

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

**No. 1 of 1996**

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## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

Senator **B Cooney (Chairman)**  
Senator **R Bell**  
Senator **the Honourable I Campbell**  
Senator **W Crane**  
Senator **M Forshaw**  
Senator **S Macdonald**

### **TERMS OF REFERENCE**

#### **Extract from Standing Order 24**

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

# CONTENTS

	<b>Page</b>
Bills Restored to the Notice Paper	7
Acts Interpretation (Delegated Legislation) Amendment Bill 1991[1993][1996]	9
Australian Centennial National Rail Transport Development Bill 1990[1993][1996]	10
Australian Sports Drug Agency Amendment Bill 1996	11
<input type="checkbox"/> Crimes Amendment (Controlled Operations) Bill 1996	12
<input type="checkbox"/> Customs and Excise Legislation Amendment Bill (No. 1) 1996	18
<input type="checkbox"/> Dairy Produce Amendment Bill 1996	21
<input type="checkbox"/> Dairy Produce Levy (No. 1) Amendment Bill 1996	22
Education and Training Legislation Amendment Bill 1996	23
<input type="checkbox"/> Excise Tariff Amendment Bill 1996	24
Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 1996	25
Health Insurance Amendment Bill 1996	26
Health Legislation (Powers of Investigation) Amendment Bill 1996	27
Housing Assistance Bill 1996	28
<input type="checkbox"/> <b>The committee has commented on these bills</b>	

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.

Housing Loans Insurance Corporation (Transfer of Assets and Abolition) Bill 1996	29
Indigenous Education (Supplementary Assistance) Amendment Bill 1996	30
Koongarra Project Area Repeal Bill 1996	31
Loan Bill 1996	32
Ministers of State Amendment Bill 1996	33
Parliamentary Proceedings Broadcasting Amendment Bill 1996	34
<input type="checkbox"/> Primary Industries and Energy Legislation Amendment Bill (No. 1) 1996	35
Prohibition of Exportation of Uranium (Customs Act Amendment) Bill 1996	38
Restitution of Property to King Island Dairy Products Pty Ltd 1996	39
<input type="checkbox"/> Sexuality Discrimination Bill 1995[1996]	40
Shipping Grants Legislation Bill 1996	43
Supply Bill (No. 1) 1996-97	44
Supply Bill (No. 2) 1996-97	45
Supply (Parliamentary Departments) Bill 1996-97	46
Sydney 2000 Games (Indicia and Images) Protection Bill 1996	47
<input type="checkbox"/> Taxation Laws Amendment Bill (No. 1) 1996	48
<input type="checkbox"/> Telstra (Dilution of Public Ownership) Bill 1996	50
<input type="checkbox"/> Therapeutic Goods Amendment bill 1996	52
<input type="checkbox"/> <b>The committee has commented on these bills</b>	

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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.

Toxic Chemicals (Community Right to Know) Bill 1993[1996]	55
Uranium Mining in Australian World Heritage Properties (Prohibition) Bill 1996	59
World Heritage Properties Conservation Amendment (Protection of Wet Tropics of Tully) Bill 1996	60

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## **Bills Restored to the Notice Paper**

On 1 and 2 May 1996, certain bills which had been introduced into the Senate in previous sessions were restored to the Notice Paper pursuant to resolutions of the Senate. The effect of the resolutions was to allow consideration of the bill in each case to resume at the stage reached in the previous session of Parliament.

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

Acts Interpretation (Delegated Legislation) Amendment Bill 1991 [1993][1996]

Australian Centennial National Rail Transport Development Bill 1990 [1993][1996]

Toxic Chemicals (Community Right to Know) Bill 1993 [1996]

The committee has previously dealt with these bills and made no comment:

Air Navigation Amendment (Extension of Curfew and Limitation of Aircraft Movements) Bill 1995[1996]

Commonwealth Electoral (Printing, Publishing and Distribution of Electoral Matters) Amendment Bill 1990 [1993][1996]

Constitution Alteration (Appropriations for the Ordinary Annual Services of the Government) Bill 1987 [1990][1993][1996]

Constitution Alteration (Ecology, Diversity and Sustainability) Bill 1995 [1996]

Constitution Alteration (Electors' Initiative) Bill 1989 [1990][1993][1996]

Constitution Alteration (Fixed Term Parliaments) Bill 1987 [1990][1993][1996]

Constitution Alteration (Qualifications and Disqualifications of Members of the Parliament) Bill 1992 [1993][1996]

Defence Amendment Bill 1988 [1990][1993][1996]

Delegated Legislation Review Bill 1988 [1990][1993][1996]

Federal Court (Grouped Proceedings) Bill 1989 [1990][1993][1996]

Income Tax Assessment (Housing Loan Interest) Amendment Bill 1989 [No.2] [1990][1993][1996]

Income Tax Assessment (Savings Accounts Interest) Amendment Bill 1989  
[No.2] [1990][1993][1996]

Motor Vehicles Standards (Emission Quotas) Amendment Bill 1990  
[1993][1996]

National Residue Survey Administration (Cost Sharing) Amendment Bill  
1993 [1996]

Nuclear Non-Proliferation (Exports) Bill 1988 [1990][1993][1996]

Nuclear Power, Uranium Enrichment and Reprocessing (Prohibition) Bill  
1993 [1996]

Parliamentary Approval of Treaties Bill 1995 [1996]

Parliamentary Commission of Inquiry (Security of Australia) Bill 1994 [1996]

Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill  
1994 [1996]

Prohibition of Exportation of Uranium to France (Customs Act Amendment)  
Bill 1995 [1996]

Radioactive Waste (Regulation of Exports and Imports) Bill 1992  
[1993][1996]

Tax Legislation Amendment (Fiscal Responsibility) Bill 1993 [1996]

World Heritage Properties Conservation (Protection of Exit Cave, Tasmania)  
Amendment Bill 1992 [1993][1996]

The following bill, also restored to the Notice Paper, was introduced shortly before the Senate rose for its Summer recess and, as a result, had not been dealt with by the committee before it lapsed when the Parliament was prorogued on 29 January 1996:

Sexuality Discrimination Bill 1995 [1996]

It is dealt with in this Digest.

## **Acts Interpretation (Delegated Legislation) Amendment Bill 1991[1993][1996]**

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

The bill proposes to provide for the:

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

### **General comment**

The committee notes that in his Second Reading speech on this bill, Senator Harradine drew attention to the fact that the bill proposes to put into effect reforms which have been recommended at various times by the Senate Standing Committee on Regulations and Ordinances.

## **Australian Centennial National Rail Transport Development Bill 1990[1993][1996]**

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

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

### **Declarations by the Minister Clauses 4 and 5**

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

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

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

## **Australian Sports Drug Agency Amendment Bill 1996**

This bill was introduced into the Senate on 8 May 1996 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the *Australian Sports Drug Agency Act 1990* to:

- consolidate the information on testing procedures into one section;
- redraft the definition of competitor to clarify the focus of the Agency's testing activities;
- enable the Agency to comply with requests from all International Sporting Federations for sample collection and testing;
- allow the Agency to conduct its testing procedures under the rule of substantial compliance;
- protect the interests of under aged and intellectually disabled competitors when notifying results of drug tests by reporting the results to a person with long term parental responsibility or a guardian;
- allow the Agency to notify a national sporting organisation of a possible positive test result without divulging the competitor's identity at that stage;
- enable the Agency to provide a competitor's submission (with the competitor's consent) to the national sporting organisation to assist in its hearing process;
- enable the Agency to pass information to a national sporting organisation regarding a third person who interferes with sample collection and testing procedures;
- amend the objectives and functions to reflect the current role of the Agency and its strategic direction.

*The committee has no comment on this bill.*

## Crimes Amendment (Controlled Operations) Bill 1996

This bill was introduced into the Senate on 8 May 1996 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the *Crimes Act 1914* to:

- allow the Commissioner, Deputy Commissioners and Assistant Commissioners of the Australian Federal Police (AFP) and members of the National Crime Authority (NCA) to issue certificates authorising a controlled law enforcement operation involving the import, export and/or possession of narcotic drugs;
- provide that certain law enforcement officers involved in an authorised controlled operation are not criminally liable for offences against section 233B of the *Customs Act 1901*, sections 10-14 of the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*, associated offences and States or Territory related offences
- require the AFP and NCA to report to the Minister on results of applications for certificates authorising controlled operations and the reasons for the decision in each case, and require the Minister to report to Parliament on these matters to Parliament;
- provide that the protection of a certificate authorising an operation does not extend to conduct involving the inducement of a suspect to commit an offence;
- preserve judicial discretions to exclude evidence or stay proceedings, except to the extent that these discretions are expressly restricted by the bill;
- require the making of reports to the Minister and to Parliament, detailing the route which narcotic goods passed in the course of an authorised controlled operation, the persons or agencies who had control of the goods during and after the operations, and the current status and whereabouts of the narcotic goods;
- provide that the fact that law enforcement officials took part in, or facilitated, the importation of narcotics prior to the commencement of this legislation, is not to render evidence of that importation inadmissible where the importation was made pursuant to a request from the AFP to the Australian Customs Service for an exemption from detailed customs scrutiny; and
- include procedures which will contain the usage of controlled operations to instances involving the investigation or detection of, or the prosecution of persons for, serious criminal activity.

This bill is substantially the same as the one with which the committee dealt with in Alert Digest No. 11 of 1995, in which it made various comments. The then Minister for Justice responded to those comments in a letter dated 29 August 1995. The committee published the Minister's response in its Thirteenth Report of 1995. For the information of Senators the relevant extract from that Report is reproduced below.

The committee notes that the recommendations made by the Senate Legal and Constitutional Legislation Committee in its Report on the previous Bill in September 1995 appear to have been substantially accepted. The committee also notes that the Legal and Constitutional Committee reached the same conclusion as the Scrutiny of Bills Committee that the bill was constitutionally valid because it is within Parliament's power to decide the parameters of a statutory offence. Having re-examined the question, the committee is content to leave for ultimate resolution by the Senate whether the trespass on personal rights and liberties occasioned by the prospective operation of the bill is appropriately balanced by the need to ensure that crimes relating to narcotics are detected and the offenders punished.

For the reasons, however, contained in its Thirteenth Report, the committee continues to be concerned with the retrospective application of Division 3 of the Schedule because, in some circumstances, retrospective application may unduly trespass on personal rights and liberties. The committee acknowledges that this bill does not criminalise previously non-criminal conduct. Criminalising previously non-criminal conduct, however, is not the only way in which retrospectivity may unduly trespass on personal rights and liberties.

The committee is concerned that the effect of the bill is to take away the protection which some persons, presently accused, have from the inadmissibility, generally, of evidence where law enforcement officers broke the law by committing an element of the offence for which those accused are being prosecuted.

*The committee, therefore, 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.*

***Extract from Thirteenth Report of 1995 on Crimes Amendment (Controlled Operations) Bill 1995***

**Abrogation of the effect of a High Court decision  
General Comment**

In Alert Digest No. 11 of 1995, the committee noted that this bill sought to abrogate the effect of the decision of the High Court in *Ridgeway v R*. In that case the High Court held that evidence should generally not be admitted where law enforcement officers break the law by committing an element of the offence for which an accused person is being prosecuted. This decision was based on public policy grounds and in defence of the civil liberties of an accused person.

The committee pointed that to the extent that the bill abrogates the rights of an accused person, it may be considered to trespass on personal rights and liberties. The committee noted that the abrogation was limited to prosecutions in respect of certain offences relating to narcotics. The committee also noted, however, that the Victorian Council for Civil Liberties, among others, opposed these measures. Whether the trespass on personal rights and liberties, therefore, is appropriately balanced by the need to ensure that crimes relating to narcotics are detected and the offenders punished, in the committee's view, was a matter for ultimate resolution by the Senate.

The Committee drew 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.

On this issue, the Minister has responded:

The Committee's first comment is that the Bill may trespass on individual rights and liberties, in abrogating the effect of the decision in *Ridgeway v R* (1995) 129 ALR 41, to the detriment of accused persons.

This is arguably the case in relation to the transitional provisions of the Bill (ss 15T to 15V) which I will discuss below. It is unquestionably not the case in relation to the remainder of the Bill. The provisions of the Bill dealing with future operations in no way alter the exclusionary rule of evidence laid down in *Ridgeway*. The discretion of the court to exclude unlawfully procured evidence remains intact.

Rather, the provisions dealing with future operations take up the express invitation of the High Court for Parliament to legislatively authorise controlled operations, if Parliament wished police to use this technique. For example, Chief Justice Mason and Justices Deane and Dawson held that:

if it be desired that those responsible for the investigation of crime should be freed from the restraints of some provisions of the criminal law, a legislative regime should be introduced exempting them from those requirements (*Ridgeway* at 58).

The committee thanks the Minister for this response. The committee, however, is not concerned with the validity of the bill. The committee, as much as the High Court, is aware that it is within the power of Parliament to pass a law that makes lawful that which was previously unlawful, if Parliament so wishes. The function of the committee is to make the Senate aware that such a bill may infringe current personal rights and liberties.

The committee is concerned that the effect of the bill is to take away the protection which an accused currently has from the inadmissibility, generally, of evidence where law enforcement officers break the law by committing an element of the offence for which the accused is being prosecuted.

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

### **Retrospective application**

#### **Proposed subsection 15T(1) [*Subsection 15U in the 1996 Bill*]**

Proposed section 15T provides:

(1) In this Division, a reference to a controlled operation is a reference to a controlled operation started before the commencement of this Part.

(2) In this Division:

*Collector of Customs for a State or Territory* has the same meaning as in the *Customs Act 1901*.

*Ministerial Agreement* means the agreement:

- a) concerning the relationship between the Australian Customs Service on the one hand, and the National Crime Authority and the Australian Federal Police on the other, with respect to narcotic drug law enforcement; and
- b) made by the Minister for Industry Technology and Commerce and the Special Minister of State on 3 June 1987.

In Alert Digest No. 11 of 1995, the committee noted that proposed subsection 15T(1), if enacted, would allow the retrospective application of the other provisions of the bill relating to the admissibility of evidence where law enforcement officers break the law by committing an element of the offence for which an accused person is being prosecuted. The effect is not only to abrogate the rights of the accused person, but to do so retrospectively. The committee sought the Minister's advice whether retrospectivity, which could extend as far as June 1987, was necessary.

Pending the Minister's advice, 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.

On this issue, the Minister has responded as follows:

The second comment made by the Committee is that pending my advice, Senators should note that proposed section 15T possibly unduly trespasses on personal rights and liberties, in that it will retrospectively abrogate the rights of accused persons.

I would draw the Committee's attention to the comments of the Member for Tangney, the Honourable Daryl Williams QC, MP, former Shadow Attorney-General, in the second reading debate on the Bill in the House of Representatives:

For my part, I regard the so-called retrospective section of the Bill as not retrospective in any real sense... The retrospective effect of this part of the Bill is to make evidence that would, under the decision in *Ridgeway*, almost certainly be excluded from evidence against an accused in a narcotics case because of the illegality of the police conduct. On the face of it, it does not affect the elements of the substantive criminal offence with which the accused is charged.

This therefore appears not to be a case where the Parliament is by legislation retrospectively making illegal an act that at the time it was committed was lawful (*Hansard*, House of Representatives, 22 August 1995 at 16-17).

The transitional provisions (ss 15T to 15V) are only partly retrospective - they lay down a rule of evidence in future cases, by reference to law enforcement conduct that has taken place in the past. The Bill will not, therefore, unsettle the result in any case in which the admissibility of evidence is determined before the Bill's commencement.

Without the transitional provisions, the evidence available to prosecute a number of pending cases relating to serious Commonwealth narcotics trafficking offences, punishable by 25 years to life imprisonment, will be in serious jeopardy. In at least two cases, there is no alternative State charge, and in most others, the evidence available to support State charges is greatly inferior to that available to support the Commonwealth charges in jeopardy because of *Ridgeway*.

Furthermore, the sentences likely to be imposed on up to ten alleged narcotics traffickers, if convicted, are likely to be less than would otherwise have been the case, because of the need to avoid charges reliant on *Ridgeway* type evidence.

While the transitional provisions have been incorporated in the Bill to preserve necessary evidence of these serious offences, they have been given as narrow scope as possible, mindful of the importance of minimising retrospectivity.

The provisions only apply to evidence relating to a Commonwealth narcotics trafficking offence, obtained in the course of an investigation relating to such an offence. Such evidence is only preserved in relation to a limited range of unlawful conduct by police, directly relating to a controlled importation in accordance with then accepted procedures.

In particular, the prosecution must show that the unlawful importation was carried out with the knowledge and approval of the Australian Federal Police and Australian Customs Service, in accordance with a 1987 Ministerial Agreement.

Thank you for this opportunity to address the issues raised by the Committee.

The committee thanks the Minister for the response to this issue.

On the matter of retrospectivity, the committee is of the opinion that the effect of certain provisions may amount to trespass on personal liberties just as much where unlawful activity is retrospectively made lawful as where lawful activity is made unlawful after the activity has taken place. The committee notes that the Minister does acknowledge the retrospectivity and has given the transitional provisions as narrow a scope as possible for that reason.

The committee also notes that the bill has been referred to the Legal and Constitutional Legislation Committee where it will receive further consideration.

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

## **Customs and Excise Legislation Amendment Bill (No. 1) 1996**

This bill was introduced into the Senate on 6 May 1996 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the *Customs and Excise Legislation Amendment Act 1995* to:

- correct transcription errors;
- correct the application and savings provisions of the Act, with particular regard to quarrying and sand mining;
- allow companies which had lodged rebate applications or any matters before the Administrative Appeals Tribunal or the courts that relate to the use of diesel fuel in mining operations prior to 1 July 1995 to be considered on the basis of the law as it existed prior to 1 July 1995, thereby restoring the original intent of the Act; and
- restore Diesel Fuel Rebate eligibility for the extraction of limestone for use in the de-acidification of soil in agriculture, post 1 July 1995.

### **Retrospectivity Clause 2**

Clause 2, if enacted, would allow this bill to be taken to have commenced on 1 July 1995. The committee notes, however, that the purpose of the bill is to amend the *Customs and Excise Legislation Amendment Act 1995* (the CELA Act) which commenced on that date and contained a number of amendments moved in the Senate.

The committee notes that the explanatory memorandum outlines the need for this bill and for the retrospectivity:

The CELA Act made substantial amendments to the *Customs Act 1901* and the *Excise Act 1901* relating to the Diesel Fuel Rebate Scheme, to tighten the eligibility criteria for rebates of customs and excise duty paid on purchases of diesel fuel.

In the course of the Senate debate on the CELA Act on 29 and 30 June 1995, 80 amendments were successfully moved to the CELA Bill as

introduced. In the course of translating those amendments into a final Royal Assent Bill, several substantive problems with the commencement and the application and savings provisions were created which were acknowledged as contrary to the expressed intention of the Senate.

The application and savings provisions problems arose because modifications were not made to these provisions to take account of amendments made by the then Opposition and Greens, in particular relating to the law as it applied to quarrying and sand mining prior to 1 July 1995. Also, consequential amendments were not made to the commencement provisions even though it was agreed that particular amendments would commence at particular times. Several minor transcription errors in the CELA Act were also identified.

On 29 August 1995, the then Government introduced the Customs and Excise Legislation Amendment Bill (No. 2) 1995 into the Senate. The purpose of that Bill was to amend the CELA Act to correct the transcription errors and the problems with the commencement and the application and savings provisions. However, the Bill lapsed upon the prorogation of Parliament on 29 January 1996.

This Bill is in substantially the same form as the 29 August 1995 Bill, with one minor addition which is detailed below, and is being pursued because the need to correct the problems with the application provisions and restore the Senate's intention still exists, particularly in relation to the law applicable to mining for minerals. The CELA Act amended the definition of minerals by excluding certain materials, with effect from 1 July 1995 only. Any existing rebate applications, or any matters before the Administrative Appeals Tribunal (AAT) or the courts, that relate to the use of diesel fuel in mining operations prior to 1 July 1995 were intended to be decided in accordance with the law as it existed prior to 1 July 1995.

The CELA Act as passed did not give effect to this intention and without the corrections to the CELA Act proposed in this Bill, these applications will be governed by the amended law. The effect of the Bill is to allow those companies which had lodged applications before 1 July 1995 to have them considered on the basis of the law as it existed prior to 1 July 1995, thereby restoring the original intention of the CELA Act.

This Bill also makes 1 minor addition to the CELA Act to restore Diesel Fuel Rebate eligibility for the extraction of limestone for use in

the de-acidification of soil in agriculture, post 1 July 1995 (items 9 and 15 of this Bill refer).

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

## **Dairy Produce Amendment Bill 1996**

This bill was introduced into the House of Representatives on 1 May 1996 by the Minister for Primary Industries and Energy.

The bill proposes to amend the definition of market milk and manufacturing milk for the purpose of administering the dairy market support arrangements. The proposed changes will apply retrospectively from 1 July 1995.

### **Retrospectivity**

#### **Clause 2**

Clause 2 of this bill, if enacted, would provide that the bill commence retrospectively from 1 July 1995.

The committee notes the reason for this retrospectivity is to give legislative effect to the current practices of the Australian Dairy Corporation. Those practices, the explanatory memorandum indicates, commenced on 1 July 1995 and are consistent Australia's commitments to the World Trade Organization Agreement. This bill operates in conjunction with the Dairy Produce Levy (No. 1) Amendment Bill 1996 to amend key definitions to enable the levy to be imposed and collected in accordance with current practices.

The committee further notes that this bill has no adverse effect on any person and expressly prevents the retrospective application of the criminal offence provisions of the *Dairy Produce Act 1986* relating to this bill.

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

## **Dairy Produce Levy (No. 1) Amendment Bill 1996**

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The committee further notes that this bill has no adverse effect on any person.

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

## **Education and Training Legislation Amendment Bill 1996**

This bill was introduced into the House of Representatives on 9 May 1996 by the Minister representing the Minister for Employment, Education, Training and Youth Affairs.

The bill proposes to amend the:

- *Higher Education Funding Act 1988* to make provision for expenditure of funds already allocated for Open Learning in respect of the years 1996, 1997 and 1998;
- *States Grants (Primary and Secondary Education Assistance) Act 1992* to provide an additional \$20.706 million for the non-government school capital program in 1996; and
- repeals the *Training Guarantee Act 1990* and *Training Guarantee (Administration) Act 1990*.

*The committee has no comment on this bill.*

## Excise Tariff Amendment Bill 1996

This bill was introduced into the House of Representatives on 1 May 1996 by the Minister for Small Business and Consumer Affairs.

The bill proposes to:

- transfer the definition of "prescribed division" from an excise by-law into the *Excise Tariff Act 1921*; and
- effect gender neutral language in the *Excise Tariff Act 1921*.

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

Subclause 2(2) of this bill provides that item 2 of Schedule 1 is taken to have commenced on 1 July 1983. By that item a new definition of prescribed division (in relation to a financial year) is substituted. The explanatory memorandum indicates that the retrospective commencement of the new definition is to ensure there is no doubt as to the validity of past revenue collections of excise duty on crude oil. The committee notes that the amendment is technical and is proposed out of caution.

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

## **Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 1996**

This bill was introduced into the Senate on 1 May 1996 by the Minister for the Environment.

The bill proposes to improve regulatory controls over the import, export and transit of hazardous waste in order that such wastes are managed in an environmentally sound manner consistent with Australia's international obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.

*The committee has no comment on this bill.*

## **Health Insurance Amendment Bill 1996**

This bill was introduced into the Senate on 8 May 1996 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the *Health Insurance Act 1973* to provide for the establishment and maintenance of the Australian Childhood Immunisation Register and the release of information from the Register to specified bodies and persons.

*The committee has no comment on this bill.*

## **Health Legislation (Powers of Investigation) Amendment Bill 1996**

This bill was introduced into the Senate on 1 May 1996 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to amend the:

- *Health Legislation (Powers of Investigation) Amendment Act 1994* to:
  - repeal the sunset clause (due to take effect on 1 July 1996). The repeal of the sunset clause will preserve the powers of the Health Insurance Commission to obtain information, conduct searches in order to monitor compliance with Medicare guidelines and execute search warrants; and the
- *Human Services and Health Legislation Amendment Act (No. 3) 1995* to:
  - repeal the sunset clause (due to take effect on 1 July 1996). The repeal of the sunset clause will ensure procedural fairness in relation to the seizure of evidential materials for the purposes of investigating Medicare fraud and over-servicing.

*The committee has no comment on this bill.*

## Housing Assistance Bill 1996

This bill was introduced into the House of Representatives on 8 May 1996 by the Minister representing the Minister for Social Security.

The bill proposes to:

- replace the *Housing Assistance Act 1989* under which the current Commonwealth State Housing Agreement is made;
- provide for the Commonwealth to make agreements with the States and Territories for the provision of housing assistance to assist people on low incomes to obtain housing. The agreements will be disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*;
- enable the Minister to authorise payments for research, development, demonstration and evaluation in relation to housing; and
- specify that the Minister must not authorise payments to a State or Territory for an assistance year unless an inter-government housing agreement has been made and the Commonwealth and State/Territory ministers have agreed on the level of expenditure by the State or Territory from its own resources on housing for that year.

*The committee has no comment on this bill.*

## **Housing Loans Insurance Corporation (Transfer of Assets and Abolition) Bill 1996**

This bill was introduced into the House of Representatives on 8 May 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister.

The bill proposes to reconstitute the Housing Loans Insurance Corporation as a new Government-owned company established under the Corporations Law and subject to regulation by the Insurance and Superannuation Commission. The bill also proposes to repeal the *Housing Loans Insurance Act 1965* and *Housing Loans Insurance Corporation (Sale of Assets and Abolition) Act 1990*.

*The committee has no comment on this bill.*

## **Indigenous Education (Supplementary Assistance) Amendment Bill 1996**

This bill was introduced into the House of Representatives on 9 May 1996 by the Minister representing the Minister for Employment, Education, Training and Youth Affairs.

The bill proposes to amend the *Indigenous Education (Supplementary Assistance) Act 1989* to provide grants of financial assistance to fund the National Aboriginal and Torres Strait Islander Education Policy. The bill proposes to amend the funding level for the period 1 January 1996 to 30 June 1997 and establish funding levels for the periods 1 January 1997 to 30 June 1998 (\$102.376 million), 1 January 1998 to 30 June 1999 (\$114.360 million) and 1 January 1999 to 30 June 2000 (\$121.976 million).

*The committee has no comment on this bill.*

## **Koongarra Project Area Repeal Bill 1996**

This bill was introduced into the Senate on 7 May 1996 by Senator Lees as a Private Senator's bill.

The bill proposes to repeal the *Koongarra Project Area Act 1981* to return the Koongarra mining project area to the Kakadu National Park and World Heritage Area.

The committee **seeks the guidance of the Senator** as to whether any rights existing by reason of the *Koongarra Project Area Act 1981* will be extinguished, or otherwise affected, by the repeal of that Act proposed by this bill.

*Pending the Senator'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.*

## **Loan Bill 1996**

This bill was introduced into the House of Representatives on 8 May 1996 by the Minister for Finance.

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

*The committee has no comment on this bill.*

## **Ministers of State Amendment Bill 1996**

This bill was introduced into the House of Representatives on 2 May 1996 by the Minister for Administrative Services.

The bill proposes to amend the *Ministers of State Act 1952* to:

- increase the appropriation from the Consolidated Revenue Fund in 1995-96 by \$25,000 to meet increased ministerial salaries for the financial year 1995-96; and
- reduce the appropriation from the Consolidated Revenue Fund in financial year 1996-97 and subsequent years by \$15,000 to reflect a reduction in size of the Ministry and the salaries of Ministers not in Cabinet.

*The committee has no comment on this bill.*

## **Parliamentary Proceedings Broadcasting Amendment Bill 1996**

This bill was introduced into the House of Representatives on 30 April 1996 by the Prime Minister. The bill, a privilege bill, is customarily presented by the Prime Minister on the first sitting day of a new Parliament as the first item of formal business.

The bill proposes to amend the *Parliamentary Proceedings Broadcasting Act 1946* to effect gender neutral language.

*The committee has no comment on this bill.*

## Primary Industries and Energy Legislation Amendment Bill (No. 1) 1996

This bill was introduced into the House of Representatives on 9 May 1996 by the Minister for Primary Industries and Energy.

The bill proposes to amend the:

- *Offshore Minerals Act 1994* to maintain the integrity of licences issued by both the Commonwealth and the States to ensure that mineral licences granted under the Act (the boundaries of which might be affected by changes in the location of the territorial sea baseline) remain wholly valid;
- *Laying Chicken Levy Act 1988* to:
  - acknowledge the Australian Egg Industry Association as the industry representative organisation to allow it to make recommendations on behalf of industry on levy related matters; and
  - authorise the Minister to facilitate future changes in industry representative organisation status by notice published in the *Gazette*;
- *Poultry Industry Assistance Act 1965* to facilitate the transfer of funds from the Poultry Industry Trust Fund to the Egg Industry Development Fund administered by the Rural Industries Research and Development Corporation for research and development on the egg industry;
- *Wool International Act 1993* to
  - remove the provision for eligible wool tax payers to make voluntary (additional) contributions of wool tax up to a further 5.5 per cent of the sale value of shorn wool, other than carpet wool;
  - provide that the amount payable to Wool International in respect of the debt component of wool tax, currently fixed at 4.5 per cent, be set by regulation;
  - facilitate Wool International undertaking a limited program of forward trading to assist in the development of a broader range of risk management options for the industry;
- *Australian Wool Research and Promotion Organisation Act 1993* to:
  - make a consequential amendment in relation to the setting of rates of wool tax; and

- provide for interim wool industry funding for the Australian Animal Health Council by the Australian Wool Research and Promotion Organisation; and
- repeals the *Egg Industry Research (Hen Quota) Levy Act 1987*, the *Poultry Industry Assistance Act 1965* and *Poultry Industry Levy Act 1965* and makes consequent (upon these repeals) amendments to the *Primary Industries Levies and Charges Collection Act 1991* and the *Rural Industries Research Act 1985*.

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

Subclause 2(2) of this bill, if enacted, would provide for the amendments proposed by Schedule 1 to have effect retrospectively from 25 February 1994.

The committee notes, however, that the purpose of the amendments is to correct oversights in drafting with effect from the date of commencement of the earlier legislation.

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

### **Insufficient scrutiny by Parliament? Schedule 6, Part 1**

By item 1 of Part 1 of Schedule 6, a new subsection 9(5) would be inserted in the *Wool International Act 1993*. That proposed subsection would limit to three sitting days the time within which a ministerial instrument under proposed subsection 9(4) could be disallowed by Parliament. The committee **seeks the advice of the Minister** on the reasons for not allowing Parliament the usual 15 sitting days.

*Pending the advice of the Minister, 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.*

**Retrospectivity**  
**Schedule 6, Part 2**

The provisions of Part 2 of Schedule 6 have retrospective application from 20 June 1995.

The committee notes that the Part provides for the return of any voluntary contributions made to Wool International, in accordance with section 45 of the *Wool International Act 1993*, after the Government's announcement on 20 June 1995 that the provision to make such contributions was to cease. The provisions, therefore, do not impose any obligations on any person other than the Commonwealth or its instrumentalities.

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

## **Prohibition of Exportation of Uranium (Customs Act Amendment) Bill 1996**

This bill was introduced into the Senate on 7 May 1996 by Senator Lees as a Private Senator's bill.

The bill proposes to prohibit the export of uranium-bearing ore or uranium ore concentrates from Australia.

*The committee has no comment on this bill.*

## **Restitution of Property to King Island Dairy Products Pty Ltd Bill 1996**

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

The bill proposes to restore the King Island dairy property to the former owners' company, King Island Dairy Products Pty Ltd.

*The committee has no comment on this bill.*

## **Sexuality Discrimination Bill 1995 [1996]**

This bill was introduced into the Senate on 29 November 1995 by Senator Spindler as a Private Senator's bill.

The bill proposes to ensure people receive equal treatment in areas governed by Commonwealth law and are protected against discrimination on the grounds of their sexuality or their transgender identity.

### **Abrogation of the privilege against self-incrimination Clause 94**

Clause 94 of the bill provides:

It is not a reasonable excuse for the purposes of section 92 for a person to refuse or fail to provide information or produce a document that the providing of the information or the production of the document might incriminate the person, but evidence of the provision of the information or the production of the document is not admissible in evidence against the person in any civil or criminal proceeding other than a proceeding for an offence under section 95.

Proposed section 92 would establish an offence with a maximum penalty of ten penalty units (\$1 000) of failing or refusing without reasonable excuse to provide information or produce a document where required to do so under the Act in respect of an inquiry by the Commissioner or in connection with a compulsory conference. Clause 94 abrogates the privilege against self-incrimination and substitutes a form of immunity.

The committee has an in-principle concern that the privilege against self-incrimination is a fundamental right which, in the absence of good reasons, ought not to be interfered with. In examining whether good reasons exist, the committee has directed its attention to whether the advantages to be gained by abrogating the privilege outweigh its loss. The committee, of course, acknowledges that it is within Parliament's power to legislate to take away the common law right against self-incrimination and in compensation for that loss to substitute such immunity as is appropriate. Where good reasons exist to interfere with this privilege, the committee has, in the past, accepted such an interference only if the information sought is peculiarly within the knowledge of the person concerned and there is immunity for the person in the form of a prohibition against the direct or indirect use of any information obtained other than in the matter in relation to which the

information was originally sought. The committee has been concerned about other exceptions which are sometimes made to the prohibition against the direct or indirect use.

Neither the explanatory memorandum nor the second reading speech addresses the reasons for abrogating the privilege. The committee, therefore, **seeks the views of the Senator** on the need for abrogation.

The committee acknowledges that clause 94 contains a form of immunity but questions both its efficacy and the extent of the exception which it includes. It seems to the committee that the clause would prohibit the use only of "evidence of the provision of the information or the production of the document" and not the use of the information or of the document itself and so, in effect, provides no protection at all. Further, the committee would prefer the exception to be confined to prosecution for false information given or a false document produced in response to a demand in the context of which the privilege is abrogated. Accordingly, the committee **asks whether the clause could be redrafted to accommodate our concerns.**

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

## **Delegation of powers to a person**

### **Clause 109**

Clause 109 of this bill, if enacted, would allow the delegation of all the powers of the Commission and of the Commissioner to any person or body of people without any limitation on the possible attributes or qualifications of such delegates.

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 takes 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 delegation should be limited to the holders of a nominated office or to members of the Senior Executive Service or that the persons to whom the powers are delegated should be selected by reference to their qualifications.

The committee notes that neither the bill nor the explanatory memorandum indicates the need for a power of such width.

Accordingly, the committee **seeks the guidance of the Senator** on whether an appropriate limitation could be imposed on this wide power of delegation.

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

## Shipping Grants Legislation Bill 1996

This bill was introduced into the House of Representatives on 1 May 1996 by the Minister for Transport and Regional Development.

The bill proposes to:

- repeal the *International Shipping (Australian-resident Seafarers) Grants Act 1995* with effect from 1 July 1996; and
- amends the *Ships (Capital Grants) Act 1987* to bring forward the existing sunset provision from 30 June 1997 to 30 June 1996.

*The committee has no comment on this bill.*

## **Supply Bill (No. 1) 1996-97**

This bill was introduced into the House of Representatives on 8 May 1996 by the Minister for Finance.

The bill proposes to seek appropriations of the Consolidated Revenue Fund in 1996-97 totalling \$14,659 million for proposed expenditure on the ordinary annual services of Government.

*The committee has no comment on this bill.*

## **Supply Bill (No. 2) 1996-97**

This bill was introduced into the House of Representatives on 8 May 1996 by the Minister for Finance.

The bill proposes to seek appropriations of the Consolidated Revenue Fund in 1996-97 totalling \$1,720 million for proposed expenditure on the construction of public works and buildings, the acquisition of sites and buildings, certain advances and loans, items of plant and equipment, grants to the States under section 96 of the Constitution and for payments to the Northern Territory and the Australian Capital Territory.

*The committee has no comment on this bill.*

## **Supply (Parliamentary Departments) Bill 1996-97**

This bill was introduced into the House of Representatives on 8 May 1996 by the Minister for Finance.

The bill proposes to seek appropriations of the Consolidated Revenue Fund in 1996-97 totalling \$68 million for proposed expenditure on running costs and other expenditure of the parliamentary departments.

*The committee has no comment on this bill.*

## **Sydney 2000 Games (Indicia and Images) Protection Bill 1996**

This bill was introduced into the Senate on 8 May 1996 by the Parliamentary Secretary to the Minister for Social Security.

The bill proposes to provide that the Sydney Organising Committee for the Olympic Games and the Sydney Paralympic Organising Committee have the power to use and to license others to use the Sydney 2000 Games indicia and images for commercial purposes.

*The committee has no comment on this bill.*

## Taxation Laws Amendment Bill (No. 1) 1996

This bill was introduced into the House of Representatives on 9 May 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister.

The bill proposes to amend the *Income Tax Assessment Act 1936* to:

- provide that a provisional tax uplift factor of 6 per cent will be used in ascertaining provisional tax payable for 1996-97, and 10 per cent for later years of income, until the Parliament otherwise provides;
- provide that the full purchase price of a share in an off-market share buy-back is treated as disposal consideration for capital gain and ordinary income purposes;
- allow income tax deductions for gifts of \$2 or more to certain funds.

### Retrospectivity Schedule 1, Part 2

The amendments proposed by Schedule 1, Part 2 of this bill would have retrospective effect from 9 May 1995. The committee notes that the amendments give effect to a budget announcement.

The committee has previously indicated that, in relation to retrospectivity, budget measures are something of a special case. In a paper titled *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-85*, the then Chairman of the Committee, Senator Tate, said:

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

Generally, in these circumstances, the committee would make no further comment on these provisions. The committee notes, however, that more than twelve months have elapsed between the announcement and the introduction of the bill. If the budget announcement were to be considered an announcement by press release, the resolution of the Senate of 8 November 1988 may have applied.

That resolution states:

where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of

a draft Bill within 6 calendar months after the date of that announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill.

As more than 6 calendar months had elapsed before the prorogation of Parliament and more than twelve months before the introduction of the bill and as the committee is not aware of any publication of a draft bill within that period, the committee **seeks the Treasurer's advice** on the reasons for the delay in introduction.

*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.*

## Telstra (Dilution of Public Ownership) Bill 1996

This bill was introduced into the House of Representatives on 2 May 1996 by the Minister representing the Minister for Communications and the Arts.

The bill proposes to amend the following Acts:

- *Telstra Corporation Act 1991* to:
  - enable and facilitate the sale of up to one-third of the Commonwealth's equity in Telstra, while requiring the Commonwealth to retain the remaining two-thirds;
  - require Telstra to keep the Minister and the Minister for Finance informed of its operations, to notify the Minister of significant proposals and to provide to the Minister a Corporate Plan;
  - set ownership limits in relation to the one-third equity in Telstra which can be held by other persons than the Commonwealth;
  - ensure Telstra's head office, base of operations and incorporation remain in Australia and that its chairperson and majority of directors are Australian citizens;
  - enable remedial action to be taken where there has been a contravention of the foreign ownership limits;
  - reaffirm that the transfer of part of the Commonwealth's equity in Telstra will not affect the "Universal Service Obligations"; and the
- *Telecommunications Act 1991* to:
  - extend the statutory obligation on general telecommunications carriers to provide the option of untimed local calls to all customers in local call areas;
  - introduce a new scheme for a customer service guarantee; and
  - extend AUSTEL's functions of developing indicative performance standards about quality of goods and services and reporting annually on carrier performance against those standards.

### General Comment

Proposed section 87F provides for a customer to recover damages from Telstra for a contravention of a performance standard prescribed by AUSTEL. Proposed subsections 87G(1) and (3), if enacted, would provide for AUSTEL and not a court to set a scale for the award of damages and to put an upper limit of \$3 000 on such

an award. The committee **seeks the advice of the Minister** on whether it is more properly the function of a court to set such damages as it appears to the court proper in the circumstances of a particular case or whether, as in Tables of Maims scales in compensation legislation, it is more appropriate for Parliament rather than an instrumentality to set such a scale.

The committee notes that by proposed section 87K normal access to damages through the court process is preserved.

*Pending the Minister's advice, the committee draws Senators' attention to the provisions, as they may inappropriately impinge on the judicial function or they may be considered to delegate legislative power inappropriately, in breach of principle 1(a)(iv) of the committee's terms of reference.*

## **Therapeutic Goods Amendment Bill 1996 (No. 2)**

This bill was introduced into the Senate on 7 May 1996 by the Parliamentary Secretary to the Minister for Social Security.

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

- clarify the distinction between "food" and "therapeutic goods";
- enable certain senior officers to temporarily approve the supply of unevaluated drugs for use in Australia in limited circumstances;
- establish a new procedure for listing on the Australian Register of Therapeutic Goods drugs that are supplied for use in Australia;
- require sponsors of goods unlawfully supplied to inform the public and to take steps to recover any of the goods already distributed;
- clarify offence provisions and introduce new offences;
- update search and seizure powers and provisions relating to warrants; and
- amend the procedures for reviewing decisions relating to the registration of therapeutic goods in the Australian Register of Therapeutic Goods.

This bill is in substantially the same form as the similarly titled bill introduced into the House of Representatives on 20 September 1995. The committee dealt with that bill in Alert Digest No. 14 of 1995. For the information of Senators the relevant part of that Digest is reproduced below:

### **Reversal of the onus of proof**

#### **Item 10 (now item 11) of the Schedule 1: Proposed subsection 20(1A)**

Proposed subsection 20(1) creates an offence if a person intentionally or recklessly engages in certain dealings in therapeutic goods that are not registered, exempt or otherwise subject to approval. Proposed subsection 20(1A) provides a defence to a prosecution for this offence if the defendant proves that the defendant was not the sponsor of the goods at the time of the dealing.

The committee notes, however that the explanatory memorandum, on page three, is very clear in pointing out that whether a person is the sponsor is not only peculiarly within the knowledge of the defendant but also is a matter which places a considerable burden on the prosecution to prove.

The provision, therefore, comes within the class of reversals of the onus of proof which the committee has been prepared to accept.

*In the light of the reasons given, the committee makes no further comment on this provision.*

## **Search and seizure without warrant Proposed section 46B**

Proposed section 46B provides:

(1) Subject to subsection (2), if an authorised person has reasonable grounds for suspecting that:

- (a) there may be on any premises a particular thing in respect of which this Act or the regulations have not been complied with; and
- (b) it is necessary in the interests of public health to exercise powers under this section in order to avoid an imminent risk of death, serious illness or serious injury;

the authorised person may, to the extent that it is reasonably necessary for the purpose of avoiding an imminent risk of death, serious illness or serious injury, enter the premises and do any of the following:

- (c) search the premises for the thing;
- (d) if the authorised person finds the thing on the premises—seize it.

(2) An authorised person is not entitled to exercise any powers under subsection (1) in relation to premises if:

- (a) the occupier of the premises has required the authorised person to produce his or her identity card for inspection by the occupier; and
- (b) the authorised person fails to comply with the requirement.

The provision lays down narrow limits within which these powers may be exercised. It requires, in the interests of public health, a reasonable suspicion of the need to search and, if necessary, to seize in order to avoid imminent risk of death, serious illness or serious injury.

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

## **Toxic Chemicals (Community Right to Know) Bill 1993 [1996]**

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

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

### **Inappropriate delegation of legislative power**

#### **Clause 23 - Duty to notify Registrar of use or production of toxic chemicals**

Clause 23 of the bill provides:

##### **Duty to notify Registrar of use or production of toxic chemicals**

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

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

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

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

**(5)** A person who fails to comply with this section is guilty of an offence.

Penalty: 2,000 penalty units.

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

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

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

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

The committee draws Senators' attention to the provision, as it may be considered to be an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the committee's terms of reference.

### **Non-reviewable decisions**

#### **Subclause 26(3) - Exemption for information that is commercial-in-confidence**

#### **Subclause 27(3) - Exemption on the grounds of military security**

Clause 26 of this bill provides:

#### **Exemption for information that is commercial-in-confidence**

**26.(1)** A person may apply to the Registrar for an exemption from compliance with this Act on the grounds that the identity of a chemical is commercial-in-confidence information where all of the following conditions are met:

- (a) that the identity of the chemical has never previously been disclosed to an employee of the applicant not bound by a confidentiality agreement;
- (b) that no person to whom this Act applies has ever rejected a claim by the applicant that the chemical is a trade secret or that its identity may be treated as commercial-in-confidence information;
- (c) that competitors could deduce the use or identity of the chemical from the notification form;
- (d) that knowledge of the identity of the chemical could cause 'substantial competitive harm' to the applicant;

- (e) that the identity of the chemical could not be discerned by reverse engineering or any other method from the applicant's products or releases'
- (f) that the applicant has taken all reasonable measures to protect the identity of the chemical;
- (g) that the precise use of the chemical by the applicant is not available in any information source accessible to the public'
- (h) that the identity of the chemical need not be disclosed under any other law.

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

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

Clause 27 of the bill provides:

**Exemption on the grounds of military security**

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

- (a) that the Registrar has not previously rejected an application for exemption for that chemical by the applicant;
- (b) that a foreign power could not deduce the military purpose from information about the chemical provided in the notification form;
- (c) that public knowledge of the identity of the chemical could cause a substantial threat to national security;
- (d) that the identity of the chemical could not be discerned by reverse engineering or any other method from the applicant's products or releases'
- (e) that the applicant has taken all reasonable measures to protect the identity of the chemical;
- (f) that the precise use of the chemical by the applicant is not available in any information source accessible to the public or to a foreign power; and
- (g) that the identity of the chemical need not be disclosed under any other law.

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

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

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

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

### **General comment**

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

## **Uranium Mining in Australian World Heritage Properties (Prohibition) Bill 1996**

This bill was introduced into the Senate on 7 May 1996 by Senator Lees as a Private Senator's bill.

The bill proposes to prohibit the mining, extraction, treatment and transport of any uranium or uranium ore on any property in Australia in any part of a World Heritage List area.

*The committee has no comment on this bill.*

## **World Heritage Properties Conservation Amendment (Protection of Wet Tropics of Tully) Bill 1996**

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

The bill proposes to amend the *World Heritage Properties Conservation Amendment (Protection of Wet Tropics of Tully) Act 1996* to prevent any dam being built which would directly or indirectly affect the Wet Tropic World Heritage Area at Tully in Queensland.

*The committee has no comment on this bill.*

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

**No. 2 of 1996**

**29 MAY 1996**

**ISSN 0729-6851**

## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

Senator **B Cooney** (Chairman)  
Senator **W Crane** (Deputy Chairman)  
Senator **R Bell**  
Senator the **Honourable I Campbell**  
Senator **M Forshaw**  
Senator **S Macdonald**

### **TERMS OF REFERENCE**

#### **Extract from Standing Order 24**

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

# CONTENTS

	<b>Page</b>
Aboriginal and Torres Strait Islander Commission Amendment Bill 1996	5
<input type="checkbox"/> Airports Bill 1996	6
Airports (Transitional) Bill 1996	8
Civil Aviation Amendment Bill 1996	9
Customs Tariff (Miscellaneous Amendments) Bill 1996	10
Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill (No. 1) 1996	11
<input type="checkbox"/> Export Market Development Grants Amendment Bill (No. 1) 1996	12
Natural Heritage Trust Fund Bill 1996	14
Public Service (Parliamentary Departments) Amendment Bill 1996	15
<input type="checkbox"/> Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996	16
<input type="checkbox"/> Telecommunications (Carrier Licence Fees) Amendment Bill 1996	18
Veterans' Affairs Legislation Amendment Bill (No. 1) 1996	19
<input type="checkbox"/> Workplace Relations and Other Legislation Amendment Bill 1996	20

**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.



## **Aboriginal and Torres Strait Islander Commission Amendment Bill 1996**

This bill was introduced into the Senate on 23 May 1996 by the Minister for Aboriginal and Torres Strait Islander Affairs. [Portfolio responsibility: Aboriginal and Torres Strait Islander Affairs]

The bill proposes to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* and *Aboriginal and Torres Strait Islander Commission Act (No. 3) 1993* to:

- reduce the size of membership of Regional Councils and make amendments relating to the Councils' powers, administration and financial arrangements;
- make provision for the management of the Commission, including the selection and appointment of the Chairperson of the Commission by the Minister for Aboriginal and Torres Strait Islander Affairs;
- amend provisions relating to the restriction on the rights to dispose of property so that such a restriction is an interest in land that can be registered against the title of that property;
- allow the appointment of an administrator to manage, investigate and report on the affairs and property of the Torres Strait Regional Authority (TSRA) in certain circumstances;
- allow the TSRA to request the Office of Evaluation and Audit (OEA) to evaluate and audit TSRA operations and to give the OEA compulsive powers when making these investigations; and
- require the General Manager of the Aboriginal and Torres Strait Islander Commercial Development Corporation (CDC) to give to the Minister and Chairperson of the Board of CDC written notice of pecuniary interests in any business and in any matter being considered or about to be considered by the Board.

*The committee has no comment on this bill.*

## Airports Bill 1996

This bill was introduced into the House of Representatives on 23 May 1996 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to establish the regulatory arrangements to apply to the airports currently owned and operated on behalf of the Commonwealth by the Federal Airports Corporation, and Sydney West Airport, following the leasing of those airports and includes some provisions which can be applied to other airports.

### **Vicarious liability and reversal of the onus of proof** **Subclause 211(2)**

Subclause 217(2) provides:

If

- (a) conduct is engaged in on behalf of a person other than a corporation by an employee or agent of the person; and
- (b) the conduct is within the employee's or agent's actual or apparent authority;

the conduct is taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in by the person unless the person establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

Clause 217, if enacted, would impose vicarious liability on a person for the criminal acts of his or her employee or agent. Subclause (2) would put the onus of disproving liability on the principal by requiring that person to establish that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

The committee is not aware of any previous occasion on which a law has imposed vicarious liability on a natural person. The committee **seeks the Minister's advice** on the reason for doing so in this bill.

The committee has been prepared to accept the imposition of criminal liability on the manager/directors of a company for the acts of a company as that is necessary for the effective operation of the criminal law. The committee, therefore, has no concerns with clause 216 which provides for the prosecution of corporations. Different considerations, however, apply where vicarious liability for the acts of other persons is imposed on an employer or principal who is a natural person.

The committee's approach to the imposition of vicarious criminal liability is similar to its approach to the imposition of strict liability. The primary issue is whether the consequences of the offence are so serious as to warrant the departure from the normal requirement that a person can be guilty of a crime only if they act intentionally or recklessly.

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

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

The committee can understand that an oil spill on the Great Barrier Reef or serving salmonella infected food would warrant offences of strict liability because of the serious consequences of such acts. Acts with less serious consequences may not justify imposing strict liability.

With respect to vicarious criminal liability, the committee is of the view that imposing such liability would be justified only by the seriousness of the consequences of the prohibited acts. An examination of the offences in the bill for which subclause 217(2) will impose vicarious criminal liability discloses a wide variety, not all of which would equate in seriousness with an oil spill on the Great Barrier Reef. For example, the committee remains to be convinced that failure to comply with every condition that may be attached to a certificate of fitness for use (under clause 99) warrants vicarious liability. The committee **seeks the Minister's advice** whether any of the offences have such serious consequences that vicarious liability is warranted and, if so, which.

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

## **Airports (Transitional) Bill 1996**

This bill was introduced into the House of Representatives on 23 May 1996 by the Minister for Transport and Regional Development. [Portfolio responsibility: Finance]

The bill proposes to establish a framework to facilitate the leasing of all Federal airports under a two stage sales process. The bill contains provisions for the transfer of airport land and other assets from the Federal Airports Corporation (FAC) to the Commonwealth; the granting of leases over the airports and transfer of associated assets to individual airport companies; treatment of the FAC's debts during the sales process; and the transfer of airport staff employed by the FAC to the airport companies.

*The committee has no comment on this bill.*

## **Civil Aviation Amendment Bill 1996**

This bill was introduced into the House of Representatives on 22 May 1996 by the Minister for Transport and Regional Development. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to increase the size of the Board of the Civil Aviation Safety Authority by the addition of a Deputy Chairperson and an additional ordinary member.

*The committee has no comment on this bill.*

## **Customs Tariff (Miscellaneous Amendments) Bill 1996**

This bill was introduced into the House of Representatives on 22 May 1996 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to make technical changes to a number of Acts as a consequence of the *Customs Tariff Act 1995*. It proposes to:

- update references to provisions of the 1987 Tariff Act with the 1995 Tariff Act (the 1987 Act being repealed by Part 3 of the 1995 Act with effect from 1 July 1996); and
- enact transitional provisions in a number of by-laws and Tariff Concession Orders so that references to the 1987 Tariff Act are to be read as references to the 1995 Tariff Act.

*The committee has no comment on this bill.*

## **Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill (No. 1) 1996**

This bill was introduced into the Senate on 23 May 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to amend the *Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991* to extend the sunset clause from 1 January 1997 to 1 January 1999. The extended sunset clause is proposed to allow for the development of complementary State/Territory regulation of private education providers.

### **Inappropriate delegation of legislative power?**

The committee understands that the effect of this legislation is being frustrated by the failure of the States/Territories to develop complementary regulation. The committee is of the opinion that arrangements, which require States/Territories to develop a complementary regulatory framework to give effect to the Commonwealth's legislation, constitutes a *de facto* delegation of legislative power. The committee, therefore, is concerned at the appropriateness of such a delegation and **seeks the Minister's advice** on whether alternative arrangements might be more effective.

*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.*

## **Export Market Development Grants Amendment Bill (No. 1) 1996**

This bill was introduced into the Senate on 21 May 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Foreign Affairs and Trade]

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

- reduce the maximum grant payable in any one year from \$250,000 to \$200,000;
- cap the amount of extra grant that may be generated in respect of expenditure details which are submitted by a claimant after the lodgement of that claimant's claim;
- limit the number of EMDG approved joint ventures and consortia to which a 'person' may be a member;
- provide for disallowance of expenditure by an approved joint venture or consortium which breaches the conditions of its approval;
- provide that claims prepared by a consultant or other persons who have been convicted of offences relating to fraud or dishonesty are invalid;
- exclude from eligibility any expenditure which relates to activities which are illegal under Australian law or the law of the country in which the activities take place;
- more clearly define the term 'ordinarily employed';
- provide for the pre-registration of first time EMDG claimants; and
- establish a grants entry test for first time EMDG claimants.

### **Retrospectivity**

#### **Item 3 of Schedule 5**

#### **Proposed new subsection 13F(1)**

Proposed new subsection 13F(1) of the Principal Act, to be inserted by item 3 of Schedule 5 to the Bill, would treat as a disqualified individual (and hence as someone not permitted to assist in the preparation of a claim for export market assistance) a person who has been convicted of various offences, even though such a conviction had been recorded before the commencement of the new section. It might appear that this provision therefore has a possible retrospective application, a view which the committee took in relation to sections 11YA and 14A of the same Act, in the committee's Fourth Report of 1993.

In relation to proposed subsection 13F(1), however, the committee takes the view that the proposed new subsection does not have any retrospective application. It seems to the committee that future eligibility to assist in the preparation of claims is being defined, in part, by past events. In this respect, the provision is similar to section 57 of the *Employment Services Act 1994* which (despite misgivings in other respects) the committee accepted, in its Fourth Report of 1995, as not having a retrospective application.

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

## **Natural Heritage Trust Fund Bill 1996**

This bill was introduced into the Senate on 21 May 1996 by Senator Kernot as a Private Senator's bill.

The bill proposes to establish a Natural Heritage Trust Fund to make payments for environmental programs of national significance (to be nominated by the Minister for the Environment). The fund will be funded by seven per cent of Telstra's pre-tax profits for the next five years and administered by the Minister for Finance.

*The committee has no comment on this bill.*

## **Public Service (Parliamentary Departments) Amendment Bill 1996**

This bill was introduced into the House of Representatives on 20 May 1996 by the Speaker (Mr Martin) as a Private Member's bill.

The bill proposes to abolish the Department of the Parliamentary Reporting Staff, the Department of the Parliamentary Library and the Joint House Department and to create the Department of Parliamentary Services. Consequential amendments are proposed to four Commonwealth Acts.

*The committee has no comment on this bill.*

## **Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Bill 1996**

This bill was introduced into the House of Representatives on 23 May 1996 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the:

- *Social Security Act 1991*, the *Student and Youth Assistance Act 1973* and the *Health Insurance Act 1973* to extend the waiting period (from 26 to 104 weeks) for certain migrants who arrived in Australia or were granted permanent residence on or after 1 April 1996 and who wish to claim certain social security payments or other benefits;
- *Social Security Act 1991* and *Student and Youth Assistance Act 1973* to allow additional information to be sought from persons (usually employers) about a class of persons with a view to reducing the need for supplementary requests for information;
- *Data-matching Program (Assistance and Tax) Act 1990* to put beyond doubt the lawfulness of using Australian Taxation Office income data for different financial years in a single data matching program cycle;
- *Social Security and Veterans' Affairs Legislation Amendment Act 1995* to amend a drafting error and make a consequential amendment; and
- *Social Security Act 1991* to make technical amendments.

### **Retrospectivity**

#### **Subclauses 2 (5) - Items 6, 7 and 8 of Schedule 5**

By virtue of subclause 2 (5), some of the provisions of this bill will have retrospective effect. It seems to the committee that, while the amendments proposed by those items appear to be technical, it is unclear whether the retrospectivity will prejudicially affect any individual. The retrospective amendment would appear to impose a two year waiting period on a person, for example, who entered Australia in November 1994 and who by force of the present subsection 921(3) would be exempted from the waiting period provisions or who by force of the present subsection 922(2) would have been subject only to a six month waiting period. It also seems to the committee that the proposed change may affect the outcome of decisions which may currently be under appeal.

The committee **seeks the Minister's advice** on whether the amendment will prejudicially affect any person.

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

### **Retrospective application Schedule 3**

The amendments proposed by Schedule 3 of this bill, if enacted, may be regarded as having retrospective application. They would allow a data-matching program to apply to information, not only from a current tax return but also from tax returns in respect of previous financial years. The committee notes that the explanatory memorandum claims that the effect of the amendment is to 'put beyond doubt' the lawfulness of using the earlier information because a doubt has arisen that the words 'available and current' tax data do not include the use of tax data available but not current.

The committee is concerned that the data matching program may have been unlawfully using the earlier data and that effect of this amendment is to change the law to give wider powers to the program than those that presently exist. The committee **seeks from the Minister** any legal advice that may have been given on these issues.

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

## **Telecommunications (Carrier Licence Fees) Amendment Bill 1996**

This bill was introduced into the House of Representatives on 22 May 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to allow for the regulations made under the *Telecommunications (Carrier Licence Fees) Act 1991* to be amended so that the Commonwealth may recover the full telecommunications carriers' share of the Commonwealth's contribution to the budget of the International Telecommunication Union. This will have the impact of increasing the carrier's annual licence fees by an estimated \$0.9 million in 1996-97. The proportion of this amount to be paid by each carrier will be calculated according to the carrier's share of timed traffic.

### **Retrospective regulations**

#### **Clause 5**

Clause 5 of this bill, if enacted, would enable regulations to be made which would have retrospective effect in derogation of subsection 48(2) of the *Acts Interpretation Act 1901*.

The committee notes, however, that the explanatory memorandum makes it clear that this provision has been inserted to guard against the possibility that the bill will not receive Royal Assent before 1 July 1996.

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

## **Veterans' Affairs Legislation Amendment Bill (No. 1) 1996**

This bill was introduced into the House of Representatives on 22 May 1996 by the Minister for Veterans' Affairs. [Portfolio responsibility: Veterans' Affairs]

The bill proposes to amend the:

- *Defence Service Homes Act 1918* to ensure loan beneficiaries under the Defence Service Homes Scheme will have consumer rights similar to those that other borrowers will have when all State and Territory Governments adopt a common Consumer Credit Code; and
- *Veterans' Entitlements Act 1986* so that the dependant of a veteran or a member who dies from a war-caused disability will be eligible for a pension without the need to establish that the death was war-caused or defence-caused.

*The committee has no comment on this bill.*

## Workplace Relations and Other Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 23 May 1996 by the Minister for Industrial Relations. [Portfolio responsibility: Industrial Relations]

The bill proposes to amend the *Industrial Relations Act 1988*, to be retitled the *Workplace Relations Act 1996*, to give primary responsibility for industrial relations and agreement making to employers and employees at the enterprise and workplace levels. Consequential amendments are also made to numerous Acts and the *Trade Union Training Act 1975* is to be repealed.

### General comment

The committee has had some difficulty in determining whether any of the provisions of this bill come within the committee's terms of reference. Because the bill makes substantial amendments to the *Industrial Relations Act 1988*, it will be difficult for any person to discover the state of the law until the amended Act is reprinted. Given these difficulties, the committee **asks the Minister** whether any thought was given to drafting these clauses in the form of a replacement bill rather than an amending bill.

### Delegation of power to a person Proposed subsection 83BE(2)

Item 2 of Schedule 3 of the bill, if enacted, would insert proposed subsection 83BE(2). This subsection would permit the Employment Advocate to delegate some functions to 'any person'. Generally the committee is concerned about an unfettered discretion to grant statutory functions to any person. The functions to be delegated under this provision appear to be very general and the committee **seeks the Minister's advice** on the reasons for the width of this delegation.

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

**Retrospective application**  
**Subitem 17(1) of Schedule 7**

Subitems 17(1) and (2) of Schedule 7, if enacted, would allow Part 1 of that Schedule to apply to terminations of employment occurring after 30 March 1994, unless an application under the current legislation in respect of that termination has been lodged before the commencement of this Schedule.

The explanatory memorandum does not indicate whether such a retrospective application would adversely affect any person. Accordingly the committee **seeks the Minister's advice** on this issue.

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

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

**No. 3 of 1996**

**19 JUNE 1996**

**ISSN 0729-6851**

## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

Senator B Cooney (Chairman)  
Senator W Crane (Deputy Chairman)  
Senator R Bell  
Senator the Honourable I Campbell  
Senator M Forshaw  
Senator I Macdonald

### **TERMS OF REFERENCE**

#### **Extract from *Standing Order 24***

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

# CONTENTS

	<b>Page</b>
<input type="checkbox"/> Australian Federal Police Amendment Bill 1996	5
Customs Amendment Bill 1996	7
Customs Tariff Amendment Bill (No. 1) 1996	8
Income Tax Assessment Amendment Bill 1996	9
Medicare Levy Amendment Bill 1996	10
Migration Legislation Amendment Bill (No. 1) 1996	11
<input type="checkbox"/> Parliamentary Contributory Superannuation Amendment Bill 1996	12

**The committee has commented on these bills**

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



## Australian Federal Police Amendment Bill 1996

This bill was introduced into the Senate on 29 May 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Australian Federal Police Act 1979* to:

- give the Commissioner a general power to end the appointment of individual members or staff members before the day of which the appointment is due to end;
- clarify that a person may challenge the termination using the provisions of the *Industrial Relations Act 1988*;
- make minor amendments relating to disciplinary obligations during special leave for service with an industrial association which will extend this provision to staff members; and
- permit the Commissioner and Deputy Commissioners of the Australian Federal Police to appoint or promote a person to a commissioned rank when authorised to do so by the Governor-General.

### Exclusion of rights

#### Item 6, Schedule 1 - proposed subsection 26F(4)

Proposed subsection 26F(4), if enacted, would prevent an appeal under the unlawful termination provisions of the *Industrial Relations Act 1988* by a member of the Australian Federal Police who is retired under paragraph 26E(2)(b) for serious misconduct. Serious misconduct is defined to mean corruption, serious abuse of power, serious dereliction of duty or any other seriously reprehensible act.

Such a member would still have the right to challenge the decision under the *Administrative Decisions (Judicial Review) Act 1977*.

The committee notes that the explanatory memorandum states:

The amendments will omit subsection 26E(3) which limits the circumstances related to disciplinary offences and criminal proceedings in which the Commissioner may make a determination under paragraph 26E(2)(b). The Commissioner will have a general power to end the appointment of individual members or staff

members. This will allow the Commissioner to act quickly and effectively against corruption and other forms of serious misconduct.

The amendments will also clarify that a person who is retired under paragraph 26E(2)(b) may challenge the termination using the remedies provided to employees by Division 3 of Part VIA of the *Industrial Relations Act 1988* ("the unlawful termination provisions"). Regulation 30BB of the Industrial Relations Regulations, which excludes the Australian Federal Police from the operation of those remedies until 1 January 1997, will be repealed following the commencement of this Bill. There will be one exception to the application of these remedies. They will not be available if a person is retired under paragraph 26E(2)(b) because of his or her behaviour and the Commissioner makes a declaration that the appointment was ended for serious misconduct which is likely to have a damaging effect on the professional self-respect or morale of members or staff members or on the public reputation of the Australian Federal Police.

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

## Customs Amendment Bill 1996

This bill was introduced into the House of Representatives on 30 May 1996 by the Minister for Industry, Science and Tourism. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Customs Act 1901* to modify the concessional treatment of goods imported under both the Tariff Concession System and the Policy By-Law System.

*The committee has no comment on this bill.*

## **Customs Tariff Amendment Bill (No. 1) 1996**

This bill was introduced into the House of Representatives on 30 May 1996 by the Minister for Industry, Science and Tourism. [Portfolio responsibility: Industry, Science and Tourism]

This bill is consequential upon the Customs Amendment Bill 1996. It proposes to amend the *Customs Tariff Act 1995* to change from "Free" to "3%" the concessional duty rate applying to Tariff Concession Orders under Part XVA of the *Customs Act 1901* and to policy by-law items 47, 55, 57 and 60 of Schedule 4 of the Tariff Act.

*The committee has no comment on this bill.*

## **Income Tax Assessment Amendment Bill 1996**

This bill was introduced into the House of Representatives on 29 May 1996 by the Prime Minister. [Portfolio responsibility: Treasury]

This bill is consequential upon the Medicare Levy Amendment Bill 1996. It proposes to make consequential amendments to the *Income Tax Assessment Act 1936* in relation to the payment of a proportion of the Medicare levy by Defence personnel.

*The committee has no comment on this bill.*

## Medicare Levy Amendment Bill 1996

This bill was introduced into the House of Representatives on 29 May 1996 by the Prime Minister. [Portfolio responsibility: Treasury]

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

- increase the rate of Medicare levy from 1.5 to 1.7 per cent for the 1996-97 income year only; and
- make members of the Defence Force liable to a proportion of the full Medicare levy, equivalent to a rate of 0.2 per cent, for the 1996-97 income year only.

The bill proposes to raise the funds required to reimburse State and Territories for the direct cost of payments made to compensate gun owners for the return of weapons.

*The committee has no comment on this bill.*

## **Migration Legislation Amendment Bill (No. 1) 1996**

This bill was introduced into the House of Representatives on 30 May 1996 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to allow the Migration Agents Registration Scheme to continue for another year, until 21 September 1997.

*The committee has no comment on this bill.*

## **Parliamentary                      Contributory                      Superannuation Amendment Bill 1996**

This bill was introduced into the House of Representatives on 30 May 1996 by the Minister for Finance. [Portfolio responsibility: Finance]

The bill proposes to amend the *Parliamentary Contributory Superannuation Act 1948*. It proposes that when there is a reduction in any parliamentary salary, the salary level will be fixed at the level immediately prior to the reduction for the purpose of determining retiring allowances, until such time as the actual salary increases to at least the fixed pre-reduction salary.

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

Subclause 2(2) of this bill would give the substantive amendments to be made by the bill retrospective effect from 2 March 1996. It appears, however, that the retrospectivity will not adversely affect anyone other than the Commonwealth.

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

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

**No. 4 of 1996**

**1996**

**ISSN 0729-6851**

## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

Senator B Cooney (Chairman)  
Senator W Crane (Deputy Chairman)  
Senator the Honourable I Campbell  
Senator M Forshaw  
Senator I Macdonald  
Senator A Murray

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# CONTENTS

	<b>Page</b>
<input type="checkbox"/> Aboriginal and Torres Strait Islander Commission Amendment Bill (No. 2) 1996	5
Australian Law Reform Commission Bill 1996	7
Australian Law Reform Commission (Repeal, Transitional and Miscellaneous) Bill 1996	8
<input type="checkbox"/> Development Allowance Authority Amendment Bill 1996	9
Income Tax Assessment Bill 1996	10
Income Tax (Consequential Amendments) Bill 1996	11
Income Tax (Transitional Provisions) Bill 1996	12
<input type="checkbox"/> Migration Legislation Amendment Bill (No. 2) 1996	13
Natural Heritage Trust of Australia Bill 1996	18
Statute Law Revision Bill 1996	19
Trade Practices Amendment (Better Business Conduct) Bill 1996	20

**The committee has commented on these bills**

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## **Aboriginal and Torres Strait Islander Commission Amendment Bill (No. 2) 1996**

This bill was introduced into the Senate on 20 June 1996 by the Assistant Treasurer. [Portfolio responsibility: Aboriginal and Torres Strait Islander Affairs]

The bill proposes to:

- require the Indigenous Land Corporation (ILC), when making decisions about the allocation of funds for land acquisition, to have regard to those indigenous people suffering most disadvantage in access to land;
- allow the ILC to make grants to and guarantee loans for Indigenous trusts and in certain circumstances, to allow the ILC to make grants and guarantee loans for individuals and Indigenous partnerships;
- enable the Minister for Aboriginal and Torres Strait Islander Affairs, in consultation with the ILC Board, to appoint additional Board members as considered appropriate from time to time;
- provide that a person is disqualified from standing for election as a Commissioner or Regional Councillor if he or she has been removed from office within the previous three years for misbehaviour;
- clarify that the Minister's consent is required for Commissioners and Regional Council Chairpersons to engage in outside employment;
- make it possible for corporations as well as individuals to obtain internal review of the merits of a decision to refuse a loan or guarantee;
- allow the Commission to delegate its power to review delegates' decisions;
- allow review by the Administrative Appeals Tribunal of the merits of a decision to refuse a loan or guarantee once internal review by the Commission has been exhausted; and
- make formal amendments.

### **Retrospectivity**

#### **Item 44 of Schedule 1 - proposed subsection 195(1)**

Item 39 of Schedule 1, if enacted, would substitute proposed subsection 195(1) for the present subsection. This amendment would broaden the categories of who may request review by the Commission of a decision to refuse a loan or a guarantee. The effect of item 44 is to validate retrospectively any requests for and reviews by the

Commission in respect of decisions of delegates where such requests and/or reviews occur before the amendments to section 195 take effect.

The effect of the retrospectivity is to enable more decisions to be subject to review and does not affect anyone detrimentally.

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

## Australian Law Reform Commission Bill 1996

This bill was introduced into the House of Representatives on 20 June 1996 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to:

- formally change the name of the Law Reform Commission to the Australian Law Reform Commission;
- require the Commission to consider proposals for complementary laws between the Commonwealth, States and Territories, to have regard to such of Australia's international treaty obligations as are relevant, and to take into account the implications of its recommendations on lowering the costs of justice;
- enable the Commission to appoint consultants;
- clarify the role of the Deputy President and provide for the appointment of an acting President in the President's absence or when the office of President is vacant;
- provide for the establishment of a Board of Management, confer chief executive powers on the President or delegate and confer appropriate powers on the full Commission or its delegate; and
- provide members and staff with immunity from civil action, the cause of which necessarily or reasonably arises in the course of duties being honestly undertaken before the Commission.

*The committee has no comment on this bill.*

## **Australian Law Reform Commission (Repeal, Transitional and Miscellaneous) Bill 1996**

This bill was introduced into the House of Representatives on 20 June 1996 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill, consequent upon the Australian Law Reform Commission Bill 1996, proposes to:

- repeal the *Law Reform Commission Act 1973*;
- provide for the commencement date for amendments to the Australian Law Reform Commission Act that either refer to the *Commonwealth Authorities and Companies Act 1996* (CAC Act) or that implement revised accountability arrangements for Commonwealth authorities associated with the CAC Act; and
- provide transitional and savings provisions to enable the operations of the Law Reform Commission established by the *Law Reform Commission Act 1973* to be continued by the reconstituted Commission established by the Australian Law Reform Commission Act.

*The committee has no comment on this bill.*

## **Development Allowance Authority Amendment Bill 1996**

This bill was introduced into the Senate on 20 June 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Finance]

The bill proposes to remove certain restrictions on the restructuring of ownership of projects eligible for the development allowance so a consistent approach is available to the various types of prospective applicants for the development allowance.

### **Retrospectivity**

#### **Item 31 of Schedule 1**

The effect of item 31 of the Schedule to this bill is to give retrospective application from 30 June 1992 to some of the amendments contained in the bill.

The retrospective application will enable payments to be made in respect of applications concerning plant expenditure which were refused or withdrawn or paid at lesser rates where entitlement, or a greater entitlement, would have existed if the amendments proposed by the bill had been in force at the relevant time. The retrospective application, therefore, is beneficial to applicants.

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

## **Income Tax Assessment Bill 1996**

This bill was introduced into the House of Representatives on 19 June 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to establish the structure and framework of a new Income Tax Assessment Act to be built up progressively to replace the *Income Tax Assessment Act 1936* as that Act is rewritten.

*The committee has no comment on this bill.*

## **Income Tax (Consequential Amendments) Bill 1996**

This bill was introduced into the House of Representatives on 19 June 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill, consequent upon the Income Tax Assessment Bill 1996, proposes to:

- amend other Commonwealth Acts that contain references to the *Income Tax Assessment Act 1936*; and
- makes amendments to the 1936 Act closing off the application of provisions that have been rewritten.

*The committee has no comment on this bill.*

## **Income Tax (Transitional Provisions) Bill 1996**

This bill was introduced into the House of Representatives on 19 June 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill, consequent upon the Income Tax Assessment Bill 1996, proposes to explain when and how the Income Tax Assessment Bill 1996 will commence to apply. As a general rule, the rewritten law will first apply for the 1996-97 income year.

*The committee has no comment on this bill.*

## Migration Legislation Amendment Bill (No. 2) 1996

This bill was introduced into the Senate on 20 June 1996 by the Assistant Treasurer. [Portfolio responsibility: Immigration and Multicultural Affairs]

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

- ensure that certain provisions of the *Human Rights and Equal Opportunity Commission Act 1986* and the *Ombudsman Act 1976* do not apply to persons who are in immigration detention, having arrived in Australia as unlawful non-citizens, unless persons themselves initiate a complaint in writing to HREOC or to the Ombudsman; and
- clarify the duties of the Minister and officials concerning advice relating to applications for visas and on access to legal and other advice.

It is proposed that the amendments would commence on 19 June 1996.

### Retrospectivity

#### Clause 2

By clause 2, this bill, if enacted, would have a limited retrospective effect in that it would be taken to have commenced on the day it was introduced into Parliament, rather than the day on which it receives Royal Assent.

The committee is opposed in principle to retrospective legislation by which vested rights are taken away. The announcement that a bill, if passed, will operate retrospectively to any extent puts departmental officers in an invidious position. Take the proposed legislation, for example. The Federal Court has ruled that the law in Australia at the present time requires the custodial officer to deliver any sealed envelope to the detainee that comes from the Human Rights and Equal Opportunities Commission or the Ombudsman. If such an envelope were to arrive today, 26 June 1996, the custodial officer would be breaking the law if he/she failed to deliver it. There is no guarantee that this legislation will be passed or, if passed, will be passed in the same terms as the proposed bill, specifically that the legislation will be given a commencement date of 19 June 1996. Is it appropriate for the Minister or the Departmental Secretary to give him/her a direction not to deliver the envelope? Is it appropriate, is it within the Minister's power, to promise an indemnity if he/she does not deliver the envelope and the legislation is not passed or not passed with retrospective effect?

The net effect is if the custodial officers act within the rule of law and obey the law as it stands the proposed retrospective effect will be nullified. In order to give the

proposed law retrospective effect the officers concerned need to break the present law. There are some shades of *Ridgeway's* case in this.

On the other side of the coin is the detainee who has a right to have the envelope delivered. If the envelope is not delivered, that right is taken away, not by law, but by a presently unlawful act on the dubious grounds that perhaps Parliament will pass a proposed law that will have retrospective effect to make the unlawful act lawful. This is an instance of where retrospectivity could have a very serious effect on the rights of people.

As the committee had occasion to say in its Third Report of 1996 on another bill:

Criminalising previously non-criminal conduct, however, is not the only way in which retrospectivity may unduly trespass on personal rights and liberties.

The committee would be interested to know **what the Minister's view is on the present obligations of his departmental officers.**

*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.*

## **Denial of access to justice?**

*The implications of section 256*

The substantive amendments to the *Migration Act 1958* which are made by this bill appear to the committee to be predicated on an inaccurate view of section 256 of that Act. Section 256 provides:

Where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

This section places a positive obligation on the person responsible for the immigration detention of a person to give access to obtaining legal advice if the detained person requests it. It does not say that this section is an exhaustive code of

all the ways in which such a detainee may have access to legal advice. Yet paragraph 2 on page 2 of the explanatory memorandum asserts that section 256 establishes that a person in immigration detention has a right to access legal advice only when they request it. Equally the second reading speech speaks of an onus on unlawful non-citizens to advise officials if they wish to seek legal advice and speaks of section 256 as making provision for access to legal advice but only where the detainees request legal advice.

Section 256 for the detainee is an enabling section ensuring a right to access legal advice if the detainee requests it. Section 256 for the custodian imposes a positive obligation to provide that access if it is requested. But section 256 is not restrictive in the sense that it denies all access to legal advice except through section 256. It is an unwarranted conclusion that because the Migration Act 1958 is otherwise silent on the matter of legal access to this class of person, that no other right to access legal advice exists and that the *Migration Act 1958* exhibits an intention to exclude all other access.

Parliament's intention in passing an Act is to be found in the interpretation which a court puts on the meaning of the words. It is true that in cases of ambiguity a court may use other documentary material. But, absent an ambiguity, no one can say the intention of an Act is other than what a court finds to be the express or implied meaning of the words. In this instance, the Federal Court in *Human Rights and Equal Opportunity Commission and Another v Secretary of the Department of Immigration and Multicultural Affairs* (unreported, 7 June 1996, Lindgren J, NG 268 of 1996) has put the matter beyond doubt.

#### *Hierarchy of Acts?*

The second reading speech can also be seen mistakenly to assume that there is some hierarchy in Acts of Parliament. It mentions that certain provisions of the *Ombudsman Act 1976* and the *Human Rights and Equal Opportunity Commission Act 1986* could be used:

to undermine the intention of section 256 of the Migration Act.

As we have seen above, the section does not exhibit an intention to exclude the operation of the *Ombudsman Act 1976* and the *Human Rights and Equal Opportunity Commission Act 1986*. So the argument that the effect of those Acts should be legislated away cannot be based on an assumption that the *Migration Act 1958* is somehow more important than the other Acts and therefore should not be undermined.

The result of the Federal Court case that has prompted this legislation is clear proof that the intention of Parliament, as found by the only institution that can

authoritatively say what that intention is, in passing the *Ombudsman Act 1976* and the *Human Rights and Equal Opportunity Commission Act 1986* was to provide a method of access to legal advice alternative to that provided in the *Migration Act 1958*. Any impression that somehow Parliament made a mistake that now has to be fixed is quite false.

*The right to knowledge*

In 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.

...

It may be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.

The maxim of law that ignorance of the law is no excuse is based on the assumption that people are able to find out what the law is that affects them. It seems to the committee that the provisions of this bill are clearly designed to make it as difficult as possible for the people subject to these laws to find out what rights they have in law. The committee rejects the notion that this is justified because it will cost money to enable them to exercise their rights if they find out about them. The protection of rights ought not to be governed by cost-benefit analysis.

The committee has previously had cause to comment that:

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 trespassing unduly on personal rights and liberties.

*The International Covenant on Civil and Political Rights*

Article 26 of the International Covenant on Civil and Political Rights provides that all persons are entitled without any discrimination to the equal protection of the law. The committee questions whether the bill discriminates against unlawful non-citizens by precluding a present lawful means of obtaining access to legal advice.

*The issue*

The issue for the committee, as always, is not whether the clauses of the bill trespass on personal rights but whether they do so unduly. The committee is not convinced by the reasons given in the explanatory memorandum and the second reading speech justifying the proposal.

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

## Natural Heritage Trust of Australia Bill 1996

This bill was introduced into the House of Representatives on 19 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Environment, Sport and Territories]

The bill proposes to:

- establish the Natural Heritage Trust of Australia Reserve (the Reserve) to provide funds for the repair and replenishment of Australia's natural environment;
- provide for \$1 billion from the proceeds of the partial privatisation of Telstra to be paid into the Reserve;
- provide for funds in the Reserve to be invested and for income from such investments to be returned to the Reserve;
- provide for funds from a number of other sources to be paid into the Reserve;
- describe the range of programs and activities to be funded from money in the Reserve;
- establish a Natural Heritage Board to provide a forum for consultation between the Minister for the Environment and the Minister for Primary Industries and Energy on the operations of the Reserve; and
- provide for the preparation and tabling of an annual report about the administration of the Reserve.

*The committee has no comment on this bill.*

## Statute Law Revision Bill 1996

This bill was introduced into the Senate on 19 June 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Attorney-General]

The bill proposes to:

- repeal 16 Commonwealth Acts that have no current or future operation;
- amend 127 Commonwealth Acts to correct drafting and clerical mistakes;
- make consequential amendments to 95 Commonwealth Acts in relation to references to the *Remuneration Tribunal Act 1973* (changed from *Remuneration Tribunals Act 1973* in 1988); and
- make amendments in relation to gender specific language to 58 Commonwealth Acts.

*The committee has no comment on this bill.*

## **Trade Practices Amendment (Better Business Conduct) Bill 1996**

This bill was introduced into the House of Representatives on 17 June 1996 by Mr Beazley as a Private Member's bill.

The bill proposes to amend the *Trade Practices Act 1974* to prohibit harsh or oppressive conduct in circumstances where:

- two parties are in a pre-existing commercial relationship (which may or may not be based on contract);
- the nature of that relationship gives one party a significant advantage in bargaining power; and
- the stronger party knowingly exploits that advantage to engage in conduct or impose terms and conditions of a contract that are, subject to a reasonable person test, outside prevailing market conditions.

*The committee has no comment on this bill.*

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

**No. 5 of 1996**

**21 August 1996**

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## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

Senator B Cooney (Chairman)  
Senator W Crane (Deputy Chairman)  
Senator the Honourable I Campbell  
Senator M Forshaw  
Senator I Macdonald  
Senator A Murray

### **TERMS OF REFERENCE**

#### **Extract from Standing Order 24**

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

# CONTENTS

	<b>Page</b>
Aboriginal Land Rights (Northern Territory) Amendment Bill 1996	5
Australian Animal Health Council (Live-stock Industries) Funding Bill 1996	6
<b>V</b> Australian Capital Territory Government Service Consequential Provisions) Amendment Bill 1996	7
<b>V</b> Bankruptcy Legislation Amendment Bill 1996	9
<b>V</b> Cattle Export Charges Amendment (AAHC) Bill 1996	11
<b>V</b> Cattle Transaction Levy Amendment (AAHC) Bill 1996	13
Child Support Legislation Amendment Bill (No. 1) 1996	15
Commonwealth Electoral Amendment (16 and 17 Year Old Voluntary Enrolment) Bill 1996	16
Constitution Alteration (President of the Commonwealth of Australia) 1996	17
<b>V</b> Defence Legislation Amendment Bill (No. 1) 1996	18
Employment, Education and Training Amendment	

( The committee has commented on these bills

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Any Senator who wishes to draw matters to the attention of the  
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Bill 1996	19
Flags Amendment Bill 1996	20
Health and Other Services (Compensation) Amendment Bill 1996	21
Health and Other Services (Compensation) Amendment Bill 1996 (No. 2)	22
Higher Education Funding Amendment Bill (No. 1) 1996	23
Higher Education Funding Amendment Bill (No. 2) 1996	25
<b>V</b> Industry Research and Development Amendment Bill 1996	26
Labelling of Genetically Manipulated and Other Foods Bill 1996	28
<b>V</b> Laying Chicken Levy Amendment (AAHC) Bill 1996	29
<b>V</b> Legislative Instruments Bill 1996	31
<b>V</b> Live-stock Export Charge Amendment (AAHC) Bill 1996	36
<b>V</b> Live-stock Slaughter Levy Amendment (AAHC) Bill 1996	38
<b>V</b> Meat Chicken Levy Amendment (AAHC) Bill 1996	40

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Mutual Assistance in Criminal Matter Legislation Amendment Bill 1996	42
<b>v</b> Native Title Amendment Bill 1996	43
Ombudsman Amendment Bill 1996	45
Ombudsman Amendment Bill 1996 [No. 2]	46
Patents Amendment Bill 1996	47
<b>v</b> Pig Slaughter Levy Amendment (AAHC) Bill 1996	48
<b>v</b> Primary Industries and Energy Legislation Amendment Bill (No. 2) 1996	50
<b>v</b> Sales Tax Amendment Bill (No. 1) 1996	53
<b>v</b> Taxation Laws Amendment Bill (No. 2) 1996	55
Taxation Laws Amendment (International Tax Agreements) Bill 1996	57
Trade Practices Amendment (Industry Access Codes) Bill 1996	58

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## **Aboriginal Land Rights (Northern Territory) Amendment Bill 1996**

This bill was introduced into the Senate on 26 June 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Aboriginal and Torres Strait Islander Affairs]

The bill proposes to amend the *Aboriginal Land Rights (Northern Territory) Act 1975* to grant three parcels of land to Aboriginal Land Trusts: the Bauhinia Downs Land Claim, the Brumby Plains Station Land Claim, and the Kartangurruru, Walpiri and Walmajeri Repeat Land Claim.

*The committee has no comment on this bill.*

## **Australian Animal Health Council (Live-stock Industries) Funding Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to provide for a number of primary industry levy Acts to direct funds to the Australian Animal Health Council Ltd.

*The committee has no comment on this bill.*

## **Australian Capital Territory Government Service (Consequential Provisions) Amendment Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister Assisting the Prime Minister for the Public Service. [Portfolio responsibility: Prime Minister]

The bill proposes to amend the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* to extend staff mobility arrangements to persons who have been compulsorily transferred from the ACT public service and consequently lost access to the mobility rights.

### **Henry VIII clause - appropriate delegation of legislative power?**

Proposed subsection 27(3), if enacted, would give the Minister (through the Governor-General) the power to make regulations to amend the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* and any other Act. The purpose of having this power to amend the Act is, in the first instance, in order to restore the mobility rights of certain ACT public servants who have compulsorily been made employees of a corporatised body. The power will also be able to be used, where the ACT Government sees fit, if future corporatisations take away mobility rights. A clause with such a power is said to be a 'Henry VIII' clause.

The committee examines 'Henry VIII clauses' under the fourth principle in its terms of reference: whether a clause in a bill inappropriately delegates legislative power. A 'Henry VIII clause' is an express provision authorising the amendment of either the empowering legislation or any other Act by means of delegated legislation. Generally the committee would draw the attention of Senators to such a provision because only Parliament itself should be empowered to change what Parliament has enacted. Where Parliament has passed a law, it seems an abrogation of parliamentary responsibility to enable some other person or body to amend Parliament's law. Such a power should be closely confined and is appropriately given only where there is sufficient justification. Unfortunately, where 'Henry VIII clauses' are proposed, often the justification put forward is one of convenience: 'it is too time-consuming or burdensome for Parliament to have to worry about changes that may need to be made in the future: it is better to leave these matters to the executive'.

Proposed section 27(3) has some similarity with subsection 27(1) of the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994*. It, too, is a 'Henry VIII clause' which the committee commented on in its Eleventh Report of 1994. The justification for the earlier clause was contained in a letter from the Minister which the committee received before the bill was introduced. In the letter, the Minister listed the reasons for needing an 'Henry VIII clause'. Basically, it seemed that the setting up of the separate ACT Government itself some years earlier was so complex that they had not been able to identify all Acts which needed to be amended. Similarly they expected that they had not been able to identify all the required amendments for the setting up of a separate ACT Government service. Consequently they needed a 'Henry VIII clause'. The committee was, therefore, disposed to accept that there was justification for such a clause on that occasion.

The committee notes that a different justification is being put forward on this occasion. It is not a matter of not being able to identify the required amendments, rather the issue is that, to restore mobility rights to certain ACT public servants who have lost those rights in the corporatisation of a government business, the application of certain provisions needs to be altered.

If it were simply a matter of achieving that purpose, it would seem to the committee that the same effect could have been achieved by altering the application of the legislation by means of this bill. It seems, however, that other corporatisations may take place, so further amending Acts would be necessary.

The power to amend, proposed by this bill, is very strictly circumscribed, limited to achieving this sole effect. In addition, the bill provides a sunset clause, giving a finite period of less than two years during which the power may operate. For these reasons the committee is of the opinion that the delegation of legislative power in these circumstances is not inappropriate.

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

## **Bankruptcy Legislation Amendment Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to:

- establish a "One Stop Service" for bankrupts and insolvent debtors and rationalise bankruptcy administration by abolishing the offices of Registrar and Deputy Registrar in Bankruptcy;
- revise antecedent transaction avoidance provisions;
- establish administrations as alternative regimes to bankruptcy and to make meeting procedures align with those in bankruptcy;
- create a new insolvency administration to be known as debt agreements for certain low income debtors;
- modernise the statement of the duties of bankruptcy trustees;
- establish new administrative arrangements for trustee registration;
- correct anomalies and improve the compulsory income contribution regime;
- replace statutory approved forms with administrative approved forms;
- give the Federal Court jurisdiction in bankruptcy exclusive of the jurisdiction of courts other than the High Court under the Constitution;
- empower the Governor-General to make regulations relating to matters other than court practice and procedure;
- create a new register of bankruptcies and personal insolvencies to be known as the National Personal Insolvency Index;
- make powers of trustees discretionary, but subject to review by the Court;
- improve the investigative powers of trustees;
- repeal spent transitional provisions;
- make consequential and transitional provisions; and
- effect gender neutral language.

## **Retrospective application Items 213 and 214**

By item 213, sections 120 and 121 of the *Bankruptcy Act 1966* are repealed and new sections are substituted. Proposed new sections 120 and 121 increase the range of transactions by a bankrupt which are to be void as against the trustee in bankruptcy. The amendments will enable a trustee in bankruptcy to lay claim to more former assets of the bankrupt for distribution among the creditors. They deal with undervalued transactions (where the transferee gave no consideration or inadequate consideration) and transfers to defeat creditors.

By item 214, subsection 122(1) is repealed and a new subsection is substituted. This subsection deals with avoidance of preferences, that is, it prevents a debtor from giving a particular creditor a preference, priority or advantage over other creditors.

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

The issue for the committee is whether the retrospective application of these clauses unduly trespasses on personal rights. People who are bankrupts when these provisions commence (item 214) or who become bankrupts after these provisions commence (item 213) may, at various times over the five years before the date of their bankruptcy, have entered into transactions which, according to the present law, would have had the effect of preventing the trustee in bankruptcy from claiming certain former assets of the bankrupt for distribution to creditors.

On the one hand, the purpose of the amendments is to seek to increase the amount available for distribution among creditors whose rights to be paid in full may be considered to have been trespassed against. On the other hand, the position of people who may have entered in good faith to some of these transactions may be adversely affected.

The committee, therefore, **seeks the advice of the Attorney-General** on the relative positions of those two groups.

*Pending the Attorney-General'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.*

## **Cattle Export Charges Amendment (AAHC) Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the *Cattle Export Charges Act 1990* to:

- allow for amounts raised under the Act to be paid to the Australian Animal Health Council; and
- set an operative charge rate of 5 cents and maximum charge rate of 50 cents per head of cattle exported.

### **Imposing charge by regulation Items 2, 3 and 4 of Schedule 1**

Items 2, 3 and 4 of Schedule 1, if enacted, would each allow a charge to be set by regulation.

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

The committee notes that, with respect to the charges set by these items, there is also set a maximum amount: '(not more than 50 cents)'. The committee also notes paragraph 4 of the explanatory memorandum of the Australian Animal Health Council (Live-stock Industries) Funding Bill 1996:

The Australian Animal Health Council Limited has been established as a non-profit company and will be jointly owned and funded by the Commonwealth Government, State and Territory Governments and the peak national representative bodies of Australia's livestock based industries. Its mission will be to ensure that the Australian animal

health service system is capable of maintaining acceptable national animal health standards which meet consumer needs and market requirements at home and overseas.

The committee can understand that, at this initial stage, the future extent of the Commonwealth's share of the funding of the Council may be uncertain.

The committee notes, however, a difference between this bill and the other charge and levy bills considered in this Digest in that there is a marked discrepancy between the set rate and the maximum rate. For example, the set rate of 5 cents is only one tenth of the maximum rate of fifty cents per head whereas the set rate of 0.21 cents in the Laying Chicken Levy Amendment (AAHC) Bill 1996 is two thirds of the maximum levy rate of 0.33 per head.

The committee **seeks the advice of the Minister** on the reasons for such a discrepancy.

*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.*

## **Cattle Transaction Levy Amendment (AAHC) Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Primary Industries. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the *Cattle Transaction Levy Act 1995* to:

- allow for amounts raised under the Act to be paid to the Australian Animal Health Council; and
- set an operative levy rate of 5 cents and maximum levy rate of 50 cents per head of cattle transacted.

### **Imposing levy by regulation Items 2 and 3 of Schedule 1**

Items 2 and 3 of Schedule 1, if enacted, would each allow a levy to be set by regulation.

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

The committee notes that, with respect to the levies set by these items, there is also set a maximum amount: '(not more than 50 cents)'. The committee also notes paragraph 4 of the explanatory memorandum of the Australian Animal Health Council (Live-stock Industries) Funding Bill 1996:

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The committee **seeks the advice of the Minister** on the reasons for such a discrepancy.

*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.*

## **Child Support Legislation Amendment Bill (No. 1) 1996**

This bill was introduced into the Senate on 27 June 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Treasury]

The bill proposes to amend the:

- *Child Support (Assessment) Act 1989* to:
  - eliminate outdated references to the repealed *Social Security Act 1947*, reflect changes made in the rewrite and recent amendments to the *Social Security Act 1991*;
  - revise the procedures in relation to revised income estimate election;
  - reflect changes made to the presumptions of parentage of the *Family Law Act 1975*; and
- *Child Support (Registration and Collection) Act 1988* to:
  - enable child support payments to be made directly to the Child Support Registrar; and
  - reduce the period an employer is required to retain child support records from seven to five years; and
- *Family Law Act 1975* to enable the Court to take into account a paying parent's potential child support liability in property and in spousal maintenance proceedings even in the absence of an administrative assessment under the *Child Support (Assessment) Act 1989*.

*The committee has no comment on this bill.*

## **Commonwealth Electoral Amendment (16 and 17 Year Old Voluntary Enrolment) Bill 1996**

This bill was introduced into the Senate on 26 June 1996 by Senator Chamarette as a Private Senator's bill.

The bill proposes to amend the *Commonwealth Electoral Act 1918* to extend the voluntary electoral enrolment to 16 year olds.

*The committee has no comment on this bill.*

## **Constitution Alteration (President of the Commonwealth of Australia) Bill 1996**

This bill was introduced into the Senate on 25 June 1996 by Senator Teague as a Private Senator's bill.

The bill proposes to amend the Constitution to provide for a President of the Commonwealth to be the Head of State of Australia.

*The committee has no comment on this bill.*

## **Defence Legislation Amendment Bill (No. 1) 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Defence Industry, Science and Personnel. [Portfolio responsibility: Defence]

The bill proposes to amend the:

- *Defence Force Discipline Act 1982* to close a loophole which could prevent the prosecution of certain offences, including offences committed by Defence Force members serving overseas; and the
- *Defence Force (Home Loans Assistance) Act 1990* to:
  - increase the maximum amount of a subsidised loan to \$80,000;
  - reduce the basic eligibility period that applies from six to five years; and
  - extend eligibility to certain members of the Reserves.

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

Subclause 2(2) of this bill, if enacted, would enable some of the amendments proposed by this bill to have effect retrospectively from 28 May 1992. The committee notes, however, that those amendments are technical only.

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

## **Employment, Education and Training Amendment Bill 1996**

This bill was introduced into the Senate on 27 June 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to amend the *Employment, Education and Training Act 1988* to:

- abolish the National Board of Employment, Education and Training, the Australian Language and Literacy Council, the Employment and Skills Council and the Schools Council and provide for a final report of their operations;
- allow the Higher Education Council and the Australian Research Council to continue as independent Councils, reporting directly to the Minister;
- provide for the appointment of committees and counsellors to assist the Higher Education Council and the Australian Research Council; and
- make technical and consequential amendments.

*The committee has no comment on this bill.*

## **Flags Amendment Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Administrative Services. [Portfolio responsibility: Administrative Services]

The bill proposes to amend the *Flags Act 1953* to ensure that the current Australian National Flag ceases to be the National Flag only if a new National Flag or flags have been submitted to the electors in each State and Territory and a majority have approved the change.

*The committee has no comment on this bill.*

## **Health and Other Services (Compensation) Amendment Bill 1996**

This bill was introduced into the Senate on 26 June 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the *Health and Other Services (Compensation) Act 1995* to create a process whereby the compensation payer or insurer will be able to pay to claimants the major portion of their judgment or settlement while at the same time paying the balance to the Commonwealth.

*The committee has no comment on this bill.*

## **Health and Other Services (Compensation) Amendment Bill 1996 (No. 2)**

This bill was introduced into the House of Representatives on 24 June 1996 by Mr Lee as a Private Member's bill.

The bill proposes to amend the *Health and Other Services (Compensation) Act 1995* to withhold an amount equal to the total medicare benefits paid to the claimant since the beginning of their compensation claim until any debt owed to the Commonwealth is calculated and paid.

*The committee has no comment on this bill.*

## Higher Education Funding Amendment Bill (No. 1) 1996

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Schools, Vocational Education and Training. [Portfolio responsibility: Employment, Education and Training]

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

- vary the maximum grant amounts for operating purposes for higher education institutions for the funding years 1996, 1997 and 1998;
- vary the maximum total amount of financial assistance payable to higher education institutions for superannuation expenditure for the funding years 1996, 1997 and 1998;
- vary the maximum total amount of financial assistance payable in grants to open learning organisations for 1996;
- vary the limit on total funds available for certain grants in respect of the funding years 1995, 1996, 1997 and 1998;
- vary the maximum total amount of financial assistance payable as grants in respect of teaching hospitals for each of the years 1996, 1997 and 1998;
- vary the maximum total amount of approved expenditure for grants for approved special capital projects for each of the years 1996, 1997 and 1998;
- amend the definition of "Qualified Accountant" to reflect the name change from the Australian Society of Accountants to the Australian Society of Certified Practising Accountants;
- revise the list of higher education institutions in Australia;
- allow advances of operating grants to be made for a wider range of purposes to universities;
- clarify that the Minister, not the institution seeking funds, estimates the expenditure by which grants may be approved;
- provide that the Minister may approved a proposal to be undertaken by an institution to conduct a research program including research training;
- amend provisions of the Open Learning Deferred Payment Scheme (OLDPS) to:
  - remove the concept of a "semester",

- enable a person to be an "eligible" student under OLDPS if they fail to provide a tax file number, and
- amend the criteria for client eligibility;
- amend the limit of eight deferred payment units in consecutive study periods to relate to a calendar year;
- amend provisions of the Open Learning Agency of Australia (OLAA) to:
  - provide that the agency makes available statistical and other information as required by the Minister,
  - remove the provision that the OLAA notify the Minister when a client does not have a tax file number, and
  - instruct the Chief Executive Officer of OLAA to provide a statement certifying that the agency has complied with legislation;
- remove the requirement for taxpayers to include the amount of HECS debt when lodging their income tax return;
- supplement grants levels for 1996, 1997 and 1998;
- adjust the amount of Aboriginal and Torres Strait Islander support funds available for institutions and provide funding to trial the development of an indigenous university network;
- move Batchelor College to the table which lists institutions funded on a triennial basis, rather than an annual basis;
- reflect the name change of Marcus Oldham College; and
- amend terminology in order to conform to guidelines issued by the Minister for Finance for the purposes of the National Audit Office.

*The committee has no comment on this bill.*

## **Higher Education Funding Amendment Bill (No. 2) 1996**

This bill was introduced into the Senate on 27 June 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Employment, Education and Training]

The bill proposes to amend the:

- *Higher Education Funding Act 1988* to cease funding for 1997 and later under the Student Organisation Support Program; and
- *States Grants (General Purposes) Act 1994* to make a consequential amendment.

*The committee has no comment on this bill.*

## **Industry Research and Development Amendment Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Industry, Science and Tourism. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the:

- *Industry Research and Development Act 1986* to:
  - reduce retrospective access to the subsidy under section 39J to a reasonable period after the end of the year of income in which the R&D activities are conducted;
  - validate purported decisions taken in relation to overseas R&D certificates and internal reviews of previous decisions; and
  - provide that regulations may be made to set fees for certain applications or requests to the Board; and
- *Income Tax Assessment Act 1936* to require a company to register for each year of income the particular R&D activities for which it wishes to claim a deduction under section 73B for expenditure incurred on those activities.

### **Retrospectivity Subclauses 2(2) and (4)**

Subclauses 2(2) and (4) of this bill, if enacted, would enable some of the amendments proposed by this bill to have effect retrospectively from 19 December 1994 and 15 June 1991 respectively.

The committee notes that the effect of the amendments is to do no more than validate the current practice which is beneficial to applicants for taxation relief.

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

**Retrospectivity**  
**Subclause 2(3) - Item 13 of Schedule 1**

By subclause 2(3) the amendment proposed by item 13 of Schedule 1 would have effect from 6 December 1995. The explanatory memorandum indicates that the amendment denies retrospective access to the Research and Development tax concession in respect of years of income prior to and including 1992-93 unless the Board had registered a company under section 39J before 2.30pm on 6 December 1995, the date of the previous Government's announcement of the reduction of retrospective access. The new Government endorsed the decision to reduce retrospective access by the Treasurer's announcement of 3 June 1996. While this is an example of legislation by press release, the committee takes into account the election and change of government as factors in the delay in introducing the legislation.

The committee also notes the need to preclude further registrations of companies after 6 December 1995 to avoid loss to the revenue.

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

## **Labelling of Genetically Manipulated and Other Foods Bill 1996**

This bill was introduced into the Senate on 27 June 1996 by Senator Woodley as a Private Senator's bill.

The bill proposes to ensure that food which has been genetically engineered, subjected to irradiation or treated to make it a functional food is appropriately labelled.

*The committee has no comment on this bill.*

## **Laying Chicken Levy Amendment (AAHC) Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the *Laying Chicken Levy Act 1988* to:

- allow for amounts raised under the Act to be paid to the Australian Animal Health Council; and
- set an operative levy rate of 0.21 cents and maximum levy rate of 0.33 cents per head of laying chickens.

### **Imposing levy by regulation Item 2 of Schedule 1**

Item 2 of Schedule 1, if enacted, would allow a levy to be set by regulation.

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

The committee notes that, with respect to the levy set by this item, there is also set a maximum amount: 'not more than 0.33 cent'. The committee also notes paragraph 4 of the explanatory memorandum of the Australian Animal Health Council (Live-stock Industries) Funding Bill 1996:

The Australian Animal Health Council Limited has been established as a non-profit company and will be jointly owned and funded by the Commonwealth Government, State and Territory Governments and the peak national representative bodies of Australia's livestock based industries. Its mission will be to ensure that the Australian animal health service system is capable of maintaining acceptable national

animal health standards which meet consumer needs and market requirements at home and overseas.

The committee can understand that, at this initial stage, the future extent of the Commonwealth's share of the funding of the Council may be uncertain.

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

## Legislative Instruments Bill 1996

This bill was introduced into the House of Representatives on 26 June 1996 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to establish a regime to govern drafting standards and procedures for the making, registration, publication, scrutiny and sunseting of delegated legislation.

### **Attorney-General's certificate - judicial review and Parliamentary scrutiny** **Clause 8**

Clause 8 provides for the Attorney-General to give a certificate to clarify definitively whether an instrument is a legislative instrument for the purposes of this legislation. In its Alert Digest No. 12 of 1994, the committee commented on a similar provision in the Legislative Instruments Bill 1994 because that bill excluded review of the exercise of this power.

The committee notes, however, that the present bill provides that the Attorney-General's decision will be subject to judicial review.

The committee also notes, however, that, in its Fifteenth Report of 1994 in respect of the Attorney-General's power to issue such a certificate, the committee endorsed the recommendation of the Senate Standing Committee on Regulations and Ordinances that the clause be amended to ensure that these certificates be subject to disallowance by Parliament. The previous Government proposed to amend the previous bill to provide for disallowance explicitly. The current bill could be interpreted as also providing for the exercise of this power to be subject to disallowance. The certificate is to be registered in Part C of the Federal Register of Legislative Instruments, so presumably it is itself a legislative instrument. Part 5 of the bill provides for the scrutiny by Parliament of registered legislative instruments. Proposed subsection 61(8) lists instruments which are not subject to disallowance but does not include these certificates in the list. As the matter may not be without doubt the committee **seeks the advice of the Attorney-General** on whether the certificate is subject to disallowance by Parliament.

*Pending the Attorney-General's advice, the committee draws Senators' attention to the provision, as it may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

### **Delegation of legislative power Clause 34 and subclause 75(2)**

These provisions, if enacted, would enable Schedule 2 and Schedule 3 to be altered by regulation. Examination of the process and safeguards built into these provisions leads the committee to the conclusion that the delegation of legislative power is not inappropriate.

The Table in Schedule 2 lists enabling legislation which authorises the making of legislative instruments which will be likely to have an effect on business. Part 3 of this bill, if enacted, would require appropriate consultation before such instruments are made. The effect of clause 34 is to enable legislation to be added to or removed from the Table in Schedule 2 by regulation when it is appropriate to add new legislation or to omit present legislation because, through amendment or repeal, it no longer authorises legislative instruments which will be likely to have an effect on business. Removal of legislation may only occur upon a determination by the Attorney-General (subclause 75(3)) that there will be no longer any effect on business.

Similarly, Schedule 3 lists Bodies that are government business enterprises. Subclause 75(2) provides that a name may be removed or added to the list by regulation.

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

### **Insufficient scrutiny by Parliament Subclause 61(7) - national schemes of legislation**

Clause 61 provides the regulatory framework which enables Parliament to disallow legislative instruments. Subclause 61(7), however, exempts certain legislative instruments from disallowance by Parliament. These are instruments made to

facilitate the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States where the legislation enabling the instrument to be made directs that the instruments may not be disallowed.

Such a provision in a bill would come within the terms of reference of this committee and would be drawn to the attention of the Senate. The committee is concerned that subclause 61(7), if enacted, could be considered to give a general approval for removing from Parliament's scrutiny subordinate legislation in respect of national schemes of legislation. Primary legislation establishing such schemes originates from the decisions of ministerial councils and may sometimes be considered to be itself not subject sufficiently to Parliamentary scrutiny.

The committee acknowledges the potential benefits to Australia of national schemes of legislation. On the other hand, the committee is of the view that the norm should be that all subordinate legislation should be subject to Parliamentary scrutiny. Precluding Parliamentary power should occur only where just and weighty reasons warrant such a provision on a case by case basis. The committee **seeks the advice of the Attorney-General** on whether he agrees that subclause 61(7) puts the wrong emphasis on this issue.

*Pending the Attorney-General's response, 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.*

### **Insufficient parliamentary scrutiny of legislative power Paragraph 61(8)(c) - Proclamation not disallowable**

Clause 61 provides for the disallowance of legislative instruments by either House of Parliament. Subclause 61(8), however, provides that certain legislative instruments are to be exempted from disallowance. Among the exemptions, paragraph (c) provides that a Proclamation under section 5 of the *Flags Act 1953* is not to be disallowable.

The committee notes that the explanatory memorandum does not contain any reason for this exemption. The second reading speech, however, indicates that the bill represents a significant shift in control over delegated legislation back towards the

Parliament and will ensure that Parliament will have a greater role in the scrutiny of delegated legislation.

The committee, therefore, **seeks the advice of the Attorney-General** on why Parliament should not have the power of disallowance in this instance.

*Pending the advice of the Attorney-General, 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.*

### **Insufficient parliamentary scrutiny of legislative power Item 14 of Schedule 1 - Instruments that are not legislative instruments**

Schedule 1 lists certain instruments and provides that they are not to be legislative instruments for the purpose of the legislation. Item 14 provides for certain instruments to be included in the list by being prescribed.

This provision was not included in the 1994 Bill. It appears that Item 14 instruments could include Determinations under the *Public Service Act 1922*, the *Defence Act 1903* and the *Remuneration Tribunal Act 1973*, which are at present subject to full scrutiny and disallowance by Parliament. The committee acknowledges that the regulation which prescribes such determinations as Item 14 instruments and therefore makes them exempt from disallowance would itself be subject to disallowance. This is not a satisfactory safeguard as a period of some months could elapse between the coming into effect of the regulation and its disallowance. Any determinations made during this period would remain in force even if the regulation was disallowed.

The committee **seeks the advice of the Attorney-General** on this issue.

*Pending the advice of the Attorney-General, the committee draws Senators' attention to the 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.*

### **Inappropriate delegation of legislative power?**

#### **Schedule 4 - Amendment of various Acts with respect to Rules of Court**

The committee notes that 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 7 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. Schedule 4 also provides, however, that the provisions of the proposed bill which are to apply to the rules of court may be modified or adapted by regulations made under the Acts regulating those Courts.

The power of those regulations to modify the primary legislation is subject to two exceptions. One 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. The other is that they may not modify the provisions of Part V of the bill which regulate the Parliamentary scrutiny of legislative instruments.

The committee is of the view that it would be possible, by modifying proposed section 48, for example, to exclude the rules of court from having to be registered. This would have the effect of excluding the rules from Parliamentary scrutiny because Part V operates only on registered instruments.

The committee dealt with this issue in its Fifteenth Report of 1994 on the former bill. The committee notes that the present bill excludes Part V from itself being modified but the committee remains of the view that other modifications could be made that would prevent Parliamentary scrutiny.

The committee notes that any regulations which modified the provisions of the proposed legislation would themselves be subject to tabling and disallowance by Parliament. The committee, however, **seeks the advice of the Attorney-General**

whether, given the intention of making rules of court subject to Parliamentary scrutiny, the bill should be drafted so as to prevent modifications by regulation that would have the effect of ousting Parliamentary scrutiny.

*Pending the Attorney-General's advice, the committee draws Senators' attention to the provisions, as they may be considered insufficiently to subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.*

# Live-stock Export Charge Amendment (AAHC) Bill 1996

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the *Live-stock Export Charge Act 1977* to:

- allow for amounts raised under the Act to be paid to the Australian Animal Health Council; and
- set an operative charge rate of 0.33 cents and maximum charge rate of 2 cents per head of sheep and lambs exported.

## Imposing charge by regulation Items 2 and 3 of Schedu\*\*\*\*

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\*\*\*\*\*lity, (that is, adjustments to the rate of a charge need to be made so frequently and/or so quickly that it is impractical to amend primary legislation) the committee prefers that the primary legislation prescribe either a maximum rate of the charge or a method of calculating such a maximum rate.

The committee notes that, with respect to the charges set by these items, there is also set a maximum amount: '(not more than 2 cents)'. The committee also notes paragraph 4 of the explanatory memorandum of the Australian Animal Health Council (Live-stock Industries) Funding Bill 1996:

The Australian Animal Health Council Limited has been established as a non-profit company and will be jointly owned and funded by the Commonwealth Government, State and Territory Governments and the peak national representative bodies of

Australia's livestock based industries. Its mission will be to ensure that the Australian animal health service system is capable of maintaining acceptable national animal health standards which meet consumer needs and market requirements at home and overseas.

The committee can understand that, at this initial stage, the future extent of the Commonwealth's share of the funding of the Council may be uncertain.

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

## **Live-stock Slaughter Levy Amendment (AAHC) Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the Live-stock Slaughter Levy Act 1964 to:

- allow for amounts raised under the Act to be paid to the Australian Animal Health Council; and
- set an operative levy rate of 0.33 cents and maximum levy rate of 2 cents per head on all sheep and lambs slaughtered.

### **Imposing levy by regulation**

#### **Items 2 and 3 of Schedule 1**

Items 2 and 3 of Schedule 1, if enacted, would each allow a levy to be set by regulation.

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

The committee notes that, with respect to the levies set by these items, there is also set a maximum amount: '(not more than 2 cents)'. The committee also notes paragraph 4 of the explanatory memorandum of the Australian Animal Health Council (Live-stock Industries) Funding Bill 1996:

The Australian Animal Health Council Limited has been established as a non-profit company and will be jointly owned and funded by the Commonwealth Government, State and Territory Governments and the peak national representative bodies of

Australia's livestock based industries. Its mission will be to ensure that the Australian animal health service system is capable of maintaining acceptable national animal health standards which meet consumer needs and market requirements at home and overseas.

The committee can understand that, at this initial stage, the future extent of the Commonwealth's share of the funding of the Council may be uncertain.

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

## **Meat Chicken Levy Amendment (AAHC) Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the Meat Chicken Levy Act 1969 to:

- allow for amounts raised under the Act to be paid to the Australian Animal Health Council; and
- set a maximum levy rate of 0.05 cents per head on day old meat chickens hatched.

### **Imposing levy by regulation**

#### **Item 2 of Schedule 1**

Item 2 of Schedule 1, if enacted, would allow a levy to be set by regulation.

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

The committee notes that, with respect to the levy which this item would allow to be prescribed by regulation, there is also set a maximum amount: '(not more than 0.05 cent)'. The committee also notes paragraph 4 of the explanatory memorandum of the Australian Animal Health Council (Live-stock Industries) Funding Bill 1996:

The Australian Animal Health Council Limited has been established as a non-profit company and will be jointly owned and funded by the Commonwealth Government, State and Territory Governments and the peak national representative bodies of Australia's livestock based industries. Its mission will be to ensure that the Australian animal health service system is capable of maintaining acceptable

national animal health standards which meet consumer needs and market requirements at home and overseas.

The committee can understand that, at this initial stage, the future extent of the Commonwealth's share of the funding of the Council may be uncertain.

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

## **Mutual Assistance in Criminal Matters Legislation Amendment Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the:

- Mutual Assistance in Criminal Matters Act 1987 to:
  - clarify the areas in which mutual assistance in criminal matters may be sought by the Attorney-General;
  - enable the Attorney-General to grant or request assistance without the Act;
  - give the Attorney-General a discretion to refuse assistance where the request relates to the prosecution or punishment of a person or an offence in respect of which the death penalty could be imposed or carried out;
  - enable the Attorney-General to refuse assistance when appropriate;
  - enable a court to require the Attorney-General to make application for mutual assistance on behalf of a defendant;
  - limit the use in Australia of material received from a foreign country to the purposes specified in the request; and
  - enable the provision and request of evidence via video link; and
- Financial Transaction Reports Act 1988 and Proceeds of Crime Act 1987 to make consequential amendments.

The committee has no comment on this bill.

## **Native Title Amendment Bill 1996**

This bill was introduced into the House of Representatives on 27 June 1996 by the Attorney-General. [Portfolio responsibility: Prime Minister]

The bill proposes to amend the:

- Native Title Act 1993 to:
  - establish a new system under which native title, compensation and non-claimant applications will be filed in the Federal Court;
  - set out the purposes of mediation in native title cases;
  - set out the process for acceptance of a claim for registration and the four conditions which must be met;
  - clarify that where an agreement is made with registered native title holders, acts affecting native title in accordance with the agreement will be valid in the unlikely event that there is a later determination that another group holds native title in the area affected by the acts;
  - clarify that registered native title claimants and holders can enter into agreements with governments and other parties to allow certain future acts to be done validly over areas even where there is a registered claim for native title in relation to that area;
  - clarify the circumstances in which certain leases and other interests originally granted before 1 January 1994 may be renewed, regranted or extended, and in which pastoral leases can be varied or non-pastoral lease activities carried out on the land; and
- Federal Court of Australia Act 1976 to enable the appointment of judicial registrars; and
- Human Rights and Equal Opportunity Commission Act 1986 to note that the Commission has functions under section 209 of the Native Title Act 1993.

### **Commencement by Proclamation**

#### **Subclause 2(3)**

Subclause 2(3) of this bill provides that the substantive amendments proposed by the bill will commence on the first day after the expiration of the period of 9 months

beginning on the day of Royal Assent, unless a provision commences before that date by Proclamation.

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

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

(a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation: or

(b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

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

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

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

The committee notes that, in accordance with paragraph 4 above, the explanatory memorandum indicates the reasons that the longer period of 9 months has been preferred:

( to enable necessary arrangements, such as the making of regulations, to take place before commencement; and

( to give time for South Australia to amend its legislation to take account of the higher threshold for registration of claims so that it will be consistent with the new provisions.

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

## **Ombudsman Amendment Bill 1996**

This bill was introduced into the Senate on 27 June 1996 by Senator Conroy as a Private Senator's bill.

The bill proposes to amend the Ombudsman Act 1976 to create a Parliamentary Joint Committee to monitor and review the Office of the Ombudsman's performance and functions and to report to both Houses on matters concerning the Ombudsman's Office.

The committee has no comment on this bill.

## **Ombudsman Amendment Bill 1996 [No. 2]**

This bill was introduced into the House of Representatives on 24 June 1996 by Mr Price as a Private Member's bill.

The bill proposes to amend the Ombudsman Act 1976 to create a Parliamentary Joint Committee to monitor and review the Office of the Ombudsman's performance and functions and to report to both Houses on matters concerning the Ombudsman's Office.

The committee has no comment on this bill.

## **Patents Amendment Bill 1996**

This bill was introduced into the Senate on 27 June 1996 by Senator Stott Despoja as a Private Senator's bill.

The bill proposes to amend the Patents Act 1990 to prohibit the patenting of naturally occurring genes or gene sequences.

The committee has no comment on this bill.

## **Pig Slaughter Levy Amendment (AAHC) Bill 1996**

This bill was introduced into the House of Representatives on 26 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the Pig Slaughter Levy Act 1971 to:

- allow for amounts raised under the Act to be paid to the Australian Animal Health Council; and
- set a maximum levy rate of 50 cents per head of pigs slaughtered.

### **Imposing levy by regulation**

#### **Item 2 of Schedule 1**

Item 2 of Schedule 1, if enacted, would allow a levy to be set by regulation.

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

The committee notes that, with respect to the levy which this item would allow to be prescribed by regulation, there is also set a maximum amount: '(not more than 50 cents)'. The committee also notes paragraph 4 of the explanatory memorandum of the Australian Animal Health Council (Live-stock Industries) Funding Bill 1996:

The Australian Animal Health Council Limited has been established as a non-profit company and will be jointly owned and funded by the Commonwealth Government, State and Territory Governments and the peak national representative bodies of Australia's livestock based industries. Its mission will be to ensure that the Australian animal health service system is capable of maintaining acceptable national animal health standards which meet consumer needs and market requirements at home and overseas.

The committee can understand that, at this initial stage, the future extent of the Commonwealth's share of the funding of the Council may be uncertain.

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

## **Primary Industries and Energy Legislation Amendment Bill (No. 2) 1996**

This bill was introduced into the House of Representatives on 27 June 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the:

- Agricultural and Veterinary Chemicals (Administration) Act 1992 to:
  - ensure that the National Registration Authority for Agricultural and Veterinary Chemicals (NRA) must comply with any lawful policy direction of the governments involved in the National Registration Scheme for Agricultural and Veterinary Chemicals;
  - clarify procedures in relation to the Department's management of chemicals subject to import and export restrictions under international obligations; and
  - enable the charging of fees for certificates concerning the export of agricultural and veterinary chemicals;
- Agricultural and Veterinary Chemicals Code Act 1994 to:
  - clarify the application of the compensation provisions under Part 3 of the Code; and
  - enable the NRA to issue one national notice under the Agvet codes rather than separate notices for each jurisdiction;
- Fisheries Management Act 1991 to provide that where there is an acquisition of property within the meaning of paragraph 31 of section 51 of the Constitution, reasonable compensation or compensation as determined by the Federal Court, is payable;
- Farm Household Support Act 1992 to ensure that the drought relief payment is payable to eligible farmers only within the period specified on the drought exceptional circumstances certificate;
- Imported Food Control Act 1992 to allow persons other than officers of the Australian Quarantine and Inspection Service to be appointed as authorised officers;

- Quarantine Act 1908 to allow for the issue of penalty notices (on-the-spot-fines) to be issued to persons alleged to have breached Australia's quarantine requirements when entering Australia; and
- repeals 15 inoperative Commonwealth Acts.

## **Retrospectivity**

### **Subclause 2(3)**

Subclause 2(3) of this bill, if enacted, would allow Schedule 3 to have effect retrospectively from 15 March 1995.

The committee notes that the effect of some of the amendments is to require less rather than more information but it is not clear to the committee whether the retrospectivity of any of the amendments will adversely affect persons other than the Commonwealth. The committee, therefore, seeks the Minister's advice on this matter.

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

## **Delegation of power to a person**

### **Schedule 6 - authorised officers - the Imported Food Control Act 1992**

Schedule 6, if enacted, would amend various provisions of the Imported Food Control Act 1992 so that not only officers of AQIS but any other person may be appointed as authorised officers for the purpose of exercising certain powers under that Act. These powers could include powers of search and seizure and the power to require answers to questions (with imprisonment for 6 months for failing to comply without a reasonable excuse) and to request assistance (with \$3 000 penalty for failing to comply without a reasonable excuse). There is no limitation as to the persons or classes of persons who may be so appointed.

The committee notes that the second reading speech refers to the possibility that quarantine officers of the various States and Territories, appointed as authorised officers, might be involved in the inspection of food with the laudable purpose of avoiding duplication of inspections. The committee does not have a problem with

such a purpose but notes that neither the bill nor the explanatory memorandum indicates the need for a power of appointment 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 has expressed a preference that the limit should preferably be to the holders of a nominated office, to members of the Senior Executive Service or by reference to the qualifications of the person to be delegated the powers.

In these circumstances the committee seeks the Minister's advice on whether the amendments could be altered to define more narrowly the intended class of appointees and to circumscribe more closely the powers that might be delegated.

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

## **Sales Tax Laws Amendment Bill (No. 1) 1996**

This bill was introduced into the House of Representatives on 27 June 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the Sales Tax Assessment Act 1992 and Sales (Exemptions and Classifications) Act 1992 to ensure that motor vehicles purchased by governments and government authorities for the private use of employees as part of their remuneration will not be eligible for exemption from sales tax.

### **Legislation by press release**

#### **Clause 2**

Clause 2 provides:

This Act is taken to have commenced at 3.15 pm, by standard time in the Australian Capital Territory, on 11 June 1996.

A 'refinement' of the exercise of legislating retrospectively (and a matter which has consistently caused the committee concern) is the practice of 'legislation by press release'. This is a practice by which the Government announces by way of press release or ministerial statement that it intends to introduce legislation or to amend existing legislation in order to give effect to a Government policy or initiative contained in the press release or statement. When the relevant legislation is introduced, it is then expressed to commence or operate from the date of the announcement.

The committee has consistently taken the view that, in principle, legislating in this way is unsatisfactory. It raises at least two points of concern. First, it involves the same sort of unfairness and uncertainty that any form of retrospective legislation entails. Secondly, the practice is predicated on the assumption that Parliament will not only pass the relevant legislation, but will also pass it in a form which gives effect to the policy or initiative that has been announced. Such an assumption can only detract from the Parliament's ability, capacity and inclination to amend legislation. In practical terms, the assumption is also unwise, given the political make-up of the Senate, which is such that the Government cannot be certain that it

will be able to guarantee that the Parliament will pass legislation in the form that is introduced.

In its 1986-87 Annual Report, the committee stated that:

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

The committee went on to say:

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

Since making those comments, the committee has observed that the practice of 'legislation by press release' appears to have been in decline in recent years and now happens relatively infrequently.

With respect to the present bill, the committee notes that it exhibits some of the unfavourable features which arouse the committee's concerns. The committee notes that the proposed amendments were announced by a press release of the Treasurer on 11 June 1996 but that that announcement was subsequently modified by a further press release on 14 June 1996. This gives rise to further uncertainty because the bill may not be passed without further amendment.

On the other hand, there are some mitigating factors. One is that the legislation has been introduced soon after the press release. The other is that the circumstances

have some similarity with the budget process where bills to legislate the measures announced in the budget are introduced on budget night or very soon after and are made retrospective in order to preclude arrangements being made which would result in loss to the revenue.

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

## **Taxation Laws Amendment Bill (No. 2) 1996**

This bill was introduced into the House of Representatives on 27 June 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the

- Income Tax Assessment Act 1936 to:
  - allow offshore banking units that provide funds management activities for non-residents to invest in Australian assets;
  - exempt from interest withholding tax god fees paid by offshore banking units as part of gold borrowings;
  - allow complying superannuation funds and complying approved deposit funds to claim deductions for expenses relating to investments in pooled superannuation trusts and life assurance policies issued by life assurance companies and registered organisations;
  - allow income tax deductions for gifts made to The Central Synagogue Restoration Fund and The Borneo Memorials Trust Fund;
  - repeal section 261, to decrease the costs involved in negotiating secured offshore lending agreements;
  - amend various provisions relating to the taxation of foreign source income; and
  - introduce new taxation rules relating to the forgiveness of commercial debt;

- Superannuation Guarantee (Administration) Act 1992 to ensure that the earnings base specified in the Aberfoyle Limited (Superannuation) Award is a valid notional earnings base for the purposes of that Act;
- Superannuation Industry (Supervision) Act 1993 and Income Tax Assessment Act 1936 to expand the use of tax file numbers for superannuation purposes;
- Fringe Benefits Tax Assessment 1986 to ensure that benefits with a value less than \$100 can qualify for the exemption from fringe benefits tax for minor benefits; and
- Taxation Laws Amendment Act (No. 4) 1995 to correct minor technical difficulties in relation to capitals gains tax and dividend imputation arrangements provisions.

### **Retrospectivity**

#### **Subclause 2(2)**

Subclause 2(2) of this bill, if enacted, would give the amendments proposed by items 44, 45 and 46 of Schedule 1 retrospective effect from 1 January 1993.

The committee notes, however, that those amendments are technical in nature and beneficial to taxpayers.

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

### **Retrospectivity**

#### **Subclauses 2(5) and (6)**

Subclauses 2(5) and (6) of this bill, if enacted, would give the amendments proposed in Schedule 6 retrospective effect.

The committee notes, however, that those amendments merely correct drafting errors.

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

## **Retrospective application**

### **Items 32 and 47 of Schedule 1, item 9 of Schedule 3**

These items, if enacted, would enable the relevant amendments to have retrospective application.

However, it seems to the committee that in all cases the amendments are either technical corrections of drafting errors or are beneficial to taxpayers.

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

## **Taxation Laws Amendment (International Tax Agreements) Bill 1996**

This bill was introduced into the House of Representatives on 27 June 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the International Agreements Act 1953 to give legislative effect to an agreement between the Australian Commerce and Industry Office and the Taipei Economic and Cultural Office concerning the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

The committee has no comment on this bill.

## **Trade Practices Amendment (Industry Access Codes) Bill 1996**

This bill was introduced into the Senate on 27 June 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Treasury]

The bill proposes to amend the Trade Practices Act 1974 to incorporate a general industry access code approval process as a basis for access undertakings in network industries.

The committee has no comment on this bill.

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

**No. 6 of 1996**

**1996**

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## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

Senator B Cooney (Chairman)  
Senator W Crane (Deputy Chairman)  
Senator the Honourable I Campbell  
Senator M Forshaw  
Senator S Macdonald  
Senator A Murray

### **TERMS OF REFERENCE**

#### **Extract from *Standing Order 24***

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
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  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
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  - (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

	<b>Page</b>
Appropriation Bill (No. 1) 1996-97	5
Appropriation Bill (No. 2) 1996-97	6
Appropriation (Parliamentary Departments) Bill 1996-97	7
Defence Legislation Amendment Bill (No. 2) 1996	8
National Firearms Program Implementation Bill 1996	9

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



## **Appropriation Bill (No. 1) 1996-97**

This bill was introduced into the House of Representatives on 20 August 1996 by the Treasurer. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$32,141.5 million) out of the Consolidated Revenue Fund for the service of the year ending on 30 June 1997, and for related purposes.

*The committee has no comment on this bill.*

## **Appropriation Bill (No. 2) 1996-97**

This bill was introduced into the House of Representatives on 20 August 1996 by the Treasurer. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$3,531.5 million) out of the Consolidated Revenue Fund for certain expenditure in respect of the year ending on 30 June 1997, and for related purposes.

*The committee has no comment on this bill.*

## **Appropriation (Parliamentary Departments) Bill 1996-97**

This bill was introduced into the House of Representatives on 20 August 1996 by the Treasurer. [Portfolio responsibility: Finance]

The bill proposes to appropriate money (\$137.2 million) out of the Consolidated Revenue Fund for certain expenditure in relation to the Parliamentary Departments in respect of the year ending on 30 June 1997, and for related purposes.

*The committee has no comment on this bill.*

## Defence Legislation Amendment Bill (No. 2) 1996

This bill was introduced into the House of Representatives on 21 August 1996 by the Minister for Defence Industry, Science and Personnel. [Portfolio responsibility: Defence]

The bill proposes to amend the:

- *Defence Act 1903, Naval Defence Act 1910 and Air Force Act 1923* to enable transfers between the three arms of the Defence Force without the necessity for resignation or discharge;
- *Defence Act 1910, Naval Defence Act 1910 and Air Force Act 1923* to change the titles of the services chiefs of staff to Chief of Navy, Chief of Army and Chief of Air Force, and makes consequential amendments to other Acts; and
- *Defence Act 1903 and Naval Defence Act 1910* to:
  - lower from Colonel (equivalent) to Major (equivalent) the minimum rank that attracts a requirement to serve 12 months after promotion; and
  - enable the Governor-General to delegate, to the Chief of the Defence Force or a service chief, the power to make limited tenure promotions.

*The committee has no comment on this bill.*

## **National Firearms Program Implementation Bill 1996**

This bill was introduced into the House of Representatives on 20 August 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Attorney-General]

The bill proposes to appropriate monies out of the Consolidated Revenue Fund to enable payments:

- to the States and Territories to provide them with reimbursement for compensation payments made to persons surrendering certain firearms as part of the nationwide amnesty and compensation-for-surrender scheme;
- to the States and Territories to provide them with reimbursement for compensation payments made to gun dealers for surrendering stock and associated loss of business; and
- to the States and Territories and by the Commonwealth for purposes related to the compensation-for-surrender scheme and to implement the new national licencing and registration schemes.

*The committee has no comment on this bill.*

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

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# CONTENTS

	<b>Page</b>
<input type="checkbox"/> Euthanasia Laws Bill 1996	5
Family Law Amendment Bill 1996	7
<input type="checkbox"/> Family (Tax Initiative) Bill 1996	8
Income Tax Rates Amendment (Family Tax Initiative) Bill 1996	9
Native Forest Protection Bill 1996	10
Proceeds of Crime Amendment Bill 1996	11
<input type="checkbox"/> Social Security Legislation Amendment (Budget and Other Measures) Bill 1996	12
States Grants (General Purposes) Amendment Bill 1996	16

**The committee has commented on these bills**

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



## **Euthanasia Laws Bill 1996**

This bill was introduced into the House of Representatives on 9 September 1996 by Mr Kevin Andrews M.H.R., the Member for Menzies, as a Private Member's bill.

The bill proposes to amend the *Northern Territory (Self-Government) Act 1978*, the *Australian Capital Territory (Self-Government) Act 1988* and the *Norfolk Island Act 1979* to provide that the Northern Territory Legislative Assembly, the Australian Capital Territory Legislative Assembly and the Norfolk Island Legislative Assembly do not have the power to make laws which would permit intentional killing (euthanasia) or assisting a person to terminate their life.

### **Self-government rights Schedules 1, 2 and 3**

The Legislative Assemblies of the Australian Capital Territory, Norfolk Island and the Northern Territory presently have power to legislate on a range of matters pursuant to the relevant provisions of the Acts identified above. This bill, if enacted, would diminish that range of matters.

The three Assemblies are all elected on a universal adult franchise. Accordingly, they operate within democracies. This bill seeks to take away from the people living within those democracies an ability they now have to elect an assembly with power to legislate about a matter of great moment.

By virtue of the Acts identified above, the Australian Capital Territory, Norfolk Island, and the Northern Territory are all jurisdictions akin to the States of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. All those States have the power to legislate on the matter with which this bill deals. If it is passed, the three relevant jurisdictions will lose that power. The States will continue to hold it.

Given this, the committee raises the following issues:

- The Commonwealth Parliament having given the Legislative Assembly of each Territory the power 'to make laws for the peace, order and good government' of each Territory, would, by this bill, negate the valid exercise of that legislative power by one of them.
- The Commonwealth Parliament, by this bill, proposes to intrude on the law-making function of the Territories not in accordance with a general principle but

on an ad hoc basis. This threatens the certainty which ought exist for its citizens when any one or more of the Territories passes a valid law.

- The Commonwealth Parliament, while undoubtedly having the power to pass this bill, would, by so doing, create a situation where some Australians are treated in a way different from other citizens because it curtails their present right to self-government in circumstances where, were they to live in the States, it could not do so.
- *The Northern Territory (Self-Government) Act 1978* has now been in operation for a number of years and, up to the time this bill was introduced, people living there had the reasonable expectation that the statute would not be amended to deprive their Assembly of a power it had held for over a decade and a half. This bill now puts that reasonable expectation at risk.
- This bill, if passed, would override the decision of the democratically elected government of the Northern Territory when it appears that there would be no head of power or international convention by which it could override the same or similar legislation enacted by the States.

*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.*

## Family Law Amendment Bill 1996

This bill was introduced into the House of Representatives on 11 September 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Family Law Act 1975* to:

- allow regulations to be made to impose fees for voluntary counselling and mediation services provided by the Family Court;
- extend the power to grant exemptions from the proposed mediation and counselling fees; and
- provide that regulations may require the refund of fees.

*The committee has no comment on this bill.*

## Family (Tax Initiative) Bill 1996

This bill was introduced into the House of Representatives on 11 September 1996 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* and *Social Security Act 1991* to provide for a family tax payment to be payable fortnightly through the Department of Social Security; and
- *Income Tax Assessment Act 1936* and *Taxation Administration Act 1953* to make consequential amendments.

### Tax File Numbers

#### Item 6 of Schedule 2

Proposed new sections 900AW and 900AX, to be inserted by item 6 of Schedule 2, would allow the Secretary of the Department of Social Security to require a claimant for, or a recipient of, family tax payments to provide the Department with their tax file number and that of their partner. The committee has been concerned with the use of tax file numbers as mere identifiers in relation to matters unconnected with taxation, as such a measure may be regarded as trespassing to some extent on an individual's privacy. The committee, nevertheless, has been prepared to accept those measures which allow for the provision of a tax file number, if it can be seen as necessary for the prevention of fraud.

In the present case, the family tax payment is the alternative to, and closely connected with, the family tax assistance program under the taxation system. As such, it appears that the requirement for the provision of tax file numbers is necessary to prevent fraud.

The committee, however, is concerned at the possibility of inappropriate and/or unintended intrusion on a person's privacy and **seeks the Minister's advice** on the procedures in place for protecting personal privacy and on their effectiveness.

*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.*

## **Income Tax Rates Amendment (Family Tax Initiative) Bill 1996**

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

The bill, together with the Family (Tax Initiative) Bill 1996, proposes to provide for family tax assistance through family tax assistance and family tax payments.

*The committee has no comment on this bill.*

## **Native Forest Protection Bill 1996**

This bill was introduced into the Senate on 11 September 1996 by Senators Brown and Lees as a Private Senator's bill.

The bill proposes to provide protection for Australian native forests by prohibiting logging in high conservation value native forests after 1 January 1996 and providing for the phasing out and subsequent prohibition of woodchip exports derived from native forests.

*The committee has no comment on this bill.*

## Proceeds of Crime Amendment Bill 1996

This bill was introduced into the House of Representatives on 11 September 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Proceeds of Crime Act 1987* to:

- provide for the annual transfer of the nett balance of the Confiscated Assets Trust Fund to the Consolidated Revenue Fund;
- enables the Commonwealth to receive money into the Confiscated Assets Trust Fund from a foreign country in recognition of assistance provided by Commonwealth law enforcement agencies; and
- authorise the Commonwealth to share proceeds of unlawful activity recovered by the Commonwealth with a foreign country where that country's law enforcement agencies have made a significant contribution to the Commonwealth's recovery of proceeds or the investigation of unlawful activity.

*The committee has no comment on this bill.*

## Social Security Legislation Amendment (Budget and Other Measures) Bill 1996

This bill was introduced into the House of Representatives on 12 September 1996 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Social Security]

The bill proposes to amend the following Acts:

- *Social Security Act 1991* to:
  - change the name of carer pension to carer payment;
  - change provisions relating to carers without affecting qualifications for payment;
  - change the sickness allowance qualification rules by removing the loss of income qualification;
  - abolish the employment entry payment and the education entry payment for all but certain pensioners;
  - extend the qualification for widow allowance to women aged at least 50 years and who were widowed, divorced or separated after turning 40 years;
  - align the conditions of payment of widow and partner allowances including common phase-out arrangements, a common definition of recent workforce experience and common access to ancillary payments;
  - extend the qualification for partner allowance to AUSTUDY, ABSTUDY and Student Financial Supplement Scheme partners;
  - facilitate the earlier phase-out of widow B pension so that there will be no new entrants to this payment and by automatically transferring widow B pensioners of age pension to age pension;
  - rationalise arrangements for recipients of age pension age by no longer granting widow and partner allowances to people of age pension age and by automatically transferring widow, partner and mature age allowance recipients attaining age pension to age pension;
  - revise impairment tables so that people whose impairments have only a relatively small impact on their overall ability to work will receive an income support payment rather than a disability support pension;
  - limit the payment of child disability allowance to 3 months before a claim is made;

- include age pension as a compensation affected payment; and
- modify the advance payment scheme for recipients of social security entitlements;
- *Student and Youth Assistance Act 1973* to:
  - align compensation provisions with corresponding provisions in the Social Security Act;
  - ensure that two or more lump sum compensation payments made in respect of one compensable event are treated as one lump sum compensation payment for the purposes of recovery provisions; and
  - make changes to compensation recovery provisions;
- *Social Security Act 1991* and *Student and Youth Assistance Act 1973* to:
  - abolish the minimum rate of payment of sickness, newstart and youth training allowances to persons under 18 years of age;
  - allow increased voluntary work participation for unemployed people;
  - ensure that where a person is unemployed as a result of industrial action that person will remain disqualified for payment for 6 weeks after the industrial action has ceased;
  - abolish the unused annual leave waiting period and replace it with an income maintenance period;
  - extend the maximum length of the liquid assets test waiting period to 13 weeks (applicable to claimants of newstart, youth training and sickness allowances);
  - introduce a 14 day grace period to allow people to renew qualification for sickness allowance or to renew exemption from the newstart or youth training allowance activity tests, through provision of a new medical certificate;
  - amend the sickness allowance qualification rules and newstart and youth training allowances activity test exemption rules so that the sole criterion for continuing sickness allowance will be a continuing temporary incapacity for work;
  - allow the backdating of disability support pension, newstart, sickness and youth training allowances through the deemed earlier date of lodgement of a claim;
  - abolish the earnings credit scheme;
  - use a single pension cut-out point as the compensation lump sum preclusion period divisor;

- remove the concessional treatment applied to deposit concession money;
- provide for the recovery of social security payments that have been paid to persons in excess of their correct entitlement but which are not currently recoverable as debts; and
- make amendments relating to the application, transitional and savings provisions made by the bill;
- *Social Security Act 1991, Student and Youth Assistance Act 1973 and Employment Services Act 1994* to:
  - tighten activity test breach provisions relating to voluntary unemployment and refusal of a job offer;
  - reclassify certain breaches as activity test breaches;
  - extend the non-payment period for moving to an area of lower employment prospects from 12 to 26 weeks; and
  - clarify the operation of Employer Contact Certificate provisions;
- *Health Insurance Act 1973, National Health Act 1953 and Hearing Services Act 1991* to abolish the health benefits card and issue health care cards to sickness allowees;
- *Health Insurance Act 1973* to abolish the savings provisions allowing the receipt of a health care card by people receiving family allowance supplement;
- *Social Security Act 1991* and *National Health Act 1953* to abolish the modified income test and savings provisions allowing pensioners to receive concession cards after cancellation of pension; and
- *Social Security Legislation (Carer Pension and Other Measures) Act 1995* to correct a technical error.

## **Retrospectivity**

### **Subclause 2(7), Schedule 16**

Subclause 2(7) of this bill, if enacted would provide that Schedule 16 would have retrospective effect from 1 July 1995.

The amendments to the *Student and Youth Assistance Act 1973* proposed by Schedule 16 mirror amendments made to the compensation recovery provisions of the *Social Security Act 1991* by two amending Acts in 1994 and 1995. The committee would not be concerned by the changes were they not being made retrospectively.

It appears that some amendments proposed by the Schedule will adversely affect some recipients (or their partners) of compensation for illness or injury since 1 July 1995.

As the explanatory memorandum indicates that the financial effect of the amendments is negligible, the committee **seeks the advice of the Minister** on why the amendments need to be given retrospective effect.

*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.*

## **Retrospectivity**

### **Subclause 2(8), Schedule 23**

By subclause 2(8) of this bill, Schedule 23 is to have effect retrospectively from 1 July 1996.

The committee notes, however, that the amendments proposed are technical only, to achieve the repositioning of a Part inserted by a previous amending Act and the consequential renumbering and correction of cross references, and will not adversely affect anyone.

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

## **States Grants (General Purposes) Amendment Bill 1996**

This bill was introduced into the House of Representatives on 11 September 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Treasury]

The bill proposes to provide for general revenue assistance to the States and Territories in 1996-97; for the Commonwealth to commence making competition payments to the States and Territories in 1997-98; and provide for the States and Territories to make fiscal contributions to the Commonwealth in 1996-97 by way of deductions from general revenue assistance.

*The committee has no comment on this bill.*

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**The Scrutiny of Bills**

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

## CONTENTS

	<b>Page</b>
* Bounty Legislation Amendment Bill 1996	5
* CMF Sale Bill 1996	6
States Grants (Primary and Secondary Education Assistance) Bill 1996	9
Sydney 2000 Games (Indicia and Images) Protection Bill 1996	10
* Veterans' Affairs Legislation Amendment (1996-97 Budget Measures) Bill 1996	11
Vocation Education and Training Funding Amendment Bill 1996	13

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

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

## Bounty Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 19 September 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the following Acts:

- *Bounty (Books) Act 1986* and *Bounty (Machine Tools and Robots) Act 1985* to terminate the bounties effective from 20 August 1996 and provide limited eligibility for production after 20 August 1996 to 20 February 1997 under certain circumstances;
- *Bounty (Ships) Act 1989* to allow bounty eligibility only for ships already under construction on 20 August 1996 and actually completed by 30 June 1997 and for ships commenced after 20 August 1996 and completed by 30 June 1997 provided that a contract for construction existed on 20 August 1996; and
- *Bounty (Computers) Act 1984* to terminate the bounty effective from 1 July 1997.

### Retrospectivity Subclause 2(2)

Under subclause 2(2), the substantive amendments proposed by Schedule 1 will have effect from Budget night and therefore prior to Royal Assent. The committee notes that the amendments give effect to a budget announcement.

The committee has previously indicated that, in relation to retrospectivity, budget measures are something of a special case. In a paper titled *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-85*, the then Chairman of the Committee, Senator Tate, said:

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

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

## CFM Sale Bill 1996

This bill was introduced into the House of Representatives on 19 September 1996 by the Minister representing the Minister for Social Security. [Portfolio responsibility: Finance]

The bill proposes to establish the framework to sell Commonwealth Funds Management Limited and its subsidiaries. It also makes amendments to various Acts and regulations resulting from the proposed sale.

### Retrospectivity

#### Subclause 2(2) - items 3 and 4 of Schedule 1

Under subclause 2(2) the amendments proposed by items 3 and 4 of Schedule 1 will have effect retrospectively from the date of commencement of Part 2 of the *Commonwealth Funds Management Limited Act 1990*. The committee notes, however, that the amendments are technical only.

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

### Retrospectivity

#### Clause 61

Clause 61, if enacted, would provide that subsection 48(2) of the *Acts Interpretation Act 1901* not apply to regulations made under any Act where they are connected with the sale of CFM and take effect on the sale day.

The committee notes that the explanatory memorandum, in paragraph 103, indicates as the reason for this provision that it may not be practicable to have the subordinate legislation made prior to the sale day.

Subsection 48(2) of the *Acts Interpretation Act 1901*, however, provides:

A regulation, or a provision of regulations, has no effect if, apart from this subsection, it would take effect before the date of notification and as a result:

- (a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of notification would be affected so as to disadvantage that person; or
- (b) liabilities would be imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification.

The committee notes that this subsection of the *Acts Interpretation Act 1901* would not prevent subordinate legislation with respect to the CFM sale from commencing retrospectively unless the rights of persons would be retrospectively affected so as to disadvantage them or unless liabilities would retrospectively be imposed on them. Clause 61, therefore, would apply only if peoples' rights were retrospectively disadvantaged or if obligations were retrospectively imposed on them.

The committee also notes that the Minister, in response to the concerns of the committee which it expressed with regard to a similar clause in the *ANL Sale Bill 1995*, wrote to the committee on 18 June 1996 as follows:

I should note at the outset that the *ANL Sale Bill* was enacted on 5 December 1995. However, by virtue of section 79, the *ANL Sale Act 1995* automatically repealed with effect from 1 January 1996 because a sale agreement had not been entered by P&O by 31 December 1995. Notwithstanding this and the fact that the Bill was developed by the former Government, I would note that clause 37(1) provides flexibility to make amendments to subordinate legislation as required to give effect to a sale and is a standard provision which has been included in legislation relating to previous asset sales. It is necessary because it is not possible to be completely sure that all required amendments to subordinate legislation have been identified. Further, as the sale day is often set at short notice, it is sometimes not practicable to have amendments made to subordinate legislation to coincide precisely with the sale day.

In its Fourth Report of 1996 the committee thanked the Minister for these comments but continued to be concerned at the net effect of this provision which seems to be that, in order to ensure a possible sale, the Commonwealth was prepared to take away peoples' rights retrospectively or retrospectively impose obligations on them. The committee was, therefore, heartened by the concluding words of the Minister's letter:

Nevertheless, the Government will keep the comments of the Committee in mind when developing future asset sale legislation.

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

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

## **States Grants (Primary and Secondary Education Assistance ) Bill 1996**

This bill was introduced into the House of Representatives on 19 September 1996 by the Treasurer. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to:

- reduce the number of programs of targeted assistance from over 40 to five priority areas, namely the Literacy, Languages and Special Learning Needs programs (two other programs are covered by other legislation);
- allow the Minister to “broadband” or transfer funds between certain groups of similar programs as priorities emerge;
- institute a revised new schools policy;
- permit the adjustment of general recurrent grants to the States and Territories; and
- provide for the increase of \$45 million over three years for the broadbanded Literacy program.

*The committee has no comment on this bill.*

## **Sydney 2000 Games (Indicia and Images) Protection Bill 1996**

This bill was introduced into the House of Representatives on 18 September by the Minister for Industry, Science and Tourism. [Portfolio responsibility: Industry, Science and Tourism]

The bill proposes to amend the *Sydney 2000 Games (Indicia and Images) Protection Act 1996* to:

- enable the Sydney Organising Committee for the Olympic Games, the Sydney Paralympic Organising Committee and licensed users to take action against all parties who may be involved in the supply of goods and services to which protected indicia and images have been applied by an unauthorised user; and
- provide that action may be taken against those who aid, abet, counsel and procure breaches of the Principal Act.

*The committee has no comment on this bill.*

## **Veterans' Affairs Legislation Amendment (1996-97 Budget Measures) Bill 1996**

This bill was introduced into the House of Representatives on 18 September by the Minister for Veterans' Affairs. [Portfolio responsibility: Veterans' Affairs]

The bill proposes to amend the following Acts:

- *Veterans' Entitlements Act 1986* to:
  - amend the service pension asset test treatment of allocated pensions;
  - discontinue the earnings credit scheme and make consequential amendments;
  - provide for the payment of a funeral benefit for the transportation of the body of a veteran who dies away from home in indigent circumstances;
  - increase the value of the Victoria Cross allowance paid to Australian recipients to \$2,700;
  - amend lump sum compensation payment provisions;
  - provide for the threshold deemed interest rate to apply to the first \$2,000 for single pensioners (\$4,000 for couples) of available money or deposit money;
  - establish a minimum variation regime for service pension and income support supplement (pension) payments; and
  - modify arrangements for advance payments of service pension and income support supplement; and
- *Defence Service Homes Act 1918* to:
  - extend eligibility for Defence Service Homes assistance for service in Cambodia, the former Yugoslavia or Somalia and certain widowers of World War II ex-servicewomen; and
  - reduce the interest rate on new additional advances provided under the Defence Services Homes Scheme from 10%pa to 6.85%pa, or to an effective rate of not more than 6.85%pa in most circumstances.

**Retrospectivity**

**Subclause 2(2) - Part 5 of Schedule 1**

Under subclause 2(2) the amendments proposed by Part 5 of Schedule 1 will have effect retrospectively from 17 August 1995. The committee notes, however, that the amendments are beneficial to the surviving Australian recipients of the Victoria Cross.

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

**Retrospectivity**

**Subclause 2(3) - Part 4 of Schedule 1**

Under subclause 2(3) the amendments proposed by Part 4 of Schedule 1 will have effect retrospectively from 21 August 1996. The committee notes, however, that the amendments are beneficial to the families of some deceased veterans as well as having been announced in the Budget.

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

## **Vocational Education and Training Funding Amendment Bill 1996**

This bill was introduced into the House of Representatives on 18 September 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Schools, Vocational Education and Training]

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

- provide normal cost supplementation in 1996 to general funding for the Australian National Training Authority (ANTA);
- reduce 1997 general funding and conditional off-the-job training funding for ANTA; and
- appropriate 1998 general funding and conditional off-the-job training funding for ANTA.

*The committee has no comment on this bill.*

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

**No. 9 of 1996**

**16 October 1996**

**ISSN 0729-6851**

## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

Senator B Cooney (Chairman)  
Senator W Crane (Deputy Chairman)  
Senator the Honourable I Campbell  
Senator M Forshaw  
Senator S Macdonald  
Senator A Murray

### **TERMS OF REFERENCE**

#### **Extract from *Standing Order 24***

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

# CONTENTS

	<b>Page</b>
<input type="checkbox"/> Bankruptcy Amendment Bill 1996	5
<input type="checkbox"/> Bankruptcy (Estate Charges) Bill 1996	6
Bankruptcy (Registration Charges) Bill 1996	7
Broadcasting Services Amendment Bill 1996	8
Child Care Legislation Amendment Bill 1996	9
Commonwealth Electoral Amendment (Political Freedom) Bill 1996	10
D'Entrecasteaux National Park Protection Bill 1996	11
Education Services for Overseas Students (Registration Charges) Bill 1996	12
Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill (No. 2) 1996	13
Higher Education Legislation Amendment Bill 1996	14
National Health (Budget Measures) Amendment Bill 1996	15
<input type="checkbox"/> Social Security Legislation Amendment Bill (No. 1) 1996	16

**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.



## Bankruptcy Amendment Bill 1996

This bill was introduced into the House of Representatives on 9 October 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Bankruptcy Act 1966* and the proposed *Bankruptcy Legislation Amendment Act 1996* to make amendments consequential upon the Bankruptcy (Estate Charges) Bill 1996 and the Bankruptcy (Registration Charges) Bill 1996. It proposes to effect the change from imposing fees by regulation to enacting separate legislation imposing charges.

### General comment

The committee would like to take the opportunity in dealing with this bill to seek the advice of the Attorney-General with regard to the drafting technique used in it.

The technique has become common, even general. The committee refers to the now almost universal practice of putting into schedules attached to a bill the amendments proposed to be made to an Act of Parliament. These amendments used to be made within the body of the bill.

This format has implications for Parliamentary procedure.

A clause in a bill may be opposed in the Committee of the Whole and, upon the question being put that the clause stand as printed, be negatived. An equality of votes will mean the question is resolved in the negative.

The issue arises as to whether a schedule must be regarded as though it were a single clause or whether each item of the schedule can be treated discretely.

If the schedule must be treated as one clause, then to defeat one or more items the whole must be opposed.

The committee understands that it is the practice of the Senate to treat, for these purposes, each item of a schedule as if it were a clause of a bill. This prevents the form in which the amendment is proposed from affecting the ability of the Senate to defeat that amendment.

Accordingly, **we ask the Attorney-General to explain** to the committee why this technique of drafting is used.

*The committee has no other comment on this bill.*

## **Bankruptcy (Estate Charges) Bill 1996**

This bill was introduced into the House of Representatives on 9 October 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to introduce charges in respect of the estate administration function carried out by registered trustees and the Official Trustee.

### **Imposing charge by regulation**

#### **Clause 7**

Paragraph 7(1)(b), if enacted, would each allow a charge to be set by regulation.

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

The committee notes that subclause 7(2) sets an upper limit by providing that the rate prescribed by regulations must not be higher than 15% of the amount on which the charge is payable.

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

## **Bankruptcy (Registration Charges) Bill 1996**

This bill was introduced into the House of Representatives on 9 October 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to impose charges in respect of applications for registration of trustees in bankruptcy, registration of trustees, re-registration and applications to vary conditions on registration.

*The committee has no comment on this bill.*

## **Broadcasting Services Amendment Bill 1996**

This bill was introduced into the Senate on 10 October 1996 by the Parliamentary Secretary to the Minister for Social Security. [Portfolio responsibility: Communication and the Arts]

The bill proposes to amend the *Broadcasting Services Act 1992* to ensure that the Minister's power to direct the Australian Broadcasting Authority to conduct investigations can extend to investigation of future regulatory arrangements and policy directions in respect of on-line services.

*The committee has no comment on this bill.*

## Child Care Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 10 October 1996 by the Minister for Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the following Acts:

- *Child Care Act 1972* to cease payment of operational subsidy to community based long day care centres, effective from 1 July; and the
- *Childcare Rebate Act 1993* to:
  - reduce the rate of childcare cash rebate benefit for some families from 1 April 1997;
  - clarify the eligibility for the rebate for foster parents and persons with informal parenting responsibilities;
  - enable families to claim the rebate against two sets of child care fees for the same period in certain circumstances;
  - amend the definition of *family* to reflect the concept of “care and responsibility” for a child, rather than “custody” of a child;
  - allow the Health Insurance Commission (HIC) to suspend payment of a claim for rebate while it is investigating matters relevant to the claim;
  - prevent payment of the rebate for care provided by a parent of a family, or partner of a parent, to a dependent child of that family;
  - require registered Childcare Cash Rebate child care providers to notify the HIC of changes to their circumstances which may affect their eligibility to be registered; and
  - clarify the definition of *child care* to ensure the rebate is only payable for child care and not tuition or other non-child care services.

*The committee has no comment on this bill.*

## **Commonwealth Electoral Amendment (Political Freedom) Bill 1996**

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

The bill proposes to repeal section 329A of the *Commonwealth Electoral Act 1918* which makes it an offence to advocate a method of voting which is legal, formal and legitimate.

*The committee has no comment on this bill.*

## **D'Entrecasteaux National Park Protection Bill 1996**

This bill was introduced into the Senate on 8 October 1996 by Senators Margetts and Murray as a Private Senator's bill.

The bill proposes to prevent mining, excavation and other prescribed operations from occurring within any part of the D'Entrecasteaux National Park in Western Australia.

*The committee has no comment on this bill.*

## **Education Services For Overseas Students (Registration Charges) Bill 1996**

This bill was introduced into the House of Representatives on 9 October 1996 by the Parliamentary Secretary to the Minister for Employment, Education, Training and Youth Affairs. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to impose an annual Provider Registration Charge for all providers of education and training services registered on the Commonwealth Register of Institutions and Courses for Overseas Students.

*The committee has no comment on this bill.*

## **Education Services for Overseas Students (Registration of Providers and Financial Regulation) Amendment Bill (No. 2) 1996**

This bill was introduced into the House of Representatives on 9 October 1996 by the Parliamentary Secretary to the Minister for Employment, Education, Training and Youth Affairs. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to:

- establish the arrangements for management of the Provider Registration Charge;
- provide for a charge to reinstate the registration of suspended providers and for a late payment penalty; and
- impose an obligation on providers to maintain records and to produce those records to the Secretary, if requested in writing to do so.

*The committee has no comment on this bill.*

## Higher Education Legislation Amendment Bill 1996

This bill was introduced into the House of Representatives on 9 October 1996 by the Parliamentary Secretary to the Minister for Employment, Education, Training and Youth Affairs. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to amend the following Acts:

- *Higher Education Funding Act 1988* to:
  - supplement funding payable to higher education institutions for superannuation expenditure, grants to open learning organisations, teaching hospitals, grants for approved special capital projects, and vary the limit on total funds available for certain grants;
  - introduce new income thresholds for the compulsory repayment of accumulated HEC debt;
  - remove the existing income threshold for the voluntary repayment of accumulated HEC debt;
  - introduce three contribution bands for students under the HECS;
  - allow institutions to charge fees to domestic students for undergraduate courses of study;
  - introduce a new system of merit scholarships for undergraduate study;
  - allow the Open Learning Agency of Australia to charge fees for delivering units of study; and
  - provide advances of operating grants for purposes determined by the Minister; and the
- *Maritime College Act 1978* to make a consequential amendment to enable the College of charge undergraduate fees on the same basis as other institutions.

*The committee has no comment on this bill.*

## **National Health (Budget Measures) Amendment Bill 1996**

This bill was introduced into the House of Representatives on 9 October 1996 by the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

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

- raise the patient contributions under the Pharmaceutical Benefits Scheme (PBS) to \$3.20 for concessional benefit prescriptions and to \$20.00 for general benefit prescriptions;
- change the arrangements for indexing the patient contributions and the general safety net threshold; and
- restrict access to the PBS to persons eligible for medicare benefits.

*The committee has no comment on this bill.*

## **Social Security Legislation Amendment Bill (No. 1) 1996**

This bill was introduced into the House of Representatives on 9 October 1996 by the Minister for Health and Family Services. [Portfolio responsibility: Social Security]

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

- exclude from the value of a person's assets any amounts received from the Mark Fitzpatrick Trust;
- preserve the automatic transfer of mature age partner allowance to wife pension when partners are automatically transferred from mature age allowance to age pension;
- continue the effect of saving provisions by removing references to "additional family payment" and replacing those with references to the new family payment regime and to correct a technical fault; and
- correct an error in Pension Rate Calculator A.

### **Retrospectivity**

#### **Subclauses 2(2) and (3)**

Subclauses 2(2) and (3) of this bill, if enacted, would give the amendments proposed by various items in Schedules 3 and 4 retrospective effect.

The committee notes, however, that those amendments are technical only and do not appear to disadvantage social security clients.

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

### **Inconsistent application**

#### **Schedule 1**

Schedule 1 of this bill, if enacted, would give the amendments proposed by the Schedule inconsistent application from 28 September 1995. The committee notes that the Mark Fitzpatrick Trust was established to provide financial assistance to persons with medically acquired HIV infection and AIDS and to the dependants and carers of such persons.

The committee also notes that the explanatory memorandum states:

When the Trust was established, it was intended that payments from the Trust would not affect any income support payment being received by persons to whom payments were made.....

At the time, no amendment was made to the assets test provisions. A commitment to make an amendment to the assets test provisions was, however, subsequently given by the (then) Minister for Social Security, the Hon Dr Neal Blewett. The amendments contained in Schedule 1 honour that commitment.

The previous Minister for Social Security, the Hon Peter Baldwin, wrote to the Chairman of the Trust on 28 September 1995, advising that payments from the Trust would be exempted in anticipation of this amendment being passed by the Parliament. This being so, the amendments have retrospective effect (ie to the date of Mr Baldwin's advice to the Chairman of the Trust). In particular, the social security payments of social security customers affected by the assets testing of their payments from the Trust will be able to be adjusted from the date that they apply for a review of their payment rate. Other than paying the higher rate of pensions, allowance or benefit from the date that a person applies for a review, however, no arrears will be payable.

This means that, although a class of people will be in the same situation, the time at which they will obtain relief will vary depending upon the date at which they lodge their application.

Accordingly, the earlier a person affected or to be affected by the proposed change in the law learns of it, the earlier he or she will be able to obtain the increase in payments. This means that people in similar circumstances will obtain dissimilar results for no other reason than the time they acquire knowledge of the proposal.

The committee also notes, however, that the outline and financial impact statement at the beginning of the explanatory memorandum describes the financial implications of these amendments as negligible. The committee, therefore, seeks the advice of the Minister on why the amendments should not apply uniformly from 28 September 1995 rather than impose a further burden of making applications for a rate of payment review on an already severely disadvantaged group.

The committee appreciates the view that no arrears ought to be payable where the circumstances of a social security client change, and the client, as the one best placed to know about the change, is expected to inform the Department and seek an

increased rate of payment. In the committee's view, the change here is not a change in the circumstances of a client but a change, and a retrospective change, in the law.

The change appears to be applied inconsistently if there is an advantage for those social security clients who were in the know about the then Minister's intention to change the law.

In the committee's view, where the change is in the law, not in the circumstances of the client, the Department ought to implement uniformly the change for all the clients affected by the change in the law.

*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.*

## **Retrospectivity Schedule 2**

Schedule 2 of this bill, if enacted, would give its amendments retrospective effect from 1 July 1995.

The committee notes, however, that those amendments are beneficial to those disadvantaged by the phasing out of the wife pension from that date.

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

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

**No. 10 of 1996**

**30 October 1996**

**ISSN 0729-6851**

## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

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

### **TERMS OF REFERENCE**

#### **Extract from *Standing Order 24***

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  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
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## CONTENTS

	<b>Page</b>
<input type="checkbox"/> Health Insurance Amendment Bill (No. 2) 1996	5
Hindmarsh Island Bridge Bill 1996	7
Immigration (Education) Charge Amendment Bill 1996	8
Migration Legislation Amendment Bill (No. 3) 1996	9
Migration (Visa Application) Charge Bill 1996	10
<input type="checkbox"/> Social Security Legislation Amendment (Further Budget and Other Measures) Bill 1996	11

**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.



## Health Insurance Amendment Bill (No. 2) 1996

This bill was introduced into the House of Representatives on 17 October 1996 by the Minister for Health and Family Services. [Portfolio responsibility: Health and Family Services]

The bill proposes to amend the *Health Insurance Act 1973* to:

- set minimum proficiency requirements which new medical practitioners must meet before the services they provide attract Medicare benefits;
- introduce the multiple services rules for diagnostic imaging and general medical services;
- increase the maximum gap between the Medicare Benefits Schedule fee listed for any out of hospital service and the Medicare benefit payable for that service to \$50; and
- remove the ability to seek an increase in fees for services claimed to be of unusual length or complexity.

### Retrospective application?

#### Schedule 1, items 3, 10 and 14

Items 3, 10 and 14 of Schedule 1, if enacted, would provide the new mechanisms by which medicare benefits may not be able to be paid in respect of professional services rendered by persons who first become medical practitioners after 1 November 1996.

The committee is concerned that there may be an aspect of retrospectivity in this scheme. It may be argued that people who have studied medicine for a number of years have had a legitimate expectation that they would be able to practice their profession on the same basis as the colleagues who have graduated before them. The committee notes that they will still be able to be employed in public hospitals and that other avenues are provided through which they may be able to provide professional services that will attract a medicare rebate. The committee, nevertheless, would appreciate the Minister's advice on this legitimate expectation and whether there are any other alternative arrangements to accommodate the position the graduates will find themselves in.

*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.*

## **Discriminatory application? - inappropriate delegation of legislative power**

### **Schedule 1, items 3, 10 and 14**

The second aspect of these items which concerns the committee is the part to be played by the regulations within the new scheme.

It appears to the committee that a medical practitioner may become a Fellow of the Royal Australian College of General Practitioners but will not be able to be recognised as a general practitioner for the purposes of the medicare benefits system unless he/she is also eligible in accordance with some as yet unspecified regulations. Alternatively, qualifying for the purposes of the medicare benefits system through the Register of Approved Placements depends on eligibility in accordance with unspecified regulations or participating in courses or programs as yet unspecified in regulations made under proposed subsection 3GA(5).

The committee notes that the Minister's second reading speech and the explanatory memorandum both lay stress on the oversupply of medical practitioners.

The committee **seeks the Minister's advice** on how the regulations will be worded so as to achieve lower numbers without discrimination.

The committee is of the opinion that the importance of this subject matter requires that more of the fundamentals of the scheme should be included in primary legislation. If a medical practitioner can qualify as a Fellow of the Royal College of General Practitioners but still not be able to render professional services which attract a medicare benefit, the committee believes that the further eligibility requirements should be in the Act and not left to regulations.

The committee would be interested in the Minister's advice on both these issues.

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

## **Hindmarsh Island Bridge Bill 1996**

This bill was introduced into the House of Representatives on 17 October 1996 by the Minister representing the Minister for Aboriginal and Torres Strait Islander Affairs. [Portfolio responsibility: Aboriginal and Torres Strait Islander Affairs]

The bill proposes to enable the construction and operation of the Hindmarsh Island Bridge without any further action being taken under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

*The committee has no comment on this bill.*

## **Immigration (Education) Charge Amendment Bill 1996**

This bill was introduced into the House of Representatives on 16 October 1996 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Immigration (Education) Charge Act 1992* to:

- ensure that the English Education Charge will no longer apply to visa applications that are made after the introduction of the proposed visa application charge; and
- set a new ceiling of \$5 500 for the amount of the English Education Charge which may be prescribed under regulations.

*The committee has no comment on this bill.*

## Migration Legislation Amendment Bill (No. 3) 1996

This bill was introduced into the House of Representatives on 16 October 1996 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the following Acts:

- *Migration Act 1958*, the *Immigration (Education) Act 1971* and the *Migration (Health Services) Charge Act 1991* to make amendments to facilitate the introduction of the proposed visa application charge;
- *Migration Act 1958* to:
  - enable the Minister to limit, if necessary, the numbers of people in every migration category able to enter Australia each year; and
  - enable a distinction to be made in regulations and decision-making between married people and those in de facto relationships, for the purposes of visa applications; and the
- *Migration Act 1958* and the *Australian Citizenship Act 1948* to remove Australian citizenship from naturalised citizens if their citizenship was obtained following fraudulent claims in their visa applications or application for Australian citizenship.

*The committee has no comment on this bill.*

## **Migration (Visa Application) Charge Bill 1996**

This bill was introduced into the House of Representatives on 16 October 1996 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to impose a visa application charge to be paid by visa applicants. The maximum amount of charge is set at \$12 500. The actual amount of charge payable will be prescribed by regulations

*The committee has no comment on this bill.*

## **Social Security Legislation Amendment (Further Budget and Other Measures) Bill 1996**

This bill was introduced into the Senate on 16 October 1996 by the Parliamentary Secretary to the Minister for the Environment. [Portfolio responsibility: Social Security]

The bill proposes to amend the following Acts:

- *Social Security Act 1991* to remove the means test exemption that applies to superannuation assets in certain cases; and
- *Social Security Act 1991* and the *Student and Youth Assistance Act 1973* to:
  - set a new maximum rate of rent assistance for single people who share accommodation; and
  - ensure that overpayments of all social security benefits and youth training allowance due to public holidays are recoverable as a debt.

### **Jumping the gun?**

#### **Schedule 3, items 6 and 9**

The explanatory memorandum on page 16 states that the proposed new arrangements for prepayments of some social security entitlements and youth training allowance will come into effect in January 1997. The legislation, however, will not be considered by the Senate until some time after Parliament resumes in February 1997. This arises pursuant to the order of the Senate of 29 November 1994 the effect of which is to adjourn debate on the second reading of a bill until the next sittings.

The committee is opposed in principle to legislation commencing to operate in anticipation that the Parliament will pass the legislation in the exact form in which it has been presented as a bill, that is, that the relevant provisions will be passed and passed without amendments.

The circumstances in this case make the proposal similar to legislation by press release. The committee has made clear its consistent view that legislation by press release is unsatisfactory. Such legislation is retrospective and when it adversely affects personal rights is unfair. Where Government treats its provisions as operative before they are enacted the question arises as to whether the Parliament will ultimately pass them into law or if it does so then whether in their original form. All this creates uncertainty.

Parliament comes to a consideration of the legislation knowing that the Executive has for some time been pursuing a course of conduct determined by the presumptions that it would be passed. This could become a factor in the considerations given to the matter.

Schedule 3 proposes amendments to give legislative authority to new arrangements for what is called holiday processing of social security benefits. The committee notes the Minister's second reading speech to the effect that at present certain social security entitlements are programmed in advance to be paid automatically on predetermined days that are earlier than usual if the recipients' normal payday falls on a holiday. The statutory bases for this are such provisions as section 660XGG for mature age allowance and section 652 for newstart allowance. The committee understands that, under the present system, the prepayment occurs prior to the Department processing the relevant statement of income and circumstances in relation to the period which the recipient lodges at the end of the period.

The new arrangements require statements, lodged prior to the normal lodgment dates, to be processed so that the prepayment is made in accordance with the estimate given. If statements are to be lodged before the end of the period to which they refer, the social security recipient is unable to make the usual statement that, as a matter of fact, a particular amount of income has been received during that period or that a change of circumstances has occurred or that the person has become aware that a change of circumstances is likely to occur.

The new arrangements will substitute a "statement" not of what a recipient knows to be a fact but a "statement" of an estimate of future income during the period or of anticipated changes of circumstances. It is not clear from the proposed legislation whether the "statement" of anticipated changes of circumstances is to be different from the present requirement to inform the Department if the person becomes aware that a specified event or change of circumstances is likely to occur. If there is no difference, the committee is not concerned about it, as it will be a statement only about what the person is presently aware of and will not require guesswork about what might happen.

The proposed amendments in item 6 of Schedule 3 refer to amounts received which are calculated 'having regard to estimated income or anticipated changes of circumstances set out in a statement made in response to a recipient statement notice in respect of the period'.

Proposed subsection 1223AA(1BA), if enacted, would provide that, where the amount received as a result of this estimation is greater than the correct amount that would have been paid if the person's actual income or circumstances had been used to calculate the payment in respect of that period, the difference between the two amounts will be a debt due to the Commonwealth.

The committee understands from the explanatory memorandum that, apart from the Christmas/New year holidays, prepayments will now not occur unless the person lodges a statement of estimated earnings/changes of circumstances.

Several issues arise:

- Does the Social Security Act give the Secretary the power to require recipients to guess? The notices requiring these "statements" to be given are to be sent under sections of the Act that require a person to make a statement about what is known as a fact. The committee further notes that they have a penalty of 6 months imprisonment attached for failure to comply without reasonable excuse. The committee **seeks the advice of the Minister** as to whether legal advice has been given on whether the power in those sections extends to requiring estimates and would be interested to receive a copy.
- Is it proposed to send a further notice at the end of the period so that the actual income/changes of circumstances can be obtained and used as the basis of calculations to determine whether the correct amount has been paid?
- If so, will adjustments to the recipients' payments be made automatically where, instead of a debt to the Commonwealth arising, the recipient has received less than the correct amount?
- If no such further notice is sent but the recipient has received less than the correct amount, will the recipient be required to initiate steps to obtain the correct amount within thirteen weeks of the "incorrect decision" or else lose entitlement to the amount?
- The proposed amendments state that the debt will arise whether the payment was received before or after the commencement of the section. Obviously a debt would not legally exist under this proposed subsection before the legislation is passed. **Is the Minister able to give the committee an assurance** that any 'debt' arising from using these procedures before the legislation is passed will not be recovered before Royal Assent?
- Finally, the committee notes that the explanatory memorandum (at p 16) indicates that the Department plans to commence using these estimates in January 1997 which will be at a time when in the normal course of events the bill will not yet have become an Act. As the explanatory memorandum makes the point that these new arrangements depend on a different type of notice being sent, why cannot the implementation of the scheme be delayed until after the legislation has received Royal Assent and avoid a situation equivalent to legislation by press release?

The committee **looks forward to the Minister's advice** on these matters.

*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. 11 of 1996**

**6 November 1996**

**ISSN 0729-6851**

## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

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

### **TERMS OF REFERENCE**

#### **Extract from Standing Order 24**

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

## CONTENTS

	<b>Page</b>
* Quarantine Amendment Bill 1996	5
Student and Youth Assistance Amendment (Waiting Period) Bill 1996	6
* Taxation Laws Amendment Bill (No. 3) 1996	7
Telecommunications Amendment Bill 1996	13
* Telecommunications (Numbering Fees) Amendment Bill 1996	14
Wool International Amendment Bill 1996	16

**\* 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.



## **Quarantine Amendment Bill 1996**

This bill was introduced into the House of Representatives on 28 October 1996 by Mr Campbell as a Private Member's bill.

The bill proposes to provide that the Commonwealth can be held liable for compensation for damages when an officer is responsible for allowing animals, plants or goods to be imported into Australia which results in the introduction of a disease or pest.

### **Commonwealth not different from its officers?**

#### **Proposed subsection 58B(5)**

Proposed subsection 58B(5) limits the Commonwealth's liability. It provides that the compensation otherwise to be paid by the Commonwealth is to be reduced by the proportion that the damages were caused, or contributed to, by the negligence or other wrongful act or omission of the person claiming compensation, or any other person.

The committee assumes that 'any other person' does not include quarantine officers so that the Commonwealth's liability to pay compensation is not to be reduced by the damages caused, or contributed to, by the negligence or other wrongful act or omission of its own officers.

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

## **Student and Youth Assistance Amendment (Waiting Period) Bill 1996**

This bill was introduced into the House of Representatives on 30 October 1996 by the Parliamentary Secretary to the Minister for Employment, Education, Training and Youth Affairs. [Portfolio responsibility: Employment, Education, Training and Youth Affairs]

The bill proposes to amend the *Student and Youth Assistance Act 1973* to introduce a two year waiting period for access to AUSTUDY for all migrants arriving in Australia on or after 1 January 1997. The waiting period will also apply to New Zealand citizens who permanently settle in Australia on or after 1 January 1997.

*The committee has no comment on this bill.*

## Taxation Laws Amendment Bill (No. 3) 1996

This bill was introduced into the House of Representatives on 31 October 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

- *Income Tax Assessment Act 1936* to:
  - provide an income tax rebate for low income aged persons; .
  - amend provisions to prevent the conversion of ordinary annuities to rebatable annuities and pensions;
  - raise the threshold above which the medical expenses rebate applies to
  - \$1 430 and \$1 500 for subsequent years;
  - remove the exemption from tax on income derived from the sale, transfer or assignment of rights to mine for gold or for any prescribed metal or mineral;
  - change the taxation treatment of eligible investments from being on revenue account to being subject to capital gains tax;
  - remove the tax deduction for loan repayments in respect of certain loans made to co-operatives by governments;
  - provide for transitional tax issues which arise when a tax exempt entity
  - becomes subject to tax on any part of its income;
- *Development Allowance Authority Act 1992* to require that:
  - new indirect infrastructure borrowings or refinancing infrastructure borrowings that succeed them are made only by Australian resident taxpayers; and
  - any transfer of rights by a direct infrastructure borrowing lender or repayment of a direct infrastructure borrowing is accompanied by repayment or parallel transfer of any associated indirect infrastructure borrowing or refinancing infrastructure borrowing that has succeeded the indirect infrastructure borrowing;
- *Income Tax Assessment Act 1936* to amend research and development tax concession provisions to:
  - reduce the rate of deduction for expenditure on plant, contracted expenditure and other R&D expenditure from 150 per cent to 125 per cent;

- make companies in partnership ineligible to claim expenditure on R&D activities under section 73B; .
- limit to four years the period in which tax assessments may be amended to reduce tax liability by reason of deductions allowable for expenditure on R&D activities claimed under section 73B;
- modify the deduction rules for interest, feedstock, core technology and pilot plant; and
- clarify the definition of research and development activities; and
- *Industry, Research and Development Act 1986* to amend research and development tax concession provisions to:
  - remove the Industry Research and Development Board's power to register syndicates under section 39P for the tax concession;
  - allow the Minister to provide formal advice to the Board and its committees; and
  - ensure that general administrative arrangements for research and development programs contained in the Act also apply to programs administered through delegated legislation authorised under sections 19 and 20.

### **Retrospectivity - 'legislation by press release' Subclause 2(3) and Schedule 3**

The object of the amendments proposed by Schedule 3 is to prevent certain types of schemes from undermining the integrity of the infrastructure borrowings program. By virtue of subclause 2(3), the amendments would commence retrospectively on 30 October 1995, being the date the previous Government had announced its intention to propose these changes. The amendments, therefore, are an example of legislation by press release and may fall within the resolution of the Senate of 8 November 1988. On the other hand, the present Government announced in the Budget that it would adopt the proposed measures but still with effect from the date of the previous Government's announcement.

The resolution of the Senate itself makes it clear that it is 'subject to any further resolution', stating:

where the Government has announced , by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of a draft Bill within 6 calendar months after the date of that

announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill.

The committee notes that the explanatory memorandum indicates that the amendments will merely have the potential to prevent future loss to the revenue and it may be that no-one will have an increased tax burden with respect to transactions already entered into. On the other hand, the committee's concern with legislation by press release is that it may be put into operation from the date of the announcement as if the legislation had already been passed by Parliament which, in fact, will occur, if at all, at a later date. As it may be possible that the proposed amendments have been, or will be, used to impose tax before the legislation is passed, the committee **seeks the Treasurer's advice** on the issue.

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

### **Retrospective application - 'legislation by press release' Schedule 1, Part 2**

The object of the amendments proposed by Part 2 of Schedule 1 is to overcome an unintended consequence of amendments made in 1994 by the *Taxation Laws Amendment (Superannuation) Act 1992* allowing certain annuities to be treated as eligible termination payments (ETPs) and further rolled over on commutation or termination. The explanatory memorandum states at 2.8:

The amendments had the unintended consequence of allowing ordinary (Non-ETP) annuities which are the subject of eligible policies to be treated as ETPs on commutation or termination. As ETPs these annuities were eligible to be rolled-over into the superannuation system and used to purchase rebatable annuities and pensions.

By virtue of item 9 of Schedule 1, the amendments made by Part 2 would apply retrospectively to annuities commuted or that terminate on or after 15 June 1996, being the date the Assistant Treasurer announced the proposal. The amendments, therefore, are an example of legislation by press release.

The committee notes that the explanatory memorandum states on page 2 that no additional revenue is expected from these amendments but that failure to correct the anomaly would pose a potentially significant threat to the revenue. The committee assumes that there is no disadvantage to taxpayers through the retrospective application of this measure.

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

### **Retrospective application Schedule 1, Part 4**

Part 4 of Schedule 1, if enacted, would remove the exemption from tax in respect of income derived by bona fide prospectors when they sell, transfer or assign their mining rights under contracts entered into after 31 December 1996. Ordinarily, the committee would not be concerned by a budget measure, as this is, which altered the incidence of taxation on income derived during the current financial year.

Although the provisions apply only to transactions which occur after 31 December 1996, they may nevertheless be regarded as retrospective in operation. The committee acknowledges that the exemption was enacted as an incentive for prospectors to search for metals and minerals whose known resources were thought to be inadequate for Australia's needs. The amendments, however, affect the reasonable expectations, which the prospectors would have had while they were carrying out the prospecting, that the realisation of the fruits of their prospecting would be exempt from tax.

The committee notes that the amendments proposed by Schedule 2 of this bill in respect of tax exempt entities that become taxable lays down an equitable principle that could apply in the case of the bona fide prospector. Proposed subdivision 57-C in 57-15(2) would provide that income is treated for the purposes of the Act as having been derived before a certain time if the income is in respect of services rendered, goods provided or the doing of any other thing before that time. The committee **seeks the Treasurer's advice** on this issue.

The committee understands that some taxpayers may have been waiting for up to two years for a decision on whether they will be treated as coming within paragraph 23(pa). In the absence of that decision, their ability to sell, transfer or assign their mining rights may be adversely affected.

The committee, therefore, **seeks the Treasurer's advice** on how the proposed legislation will affect this group of taxpayers.

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

### **Retrospectivity Part 6 of Schedule 1**

The amendments proposed by Part 6 of Schedule 1 would apply retrospectively from Budget night and therefore prior to Royal Assent. The committee notes that the amendments give effect to a budget announcement and that the retrospectivity is necessary to prevent the avoidance of tax.

The committee has previously indicated that, in relation to retrospectivity, budget measures are something of a special case. In a paper titled *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-85*, the then Chairman of the Committee, Senator Tate, said:

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

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

### **Retrospective application Schedule 2**

The amendments proposed by Schedule 2 would apply to tax exempt entities that become taxable on or after 3 July 1995 being the date the previous government announced a somewhat similar scheme. Although this is another example of legislation by press release, the committee notes that the explanatory memorandum states that the provisions are expected to be revenue neutral.

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

## **Retrospective application Schedule 4**

The amendments proposed by Schedule 4 will apply in part from 23 July 1996 and in part from Budget night. Although the amendments which apply from 23 July 1996 are examples of legislation by press release, they do not fall within the resolution of the Senate of November 1988 as they have been introduced within 6 months of the announcement.

In respect of those applying from Budget night, the committee has previously indicated that, in relation to retrospectivity, budget measures are something of a special case. In a paper titled *The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-85*, the then Chairman of the Committee, Senator Tate, said:

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

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

## Telecommunications Amendment Bill 1996

This bill was introduced into the House of Representatives on 30 October 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to amend the *Telecommunications Act 1991* to:

- clarify the exemptions from prosecution which are provided for disclosure by employees of telecommunications carriers or eligible service providers of customer information to operators of emergency services; and
- enable AUSIBL to:
  - determine when a numbering charge (provided for in the Telecommunications (Numbering Fees) Amendment Bill 1996) is due and payable,
  - make written determinations to recover numbering charges, no later than 15 June in the financial year, and
  - make written determinations to recover late payment penalties.

*The committee has no comment on this bill.*

## **Telecommunications (Numbering Fees) Amendment Bill 1996**

This bill was introduced into the House of Representatives on 30 October 1996 by the Minister representing the Minister for Communications and the Arts. [Portfolio responsibility: Communications and the Arts]

The bill proposes to amend the *Telecommunications (Numbering Fees) Act 1991* to require carriers and service providers to pay annual charges on numbers held by them for provision of telecommunications services. The charge will be set by AUSTEL in a written determination and limited to a maximum of \$100 000 per number per annum.

### **Inappropriate delegation of legislative power Clauses 9 and 10**

Clause 9 of this bill, if enacted, would provide that the amount of a charge to be imposed on a telecommunications number would be determined by AUSTEL. Clause 10 would set a maximum charge on a number at \$100 000.

The committee has consistently drawn attention to provisions which allow Ministers an unfettered power to make regulations to set the rate of a levy or a charge as such provisions may be considered to delegate legislative power inappropriately. The basis for this view is that, with such a power, a rate of charge could be set so high that it amounts to a tax. The committee is firmly of the view that taxation is a matter for primary legislation. Where it is impracticable to set the rate of the levy or charge in primary legislation, the committee has developed a policy of requesting that the primary legislation should prescribe either a maximum rate of charge or a method of calculating such a maximum rate.

In this case, a maximum rate is established in the primary legislation but two issues concern the committee. The first is that the power to determine the level of the actual charge is not given to a Minister but to a semi-autonomous body. The second is that the maximum amount is so high that it may be considered the grant of a power to levy a tax, which the committee believes should be a matter for Parliament.

The committee acknowledges that the determinations are disallowable instruments but points out that disallowance only takes effect from the date of the disallowance and that charges levied between the determination coming into effect and the disallowance would remain valid and payable.

The committee **seeks the Minister's views** on these issues.

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

## Wool International Amendment Bill 1996

This bill was introduced into the House of Representatives on 30 October 1996 by the Minister for Primary Industries and Energy. [Portfolio responsibility: Primary Industries and Energy]

The bill proposes to amend the current terms of the fixed disposal schedule of the wool stockpile with a requirement that Wool International sell and deliver the last bale by 31 December 2000. The functions of Wool International in relation to the stockpile are also clarified.

*The committee has no comment on this bill.*

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

**No. 12 of 1996**

**20 November 1996**

**ISSN 0729-6851**

## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

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

### **TERMS OF REFERENCE**

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

	<b>Page</b>
<input type="checkbox"/> Corporations Law Amendment Bill 1996	5
Customs Amendment Bill (No. 2) 1996	6
<input type="checkbox"/> Customs Depot Licensing Charges Bill 1996	7
<input type="checkbox"/> Import Processing Charges Bill 1996	8
<input type="checkbox"/> Migration Legislation Amendment Bill (No. 3) 1996	9
Sex Discrimination Amendment Bill 1996	11
Sydney Airport (Regulation of Movements) Bill 1996	12

**The committee has commented on these bills**

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



## Corporations Law Amendment Bill 1996

This bill was introduced into the House of Representatives on 6 November 1996 by the Parliamentary Secretary (Cabinet) to the Prime Minister. [Portfolio responsibility: Treasury]

The bill proposes to amend the Corporations Law to:

- ensure that debts and claims arising while a company is under a deed of company arrangement are admissible to proof in a subsequent winding up; and
- ensure the validity of acts of liquidators who admitted such debts and claims on the basis that they were provable, prior to the commencement of this bill.

### Retrospectivity

#### Proposed section 1141

Proposed section 1141, if enacted, would have the effect of validating any actions taken by a liquidator of a company at any time prior to the commencement of the bill.

The committee notes, however, that, although this gives the provision a retrospective effect, the retrospectivity would be to the benefit of creditors of companies that go into liquidation. The committee also notes that the bill is designed to overcome an anomaly in the operation of Part 5.3A which was uncovered by a court decision.

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

## Customs Amendment Bill (No. 2) 1996

This bill was introduced into the House of Representatives on 7 November 1996 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of three proposing to provide for the implementation of a cost recovery regime for import related services. In particular, this bill proposes to amend the *Customs Act 1901* to:

- set fees which relate to those entries required to move imported goods out of a warehouse and into home consumption;
- set replacement fees (currently contained in the Customs Act) for the processing of applications for the refund of customs duty and for the provision of officers' services either out of hours or at locations where such services are not usually provided;
- provide administrative provisions, including the collection mechanism, for the seven charges imposed by the Import Processing Charges Bill 1996; and
- introduce a new licensing regime, which will provide the basis for the imposition of a 'user pays' licence application charge and an annual depot licence charge.

*The committee has no comment on this bill.*

## **Customs Depot Licensing Charges Bill 1996**

This bill was introduced into the House of Representatives on 7 November 1996 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of three proposing to provide for the implementation of a cost recovery regime for import related services. In particular, this bill proposes to impose depot licensing application charges and annual depot licence charges as the basis for the new depot licensing regime.

### **Imposing charge by regulation Clauses 5 and 6**

Clauses 5 and 6, if enacted, would each allow the amount of a charge to be prescribed by regulation.

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

The committee notes that in each case, the relevant provision, while allowing the charge to be set at such other amount as is prescribed, sets an upper limit which must not be exceeded.

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

## **Import Processing Charges Bill 1996**

This bill was introduced into the House of Representatives on 7 November 1996 by the Minister for Small Business and Consumer Affairs. [Portfolio responsibility: Industry, Science and Tourism]

The bill is one of three proposing to provide for the implementation of a cost recovery regime for import related services. In particular, this bill proposes to impose import entry and cargo reporting charges on importers of goods, or the air or sea cargo reporter in respect of the goods. Different charges will apply for electronic and manually lodged entries.

### **Imposing charge by regulation Clauses 5, 6 and 7**

Clauses 5, 6 and 7, if enacted, would each allow the amount of a charge to be prescribed by regulation.

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

The committee notes that in each case, the relevant provision, while allowing the charge to be set by reference to such other amount as is prescribed, sets an upper limit which must not be exceeded.

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

## **Migration Legislation Amendment Bill (No. 3) 1996**

This bill was introduced into the House of Representatives on 16 October 1996 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the following Acts:

- *Migration Act 1958*, the *Immigration (Education) Act 1971* and the *Migration (Health Services) Charge Act 1991* to make amendments to facilitate the introduction of the proposed visa application charge;
- *Migration Act 1958* to:
  - enable the Minister to limit, if necessary, the numbers of people in every migration category able to enter Australia each year; and
  - enable a distinction to be made in regulations and decision-making between married people and those in de facto relationships, for the purposes of visa applications; and the
- *Migration Act 1958* and the *Australian Citizenship Act 1948* to remove Australian citizenship from naturalised citizens if their citizenship was obtained following fraudulent claims in their visa applications or application for Australian citizenship.

### **Exclusion of application of *Sex Discrimination Act 1984* Schedule 3**

Schedule 3, if enacted, would exclude the operation of the *Sex Discrimination Act 1984* in relation to certain regulations dealing with visa applications. Its effect would be that de facto couples would be able to be treated differently from married couples, contrary to the current provisions of the *Sex Discrimination Act 1984*.

As the *Sex Discrimination Act 1984* is a major legislative bulwark of human rights in this country, its exclusion could be warranted only in the most serious circumstances. The issue for the committee is whether the circumstances in this instance justify the exclusion. The committee, therefore, seeks the advice of the Minister on this issue.

*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.*

**Time limits on prosecution for summary offences  
Schedule 4, item 5**

Item 5 of Schedule 4, if enacted, would prospectively remove the ten year limitation period for commencing proceedings to prosecute an offence against subsection 50(1) of the *Australian Citizenship Act 1948*.

The offence consists of concealing a material circumstance or making a false or misleading statement in relation to, or for the purposes of, the Act. Conviction carries a penalty of up to \$1 000 or imprisonment for six months or both.

The committee questions whether there is an unfair difference in the treatment of summary offences by removing the ten year limitation on prosecution for this summary offence. Time limitations on prosecutions apply almost universally to other summary offences. The committee, therefore, seeks the advice of the Minister on whether the difference in treatment is warranted.

*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.*

## Sex Discrimination Amendment Bill 1996

This bill was introduced into the House of Representatives on 6 November 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Sex Discrimination Act 1984* to limit exemptions under subsections 40(2) and 40(3) of the Act. Particularly, it:

- narrows existing exemptions for anything done by a person in direct compliance with specified taxation legislation to an exemption by reference to marital status discrimination;
- narrows the existing exemption for anything done by a person in direct compliance with the *Social Services Act 1980* of Norfolk Island to an exemption by reference to sex discrimination in relation to eligibility for age pension, and to provide for an exemption by reference to marital status discrimination in relation to differential rates of benefits payable and different income thresholds;
- implements a phasing out of the existing exemption relating to the operation of certain definitions in the *National Health Act 1953*; and
- removes the existing exemption for marital status discrimination arising where a person does anything in direct compliance with any regulations, rules, by-laws, determinations or directions made under the *Gift Duty Assessment Act 1941*.

*The committee has no comment on this bill.*

## **Sydney Airport (Regulation of Movements) Bill 1996**

This bill was introduced into the House of Representatives on 4 November 1996 by Mr Albanese as a Private Member's bill.

The bill proposes to limit the number of aircraft movements allowed at Sydney (Kingsford-Smith) Airport to 80 per hour. It provides:

- that an aircraft movement is not counted if it involves an emergency;
- that an authorised person must obtain information about the number of movements on a monthly basis and provide the information to the Minister within 10 days. The information is then required to be tabled in Parliament within 10 days;
- for the issuing of both restraining injunctions and performance injunctions; and
- for consequential amendments to the *Airports Act 1996*.

*The committee has no comment on this bill.*

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

**ALERT DIGEST**

**No. 13 of 1996**

**27 November 1996**

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## **SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**

### **MEMBERS OF THE COMMITTEE**

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

### **TERMS OF REFERENCE**

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  - (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

	<b>Page</b>
<input type="checkbox"/> Financial Laws Amendment Bill 1996	5
General Insurance Supervisory Levy Amendment Bill 1996	8
<input type="checkbox"/> International Transfer of Prisoners Bill 1996	9
Payment of Tax Receipts (Victoria) Bill 1996	11

**The committee has commented on these bills**

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



## Financial Laws Amendment Bill 1996

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

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

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

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

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

Subclauses 2(3) and (4), if enacted, would give retrospective effect to amendments to be made by certain items in Schedule 7 and by Schedule 10 from 1 October 1994, the date of the commencement of the *Insurance Laws Amendment Act 1994*.

The committee notes that the relevant amendments are for the purpose of either correcting drafting errors or resolving ambiguities in the existing legislation.

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

**Non-reviewable decisions  
Items 32 and 33, Schedule 12**

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

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

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

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

The matter is one of striking a balance between the interests of the policy holders and the interests of the insurance companies. The committee notes that the explanatory memorandum speaks of the appeal system's 'potential for ensuing time

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delays to jeopardise policy owners interests'. The committee **seeks the Treasurer's clarification** on this point which is crucial to deciding where a proper balance lies.

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

### **Inappropriate delegation of legislative power Information sharing amendments**

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

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

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

## **General Insurance Supervisory Levy Amendment Bill 1996**

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

The bill proposes to amend the *General Insurance Supervisory Levy Act 1989* to increase the statutory upper limit of the annual supervisory levy paid by Australia's 166 general insurers. The statutory upper limit is distinct from the actual levy, which is set by regulation.

*The committee has no comment on this bill.*

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

## International Transfer of Prisoners Bill 1996

This bill was introduced into the House of Representatives on 21 November 1996 by the Attorney-General and Minister for Justice. [Portfolio responsibility: Attorney-General]

The bill proposes to enable Australians imprisoned overseas, and foreign nationals imprisoned in Australia, to be returned to their home countries to complete the serving of their sentences. Further it proposes to enable persons having a connection with Australia who have been convicted by the international war crimes tribunals of war crimes in former Yugoslavia and Rwanda to be transferred to Australia to serve their sentences.

### Commencement by Proclamation

#### Subclause 2(2)

Subclause 2(2) of this bill provides:

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

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

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

3. As a general rule, a restriction should be placed on the time within which an Act should be proclaimed (for simplicity I refer only to an Act, but this includes a provision or provisions of an Act). The commencement clause should fix either a period, or a date, after Royal Assent, (I call the end of this period, or this date, as the case may be, the 'fixed time'). This is to be accompanied by either:
  - (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation: or
  - (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.
4. Preferably, if a period after Royal Assent is chosen, it should not be longer than 6 months. If it is longer, Departments should explain the reason for this in the Explanatory Memorandum. On the other hand, if the date option is chosen, [the Department of the Prime Minister and Cabinet] do not wish at this stage to restrict the discretion of the instructing Department to choose the date.

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

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

The committee notes that paragraph 6 is applicable here as the explanatory memorandum points out that the commencement date will depend on the time taken for the enactment of complementary State/Territory legislation.

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

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

## **Payment of Tax Receipts (Victoria) Bill 1996**

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

The bill proposes to appropriate monies for the payment to Victoria of an amount or amounts agreed to under the Deed for the Return of Certain Tax Payments executed by the Commonwealth and Victoria on 20 November 1996. The Deed was negotiated so that the Commonwealth will pay Victoria an amount no greater than the windfall tax revenue that will accrue to the Commonwealth as a result of the settlement of a dispute over the pass-on of petroleum resource rent tax between Victorian gas utilities and their suppliers.

*The committee has no comment on this bill.*

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

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Senator B Cooney (Chairman)  
Senator W Crane (Deputy Chairman)  
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# CONTENTS

	<b>Page</b>
Marine Personnel Legislation Amendment Bill 1996	5

**The committee has commented on this bill**

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



## **Marine Personnel Legislation Amendment Bill 1996**

This bill was introduced into the Senate on 27 November 1996 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Transport and Regional Development]

The bill proposes to amend the *Seafarers Rehabilitation and Compensation Act 1992* and the *Occupational Health and Safety (Maritime Industry) Act 1993* to address inconsistencies and anomalies in the current legislation. The amendments flow from recommendations by the tripartite Seafarers Safety, Rehabilitation and Compensation Authority to improve the administration of workers' compensation and occupational health and safety schemes.

### **Retrospectivity**

#### **Subclause 2(2)**

Subclause 2(2) of this bill, if enacted, would give retrospective effect to item 75 of Schedule 1 from 24 June 1993.

The effect of item 75 of Schedule 1 is to provide that State and Territory stamp duty is not payable on insurance policies issued in respect of employer liabilities under the *Seafarers Rehabilitation and Compensation Act 1992*. The committee has consistently taken a benign view of a retrospective provision which does not disadvantage anyone other than the Commonwealth. In this instance the provision would retrospectively disadvantage State and Territory governments. The explanatory memorandum, however, points out that State and Territory legislation generally exempts similar insurance policies in their own occupational health and safety legislation.

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

### **Retrospectivity**

#### **Subclause 2(3)**

Subclause 2(3) of this bill, if enacted, would give retrospective effect to item 9 of Schedule 2 from 18 July 1994.

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

As at present advised, the committee sees no reason for the need to insert the proposed provision. In its view, the general regulation making power in section 121 would include the power to impose penalties for contravention of regulations made under the Act.

The committee would be interested in the reasons for inserting a specific power.

The committee notes that the explanatory memorandum asserts that the retrospective commencement will not be to anyone's detriment 'because no penalties have been imposed under those regulations (and no prosecutions are pending).'

The committee, therefore, **seeks the Minister's advice** on the need for retrospectivity as the amendment would be just as effective if it commenced on Royal Assent.

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

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

**Senate Standing Committee**

**for**

**The Scrutiny of Bills**

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## CONTENTS

	<b>Page</b>
<input type="checkbox"/> Workplace Relations and Other Legislation Amendment Bill (No. 2) 1996	5

**The committee has commented on this bill**

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



## **Workplace Relations and Other Legislation Amendment Bill (No. 2) 1996**

This bill was introduced into the Senate on 5 December 1996 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Industrial Relations]

The bill proposes to allow the extended operation of the *Workplace Relations Act 1996* in Victoria. The bill is the result of the referral to the Commonwealth by Victoria of the power to legislate over industrial relations matters in that State by the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

### **Retrospectivity Subclause 2(4) - Schedule 3**

Under subclause 2(4) the amendments proposed in Schedule 3 will have effect retrospectively from the date of assent to the *Workplace Relations and Other Legislation Amendment Act 1996*. The committee notes, however, that the amendments are technical only.

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