as there is no requirement for the amendments to be tabled or opportunity for them to be disallowed the process may also be considered as insufficiently subjecting the exercise of legislative power to parliamentary scrutiny.

*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. It may also 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.*

## Offence of strict liability/reversal of onus of proof
## Subclauses 22(5), 23(5) and 29(4)

These subclauses, if enacted, would reverse the onus of proof in offences of strict liability. The bill proposes to empower the Director of the Classification Board to call in, by giving a notice in writing to the publisher, submittable publications and computer games that contain contentious material in order to classify them and also to call in intended advertising material for approval. Failure by a publisher to comply will be an offence of strict liability with a penalty of 20 units.

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 grounds exist which would justify the imposition of strict liability.

The committee notes the explanation given in the explanatory memorandum justifying the imposition of strict liability and reversing the onus of proof in these cases. For example, paragraph 44 states in respect of subclause 22(5) :

> Failure to comply with a notice under this clause is made a strict liability

offence. It is, however, a defence to prosecution under the section if the defendant proves that he or she did not intend to publish the publication in the A.C.T. or cause, authorise, permit or licence the publication to be published in the A.C.T.. The offence has been made one of strict liability on the basis of recommendation 44 of the Australian Law Reform Commission's report *Censorship Procedure* (Report no 55). That recommendation was that the offence be drafted as one of strict liability if it was directed at professionals engaged in the dissemination of films and publications as a business. As the offence is a less serious one and is not subject to imprisonment it is appropriate to follow the ALRC's recommendation. As a strict liability offence, the defence of honest and reasonable mistake will still be available as well as the defence provided.

Paragraphs 49 and 58 refer to the same reasons in respect of subclauses 23(5) and 29(4) respectively.

*In the light of these reasons the committee makes no further comment on these provisions.*

## General comment

The committee has received a submission from Mr Stephen Brown which is attached to this Digest. It covers some matters which have been dealt with above and others which would seem to be outside the committee's terms of reference. It is included for the information of Senators.

# Commonwealth Authorities and Companies Bill 1994

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

The bill is one of a package of three to replace the *Audit Act 1901*. Particularly it sets out reporting and accountability rules for Commonwealth authorities and companies.

*The committee has no comment on this bill.*

# Complaints (Australian Federal Police) Amendment Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Immigration and Ethnic Affairs.

The bill proposes to amend the *Complaints (Australian Federal Police) Act 1981* to:

- extend the Act to include non-sworn AFP staff;
- create two new offences: making a false complaint or giving false information, and victimisation of a complainant or a person assisting in the investigation of a complaint;
- provide for investigations by the Ombudsman or Investigation Division of action by a member or staff member of the AFP;
- make evidence obtained by the Ombudsman in the course of an investigation admissible in disciplinary hearings;
- abolish the requirement that hearings of complaint-based disciplinary charges be held before the Disciplinary Tribunal where the appointee charged pleads guilty;
- change rank requirements for conciliators in complaints cases;
- extend the Ombudsman's discretion to determine that a complaint should not be investigated where he or she is satisfied that it is trivial;
- adjust penalty provisions to current policy; and
- remove sexist terminology.

*The committee has no comment on this bill.*

# Crimes Amendment Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to amend the *Crimes Act 1914* as an interim measure pending the commencement of the Criminal Code Bill 1994 which will not be completed for five years. The bill will apply the common law principles of criminal liability to all Commonwealth offences and amend areas relating to the age of criminal responsibility and attempt and conspiracy to commit an offence.

*The committee has no comment on this bill.*

# Crimes and Other Legislation Amendment Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to amend the following portfolio Acts:

- *Australian Security Intelligence Organization Act 1979* to:
  - include certain offences in the *Crimes (Ships and Fixed Platforms) Act 1992* in the category of acts of politically motivated violence;
  - allow the Director-General of Security to authorise an ASIO officer to approve persons authorised to exercise the authority of warrants issued by the Attorney-General; and
  - allow ASIO officers to apply for vacant positions in the Australian Public Service;
- *Crimes Act 1914* to:
  - enable courts to consider cultural background when sentencing federal offenders;
  - make minor drafting amendments to provisions concerning action in the event of breach of certain court orders;
  - exclude ACT prisoners from the Commonwealth provisions on escape from lawful custody, ensure that the sentence of federal prisoners convicted of escape under State provisions ceases to run for the length of the escape, and replace outdated references to detention at the Governor-General's pleasure;
  - remove scanning devices from the category of prohibited interception devices; and
  - reflect the name change of the Cash Transaction Reports Agency to the Australian Transaction Reports and Analysis Centre;
- *Transfer of Prisoners Act 1983* to:
  - include the ACT in the national transfer of prisoners scheme; and

- correct minor drafting errors.

Minor amendments are also made to 14 Acts falling within this portfolio.

## Retrospectivity
## Subclauses 2(5) and 2(6)

These subclauses provide that some of the amendments to be made by this bill will have retrospective effect. The purpose of the amendments, however, appears to be to correct typographical errors.

*Accordingly the committee makes no further comment on these subclauses.*

## Commencement by Ministerial Declaration
## Subclause 2(7)

Subclause 2(7) provides:

> (7) The amendments made by sections 25 and 28 to the *Transfer of Prisoners Act 1983* do not take effect (except for the purposes of the making of a declaration under section 5 of that Act in relation to the Australian Capital Territory) until such a declaration is made.

This subclause would allow the amendments to come into effect only when the Minister makes a declaration under section 5 of the *Transfer of Prisoners Act 1983* without there being any time limit within which the declaration must be made.

The committee notes the absence from the explanatory memorandum and the second reading speech of any reason for the Minister to be given such an unfettered discretion.

In the absence of such a reason and in the interests of greater certainty as to whether these clauses are, or are not, in force **the committee seeks the Minister's consideration** of adding a further clause which would deem clauses 25 and 28 to be repealed if the Minister has not made the declaration within 6 months of Royal Assent.

*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.*

## Delegation of power
## Clause 6 - Exercise of authority under warrants

Clause 6 of the bill, if enacted, would repeal the present section 24 of the *Australian Security Intelligence Organization Act 1979* (the Act) and substitute a new section. The effect of the change to the section is to allow the Director-General to appoint an officer of the organization to perform a function which the Director-General must perform personally at present: to appoint those persons who will exercise the authority contained in warrants issued by the Attorney-General under certain sections of the Act. Those sections enable warrants with respect to search warrants, listening devices, mail interception and collection of foreign intelligence in Australia.

Proposed subsection 24(1) provides:

> 24.(1) The Director-General, or an officer of the Organization appointed by the Director-General in writing to be an authorising officer for the purposes of this subsection, may, by signed writing, approve officers and employees of the organization, and other people, as people authorised to exercise, on behalf of the Organization, the authority conferred by relevant warrants.

The committee notes that there is no limitation as to the persons or classes of persons to whom the Director-General or his appointee can approve to exercise the authority granted by the warrants. The committee also notes that the present section 24 contains a similar wide choice of the recipients of these powers. Under the present section the Director-General can approve any person. Neither the bill nor the explanatory memorandum indicates the need for a power of such width.

Since its establishment the committee has consistently drawn attention to provisions which allow for the delegation of significant and wide-ranging powers to 'a person'. Generally, the committee has taken the view that it would prefer to see a limit on either the sorts of powers that can be delegated in this way or the persons to whom the powers can be delegated. If the latter course is adopted, the committee prefers that the limit should be to the holders of a nominated office, to members of the Senior Executive Service or by reference to the qualifications of the person to be delegated the powers.

Although the proposed section merely repeats the earlier section on this point, the committee points out that the present section was enacted in 1979 before this committee existed. Accordingly, **the committee seeks the Minister's advice** on the reasons for having no limitation on the class of persons who can be approved.

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

# Criminal Code Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill is the first stage in the progressive development of a Commonwealth Criminal Code. It sets out general principles of criminal responsibility which will apply to all Commonwealth offences within five years.

## Commencement by proclamation
## Clause 2

By virtue of clause 2, this bill is to commence 5 years after Royal Assent or by earlier proclamation. The committee notes that this Bill could commence outside a period of six months from the date of Royal Assent. This would be contrary to the preference expressed in paragraph 4 of the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. That paragraph provides:

> 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.

The explanatory memorandum indicates, however, the reasons for the delay in commencement. The General Outline suggests:

> The Criminal Code Bill 1994 (the 1994 Bill) is the first stage in the progressive development of a Commonwealth Criminal Code which will contain a complete and revised criminal law for the Commonwealth. The 1994 Bill sets out general principles of criminal responsibility which will within 5 years apply to all Commonwealth offences. The principles are contained in Chapter 2 of the Criminal Code. The principles will not apply to all offences immediately because there will be a large number of consequential amendments required in relation to many offences contained in legislation administered by various portfolios. This is necessary because existing offences are drafted on the basis of different principles. It has been decided that the principles will first apply to what are currently *Crimes Act 1914* offences. This will occur when those offences are moved into the Criminal Code. It is hoped that process will be completed during 1995.

The Government has taken a staged approach to the development of the Criminal Code for several reasons. The first is to spread the work involved in making the consequential amendments. The second is to ensure that before the work on the consequential amendments is started, we can be certain that the basic principles to be applied are acceptable to the Parliament. Thirdly, it will allow the orderly introduction of the principles. This should assist practitioners and courts to adjust to the changed approach and minimise confusion. Finally, it will demonstrate the Commonwealth's commitment to the Code project and to State and Territory Governments who have collaborated in the development of the Model Criminal Code.

*In the light of these reasons the committee makes no further comment on this bill.*

# Customs Tariff (Uranium Concentrate Export Duty) Act Repeal Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to remove the uranium export levy by repealing the Customs Tariff (Uranium Concentrate Export Duty) Act 1980. The funds previously collected by the levy will be replaced by a contractual arrangement with Energy Resources of Australia Ltd to pay the Commonwealth at least $1.5 million per annum (this arrangement is reviewable after two years).

*The committee has no comment on this bill.*

# Employment Services Bill 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Minister for Employment, Education and Training.

The bill proposes to establish:

- the Commonwealth Employment Service within the Department of Employment, Education and Training (DEET);
- Employment Services Regulatory Authority as an independent statutory authority responsible for regulating the case management system;
- Employment Assistance Australia as a separate organisation, within DEET, to provide case management services.

## Double penalty and retrospective application
## Clause 45

Clause 45, if enacted, would restrict the Employment Services Regulatory Authority (ESRA) from accrediting persons who have been found guilty of various offences relating to fraud and dishonesty. In particular, paragraph 45(6)(b) prohibits accreditation for a period of five years after the person has paid the penalty imposed by reason of his or her conviction.

The committee is concerned that the provision, if enacted, may be considered to trespass unduly on personal rights by imposing a double penalty on a person in that even after a convicted person has paid his or her debt to society, the fact of the conviction will operate for a further five years to discriminate against the person.

The committee considers that it is inappropriate for the proposed section to have retrospective application in that the offence and the conviction could have occurred before the commencement of the section. Hence, the committee is concerned that the retrospective application may be considered to trespass unduly on personal rights in that a statutory penalty is being imposed retrospectively on a convicted person in addition to the penalty imposed by the court. It may be that, in future cases, courts may take into account the statutory penalties imposed by this bill in considering an appropriate sentence. Such an adjustment of sentence is not possible for those already sentenced on whom these statutory penalties are retrospectively imposed.

The committee finds no explanation in the explanatory memorandum for the apparent

lack of correspondence between the purpose of the accreditation scheme and the definition of a person disqualified from being accredited. **The committee seeks the Minister's advice** on why it is thought that a person who up to ten years previously committed an act of fraud or dishonesty is now an inappropriate person to be accredited for the purpose of assisting the unemployed to obtain employment.

*Pending the Minister's advice on these matters, 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.*

# Employment Services (Consequential Amendments) Bill 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Minister for Employment, Education and Training.

The bill proposes to amend the following Acts, consequent upon the Employment Services Bill 1994 commencing:

- *Employment, Education and Training Act 1988* to repeal Part VI under which the Commonwealth Employment Service is currently established;

- *Freedom of Information Act 1982* to provide for members of the public to have rights of access to documents relating to case management services held by contracted case managers;

- *Ombudsman Act 1976* to provide for the Ombudsman to investigate complaints about contracted case managers and refer those complaints to the Employment Services Regulatory Authority where the Ombudsman thinks this action appropriate;

- *Privacy Act 1988* to apply provisions of it to contracted case managers when providing case management services; and

- *Social Security Act 1991* to provide for the disclosure of information to contracted case managers by the Secretary to the Department of Social Security and to insert notes cross referencing relevant provisions to the *Employment Services Act 1994*.

*The committee has no comment on this bill.*

# Family Law Reform Bill 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Attorney-General.

The bill proposes to amend the *Family Law Act 1975* to:

- facilitate the greater use of mediation, counselling and arbitration in the resolution of family law disputes, prior to seeking a court impose action;
- replace the concepts of custody and access with emphasis on the concept of parental responsibility;
- provide an objects clause in the Act to provide that children should receive adequate and proper parenting to help them achieve their full potential and to ensure parents fulfil their duties and responsibilities;
- update numerous provisions relating to children so they are consistent with the new concepts of parental responsibility.

## Commencement on proclamation
## Clause 2

Clause 2 of the Bill provides:

> **2.** This Act commences on a day or days to be fixed by proclamation.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or

(b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

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

The explanatory memorandum comments on the commencement provision at page 5:

> ...that the Act commences on a day or days to be fixed by Proclamation. The purpose of commencing the Act by Proclamation is to enable changes to be made to regulations and Rules of Court and also all consequential amendments to other Commonwealth legislation such as the *Child Support (Registration and Collection Act 1988,* the *Child Support (Assessment) Act 1989* and the *Social Security Act 1991.* It is recognised that where other legislation relies on the former concepts of "custody" and "access", there will need to be sufficient time to ensure that these are brought into line with the new concepts established under this Bill. In addition, there will also need to be sufficient time to educate both the community and the legal profession about the changes.

The committee notes from this that paragraph 6 of the Drafting Instruction may be applicable in that the commencement may be seen as dependent on events whose timing is uncertain. The committee is of the opinion, however, that commencement could be indefinitely protracted without some limitation as to time.

Accordingly, **the committee seeks the Attorney-General's advice** whether a period of twelve months after Royal Assent might not be sufficient time for the implementation of the consequential changes which the explanatory memorandum mentions.

*Pending the Attorney-General'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.*

# Financial Management and Accountability Bill 1994

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

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

- covers the underlying principles to govern the activities of persons in organisations that, financially, are agents of the Commonwealth;
- specifies the responsibilities and powers of the Finance Minister and chief executives of agencies;
- incorporates principles of financial control; and
- replaces the Trust Fund with the Reserved Money Fund and the Commercial Activities Fund.

## Commencement on proclamation
## Clause 2

Clause 2 of the Bill provides:

> **2.** This Act commences on a day to be fixed by Proclamation. However, if this Act does not commence by Proclamation before 1 July 1995 then it commences on 1 July 1995.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
>
> (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or

(b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

The committee notes that the 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 an open-ended discretion on the Minister 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.

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

# Higher Education Funding Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Minister for Employment, Education and Training.

The bill proposes to amend the following portfolio Acts:

- *Higher Education Funding Act 1988* to:
  - require that people who leave full time education for the first time have their HECS debt for that financial year calculated on a pro-rata basis in accordance with the proportion of the year spent in the workforce (effective from 1 January 1995);
  - remove the restriction on the number of units for which an eligible client under the Open Learning Deferred Payment Scheme (OLDPS) may defer payment in the first semester of study;
  - clarify that the amount of basic charge payable by students under OLDPS for a study unit in the December/March semester is the amount payable in the following semester;
  - amend the maximum level of grant funding available under certain provisions of the Act and to provide for the transfer of funds to the *Aboriginal Education (Supplementary Assistance) Act 1989*; and
  - make a minor change to the definition of overseas student; and

- *Higher Education Funding Amendment Act (No. 2) 1992* and *Higher Education Funding Amendment Act 1994* to make technical amendments.

## Retrospectivity
## Subclauses 2(3) to 2(6)

These subclauses provide that some of the amendments to be made by this bill will have retrospective effect. The purpose of the amendments, however, appears to be solely to correct drafting errors.

*Accordingly the committee makes no further comment on these subclauses.*

# Higher Education Funding (Student Organisations) Amendment Bill 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Minister for Employment, Education and Training.

The bill proposes to amend the *Higher Education Funding Act 1988* to allow the Commonwealth to make payments to student organisations directly for certain permitted purposes and recover funds from the States' general revenue assistance, if necessary. The bill is a direct result of the *Tertiary Education (Amendment Act) 1994* passed by the Victorian Government and the actions of the Tasmanian State Government towards the University of Tasmania.

*The committee has no comment on this bill.*

# Human Services and Health Legislation Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to amend the following portfolio Acts:

- *Health Insurance Act 1973* to:
  - avoid the need to reprint lengthy schedules in reprints of the Act (the schedule content is printed regularly in regulations under the Act);
  - allow the maximum number of licences for collections centres to be varied in special circumstances;
  - clarify the section relating to the Minister acting to alleviate hardship caused by commercial decisions of pathology practices in locating their collection centres;
  - insert a definition of supervision of the rendering of pathology services;
  - omit references to temporary licensed collection centres (which ceased to exist after 31 January 1994); and
  - extend the exemption period from 1 January 1995 to 1 January 1997 for prescribed radiology services;
- *Hearing Services Act 1991* to change reference to the Pensioner Health benefit Card with Pensioner Concession Card.
- *Health Legislation Amendment Act 1986* to repeal section 5 which was not proclaimed due to definition difficulties and insert a new section which overcomes the difficulties.
- *National Health Act 1953* to:
  - remove an anomaly relating to the rendering of a pathology service in a hospital or day hospital facility;
  - provide that a safety net concession card under the Pharmaceutical Benefits

Scheme may be issued only to a person entitled to medicare benefits; and

- allow a pharmacist to supply a patient with a different brand of pharmaceutical benefit from that specified in the prescription, under certain circumstances.

**#** *National Health Amendment Bill (No. 2) 1993* to correct a minor drafting error.

## Retrospectivity
## Subclauses 2(2) and 2(6)

These subclauses provide that some of the amendments to be made by this bill will have retrospective effect. The purpose of the amendments, however, appears to be solely to correct drafting errors.

*Accordingly the committee makes no further comment on these subclauses.*

# International Air Services Commission Amendment Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to amend the *International Air Services Commission Act 1992* to:

- amend certain definitions;
- bring air services on the Taiwan route within the scope of the Act;
- streamline processes for the International Air Services Commission to deal with applications for capacity or for minor variations to determinations;
- allow the Secretary of the Department of Transport to make certain operations decisions in special circumstances (to be prescribed by regulation under the Act);
- amend the Commission's quorum provisions;
- require that the Chairperson of the Commission disclose any conflict of interest;
- require that only notification of a determination being made be published; and
- correct various terminology for the purposes of the Act.

*The committee has no comment on this bill.*

# Law and Justice Legislation Amendment Bill (No. 2) 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to amend the following portfolio Acts:

- *Law Officers Act 1964* to allow the Governor-General to appoint a qualified person to act as Solicitor-General when the Solicitor-General is unable to perform the duties; and

- *Service and Execution of Process Act 1992* to:

  - clarify provisions relating interstate service of process at an address for service in proceedings;

  - provide for notification requirements once a person is arrested under an interstate warrant;

  - provide that a warrant of apprehension for non-payment of a lower court fine must be directed to police in only one State or Territory; and

  - strengthen the existing provisions relating to withdrawal of a warrant under part 7 when a fine has been paid; and

- *Trade Practices Act 1974* to:

  - increase the penalties for breaches of product safety and information provisions;

  - insert a regulation making power relating to penalty infringement notices;

  - clarify the basis upon which an officer may exercise powers of entry without warrant to inspect unsafe goods;

  - streamline procedure for effecting entry to premises under certain warrant conditions;

  - empower the departmental Secretary to apply to the Court in certain circumstances.

The bill also makes minor technical amendments to the *Copyright Act 1968*, *Judiciary*

*Act 1903* and *Law Officers Act 1964*.

## Retrospectivity
## Subclause 2(3)

This subclause provides that two of the amendments to be made by this bill will have retrospective effect. The purpose of the amendments, however, appears to be solely to correct drafting errors.

*Accordingly the committee makes no further comment on this subclause.*

# Legislative Instruments Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to establish a regime governing drafting standards and procedures for the making, publication and scrutiny of delegated legislation. The bill establishes the Federal Register of Legislative Instruments to be maintained by the Principal Legislative Counsel. The *Statutory Rules Publication Act 1903* is repealed by this bill and amendments are made to the *Acts Interpretation Act 1901*, *Administrative Decisions (Judicial Review) Act 1977*, *Family Law Act 1975*, *Federal Court of Australia Act 1976*, *High Court of Australia Act 1979* and *Industrial Relations Act 1988*.

## General comment
## Clause 7

The term 'legislative instrument' has the meaning given in clause 4 of this bill.

Clause 7, if enacted, would provide a mechanism for removing a doubt whether an instrument or a particular kind of instrument is, or is not, a legislative instrument. Under clause 7, where uncertainty exists, an application may be made for the Attorney-General to determine whether or not an instrument, or an instrument of a particular kind, is, or will be, a legislative instrument. The Attorney-General is required to issue a certificate containing the decision which is subsequently recorded in Part C of the proposed Federal Register of Legislative Instruments (cf clause 39).

Subclause 7(5) provides:

> **(5)** A certificate given by the Attorney-General under this section is, for all purposes, conclusive of the question whether the instrument to which the certificate relates is, or is not, or whether the kind of instrument to which the certificate relates will be, or will not be, a legislative instrument.

The committee acknowledges the reasoning behind this provision, noting the desire expressed in paragraph 11 of the explanatory memorandum to reduce the likelihood of litigation on whether an instrument falls within the ambit of the legislation. There is always a healthy tension between the attractiveness of a convenient solution to a problem and the experience that resulted in the establishment of this committee: experience that attractive solutions sometimes have a downside of making rights, liberties or obligations unduly dependent on non-reviewable decisions or of making the exercise of legislative power insufficiently subject to parliamentary scrutiny.

It seems to the committee that the power given to the Attorney-General by clause 7 may be characterised as either judicial, administrative or legislative.

## Judicial in character?

Without clause 7, the question of whether an instrument is a legislative instrument within the meaning of clause 4 would be settled by a court. If clause 7 gives the Attorney-General the exclusive right to interpret what clause 4 means, this may be seen as trespassing on the judicial function contrary to Chapter III of the Constitution.

Whether or not a constitutional challenge would be successful, the proposed mechanism raises a further issue of whether it is appropriate for the Attorney-General to have the function of conclusively interpreting legislation. Whether the clause is constitutionally valid or not in a narrow sense, the clause may be considered to trespass on personal rights and liberties in that it is basic to our system of democracy that citizens have the right to have the law interpreted by an impartial court and not by a minister of the government of the day.

The committee acknowledges, of course, that, in the Westminster system, the responsibility of the Attorney-General as the First Law Officer places him or her in a special role vis-a-vis other government ministers in that it is the function of the Attorney-General to provide legal advice to the other ministers.

Clause 7 provides that the certificate given by the Attorney-General 'is, for all purposes, conclusive' of the question whether the instrument comes within the meaning of legislative instrument in clause 4. Were it not for clause 7, the Attorney-General or another relevant Minister, advised and represented by the Attorney-General, would be a party to litigation to decide whether an instrument was a legislative instrument within the meaning of clause 4. It is unacceptable that the power conclusively to decide an issue should be given to a person who would otherwise be one of the parties to litigation to decide that very issue.

Accordingly, **the committee seeks the Attorney-General's advice** on this interpretation of the power in clause 7.

> *Pending the Attorney-General's response, 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.*

## Administrative or legislative in character?

If clause 7 gives an administrative decision making power, it is the function of this committee to draw to the attention of Senators that, as the decision is not reviewable, personal rights, liberties or obligations may become unduly dependent upon non-reviewable decisions.

If clause 7 gives the Attorney-General a legislative power - the Attorney-General is delegated by Parliament to make a subordinate law that an instrument or a particular kind of instrument is not to be subject to this legislation - the committee would question whether this is an appropriate delegation of legislative power contrary to the fourth of our terms of reference. Further, if the determination itself is a legislative instrument -the committee would suggest that it ought to be registered (perhaps separately) within Part A rather than in Part C and thus be subject to Parliamentary scrutiny under proposed Part V of the bill by way of tabling and disallowance procedures.

Accordingly, **the committee seeks the Attorney-General's advice** (Not a certificate!) on these issues.

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

## Non-reviewable decision-making powers
## Clauses 17 and 19

These sections give responsible Ministers, the Attorney-General and 'rule-makers' decision making powers that are excluded from review under the *Administrative Decisions (Judicial Review) Act 1977*. These powers are to decide not to engage in the consultation process which would otherwise be required or to decide who must be consulted as the persons likely to be affected by the instrument.

The committee recognises the need to avoid consultation or the uselessness of engaging in it (for example, where comparable consultation has already taken place) in the circumstances outlined in paragraph 19(1)(a) of the bill. The committee also notes that paragraph 17(b) requires the recording of the decision in writing and subclause 19(2) requires in writing both the recording of the decision and the reasons for it.

**The committee seeks the Attorney-General's advice** whether those decisions (and reasons) will be published or whether access to them would be available under Freedom of Information legislation. It may be that the appropriate forum to review those decisions is the Parliament itself, particularly with the expert assistance of the Senate Standing Committee on Regulations and Ordinances, when the legislative instruments themselves are tabled and subject to disallowance.

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

## Inappropriate delegation of legislative power
## Clause 21, subclause 58(2) and Schedule 4

### Clause 21 - Amending Schedule 2, legislative instruments directly affecting business

Clause 21 concludes Part 3 of the bill which regulates the consultation required before the making of legislative instruments which directly affect business. Part 3 provides that consultation will be required where legislative instruments are to be made under enabling legislation listed in Schedule 2.

Clause 21 enables legislation to be added to the list or removed where

- the enabling legislation has been repealed, revoked or amended so as no longer to authorise the making of legislative instruments; or

- the legislative instruments authorised by the enabling legislation no longer directly affect business.

Subclause 58(3) further provides that regulations removing legislation from Schedule 2 require the consent of the Attorney-General.

### Subclause 58(2) - Amending Schedule 3, the list of government business enterprises

This subclause enables the list of government business enterprises in Schedule 3 to be amended by adding the name of a body to the Schedule or by omitting a name from the Schedule. By force of subclause 4(3), ministerial directions issued to government business enterprises which are listed in Schedule 3 are not legislative instruments for the purposes of the proposed bill.

Enabling primary legislation to be amended by subordinate legislation always raises the issue of whether the legislative power of the Parliament has been inappropriately delegated. The committee notes with respect to these instances:

- it is in the public interest that consultation takes place before legislative instruments are made and so there can be no objection to adding to the list in Schedule 2, by regulation, either present legislation that may have been inadvertently omitted or new legislation where that legislation does not, itself, provide for its inclusion in the schedule- the course the committee would prefer;

- factual criteria have to be met and the Attorney-General must determine in writing that they have been met, before any legislation can be removed from Schedule 2.

- as the decision for a body to operate or not as a government business enterprise is peculiarly one for the executive, it is not inappropriate that including or omitting the name from Schedule 3 should be by regulation; where, however, enabling primary legislation is needed to confer the status of government business enterprise on a body, that legislation could amend Schedule 3.

*In the light of these considerations and on the assumption that the Senate Standing Committee on Regulations and Ordinances will scrutinise the regulations made under these clauses, the committee makes no further comment on the provisions.*

## Schedule 4 - Amendment of various Acts with respects to Rules of Court

Schedule 4 regulates, inter alia, the interaction between the substantive provisions of the proposed bill and the Rules of Court of the Family Court, the Federal Court, the High Court and the Industrial Relations Court. Clause 6 of the bill provides generally that the rules of those courts are not legislative instruments for the purposes of the legislation.

Schedule 4, however, would provide that the proposed bill with some exceptions, would apply to those rules as if they were legislative instruments with such further modifications and adaptations as are made by regulations made under the Acts regulating those Courts.

The only limit on the power of those regulations to modify the primary legislation is that the Rules of Court of the Federal Court, Industrial Relations Court and the High Court must provide some procedure for consultation before a rule directly affecting business is made.

It would be possible to exclude the rules of court from having to be registered and to exclude them from Parliamentary scrutiny. The committee views these consequences seriously and **seeks the Attorney-General's advice** on whether some further limitation on the width of this power could be included in the bill.

*Pending the Attorney-General'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. 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.*

## General comment
## Clause 48

The committee views with concern the proposed limitation on the Senate's powers contained in proposed clause 48.

Clause 48, if enacted, would take away the Senate's present power to disallow an individual provision in a set of rules. The bill provides that the Senate could only disallow the whole legislative instrument. This means that all the rules contained in the instrument have to be disallowed in order to ensure that a single objectionable one ceases to have effect.

A less attractive alternative is provided by subclause 48(4). By resolution, consideration of a motion to disallow could be deferred for a specified period to enable a rule to be remade to achieve an objective specified in the resolution. At the end of the period, if the amendment specified had not been satisfactorily achieved, the Senate would either have to disallow the whole instrument or allow it to continue in force.

At present, by disallowance, an individual objectionable clause ceases to have effect and needs to be remade in an acceptable form. Under the proposed legislation, the objectionable clause will continue in force until the new clause is made. In the worst scenario, the proposed legislation will enable the rule-maker, by not remaking the rule in

the deferral period, to force the Senate to disallow all the rules in a particular instrument or let the objectionable one continue in force.

*The committee draws Senators' attention to these consequences of clause 48 as it may be considered effectively to lessen the Senate's powers with respect to scrutinising the exercise of legislative power.*

# Life Insurance Bill 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Parliamentary Secretary to the Treasurer.

The bill proposes to establish a new regime for the life insurance industry. It provides for:

- updated and ungraded solvency and capital adequacy standards;
- the establishment of a Life Insurance Actuarial Standards Board to develop actuarial standards relevant to life company prudential controls;
- increased responsibilities for directors, auditors and actuaries of life companies;
- additional powers and resources for the Insurance and Superannuation Commission.

## Inappropriate delegation of legislative power/insufficient parliamentary scrutiny

## Clause 24 - Modification of proposed section 23 to particular companies

Proposed section 23 sets out the minimum adjusted paid-up share capital or the minimum eligible assets in excess of liabilities which a life company must have. It provides for the minimum amount to be increased by regulations. Proposed section 24, however, would enable the Treasurer to make a written declaration lessening the amount for a particular life company.

An express provision authorising the amendment of either the empowering legislation or any other Act is what is regarded as a 'Henry VIII' clause. Often a 'Henry VIII' clause provides for the amendment of primary legislation by regulations. These, of course, would be tabled in Parliament and subject to disallowance. In the present bill, not only is there no opportunity for Parliament to scrutinise the amendment of primary legislation by the executive but there appears to be no requirement for the amendment even to be made public.

> *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.The committee also 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.*

## Abrogation of the privilege against self-incrimination
## Clause 148

Subclause 148(1) provides:

> **148.(1)** For the purpose of section 147, it is not a reasonable excuse for a person to refuse or fail to:
>
> (a) produce a record; or
>
> (b) answer a question; or
>
> (c) make a statement;
>
> in accordance with a requirement of the Commissioner or an authorised person that producing the record, answering the question or making the statement, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

Subclause 148(1), if enacted, would abrogate the privilege against self-incrimination.

Subclause 148(2), however, provides :

> **(2)** However, none of the following is admissible against the person in a criminal proceeding or a proceeding for the imposition of a liability (other than a proceeding for an offence against, or arising out of, section 147):
>
> (a) evidence of the production of the record, the answer to the question or the making of the statement;
>
> (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the production of the record, the answer to the question or the making of the statement.

This clause is in a form which the committee has previously been prepared to accept, as it contains a limit on the use to which any information obtained can be put. The committee notes in particular that the **indirect** as well as the direct use of such information would be precluded. This is, therefore, a 'use/derivative use' indemnity.

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

## Reversal of onus of proof?
## Subclause 210(5)

This subclause, if enacted, would provide a defendant with a statutory defence to a prossecution for contravening subclause 210(4). Proposed section 210 disqualifies bankrupts and persons convicted of certain offences from holding certain positions of trust in life companies. Under subclause 210(4), it is an offence for a company intentionally or recklessly to permit a disqualified person to be or act in one of these positions. The defence to this prosecution provided by subclause (5) requires the defendant to prove that:

> (a) the defendant did not know, and had no reasonable grounds to suspect, that the person was a disqualified person; and
>
> (b) the defendant had made all reasonable efforts to ascertain whether the person was a disqualified person.

The committee has difficulty in seeing the need for this provision as subclause (4) makes the defendant's intention or recklessness an element of the offence, proof of which would lie with the prosecution.

Further, the committee also surmises that a defendant would have difficulty proving both (a) and (b) of the defence set out above. If the defendant did not know and had no reasonable grounds to suspect that a person was a disqualified person why would the defendant take all reasonable steps to ascertain what he had no reasonable grounds to suspect ? Accordingly, **the committee seeks the Treasurer's advice** on this matter.

*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.*

# Life Insurance (Consequential Amendments and Repeals) Bill 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Parliamentary Secretary to the Treasurer.

The bill proposes to amend 18 Acts and the Corporations Laws consequent upon the commencement of the Life Insurance Bill 1994. It also provides for the repeal of the *Life Insurance Policy Holders' Protection Levies Act 1991* and *Life Insurance Policy Holders' Protection Levies Collection Act 1991*.

*The committee has no comment on this bill.*

# Merit Protection (Australian Government Employees) Amendment Bill 1994

This bill was introduced into the Senate on 30 June 1994 by the Minister for Family Services.

The bill proposes to amend the *Merit Protection (Australian Government Employees) Act 1984* to:

- provide that the Merit Protection and Review Agency (MPRA), or a committee established by the MPRA, can perform employment related functions in addition to those already provided by the Act;

- provide that the MPRA deem a promotion appeal to be an application for review and vice versa;

- empower the MPRA to issue guidelines to Joint Selection Committees which are tripartite staff selection committees with an MPRA-nominated convenor;

- provide that the MPRA would not be subject to direction by any other person or by any body/authority other than a court;

- make the disruption of the proceedings of a Review Committee established under the Act an offence;

- provide that Review Committee members are subject to the same confidentiality provisions as MPRA members and staff; and

- create a penalty for a failure to comply with a summons issued by the convenor of a Redeployment and Retirement Appeal Committee.

*The committee has no comment on this bill.*

# National Residue Survey Administration (Meat Chickens) Amendment Bill 1994

This bill was introduced into the House of Representatives on 28 June 1994 by the Parliamentary Secretary to the Treasurer.

The bill proposes to increase the maximum rate of national residue survey levy from 0.02 cents per head to 0.06 cents per head at the request of the Australian Chicken Meat Federation.

*The committee has no comment on this bill.*

# Parliamentary Approval of Treaties Bill 1994

This bill was introduced into the Senate on 29 June 1994 by Senator Bourne as a Private Senator's bill.

The bill proposes to provide that treaties or reservations which the Government proposes should apply to Australia require parliamentary approval.

*The committee has no comment on this bill.*

# Parliamentary Commission of Inquiry (Security of Australia) Bill 1994

This bill was introduced into the Senate on 30 June 1994 by Senator Woodley as a Private Senator's bill.

The bill proposes to establish a parliamentary commission of inquiry to prioritise the security threats facing Australia and to determine whether national resources are adequate to meet these threats.

*The committee has no comment on this bill.*

# Primary Industries and Energy Legislation Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 28 June 1994 by the Parliamentary Secretary to the Treasurer.

The bill proposes to amend the following portfolio Acts:

- *Australian Wine and Brandy Corporation Act 1980* to ensure all producers who pay wine grapes levy are entitled to vote at the Corporation's Annual General Meeting;

- *Australian Wool Research and Promotion Organisation Act 1993* to:

  - ensure the Australian Wool Research and Promotion Organisation (AWRPO) has regard to Ecologically Sustainable Development principles and that these principles are reflected in the AWRPO's corporate and operational plan; and

  - include a member on the AWRPO Board who has qualifications relevant to, or experience in, environmental and ecological matters; and

  - allow funds received from patents and trademarks by the AWRPO to be directed to activities other than research and development;

- *Farm Household Support Act 1992* to implement measures to improve the delivery to farmers and administration of Farm Household Support;

- *Fisheries Administration Act 1991* to:

  - enable all relevant levies, fees and payments to be identified to clarify between Government and industry contributions to the Australian Fisheries Management Authority (AFMA); and

  - change the reference to the Australian Fisheries Council to the Ministerial Council on Forestry, Fisheries and Aquaculture;

- *Fisheries Management Act 1991* to:

  - allow fishing permit holders greater flexibility in nominating the boat to be used with that permit;

  - clarify emergency powers available to the AFMA and certain powers and

obligations of fisheries officers;

- *National Residue Survey Act 1992* to enable funds collected from the cattle industry to be used for target testing programs and for education and extension programs aimed at reducing contamination on farms;

- *Primary Industries and Energy Research and Development Act 1989* to remove an anomaly in funding arrangements for the Fisheries Research and Development Corporation;

- *Sugar Cane Levy Act 1987* to provide that organisations will be prescribed for the purposes of the definition of sugar industry organisations;

- *Wool Legislation (Repeals and Consequential Provisions) Act 1993* to correct the title of a cited Act;

- *Wool Tax Act (No. 3) 1964* to remove the reference to "registered" as part of the title of wool dealers;

- *Wheat Marketing Act 1989* to:

  - extend the definition of "grain";

  - improve the allocation of levy payments to equity holders in the Wheat Industry Fund; and

  - remove the age limit restriction on Australian Wheat Board members.

The bill also amends seven Acts to reflect the amalgamation of certain Ministerial Councils into the Agriculture and Resource Management Council of Australia and New Zealand.

## Retrospectivity
## Subclause 2(4)

This subclause provides that one of the amendments to be made by this bill will have retrospective effect. The purpose of the amendment, however, is solely to correct a typographical error.

*Accordingly the committee makes no further comment on this subclause.*

# Primary Industries Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 28 June 1994 by the Parliamentary Secretary to the Treasurer.

The bill proposes to amend the following portfolio Acts:

- *Australian Meat and Live-stock (Quotas) Act 1990* to:
  - clarify the types of restrictions imposed by importing countries which enable the AMLC to establish export quota mechanisms; and
  - insert a delegations clause to enable AMLC's staff to sign the documents imposing a quota scheme; and
- *Beef Production Levy Act 1990* to:
  - introduce a conversion factor allowing the beef production levy to be calculated where only a cold carcase weight is available;
- *Primary Industries Levies and Charges Collection Act 1991* to:
  - clarify the intention that an agent, if involved in the sale of cattle, is responsible for collecting and forwarding the levy to the Commonwealth;
  - impose penalties for offences relating to the amendment made to the *Beef Production Levy Act 1990* regarding carcase weights; and
  - correct an omission relating to abattoir proprietors' ability to refuse to slaughter certain livestock.

## Delegation of power
## Proposed section 8A of the *Australian Meat and Live-stock (Quotas) Act 1990*

Clause 5 of the bill, if enacted, would provide that under new section 8A the Australian Meat and Livestock Corporation would be able to delegate all or any of its powers under the Act to 'a person'.

The committee notes that there is no limitation as to the persons or classes of persons to

whom the Corporation can delegate these various powers and functions. The committee also notes that, although the explanatory memorandum mentions that the staff of the Corporation will be able to exercise delegated authority, neither the bill nor the explanatory memorandum indicates the need for a power of such width.

Since its establishment the committee has consistently drawn attention to provisions which allow for the delegation of significant and wide-ranging powers to 'a person'. Generally, the committee has taken the view that it would prefer to see a limit on either the sorts of powers that can be delegated in this way or the persons to whom the powers can be delegated. If the latter course is adopted, the committee prefers that the limit should be to the holders of a nominated office, to members of the Senior Executive Service or by reference to the qualifications of the person to be delegated the powers.

The committee realises that this amendment, as the explanatory memorandum correctly observes, would bring the delegation power in the Quotas Act into conformity with the delegation power in section 48 of the *Australian Meat and Live-stock Corporation Act 1977*. The committee prefers, however, that the proposed clause should be modified to limit the delegation perhaps to certain staff of the Corporation and invites the Minister to consider whether the earlier legislation should also be amended - section 48 being enacted before this committee existed.

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

# Primary Industries Levies and Charges (Wine Grapes) Collection Amendment Bill 1994

This bill was introduced into the House of Representatives on 28 June 1994 by the Parliamentary Secretary to the Treasurer.

The bill proposes to amend the definition of a producer of grapes, dried grapes or grape juice so that small wine producers who 'toll process' are eligible to pay levy and be members of the Australian Wine and Brandy Corporation.

*The committee has no comment on this bill.*

# States Grants (General Purposes) Bill 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Assistant Treasurer.

The bill proposes to provide general purposes assistance to the States and Territories of approximately $15 billion in 1994-95.

*The committee has no comment on this bill.*

# States Grants (Primary and Secondary Education Assistance) Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *States Grants (Primary and Secondary Education Assistance) Act 1992* to provide in 1995:

- \$8.7million for literacy development for young school children;
- \$4 million for grants to school authorities to support the study of ten priority languages; and
- make changes to funding for new and changing non-government schools;
- simplify administrative arrangements for approving block grant authorities under the Capital Grants Program; and
- effect funding schedules for capital grants for government and non-government schools and grants for community languages for 1995.

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

These subclauses provide that some of the amendments to be made by this bill will have retrospective effect. The purpose of the amendments, however, appears to be solely to correct minor drafting and typographical errors.

*Accordingly the committee makes no further comment on these subclauses.*

# Student Assistance (Budget Matters) Amendment Bill 1994

This bill was introduced into the House of Representatives on 29 June 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to amend the *Student Assistance Act 1973* to:

- allow students who have received AUSTUDY or ABSTUDY benefits to repay all or part of the benefits to maximise the amount of their Supplement loan; and

- make Supplement loans available to students who do not qualify for AUSTUDY or ABSTUDY because of the spouse income test.

*The committee has no comment on this bill.*

# Taxation Laws Amendment Bill (No. 3) 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Special Minister of State.

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
  - introduce a tax file number based reportable payments system;
  - make amendments relating to foreign investment funds and controlled foreign companies;
  - provide exemption from dividend withholding tax for certain foreign source dividend income;
  - allow deductibility of certain business relocation expenses associated with regional headquarters establishing in Australia;
  - make amendments relating to the home child care allowance and dependent rebate and partner allowance;
  - include in the assessable income of a registered organisation income derived from certain assets of the organisation;
  - amend the definition of provisional tax uplift factor;
  - repeal provisions relating to short-term asset sales and the home loan interest rebate;
  - allow a deduction for a testamentary gift of property made to certain institutions under the Cultural Bequests Program and exempt the gifts from capital gains tax provisions;
  - correct two drafting errors relating to gift provisions;
  - amend superannuation provisions relating to reasonable benefits limits;
  - implement new measures relating to taxation of Australian branches of foreign banks;

- *Income Tax (Mining Withholding Tax) Act 1979* to reduce the rate of mining withholding tax from 5.8 per cent to 4 per cent;

- Sales Tax Laws to:

  - limit the value of the exemption for motor vehicles for use in providing child care;

  - provide a credit for sales tax borne before the child care body became entitled to exemption;

  - provide a credit for tax borne on parts, fittings or accessories used in the repair, renovation or upgrading of goods to be exported;

  - reduce the clawback of sales tax credit involved with goods that have been replaced under warranty, repaired and resold;

  - allow both registered and unregistered persons to supply a single quotation for all their exempt purchases in a period, where that period does not exceed one year;

  - allow for multiple trial loans, leases or demonstrations in exempt circumstances before an ultimate sale or lease for the remainder of the statutory period;

  - allow an exemption for certain imported second-hand computer and related equipment for use in newly established regional headquarters in Australia by approved companies;

  - provide credits for tax borne on dealings with certain imported second-hand computer and related equipment for use in regional headquarters in Australia by approved companies;

  - ensure containers used to deliver take-away food and beverages and certain ice-cream and biscuit goods are excluded from exemption; and

  - reinstate the exemption for wireless receivers used by persons mainly to make contact with radio services conducted by the Royal Flying Doctor Service or similar services.

## Retrospectivity

## Subclause 2(2)

Subclause 2(2) would permit some of the amendments proposed by this bill to have effect retrospectively from 1 January 1993. The committee notes that the explanatory memorandum states on page 2 that the amendments will apply from 1 January 1993 where they operate to the advantange of taxpayers.

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

## Retrospectivity
## Subclause 2(4)

Subclause 2(4) provides for some of the amendments proposed by this bill to have effect retrospectively from 1 July 1994. The committee notes that the explanatory memorandum states on page 8 that the date of effect is the day after the date of the introduction of the bill. The amendments will increase liability for sales tax but it may be suggested that the amendments are of such a nature that if they were to commence at any time after the date of their introduction into Parliament a way would have been left open for the avoidance of sales tax.

*Accordingly, the committee makes no further comment on this provision.*

## Retrospectivity
## Subclause 2(5)

Subclause 2(5) would permit some of the amendments proposed by this bill to have effect retrospectively from 30 June 1994. The committee notes that the explanatory memorandum indicates on page 146 that the amendments will operate to the advantange of taxpayers.

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

## Retrospective application from 1 July 1994

## Clauses 48, 84, 98, 101, 104, 107 and 119

These clauses provide for various amendments in the bill to apply from 1 July 1994 and therefore to some extent retrospectively. In each case, however, the amendments operate to the benefit of taxpayers.

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

## Retrospective application from 1 July 1993
## Clause 87

This clause would allow the amendments proposed in clause 86 to apply from 1 July 1993.

*As the amendments are solely to correct drafting errors the committee makes no further comment on this clause.*

## Retrospective application from 1 January 1993
## Subclause 136(1)

This subclause would allow the amendments proposed by clauses 130, 132 and 135 to apply from 1 January 1993.

*As these amendments provide for a sales tax credit, to the advantage of taxpayers, the committee makes no further comment on this subclause.*

# Taxation Laws Amendment (Infrastructure Borrowings) Bill 1994

This bill was introduced into the House of Representatives on 30 June 1994 by the Special Minister of State.

The bill proposes to extend the range of eligible sectors and modify the administrative and tax treatment of infrastructure borrowings to attract investors and to facilitate more private sector provision of publicly accessible infrastructure. The Development Allowance Authority will be responsible for the approvals, management and monitoring functions relating to infrastructure borrowings.

*The committee has no comment on this bill.*

# Wine Grapes Levy Amendment Bill 1994

This bill was introduced into the House of Representatives on 28 June 1994 by the Parliamentary Secretary to the Treasurer.

The bill proposes to amend the *Wine Grapes Levy Act 1979* to:

- provide for the marketing component of the levy on producers to be set by regulations (the research component is currently set by regulation);
- end the exemption from the levy for producers who process less than 10 tonnes of fresh grapes;
- specify that the total of the marketing component of the levy not exceed 0.5 per cent of the gross value of production of the industry; and
- raise the maximum rate of levy for the research component to $3 per tonne.

*The committee has no comment on this bill.*

# Senate Standing Committee

# for

# The Scrutiny of Bills

# ALERT DIGEST

No. 13 of 1994

31 AUGUST 1994

ISSN 0729-6851

# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator **M Colston** (Chairman)
Senator **A Vanstone** (Deputy Chairman)
Senator **R Bell**
Senator **B Cooney**
Senator **M Forshaw**
Senator **J Troeth**

## TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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**The Committee has no comment on these Bills as they raise no issues in relation to the Committee's terms of reference.**

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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.

# Asian Development Bank (Additional Subscription) Bill 1994

This bill was introduced into the House of Representatives on 24 August 1994 by the Assistant Treasurer.

In May 1994 the Board of Governors of the Asian Development Bank adopted a resolution authorising the acceptance of increases in individual members' subscriptions. This bill proposes to:

- empower the Treasurer to make the necessary arrangements with the Asian Development Bank for the purchase by Australia of entitlement of 2,047 additional paid-in shares and 100,323 additional callable shares, of the capital stock of the Bank;

- empower the Treasurer to make the arrangement on such terms and conditions as he considers, and where appropriate, to issue promissory notes to the Bank in payment; and

- appropriate the funds necessary to make payments under such agreement.

*The committee has no comment on this bill.*

# Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill 1994

This bill was introduced into the House of Representatives on 24 August 1994 by the Minister for Employment, Education and Training.

The bill proposes to amend the regulation making power in section 6A so regulation can be made that will exempt providers, either in whole or part, from the requirements concerning notified trust accounts under section 6A of the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991*.

*The committee has no comment on this bill.*

# Senate Standing Committee

# for

# The Scrutiny of Bills

# ALERT DIGEST

## No. 14 of 1994

21 September 1994

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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator **M Colston** (Chairman)
Senator **A Vanstone** (Deputy Chairman)
Senator **R Bell**
Senator **B Cooney**
Senator **M Forshaw**
Senator **J Troeth**

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# Departure Tax Amendment Bill 1994

This bill was introduced into the House of Representatives on 31 August 1994 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to replace the existing departure tax with a passenger movement charge and increase the charge from $25 to $27. The charge will be effective from 1 January 1995.

*The committee has no comment on this bill.*

# Departure Tax Collection Amendment Bill 1994

This bill was introduced into the House of Representatives on 31 August 1994 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to provide the mechanism to collect the charge imposed by the Departure Tax Amendment Bill 1994.

*The committee has no comment on this bill.*

# Excise Tariff Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 31 August 1994 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to amend the *Excise Tariff Act 1921* to include certain tariff proposals into the Act. The effect of these proposals is to:

- decrease the excise duty payable on fuel oil, heating oil and kerosene by 1.977 cents per litre (effective 11 May 1994);
- decrease the excise duty payable on topped crude oil by 2.977 cents per litre (effective 11 May 1994);
- remove topped crude oil from the one cent increase of 1 August 1994;
- decrease the customs duty payable on fuel oil, heating oil, kerosene, topped crude oil and aviation gasoline (avgas) and increase the customs duty payable on aviation kerosene (avtur);
- decrease the excise duty payable on avgas by 6.327 cents per litre;
- increase the excise duty payable on avtur by 1.194 cents per litre;
- exempt certain uses of stabilised crude petroleum oil and condensate from excise duty; and
- impose excise duty on stabilised crude petroleum oil and condensate for certain uses.Excise Tariff Bill

## Retrospectivity
## Subclauses 2(2) to (4)

These subclauses provide for the substantive provisions of this bill to have retrospective effect from 1 April 1994, 11 May 1994 and 1 July 1994, respectively.

Subclause 2(2) will give retrospective effect from 1 April 1994 to the incorporation of Tariff Proposal No. 4 of 1993 into the *Excise Tariff Act 1921* by proposed section 4 of this bill. The Tariff Proposal was tabled in the House of Representatives on 29 June 1994.

Subclause 2(3) will give retrospective effect to proposed sections 3 and 5 of the bill from 11 May 1994. The explanatory memorandum indicates that these proposed sections remove topped crude oil from the 1 cent per litre increase in excise duty of 1 August 1994 and decrease the excise duty payable on fuel oil, heating oil, kerosene and topped crude oil. The Excise Tariff alteration was notified in Excise Tariff Proposal No. 2 of 1994 which was tabled in the House of Representatives on 10 May 1994. Apart from other considerations, as the retrospectivity is beneficial to persons other than the Commonwealth, the committee makes no further comment on this subclause.

Subclause 2(4) will give retrospective effect to proposed section 6 of the bill from 1 July 1994. The explanatory memorandum indicates that, although the proposed section will decrease excise on aviation gasoline, it will increase the excise payable on aviation kerosene. This Excise Tariff alteration was notified in Excise Tariff Proposal No. 3 of 1994 which was tabled in the House of Representatives on 29 June 1994.

The committee notes that the Excise Tariff Proposals have been tabled in Parliament during the year and that some retrospectivity is standard in relation to changes in rates of excise duty.

*Accordingly the committee makes no further comment on these subclauses.*

# Social Security (1994 Budget and White Paper) Amendment Bill 1994

This bill was introduced into the House of Representatives on 31 August 1994 by the Parliamentary Secretary to the Minister for Social Security.

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

- modify liquid assets waiting period provisions;
- codify a number of elements in activity tests and activity agreements;
- allow certain persons to receive advance payment of job search allowance and newstart allowance;
- broaden the activities available to job search or newstart agreement clients;
- relax the residence requirements for refugees applying for certain social security pensions;
- enable additional family payment to be paid in certain circumstances even if parent(s) temporarily absent overseas;
- include rental or mortgage subsidy cash payments made to employees in fringe benefit provisions;
- effect a ministerial determination concerning the valuation of housing fringe benefits for the ADF; and
- amend social security definitions relating to the calculation of an undeducted purchase price.

## Retrospectivity
## Subclause 2(10)

Subclause 2(10), if enacted, would give the provisions in Schedule 8 retrospective effect from 1 July 1994. The amendments proposed by the Schedule, however, are technical only. The explanatory memorandum points out that they are designed to preserve the meanings of certain definitions as they were prior to changes to the *Income Tax Assessment Act 1936* which came into effect on 1 July 1994. They will prevent an

unintended effect flowing from those changes.

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

# Social Security (New Zealand Agreement) Amendment Bill 1994

This bill was introduced into the House of Representatives on 31 August 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the *Social Security Act 1991* to insert the new international agreement on social security signed by Australia and New Zealand on 19 July 1994.

*The committee has no comment on this bill.*

# Senate Standing Committee

# for

# The Scrutiny of Bills

# ALERT DIGEST

No. 15 of 1994

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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

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

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

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# Copyright (World Trade Organization Amendments) Bill 1994

This bill was introduced into the House of Representatives on 21 September 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill is one of five bills that make changes to Australian law to enable Australia to meet its obligations under agreements negotiated in the Uruguay Round of the General Agreement of Tariffs and Trade. Further, the meeting of these obligations will enable Australia to become a member of the World Trade Organization, should it decide to do so. In particular, this bill enables obligations to be met in relation to copyright under the Agreement on Trade-Related Aspects of Intellectual Property Rights.

## Commencement
## Clause 2

Clause 2 of this bill provides that the commencement of the substantive provisions of the bill is tied to the coming into force of the Agreement Establishing the World Trade Organization (the Agreement).

Part 2 of this bill will come into effect one year after the Agreement comes into force. Parts 3 and 4 will come into effect either on 1 July 1995 or, if the Agreement has not come into force for Australia by that date, on a day to be fixed by Proclamation.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

The Drafting Instruction provides;

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:

(a)
a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or

(b)
a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

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

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

The committee notes that the explanatory memorandum states at page 4:

3. The expected date of entry into force of the WTO Agreement is 1 January 1995. However, that date is subject to negotiation and necessary legislative changes and authorisation in a number of countries. If the major members of the Uruguay Round trade negotiations, such as the United States of America and the European Union, have not implemented the necessary legislation to become members of the WTO by 1 January 1995, it is likely that the date for the entry into force of the WTO Agreement will be delayed.

It would therefore appear that paragraph 6 of the Drafting Instruction is applicable.

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

# Customs Tariff (World Trade Organization Amendments) Bill 1994

This bill was introduced into the House of Representatives on 21 September 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill is one of five bills that make changes to Australian law to enable Australia to meet its obligations under agreements negotiated in the Uruguay Round of the General Agreement of Tariffs and Trade. Further, the meeting of these obligations will enable Australia to become a member of the World Trade Organization, should it decide to do so. In particular, this bill amends the *Customs Tariff Act 1987* to reduce tariff rates for cheese, unmanufactured tobacco, foodstuffs, very low alcohol beer, diagnostic and laboratory reagents, certain replacement components of motor vehicles, power line filters and electro-medical equipment and apparatus.

## Commencement
## Clause 2

Clause 2 of this bill provides that the commencement of the substantive provisions of the bill will come into effect on the day on which the Agreement Establishing the World Trade Organization comes into force for Australia as provided in the Copyright (World Trade Organization Amendments) Bill 1994.

As discussed by the committee in dealing with that bill in this Digest, the commencement at some unspecified future time may be necessary, as the measures, being designed to give effect to Australia's international obligations, are dependent on necessary legislative changes and authorisations in a number of countries.

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

# Dairy Produce (World Trade Organization Amendments) Bill 1994

This bill was introduced into the House of Representatives on 21 September 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill is one of five bills that make changes to Australian law to enable Australia to meet its obligations under agreements negotiated in the Uruguay Round of the General Agreement of Tariffs and Trade. Further, the meeting of these obligations will enable Australia to become a member of the World Trade Organization, should it decide to do so. In particular, this bill amends the *Dairy Produce Act 1986* to bring forward the planned termination of the market support payment scheme from 30 June 2000 to 30 June 1995, completely removing the subsidy on the export of dairy products.

## Commencement
## Clause 2

Clause 2 of this bill provides that the legislation will come into effect on 1 July 1995 if the Agreement Establishing the World Trade Organization has come into force for Australia by that date. If that has not occurred, the legislation will come into effect on the day that the agreement does enter into force as fixed by proclamation under the Copyright (World Trade Organization Amendments) Bill 1994.

As discussed by the committee in dealing with that bill in this Digest, the commencement at some unspecified future time may be necessary, as the measures, being designed to give effect to Australia's international obligations, are dependent on necessary legislative changes and authorisations in a number of countries.

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

# Human Rights (Sexual Conduct) Bill 1994

This bill was introduced into the House of Representatives on 21 September 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to provide that sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

*The committee has no comment on this bill.*

# Migration Legislation Amendment Bill (No. 3) 1994

This bill was introduced into the House of Representatives on 21 September 1994 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to amend the *Migration Act 1958* to clarify certain provisions of the Act in relation to the custody of certain unauthorised boat arrivals. Consequentially, certain sections of the Act are repealed.

## Retrospectivity

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

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

> *Accordingly, the committee continues to draw Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

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

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

### Subclause 2(2)

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

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

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

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

### The background

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

Under the common law an alien who is within this country, whether lawfully or unlawfully, is not an outlaw (except enemy aliens in time of war). 'Neither public official nor private citizen can lawfully detain him or her... except under and in accordance with some positive authority conferred by the law' (*Chu Kheng Lim v. Minister for Immigration* (1992) 176 CLR 1, at p. 19 per

Justices Brennan, Deane and Dawson). Their Honours go on to point out that, if the unlawful detention is by a person who is an officer of the Commonwealth, the status of that person as such an officer will not, of itself, confer immunity from proceedings against him or her personally in the ordinary courts of the land.

In the *Chu Kheng Lim* case, six of the seven judges of the High Court discussed the meaning of section 36 of the *Immigration Act 1958*, the section into which clause 7 of the present bill will insert significant subsections. The section as it stood on 1 November 1989 authorised the detention of the particular person in custody only until the departure of the vessel from Australia or 'until such earlier time as an authorised officer directs'. All six judges had no difficulty with the plain meaning of the section. It was not considered ambiguous or doubtful or open to other interpretations. Justices Brennan, Deane and Dawson in their joint judgment concluded that the view apparently taken by the Minister's Department was a mistaken approach to the construction of that section: the view that, in a case where a vessel can never leave because it has been destroyed, temporary custody can continue indefinitely was mistaken. They also concluded that 'the continued detention of each plaintiff in custody after the destruction of the boat on which he or she arrived in Australia was unlawful'(at p. 22).

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

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

Recent High Court decisions raise doubts whether section 54RA is constitutionally valid in that the taking away of the general right to damages and substituting compensation of $1 a day may be the acquisition of a person's property on unjust terms. In the event of

such a finding, substantial damages for unlawful imprisonment may be awarded. Hence the proposal to amend the law retrospectively to validate the unlawful imprisonment.

### Rationale justifying retrospectivity

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

- the amendments need to be retrospective to prevent a possible windfall through substantial awards of damages;

- because the Minister and the Department thought that the law gave them the power to detain these people in custody, it ought to be changed retrospectively so that it will be taken to have meant from 1 November 1989 what the Minister and the Department understood it to mean; and

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

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

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

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

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

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

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

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

The Minister has responded as follows:

Your Committee expressed concern about subclause 2(2) of the bill , which would give retrospective effect to clauses 5, 6 and 7 of the Bill, and noted the purpose of the retrospectivity was to limit the effect of recent Court decisions. I note the comments about the justification for the retrospectivity - which goes to the fundamental issue of the proposed effect of the Bill. I also note the findings that the Bill does not appear to justify validating unlawful imprisonment and may be considered to trespass unduly on personal rights and liberties.

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

As set out in the Explanatory Memorandum to the Bill, recent Court decisions have cast doubt on the way the Commonwealth administered section 36 of the *Migration Act 1958* (renumbered section 88 by section 35 of the *Migration Legislation Amendment Act 1989* on 19 December 1989). Consequently, the

> understanding of the law held at the relevant time by the Minister and the Department and the persons detained has been proven to be incorrect.
>
> Other Court decisions have now cast doubt on the effectiveness of section 54RA of the *Migration Act 1958* - the specific legislation enacted by Parliament in December 1992 to limit the possible compensation payable by the Commonwealth in this situation. That legislation dealt with exactly the same fact situation as does the current Bill. It is worth noting that section 54RA was also retrospective in nature, in that it altered rights that existed before its commencement.
>
> In commenting upon the Government's justifications for retrospectivity, I do not consider your Committee placed sufficient weight on the fact that the uncertainty about the operation of section 36 (section 88) turned not on the issue of unauthorised arrival, but on the haphazard fate of the boats on which the persons concerned arrived. As such, the unlawfulness of the custody arose as a result of a technical misunderstanding of the operation and effect of the section.
>
> Furthermore, I do not consider your Committee gave sufficient weight to the fact that, until the Court decisions were handed down, the lawfulness of the custody under section 36 (section 88) of those concerned was never challenged.
>
> In practical terms, the Government is, therefore, proposing in this Bill to do no more than restore the status quo as agreed by the Parliament in December 1992.

The committee thanks the Minister for responding but continues to find unconvincing the rationale for retrospectivity which the Minister has repeated. The Minister has again asserted that the award of damages would be a windfall without addressing the reasons the committee put forward to show that windfall cannot be applied to the enforcement of a legal right. The Minister has not addressed the concept of responsibility and accountability of a person exercising authority to ensure that the use of authority is within power. Finally, no Scrutiny of Bills committee could be expected to agree that the law ought to be not what Parliament has passed but what the Minister thought had been passed.

# Migration Legislation Amendment Bill (No. 4) 1994

This bill was introduced into the Senate on 21 September 1994 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to amend the *Migration Act 1958* to ensure that non-citizens covered by the Comprehensive Plan of Action for Indo-Chinese refugees or in relation to whom there is a safe third country, should not be able to apply for a protection visa and, in some cases, any other visa. Transitional arrangements are provided for non-citizens applying for protection visas on or after 1 September 1994 and before commencement.

## Non reviewable decision
## Proposed section 91F

Proposed section 91F of the *Migration Act 1958*, if enacted, would give to the Minister, if the Minister thinks it is in the public interest, a discretion to determine that the new scheme for asylum seekers is not to apply to a particular person. The decision not to exercise this discretion is apparently not reviewable in any way, as proposed new subsection 91F(6) provides that the Minister does not have a duty to consider whether to exercise the power to exempt a particular person from the scheme.

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

The committee notes that proposed subsection 96F(3) requires the Minister to lay before Parliament a favourable determination and the reasons for making it but the committee is of the opinion that scrutiny ought to be directed at the reasons for not considering to make a determination or, having considered, the reasons for refusing the determination. Accordingly, **the committee seeks the Minister's advice** on an appropriate method of 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 on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.*

## Retrospectivity - legislation by press release

## Schedule item 3

Schedule item 3, if enacted, would have the effect of bringing the new scheme into effect on 1 September 1994. It provides that applications from asylum seekers made, but not granted, during the transitional period (from 1 September 1994 until Royal Assent) would cease to be valid on the commencement of the bill and would be treated as having been made after commencement.

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

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

On the other hand, the retrospectivity of the proposed bill takes away the present rights of asylum seekers under the current law of Australia.

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

# Patents (World Trade Organization Amendments) Bill 1994

This bill was introduced into the House of Representatives on 21 September 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill is one of five bills that make changes to Australian law to enable Australia to meet its obligations under agreements negotiated in the Uruguay Round of the General Agreement of Tariffs and Trade. Further, the meeting of these obligations will enable Australia to become a member of the World Trade Organization, should it decide to do so. In particular, this bill amends the *Patents Act 1990* to:

- increase the term of a standard patent from 16 to 20 years and make consequential and transitional amendments;
- place the onus on the defendant to prove there has been no infringement in certain infringement proceedings relating to patented processes; and
- extend the conditions under which compulsory licences to work a patent are granted by a court.

*The committee has no comment on this bill.*

# Rights to Privacy and Equality (ICCPR) Bill 1994

This bill was introduced into the Senate on 22 September 1994 by Senator Chamarette as a Private Senator's bill.

The bill proposes to give legislative effect to Articles 17 and 26 of the International Covenant on Civil and Political Rights. These articles relate to privacy and the right to equality before the law.

*The committee has no comment on this bill.*

# Sales Tax (World Trade Organization Amendments) Bill 1994

This bill was introduced into the House of Representatives on 21 September 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill is one of five bills that make changes to Australian law to enable Australia to meet its obligations under agreements negotiated in the Uruguay Round of the General Agreement of Tariffs and Trade. Further, the meeting of these obligations will enable Australia to become a member of the World Trade Organization, should it decide to do so. In particular, this bill amends the *Sales Tax (Exemptions and Classifications) Act 1992* to extend the concessional rate of sales tax presently applying to certain Australian, New Zealand and Papua New Guinean fruit and vegetable juice products to similar goods made from fruits or vegetables grown in other countries.

*The committee has no comment on this bill.*

# Trade Marks Bill 1994

This bill was introduced into the House of Representatives on 21 September 1994 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

The bill proposes to provide for the registration of trade marks, collective trade marks, certification trade marks and defensive trade marks and sets out and protects the rights deriving from registration. The bill conforms with the standards and principles prescribed for trade marks in the Agreement Establishing the World Trade Organization. The bill repeals the *Trade Marks Act 1955*.

## Commencement
## Clause 2

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

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

The Drafting Instruction provides;

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
>
> (a)
> a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or
>
> (b)
> a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
>
> 4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should

> explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.
>
> 5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.
>
> 6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

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

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

> 3. The timing is necessary to allow trade mark owners and users, practitioners and the Trade Marks Office sufficient opportunity to prepare for implementation of the provisions in the Bill. It is consistent with the Agreement Establishing the World Trade Organization which would require Australia to meet its obligations within one year following the date of its entry into force.

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

## Offences of strict liability
## Subclauses 154(4) and 157(4)

Proposed subsection 154(1) would create an offence where a person falsifies or unlawfully removes a representation of a trade mark, knowing that the trade mark is registered. Proposed subsection 157(1) creates an offence with respect to selling or importing goods for trade or manufacture if the person knows that the goods have false marks.

Offences against these subsections would normally require the prosecution to prove that the defendant knew that the trade mark was registered or that the marks were false.

Proposed subsections 154(4) and 157(4), however, if enacted, would deem the offence to have occurred and the defendant liable to imprisonment if the defendant ought reasonably to have known these matters, **even if** they did not, in fact, have such knowledge.

The committee would question the legitimacy of enabling the prosecution to have a fall back position: where the prosecution fails to prove that the person knew that he/she was contravening the law, the defendant is to be guilty because he/she should have known.

The committee raised similar concerns when sections 99 and 100 were inserted in the present *Trade Marks Act 1955* in 1989. In the committee's Twelfth Report of 1989, the committee said:

> The Committee notes the response of the Minister but considers that where legislation creates a serious offence, an element of that offence ought to be a guilty intention or a reckless disregard of the consequences of that act. Mere negligence should not be enough to make a person guilty of a serious crime.
>
> The test provided in the proposed subsections to visit criminality on a person is that he or she 'ought reasonably to have known of the existence of a set of facts'. This test is less stringent than one requiring actual knowledge or a reckless disregard of the facts which the Committee considers the appropriate standard to be applied before a person is found guilty of a serious offence.

The committee does not have any difficulty with the intention of the legislation: 'to eliminate wilful blindness' as a defence. But the committee is concerned with the width of the provisions and wonders whether mere negligence should attract criminal liability.

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 grounds exist which would justify the imposition of strict liability.

The committee notes that, although strict liability is imposed by the present Act for sale

and importation, the offence in proposed section 154 does not appear to be one of strict liability in the present Act. It cannot be said therefore to be merely continuing the policy of the present Act. The committee also notes that the explanatory memorandum contains no justification for imposing strict liability for either offence and seeks the Minister's advice on the matter.

*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. 16 of 1994

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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

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

## TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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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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# Aerospace Technologies of Australia Limited Sale Bill 1994

This bill was introduced into the House of Representatives on 12 October 1994 by the Minister for Finance.

The bill proposes to provide for the sale of Aerospace Technologies of Australia Limited. It also proposes to make a consequential amendment to the *Commonwealth Borrowing Levy Act 1987*.

## Retrospectivity
## Subclause 2(1)

By virtue of subclause 2(1), certain provisions of the bill will be taken to have commenced on 12 October 1994, the date on which the bill was introduced into Parliament.

The committee notes the reason for the retrospectivity according to the explanatory memorandum is that there is a possibility that a subsidiary body of ASTA may be sold before the sale day of ASTA itself. The explanatory memorandum points out on page 1 that:

> While there is the possibility of retrospective application of the provisions applicable to all ASTA bodies (ie ASTA and its subsidiaries) if a subsidiary is sold prior to the Bill receiving the Royal Assent, no employee or other rights will be adversely impacted as a result.

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

## Commencement
## Subclause 2(3)

Subclause 2(3) of the bill provides:

> **(3)** If a provision of this Act does not commence within the period of 2 years beginning on the day on which this Act receives the Royal Assent, the provision is taken to have been repealed at

the end of that period.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

> 3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
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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, by virtue of clause 2, this bill could commence outside a period of six months from the date of Royal Assent. This would be contrary to the preference expressed in paragraph 4 of the Drafting Instruction.

Although no reason for choosing a longer period is specifically set out in the explanatory

memorandum, the committee is of the opinion that 2 years is a reasonable period within which to complete the measures necessary for the sale of this undertaking.

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

# ANL Guarantee Bill 1994

This bill was introduced into the House of Representatives on 22 September 1994 by the Treasurer.

The bill proposes to authorise the Treasurer to guarantee payments under a loan agreement against ANL's existing debt and any further net drawdowns on ANL's promissory note facility.

*The committee has no comment on this bill.*

# Australian Capital Territory Electoral Legislation Amendment Bill 1994

This bill was introduced into the Senate on 12 October 1994 by the Minister for Small Business, Customs and Construction.

The bill proposes to amend and repeal those parts of the Commonwealth's Australian Capital Territory self-government legislation which are no longer appropriate now the ACT Legislative Assembly has enacted its own legislation covering the conduct of elections and related matters. It also proposes to make transitional arrangements dealing with disputed qualifications of members, which are not covered by the ACT's legislation in the period up to the 18 February 1995 election. The *Australian Capital Territory (Electoral) Act 1988* is repealed.

*The committee has no comment on this bill.*

# Child Support Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 12 October 1994 by the Assistant Treasurer.

The bill proposes to amend the:
*Child Support (Assessment) Act 1989* to:

- extend the facility relating to instruments to be signed by a person acknowledging parentage to mothers,

- align the child support legislation with the *Family Law Act 1975* by allowing the Registrar to be satisfied that a man is a parent of a child in certain circumstances, and

- ensure that a child support agreement entered into by a custodian who is in receipt of certain social security payments meets the reasonable action to obtain maintenance provisions in the *Social Security Act 1991*;

and the *Social Security Act 1991* to make consequential amendments upon the introduction of changes to child support agreements;

and the *Child Support (Registration and Collection) Act 1988* to:

- allow the Registrar not to enforce liabilities arising from court orders or court registered agreements in certain circumstances, and

- allow payees who are receiving DSS payments to elect not to have the maintenance liability enforced by the Registrar.

*The committee has no comment on this bill.*

# Customs Legislation (World Trade Organization Amendments) Bill 1994

This bill was introduced into the House of Representatives on 12 October 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill is one of a package of bills that make changes to Australian law to enable Australia to meet its obligations under agreements negotiated in the Uruguay Round of the General Agreement on Tariffs and Trade. Further, the meeting of these obligations will enable Australia to become a member of the World Trade Organization, should it decide to do so. In particular, this bill amends the *Customs Act 1901* and *Anti-Dumping Authority Act 1988* to bring Australia's anti-dumping and countervailing regimes into conformity with the standards and principles arising from the Uruguay Round agreements.

## Commencement on proclamation
## Clause 2

Clause 2 of this bill provides that the commencement of the substantive provisions of the bill will come into effect on the day on which the Agreement Establishing the World Trade Organization (the Agreement) comes into force for Australia as provided in the Copyright (World Trade Organization Amendments) Bill 1994.

The committee dealt with the issue of the open-ended arrangement for the coming into force of the Agreement when discussing the Copyright (World Trade Organization Amendments) Bill 1994 in Alert Digest No. 15 of 1994. In that Digest the committee noted the reasons given in the explanatory memorandum of that bill at page 4:

> 3. The expected date of entry into force of the WTO Agreement is 1 January 1995. However, that date is subject to negotiation and necessary legislative changes and authorisation in a number of countries. If the major members of the Uruguay Round trade negotiations, such as the United States of America and the European Union, have not implemented the necessary legislation to become members of the WTO by 1 January 1995, it is likely that the date for the entry into force of the WTO Agreement will be delayed.

It seems to the committee that the commencement of this legislation at some unspecified future time may be necessary, as the measures, being designed to give effect to Australia's

international obligations, are dependent on necessary legislative changes and authorisations in a number of countries.

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

# Customs Tariff (Anti-Dumping) (World Trade Organization Amendments) Bill 1994

This bill was introduced into the House of Representatives on 12 October 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill is one of a package of bills that make changes to Australian law to enable Australia to meet its obligations under agreements negotiated in the Uruguay Round of the General Agreement on Tariffs and Trade. Further, the meeting of these obligations will enable Australia to become a member of the World Trade Organization, should it decide to do so. In particular, this bill amends the *Customs Tariff (Anti-Dumping) Act 1975* to bring Australia's anti-dumping and countervailing regimes into conformity with the standards and principles arising from the Uruguay Round agreements. The bill will complement the Customs Legislation (World Trade Organization Amendments) Bill 1994.

## Commencement on proclamation
## Clause 2

Clause 2 of this bill provides that the commencement of the substantive provisions of the bill will come into effect on the day on which the Agreement Establishing the World Trade Organization (the Agreement) comes into force for Australia as provided in the Copyright (World Trade Organization Amendments) Bill 1994.

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It seems to the committee that the commencement of this legislation at some unspecified future time may be necessary, as the measures, being designed to give effect to Australia's

international obligations, are dependent on necessary legislative changes and authorisations in a number of countries.

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

# Drought Relief Payment Bill 1994

This bill was introduced into the House of Representatives on 11 October 1994 by the Minister for Resources.

The bill proposes to amend the:
*Farm Household Support Act 1992* to provide drought relief payments to farmers who are experiencing difficulty in meeting living expenses and are in exceptional circumstances due to extreme drought;
*Income Tax Assessment Act 1936* to provide for the tax treatment of drought relief payments;
*Health Insurance Act 1973* to classify recipients of drought relief payments as disadvantaged persons so they may receive a Health Care Card; and
*Social Security Act 1991* to exempt the approval of certain aspects from review and appeals processes under that Act.

## Retrospective operation
## Schedule - items 79 to 82

Items 79 to 82 of the Schedule, if enacted, would affect acts and events which occur between 21 September 1994 and the date of Royal Assent. In effect, they have a certain retrospective operation. The measures, however, are intended to regulate the transitional arrangements for the payment of drought relief until Royal Assent occurs.

*As they are generally beneficial to the recipients of drought relief, the committee makes no further comment on these provisions.*

# Family Law Reform Bill 1994 [No. 2]

This bill was introduced into the House of Representatives on 13 October 1994 by the Attorney-General.

The bill proposes to amend the *Family Law Act 1975* to:

- facilitate the greater use of mediation, counselling and arbitration, in the resolution of family law disputes, both within the court and in approved organisations in the community;
- provide for an approval mechanism for community based counselling and mediation organisations under the Act;
- expand the opportunity of approved organisations to undertake mediation and counselling that arises under the Act;
- extend the immunity provisions that presently exist for court based personnel to approved mediators;
- extend the secrecy and admission provisions that presently exist for court based personnel to approved community mediators and counsellors;
- replace the concepts of custody and access with 'parental responsibility';
- provide that children receive adequate and proper parenting to help them achieve their full potential and ensure parents fulfil their duties and responsibilities concerning their children;
- resolve inconsistencies between contact order and family violence orders;
- re-enact a number of existing provisions whilst updating them to be consistent with the concept of parental responsibility;
- bring staff of the Australian Institute of Family Studies under the *Public Service Act 1922*; and
- remove references to the Australian Legal Aid Office (which no longer exists).

*The committee has no comment on this bill.*

# Income Tax (Deficit Deferral) Bill 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Minister for Justice.

The bill proposes to impose a tax on the deferral of franking deficits of companies.

*The committee has no comment on this bill.*

# Income Tax (Former Complying Superannuation Funds) Bill 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Minister for Justice.

The bill proposes to impose tax on the net previous income of superannuation funds that change their status from complying to non-complying.

*The committee has no comment on this bill.*

# Income Tax (Former Non-resident Superannuation Funds) Bill 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Minister for Justice.

The bill proposes to impose tax on the net previous income of superannuation funds that change their status from non-resident to resident.

*The committee has no comment on this bill.*

# Income Tax Rates Amendment Bill 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Minister for Justice.

The bill proposes to amend the *Income Tax Rates Act 1986* to correct a small error in the threshold at which the income of a medium credit union is subject to tax (by reducing the threshold from income exceeding $50,000 to income exceeding $49,999).

*The committee has no comment on this bill.*

# Industrial Relations Legislation Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 12 October 1994 by the Minister for Industrial Relations.

The bill proposes to amend the:
*Coal Industry Act 1946*
*Industrial Relations Act 1988*
*Industrial Relations (Consequential Provisions) Act 1988* and
*Sex Discrimination Act 1984* to:

- require the Coal Industry Tribunal and Local Coal Authorities to exercise their jurisdiction in a manner more consistent with the Australian Industrial Relations Commission (AIRC),

- make awards etc. of the Coal Industry Tribunal subject to appeals and references to, and reviews by, a Full Bench of the AIRC,

- preclude the establishment of further Local Coal Authorities and the making of further appointments to existing Local Coal Authorities, and

- allow the abolition of the Coal Industry Tribunal with the AIRC performing functions and exercising powers in respect to industrial matters in the coal mining industry; and

*Remuneration and Allowances Act 1990* to convert the Parliamentary Allowance of $4,767 into salary; and
*National Occupational Health and Safety Commission* to amend the quorum and voting arrangements applicable to Commission decisions about grants to a body represented on the Commission.

## Commencement on proclamation
## Schedule 1 - item 1

Item 1 of Schedule 1 of the bill provides:

> 1. Commencement
> (1) Items 16, 17 and 18 commence on a day or days to be fixed by Proclamation.
> (2) Part 2 of this Schedule (other than items 16, 17 and 18)

commences on a day to be fixed by Proclamation.

(3) The provisions of Part 3 of this Schedule commence on a day or days (not earlier than 2 years after the date of commencement of the provisions to which subitem (2) applies) to be fixed by Proclamation.

(4) The Governor-General must not make a Proclamation fixing a day for the commencement of a provision of Part 2 or 3 of this Schedule unless the Governor of New South Wales has consented in writing to the provision coming into operation.

The committee has placed importance on the Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 which sets out a general rule about restricting the time for proclamation. The Drafting Instruction provides, in part:

3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:

(a)
a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or

(b)
a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

5. It is to be noted that if the 'repeal' option is followed, there is no limit on the time from Royal Assent to commencement, as long as the Proclamation is made by the fixed time.

6. Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an

event whose timing is uncertain (eg enactment of complementary State legislation).

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

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

The committee notes that, although the explanatory memorandum sets out the conditions for the commencement of these provisions, no unusual circumstances are suggested to warrant not providing automatic repeal at a fixed time.

The committee is of the opinion, however, that commencement could be indefinitely protracted without some limitation as to time. Accordingly, **the committee seeks the Minister's advice** whether a period of twelve months after Royal Assent might not be sufficient time to obtain the consent of the Governor of New South Wales and what steps the Minister might take to further this process.

Further, the status of items 16, 17 and 18 is unclear to the committee. The explanatory memorandum states that they can be proclaimed on a different date from the other provisions in Part 2 of Schedule 1. **The committee seeks the Minister's advice** on whether it is intended to proceed with these amendments even if the other provisions of Part 2 are never proclaimed. If so, again there seems to be no reason for not providing for automatic commencement or repeal at a fixed time.

*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.*

# Quarantine Amendment Bill 1994

This bill was introduced into the Senate on 12 October 1994 by the Minister for Small Business, Customs and Construction.

The bill proposes to amend the *Quarantine Act 1908* to allow for a limited remission power to apply to fees imposed by Ministerial determinations for quarantine services provided by the Australian Quarantine and Inspection Service.

*The committee has no comment on this bill.*

# Royal Commission into the New South Wales Police Service (Access to Information) Bill 1994

This bill was introduced into the Senate on 12 October 1994 by the Minister for Small Business, Customs and Construction.

The bill proposes to enable information relevant to the terms of reference of the Royal Commission into the New South Wales Police Service to be passed to that Royal Commission. It proposes to amend the:
*Financial Transaction Reports Act 1988* to give the Royal Commission access to AUSTRAC's database of reportable transactions under the Act; and
*Telecommunications (Interception) Act 1979* to enable agencies with the power to conduct interceptions under that Act to communicate relevant information obtained under warrant to the Royal Commission.

*The committee has no comment on this bill.*

# Social Security (Parenting Allowance and Other Measures) Legislation Amendment Bill 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the following Acts:
*Social Security Act 1991* to:

- provide for the introduction of a parenting allowance to incorporate and retain the major elements of the home child care allowance;
- modify certain social security benefit income tests;
- modify the partner allowance from 1 July 1995; and
- provide for the introduction of a widow allowance, payable from 1 January 1995 and rename the widowed person allowance;
- phase out wife pension as a discrete payment under the Act;
- provide for the introduction of an education entry payment for recipients of wife pension, partner allowance, parenting allowance, widow allowance and mature age partner allowance; and

*Social Security Legislation Amendment Act (No. 4) 1994* to remove the sunset clauses included in this Act to provide the continuation of the advance pharmaceutical allowance; and
*Data-matching Program (Assistance and Tax) Act 1990*, *Income Tax Assessment Act 1936*, *Veterans' Entitlements Act 1986*, *Health Insurance Act 1973* and *National Health Act 1953* to make consequential amendments.

## Retrospectivity
## Subclauses 2(2) 2(4) and 2(8)

These subclauses provide that some of the amendments to be made by this bill will have retrospective effect. The amendments, however, appear to be either beneficial to social security recipients or technical in nature.

*Accordingly, the committee makes no further comment on these subclauses.*

## Further use of tax file numbers
## Schedule 1 - item 1: Insertion of proposed sections 912 and 913
## Schedule 4 - item 1: Insertion of proposed section 408CD

The effect of these proposed new sections is that an allowance would not be payable unless the person and his or her partner has provided his or her tax file number to the Secretary.

The committee continues to maintain that, although tax file numbers may be considered necessary to prevent persons defrauding the system, they may also be considered to be unduly intrusive into a person's private life.

*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.*

# Student Assistance (Youth Training Allowance) Amendment Bill 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to change the name of the *Student Assistance Act 1973* to the *Student and Youth Assistance Act 1973* to provide for the payment of Youth Training Allowance to young unemployed people under the age of 18 years instead of job search allowance.

## Further use of tax file numbers

## Clause 18: Insertion of proposed sections 86 and 87 in the *Student Assistance Act 1973*

The effect of these proposed new sections is that an allowance would not be payable unless the person and his or her partner has provided his or her tax file number to the Secretary.

The committee continues to maintain that, although tax file numbers may be considered necessary to prevent persons defrauding the system, they may also be considered to be unduly intrusive into a person's private life.

> *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.*

# Student Assistance (Youth Training Allowance - Transitional Provisions and Consequential Amendments) Bill 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Minister for Schools, Vocational Education and Training.

The bill proposes to make savings and transitional provisions to complement the Student Assistance (Youth Training Allowance) Amendment Bill 1994. It provides for the treatment of claims for job search allowance made by people under the age of 18 years and which would have a date of commencement before the commencement of the Youth Training Allowance legislation.

*The committee has no comment on this bill.*

# Supported Accommodation Assistance Amendment Bill 1994

This bill was introduced into the House of Representatives on 12 October 1994 by the Minister for Housing and Regional Development.

The bill proposes to amend the *Supported Accommodation Assistance Act 1989* to prevent the Commonwealth entering into an agreement, or authorising payments, under that Act after the date on which the first State enters into an agreement under the new *Supported Accommodation Assistance Act 1994*.

*The committee has no comment on this bill.*

# Supported Accommodation Assistance Bill 1994

This bill was introduced into the House of Representatives on 12 October 1994 by the Minister for Housing and Regional Development.

The bill proposes to authorise financial assistance by the Commonwealth to the States, the Australian Capital Territory and the Northern Territory in relation to the continuation of the jointly funded Supported Accommodation Assistance Program. The bill also proposes to establish a Commonwealth Advisory Committee on Homelessness to provide community consultation in the development of policy relating to homelessness.

*The committee has no comment on this bill.*

# Taxation Laws Amendment Bill (No. 4) 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Minister for Justice.

The bill proposes to amend the following Acts:
*Income Tax Assessment Act 1936* to:

- provide a deduction for successful cash bids for certain authorities for off-shore petroleum exploration and production permits;
- relieve the higher rate of taxation on certain income derived by a minor in connection with a family breakdown;
- clarify anti-avoidance provisions relating to relief available to minor beneficiaries of 'income splitting' arrangements;
- bring franking account debits and credits into line with recent changes to the arrangements for the collection of company tax;
- ensure that when an early payment of company tax is made and other provisions are met, the total amount of imputation credits attached to the dividends cannot exceed the company tax paid;
- include in assessable income any amounts representing the return of deductible superannuation contributions to a sponsoring employer or associate of a sponsoring employer;
- clarify the calculation of notional taxable income of a credit union;
- divide the income of a pooled development fund into two classes (income from small and medium sized enterprises and other income);
- clarify the existing tax treatment of overseas superannuation funds and related payments to them;
- ensure tax concessions for superannuation contributions and benefits are limited to benefits which accumulate in superannuation funds that comply with Australian regulations;
- ensure non-resident superannuation funds cannot be used to avoid Australian regulations and Australian tax concessions are not diverted to non-residents;

- ensure that, subject to withholding tax dividend, interest and royalty income derived by non-resident entities do not qualify as foreign superannuation funds;

- extend the current exemption for amounts taxed under the foreign investment fund measures;

- recoup tax concessions given to superannuation funds that change their status from complying to non-complying and impose tax on funds changing their status from non-resident to resident;

- subject to income tax on a new basis all share and share right discount benefits provided to non-employees in respect of services; and

- make consequential amendments relating to employee share acquisition schemes; and

*Income Tax Rates Act 1986* to reduce the rate of tax payable by pooled development funds on income from small and medium sized enterprises to 15 per cent; and

*Fringe Benefits Tax Assessment Act 1986* to:

- include certain employer contributions paid to non-complying superannuation funds as fringe benefits; and

- impose fringe benefits tax on share and share right discount benefits provided by an employer to employees; and

*Superannuation Industry (Supervision) Act 1993* to restrict complying status to resident superannuation funds and resident approved deposit funds; and

*Income Tax 1986* and *Superannuation Guarantee (Administration) Act 1992* to make consequential amendments; and

*Income Tax Assessment Act 1936* and *Industry, Research and Development Act 1986* to:

- lower the expenditure threshold for the 150 per cent concession to $20,000;

- allow certain expenditure incurred on research and development activities undertaken outside Australia to be eligible for the concession; and

- reduce the expenditure threshold from $1,000,000 to $500,000 for companies registering jointly; and

*Taxation (Interest on Overpayments) Act 1982* to:

- broaden the circumstances in which interest will be paid on overpayments of income tax; and

- provide for payment of interest where there has been early payment of certain

taxes; and

*Superannuation Guarantee (Administration) Act 1992* to overcome a fall in the interest rate used to calculate superannuation guarantee charge by allowing for the rate to be prescribed for the purposes of the Act; and

*Development Allowance Authority Act 1992* to require the company chairperson's signature on applications for pre-qualifying certificates, transfers and variations of certificates of registration and pre-qualification for the development allowance.

## Retrospectivity
## Subclause 2(2) - Part 3 of Schedule 1: dividend imputation

Subclause 2(2) would permit the amendments proposed by Part 3 of Schedule 1 (apart from item 86) of this bill to have effect retrospectively from 12 October 1994, the date of the introduction of the bill. The committee notes that the explanatory memorandum states on page 51 that these proposals will amend the imputation system to introduce new provisions to account for payments and refunds of company tax under the new instalment arrangements. The explanatory memorandum further states on page 55 that:

> 3.25 Because some early balancing medium instalment taxpayers (that is, companies with accounting periods ending before 30 June 1995 in lieu of the 1994-95 financial year) are likely to make payments under the new instalment arrangements before the Bill is enacted, these provisions will commence from the date of introduction of the Bill into Parliament.
> ***[Subclause 2(2)]***

It appears to the committee that these arrangements are advantageous to the taxpayers affected.

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

## Retrospectivity
## Item 13 and subitem 21(1) of Schedule 1

These provisions would permit the relevant amendments to have effect retrospectively from I July 1979. The committee notes that the explanatory memorandum indicates on page 39 that the amendments will reinstate Parliament's original intention to relieve, from taxation at higher rates, income derived by a minor from the investment of property transferred to or beneficially to a minor as part of a legal settlement in connection with a

family breakdown.

> *As the amendments operate to the advantage of taxpayers, the committee makes no further comment on this provision.*

## Retrospectivity
## Item 88 of Schedule 1

By virtue of item 88 of Schedule 1, the amendments in respect of amounts representing the return of deductible superannuation contributions to an employer which are to be made by Part 4 of that Schedule would apply from I July 1988.

The committee notes that the explanatory memorandum indicates the reasons for the retrospectivity at paragraphs 4.3 and 4.4 which state:

> 4.3 The amendments are proposed to apply from 1 July 1988 *[item 88 of Schedule 1]*. The proposed amendments have retrospective application because of:
>
> - the nature of the arrangements entered into;
>
> - the serious threat to the revenue caused by those arrangements (a review of ten company groups by the Australian Taxation Office identified a total surplus of $3.2 billion in their employer sponsored superannuation funds. If these figures are indicative of the industry in general, then the revenue impact of any defect in the current law is potentially very significant); and
>
> - the clear thrust of the existing law.
>
> 4.4 Moreover, to allow surpluses to be repatriated tax free would give an undue benefit to employers who entered into arrangements to avoid the existing law at the expense of the taxpayer community in general.

*In the light of this explanation the committee makes no further*

*comment on this provision.*

## Retrospective application
## Items 67, 72 and 99 of Schedule 3
## Item 37 of Schedule 5

These items provide for various amendments to have a measure of retrospective application. In each case, however, the amendments operate to the benefit of taxpayers.

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

## Retrospectivity
## Part 1 of Schedule 6 - Fringe benefits tax on employee share benefits

The amendments proposed by this Part would apply from 10 May 1994.

The committee notes that the retrospectivity will date only from the night of the budget when the liability was announced.

*As the committee accepts retrospectivity where it gives effect to a Budget measure, the committee makes no further comment on the provision.*

# Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Minister for Veterans' Affairs.

The bill proposes to amend the *Veterans' Entitlements Act 1986* to:

- align the treatment of compensation payments received by service pensioners with recipients of comparable social security payments under the *Social Security Act 1991*;
- provide consequential amendments to the Act and other Acts as a result of the introduction of the income support supplement into the *Veterans' Entitlements Act 1986*;
- provide automatic eligibility for a funeral benefit to the estate of a veteran who at the time of his death was receiving extreme disablement adjustment or was a former prisoner of war;
- enable applicants to the Veterans' Review Board to be reimbursed the costs of obtaining medical evidence after the primary decision up to a maximum amount of $425 for each condition claimed and for the reimbursement of reasonable travelling expenses incurred;
- remove the provisions requiring the appointment of medical members to the Veterans' Review Board;
- allow widows, widowers and non-illness separated spouses who are partner service pensioners and blind to be paid at the rate applicable to blind veteran age and invalidity service pensioners;
- make an education entry payment available to partner and carer service pensioners;
- remove the waiting period for service pension for refugees;
- provide that the pharmaceutical allowance will no longer be payable to service, disability and war widow/er pensioners absent from Australia for 12 months or more (the payment will resume after the pensioners return to Australia);

- allow the Repatriation Commission to make determinations in relation to service pension to increase a person's rate of pension or to cancel a person's pension in situations where a determination has previously been made reducing the rate to nil; and

*Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Act 1994* to make technical amendments; and

amends other Acts to reflect the repeal of the *Seamen's War Pensions and Allowances Act 1940*.

## Retrospectivity
## Subclause 2(2)

Subclause 2(2) of this bill, if enacted, would give retrospective effect to Division 5 of Part 2 from 1 July 1994. Division 5 will enable applicants to the Veterans' Review Board to be reimbursed for the cost of obtaining relevant documentary medical evidence.

*As the amendments proposed are advantageous to the applicants, the committee makes no further comment on the provision.*

# Veterans' Affairs Legislation Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 13 October 1994 by the Minister for Veterans' Affairs.

The bill proposes to amend the *Veterans' Entitlements Act 1986* to:

- increase the qualifying age (from 55 to 60 years) at which women can qualify for age service pension from the Department of Veterans' Affairs (to be phased in over a 20 year period, commencing 1 July 1995);
- reintroduce the advance pharmaceutical allowance with effect from 1 January 1995; and
- increase the maximum rate of dependent child add-on which is payable to service pensioners for children under the age of 16 years by $52 per year.

*The committee has no comment on this bill.*

# Senate Standing Committee

# for

# The Scrutiny of Bills

# ALERT DIGEST

No. 17 of 1994

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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

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

## TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

# CONTENTS



* The Committee has commented on these Bills.

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

# Appropriation Bill (No. 3) 1994-95

This bill was introduced into the House of Representatives on 9 November 1994 by the Minister for Finance.

The bill proposes to appropriate money ($675,722,000), in addition to those made by Appropriation Act (No. 1) 1994-95, out of the Consolidated Revenue Fund to meet payments for the ordinary annual services of the Government.

*The committee has no comment on this bill.*

# Appropriation Bill (No. 4) 1994-95

This bill was introduced into the House of Representatives on 9 November 1994 by the Minister for Finance.

The bill proposes to appropriate money ($399,214,000), in addition to those made by Appropriation Act (No. 2) 1994-95, out of the Consolidated Revenue Fund 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.

*The committee has no comment on this bill.*

# Appropriation (Parliamentary Departments) Bill (No. 2) 1994-95

This bill was introduced into the House of Representatives on 9 November 1994 by the Minister for Finance.

The bill proposes to appropriate money ($7,239,000), in addition to those made by Appropriation (Parliamentary Departments) Act 1994-95, out of the Consolidated Revenue Fund for recurrent expenditure of the parliamentary departments.

*The committee has no comment on this bill.*

# Commonwealth Electoral Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 9 November 1994 by the Minister for Administrative Services.

The bill proposes to amend the *Commonwealth Electoral Act 1918* to provide that:

- registered political parties will not have to report minute details of financial transactions in annual returns;
- donors to registered political parties will report annually to the Australian Electoral Commission (AEC);
- the agent of a registered political party will have a right to attend compliance investigations into local party units;
- organisations closely related to registered political parties will be required to furnish annual returns to the AEC and to detail the source of capital where income derived has been used wholly or mainly for the benefit of a political party;
- an anomaly will be removed to enable the current party agent to make a request for amendment to a claim or return;
- the rate for election funding reimbursement will be amended so that a Senate vote will be funded at the same rate as a House of Representatives vote and the rate will be increased to $1.50 per vote; and
- payments of election funding entitlements will also be made to the National Secretariat of a registered political party.

*The committee has no comment on this bill.*

# Infrastructure Certificate Cancellation Tax Bill 1994

This bill was introduced into the House of Representatives on 9 November 1994 by the Minister for Justice.

The bill proposes to amend the *Income Tax Assessment Act 1936* to impose a tax on the certificate holder as a consequence of a breach of the conditions relating to a certificate issued allowing the holder to raise funds through "infrastructure borrowings".

*The committee has no comment on this bill.*

# Organisation for Economic Co-operation and Development (Financial Support Fund) Repeal Bill 1994

This bill was introduced into the House of Representatives on 9 November 1994 by the Assistant Treasurer.

The bill proposes to repeal the *Organisation for Economic Co-operation and Development (Financial Support Fund) Act 1976* which is no longer required as the fund was never brought into effect, because of the failure of some other OECD countries to ratify the agreement.

*The committee has no comment on this bill.*

# Pipeline Legislation Amendment Bill 1994

This bill was introduced into the Senate on 9 November 1994 by the Minister for Defence.

The bill proposes to amend the:

*Moomba-Sydney Pipeline System Sale Act 1994* to:

- ensure State licensing laws apply to private sector pipelines when these run in easements in which the Commonwealth has an ownership interest, and

- ensure instruments created for the express purpose of obtaining new easements required for the ethane pipeline remain in the ownership of the Pipeline Authority; and

*Pipeline Authority Act 1973* to:

- provide progressive transfer to Gorodok Pty Ltd of easements obtained by the Pipeline Authority, and

- facilitate the registration of Gorodok's ownership of easements by State titles offices.

## Retrospectivity
## Subclause 2(2)

Subclause 2(2), if enacted, would give retrospective effect to Part 2 of this bill from 1 July 1994. Part 2 of the bill would amend the *Moomba-Sydney Pipeline System Sale Act 1994.*

The committee notes from paragraph 3 of the explanatory memorandum that the purpose of the amendments is to clarify the original intention of that Act that State licensing laws apply to private sector pipelines when these run in easements in which the Commonwealth has an ownership interest.

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

# Racial Hatred Bill 1994

This bill was introduced into the House of Representatives on 10 November 1994 by the Attorney-General

The bill proposes to amend the:

*Crimes Act 1914* to create new criminal offences in respect of racial hatred to give effect to Australia's obligations under Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination and Article 20.2 of the International Covenant on Civil and Political Rights; and

*Racial Discrimination Act 1975* to place offensive behaviour based on racial hatred within the existing jurisdiction of the Human Rights and Equal Opportunity Commission for conciliation and/or determination of complaints.

## Freedom of communication
## Part 2

The amendments to the *Crimes Act 1914* proposed by Part 2 of this bill may be regarded, prima facie, as curtailing the right of freedom of communication in that they would create criminal offences, punishable by a term of imprisonment, from statements made by the accused. Such an interference would be considered a trespass on personal rights and liberties, as contemplated by principle 1(a)(i) of the committee's terms of reference. However, the principle requires the committee to examine legislation to consider whether it trespasses **unduly** on personal rights and liberties.

The committee acknowledges that the freedom of expression is not absolute. In this regard, the committee notes that Article 19 of the International Convention on Civil and Political Rights (to which Australia is a signatory) provides:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> > (a) For respect of the rights or reputations of others;
> >
> > (b) For the protection of national security or of public order (ordre public), or of public health or morals.

What is a 'necessary' restriction on the freedom of expression has to be decided on the basis of what is justifiable in the particular circumstances. Restrictions on the freedom of expression which are currently regarded as necessary relate to matters such as defamation and pornography.

Ultimately, what is a necessary restriction is a matter of public policy. As such, it is a question which is appropriately a matter for decision by the Parliament.

The committee draws attention to the tests proposed by the Chief Justice and Mr Justice Brennan in the High Court for dealing with a similar problem in the political advertising bans case arising from the *Political Broadcasts and Political Disclosures Act 1991*.[1] In that case, a majority of judges found that there was a constitutional implication of freedom of communication with respect to political matters. The Racial Hatred Bill, on the other hand, deals with freedom of communication in a wider context. Nevertheless, the principles stated by the members of the High Court to determine what is a necessary restriction are equally applicable.

The Chief Justice pointed out that freedom of communication is not absolute. He used the example of intimidation:

> "Parliament may regulate the conduct of persons with regard to elections so as to prevent intimidation and undue influence, even though that regulation may fetter what otherwise would be free communication".[2]

Freedom to communicate does not always and necessarily prevail over competing interests of the public. The test to be applied is one of weighing the respective interests

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[1] *Australian Capital Television Pty Ltd and Ors v The Commonwealth* (1992) 66 ALJR 695 (HC).

[2] loc. cit. p 705.

involved and assessing the necessity for the restriction imposed. The Chief Justice spoke of restriction imposing a burden on free communication that was disproportionate to the attainment of the competing public interest.

Mr Justice Brennan proposed a similar test of proportionality:

> "To determine the validity of a law which purports to limit political advertising, it is necessary to consider the proportionality between the restriction which a law imposes on the freedom of communication and the legitimate interest which the law is intended to serve....Proportionality is, of course, a matter of degree. When the boundary of permissible restriction on freedom of speech is passed, the law imposing the restriction loses the constitutional support of the power which would otherwise be available to support it."[3]

He also said:

> "...the freedom cannot be understood as a personal right the scope of which must be ascertained in order to discover what is left for legislative regulation; rather, it is a freedom of the kind for which s 92 of the Constitution provides: an immunity consequent on a limitation of legislative power. The power cannot be exercised to impair **UNDULY** the freedom of informed political discussion which is essential to the maintenance of a system of representative government."[4]

He went on to use wartime censorship as an example of a law in which freedom to discuss matters of defence may be virtually eliminated. He suggested a variable boundary for the freedom because for a law to restrict validly a freedom of communication of political matters, "the restriction must serve some other legitimate interest and it must be proportionate to the interest to be served." He also said that the "proportionality of the restriction to the interest served is incapable of a priori definition: in the case of each law, it is necessary to ascertain the extent of the restriction, the nature of the interest served and the proportionality of the restriction to the interest served."

He then examined each of those three points: he determined the extent of the restriction on political communication, he set forth the purpose of the proposed legislation and then considered whether "the prohibition on political advertising by means of the electronic

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[3] loc.cit. p 711.

[4] loc. cit. p 708. Emphasis added.

media during election periods imposed by s 95B is not disproportionate to the objects of minimising the risk of political corruption and reducing the untoward advantage of wealth in the formation of political opinion."[5]

To assist the Senate to determine whether the Racial Hatred Bill unduly trespasses on personal rights and liberties, the committee is of the view that a similar process needs to be undertaken: is the restriction on freedom of speech proportional to the interest to be served by imposing that restriction - the protection of individuals and groups from harassment and fear because of their race, colour or national or ethnic origin?

The answer to such a question will show whether the provisions unduly trespass on personal rights and liberties.

> *As the answer is appropriately a matter for decision by the Parliament, however, the committee expresses no further views on the bill.*

[5] loc. cit. p 711.

# Weapons of Mass Destruction (Prevention of Proliferation) Bill 1994

This bill was introduced into the Senate on 9 November 1994 by the Minister for Defence.

The bill proposes to prevent Australian assistance being given to programs for the development of weapons of mass destruction programs. It does not extend to exports of goods covered by the Customs (Prohibited Exports) Regulations.

## Reversal of onus of proof
## Subclause 14(7)

Subclause 14(7) provides:

> **(7)** In a prosecution for an offence for supplying or exporting goods or providing services in contravention of section 9, 10 or 11, it is a defence if it is proved that the goods were supplied or exported, or the services were provided, in compliance with conditions contained in a notice in force under this section.

The **committee seeks the Minister's advice** on the usefulness and appropriateness of sub-clause 14(7).

On analysis, there seems to be a problem in how the offence provisions operate with respect to permits under clause 13 and notices under clause 14.

Clause 13 allows the Minister to issue a permit to supply or export goods or provide services (designated actions) where the Minister is satisfied that such designated actions would not be contrary to Australia's international or treaty obligations or the national interest. Clause 14, however, allows the Minister, where the Minster considers that a clause 13 permit could not be given, to issue a notice allowing such actions subject to conditions stated in the notice.

Clauses 9, 10 and 11 provide for prohibition of the designated actions except where they are authorised by a permit under clause 13 and further provide for designated actions without permit or in contravention of a condition stated in a permit to be offences. Subclauses 9(2), 10(2) and 11(2) provide that the respective clauses operate subject to subclause 14(7).

Clause 14, however, has its own offence provision - subclause 14(6) - which prohibits the designated actions in contravention of a notice or of a condition in a notice.

It seems to the committee that the intention of providing the defence in subclause 14(7) is to clarify that where the Minister cannot give a permit under clause 13 but issues a notice under clause 14, a person should not be exposed to prosecution under clauses 9, 10 and 11 because no permit exists. Obviously, if no permit exists, the alternative charge under clauses 9, 10 and 11 of acting contrary to a condition in a permit cannot be laid.

The committee is concerned that subclause 14(7) should need to be invoked in a prosecution under clauses 9, 10 or 11.

It seems inappropriate to prosecute someone for not having a permit where the Minister has considered that a permit cannot be issued but instead the Minister has issued a notice. It is even more inappropriate where the law provides a specific offence for not complying with the notice.

The committee is of the opinion that if consideration is being given to prosecuting someone for acting without a permit, it should be incumbent on the prosecution to find out whether a notice has been issued. If it then seems that the conditions of the notice have not been complied with, prosecution should proceed only under subclause 14(6). **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.*

# Senate Standing Committee

# for

# The Scrutiny of Bills

# ALERT DIGEST

No. 18 of 1994

20 NOVEMBER 1994

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# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

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

## TERMS OF REFERENCE

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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* The Committee has commented on these Bills.

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.

# Corporations Law Amendment Bill 1994

This bill was introduced into the Senate on 16 November 1994 by the Minister for Defence.

The bill proposes to amend the Corporations Law to facilitate the trading of new securities and futures industry products on a more flexible basis.

## Inappropriate delegation of legislative power
## Clauses 3 and 4

Proposed subsections 72(1A) and (1B) of the Corporations Law, to be inserted by clause 3, and proposed subsections 92(1A) and (1B) of the Corporations Law, to be inserted by clause 4, were the subject of comment by the Committee, in Alert Digest No. 6 of 1994, when they were included in the Corporations Legislation Amendment Bill 1994. The committee took the view that the proposed subsections may be an inappropriate delegation of legislative power, as the definition of a futures contract and a security, for the purposes of the Corporations Law, may to some extent, be determined by regulations and not in the primary legislation. The proposed subsections were withdrawn from the earlier bill in the course of its being debated in the House of Representatives.

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

> The committee received a submission from Michael G Hains expressing concern at 'the delegation of substantial powers to modify the Corporation Law as it applies to derivative financial products'.
>
> The submission argued that the definition of what constitutes a futures contract or a security should be in primary legislation and not left to delegated legislation.
>
> The committee sought the Attorney-General's advice on the matters raised by Mr Hains submission.
>
> Pending the Attorney-General's advice, the committee drew Senators' attention to the provision, as it may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.

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

> The Committee has sought my advice on the matters raised by the submission from Mr Michael G Hains which is attached to the Digest.
>
> I wish to advise the Committee that the Government has decided not to proceed with the amendments proposed by item nos 4 to 8 and item 21 of Schedule 8. The amendments in question are to the definitions of "securities" and "futures contract", to facilitate the trading of equity based instruments having the characteristics of both equity and futures products.
>
> The amendments were included in the Bill, as an urgent measure, following the public exposure of the draft Bill and before its introduction. I acted quickly to incorporate the amendments in the Bill at that stage, following representations by the Australian Stock Exchange ("ASX") stressing their importance and urgency. The ASX stated that they wished to be able to trade an important new product from 1 July this year. However, I have now been informed by the ASX that they will not be in a position to trade this product until later in the year.
>
> In light of that, I decided to withdraw the amendments so that further consultation can be undertaken with industry representatives. An amendment to this effect was moved on behalf of the Government and agreed to by the House of Representatives during the course of the second reading debate in the House.

As clauses 3 and 4, if enacted, would enable the regulations to modify the Corporations Law, the concerns of the committee have not been addressed.

> *The committee, therefore, continues to draw Senators' attention to the provisions, as they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

# Customs Tariff Amendment Bill (No. 2) 1994

This bill was introduced into the House of Representatives on 16 November 1994 by the Parliamentary Secretary to the Minister for Industry, Science and Technology.

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

- ensure Australia's compliance with the Harmonized Commodity Description and Coding System;
- reduce the customs rate of duty on topped crude oil, fuel oil, heating oil and kerosene;
- extend the phase out of access to the Developing Country margin of preference for certain countries;
- increase the customs duty on aviation gasoline and aviation kerosene;
- reduce the customs duty on aviation gasoline;
- provide a free rate of duty for unvulcanised compounded rubber of Malaysian origin;
- insert a duty rate of 15 per cent for certain passenger motor vehicle replacement components;
- restores the correct level of assistance for glass and plastic semi-finished lens blanks for use in spectacles; and
- make technical and administrative changes.

## Retrospectivity
## Subclause 2(2)

By virtue of subclause 2(2), clause 3 would have retrospective effect from 1 January 1992. The amendments, however, made by clause 3 appear to be technical in nature and appear not to affect the rate of tariff.

*The committee, therefore, makes no further comment on this provision.*

## Retrospectivity
## Subclause 2(3)

Subclause 2(3), if enacted, would give retrospective effect to the amendments made by Schedule 1. These amendments give effect to changes announced in the Budget.

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

## Retrospectivity
## Subclauses 2(4) to (6)

Subclauses 2(4) to (6), if enacted, would give retrospective effect to various amendments set out in schedules 2 and 3 of the bill and in clause 6 of the bill.

Clause 6 corrects a spelling error and accordingly requires no further comment.

Other amendments arise from bilateral trade concessions under the Malaysia-Australia Trade Agreement or were announced in the Budget and also require no further comment.

It is not clear, however, from the explanatory memorandum whether there has been previous announcement of the amendments extending the coverage of the phase out of access to the Developing Country margin of preference and those inserting a higher rate of duty on certain goods used as replacement components in passenger motor vehicles.

The committee has been prepared to accept retrospectivity with respect to tariff changes where the changes have been announced and the legislation has been introduced so expeditiously that it is not affected by the terms of the Senate Resolution of the 8 November 1988. The committee has also been prepared to accept retrospectivity where otherwise liability to taxation could be inappropriately avoided. The **committee seeks the Minister's advice on these issues.**

*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.*

# Health and Other Services (Compensation) Administration Fee Bill 1994

This bill was introduced into the House of Representatives on 16 November 1994 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to impose administration fees to cover costs of the processes set out in the Health and Other Services (Compensation) Bill 1994 and the Health and Other Services (Compensation) Care Charges Bill 1994. The fee will be payable by insurers and other compensation payers at the time an amount of compensation becomes payable in relation to a personal injury compensation claim.

*The committee has no comment on this bill.*

# Health and Other Services (Compensation) Bill 1994

This bill was introduced into the House of Representatives on 16 November 1994 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill is one of a package to address double dipping in health and community service programs by compensable people. The bill provides for:

- the recovery of medicare and nursing home benefits paid for services in respect of a compensable injury prior to compensation becoming payable;
- the Health Insurance Commission to act as the Commonwealth's agent for the recovery of benefits; and
- a requirement that all insurers and other compensation payers notify the Health Insurance Commission of all claims lodged for compensation where liability is not accepted within six months of the date of claim.

## Abrogation of legal professional privilege
## Proposed new paragraph 38(3)(a)

Proposed new paragraph 38(3)(a), if enacted, would preclude a person from relying on a claim of legal professional privilege as a reason for not complying with a notice under section 36 to give information or produce a document.

Paragraph 38(3)(a) provides :

> **(3)** For the purposes of subsection (1), a person is not taken to have reasonable excuse for refusing or failing to comply with a notice under section 36 only because:
>
> (a) the information or document is, or could be, subject to a claim of privilege that would prevent the information being given in evidence, or the document being produced as evidence, in proceedings before a court of tribunal;

The committee notes the reasons for the provision given on page 28 of the explanatory memorandum which states:

> Subclause 38(3) provides that the fact that the information or

> document which is sought is or could be subject to legal professional privilege does not, of itself, constitute a reasonable excuse for failing to comply with a notice issued under clause 36. Similarly, a contractual obligation not to relay the information or document to any third party is not a "reasonable excuse" for failing to comply with a requirement to provide information under clause 36. These provisions are an important feature of this Bill because they will improve the transparency of settlements and judgements in compensation cases.

The committee questions whether the advantages to be gained from this provision outweigh the trespass on the right to maintain confidentiality in client-solicitor relationships.

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

## Abrogation of the privilege against self-incrimination Proposed new subsection 38(4)

This proposed section, if enacted, would abrogate the privilege against self-incrimination for a person required to answer questions or produce documents under section 36.

Again, the committee questions whether the advantages to be gained from this provision outweigh the trespass on personal rights in the abrogation of the privilege against self-incrimination.

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

# Health and Other Services (Compensation) Care Charges Bill 1994

This bill was introduced into the House of Representatives on 16 November 1994 by the Parliamentary Secretary to the Minister for Human Services and Health.

The provisions of the bill essentially duplicate those provisions in the Health and Other Services (Compensation) Bill 1994 which relate to the recovery of medicare and nursing home benefits paid to the compensable person prior to settlement or judgment. Section 55 of the Constitution requires that proposed laws imposing taxation be contained in separate legislation. Accordingly, this bill satisfies that requirement should any of the proposed recovery provisions be regarded as laws imposing taxation.

*The committee has no comment on this bill.*

# Health and Other Services (Compensation) (Consequential Amendments) Bill 1994

This bill was introduced into the House of Representatives on 16 November 1994 by the Parliamentary Secretary to the Minister for Human Services and Health.

The bill proposes to make consequential amendments to the *Health Insurance Act 1973*, the *Health Insurance Commission Act 1973* and the *National Health Act 1953* as a result of the new arrangements contained in the Health and Other Services (Compensation) Bill and the Health and Other Services (Compensation) Care Charges Bill 1994.

*The committee has no comment on this bill.*

# Qantas Sale Amendment Bill 1994

This bill was introduced into the Senate on 16 November 1994 by the Minister for Defence.

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

- allow Qantas to participate in the Australian Stock Exchange's new electronic system for registering share transfers (CHESS);

- vary provisions protecting employees' accrued long service leave entitlements to ensure consistency with other Acts;

- extend the sunset clause to 31 August 1995, if required; and the

*Air Navigation Act 1920* to confirm that controls on foreign shareholdings in Australian international airlines do not apply to Qantas.

*The committee has no comment on this bill.*

# Telecommunications (Standards of Service) Amendment Bill 1994

This bill was introduced into the House of Representatives on 7 November 1994 by Mr Forrest as a Private Member's bill.

The bill proposes to amend the *Telecommunications Act 1991* to amend the standard telephone definition to the 'standard telecommunications service'. Further it proposes that Austel will be empowered to recommend to the Minister changes to the definition which, if accepted in whole or part, would be effected through regulation and consequently a disallowable instrument.

*The committee has no comment on this bill.*