Senate Standing Committee

for the

Scrutiny of Bills

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

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

TABLE OF CONTENTS

- **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.

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

Australian Wool Research and Promotion Organisation Amendment (Funding and Wool Tax) Bill 2000

This bill was introduced into the House of Representatives on 16 February 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *Australian Wool Research and Promotion Organisation Act 1993* to provide for:

- the Australian Wool Research and Promotion Council to plan, facilitate and implement the decisions taken in the light of the outcome of WoolPoll 2000 (which enables woolgrowers to vote on their preferred types of industry services and the amount of investment in those services); and
- ministerial determination of the rate of wool tax having had regard to the preferences of persons who have been liable to pay wool tax;

The bill also proposes to amend five *Wool Tax Acts* to reduce the minimum rate of wool tax from 2.75% to nil in order to allow the range of wool tax options put to growers in WoolPoll 2000 to be implemented.

The Committee has no comment on this bill.

Census Information Legislation Amendment Bill 2000

This bill was introduced into the House of Representatives on 17 February 2000 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes that name-identified 2001 Census information, from households which provide explicit consent, will be retained by the Australian Bureau of Statistics and then transferred to and stored by the National Archives of Australia for release, for future research purposes, after a closed access period of 99 years.

An explicit non-disclosure provision is included in the bill to amend the *Archives Act 1983* to ensure the information will be protected from release for any purpose in the closed access period.

A further explicit provision is included to amend both the *Archives Act 1983* and the *Census and Statistics Act 1905* to provide protection from compulsory disclosure to a court or tribunal.

The bill also proposes to change the name of "Australian Archives" to "National Archives of Australia".

The Committee has no comment on this bill.

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

Corporations Law Amendment (Employee Entitlements) Bill 2000

This bill was introduced into the House of Representatives on 17 February 2000 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes amendments to the Corporations Law that will:

- introduce a new offence to penalise persons who deliberately enter into agreements or transactions for the purposes of avoiding payment of employee entitlements;
- provide for a court to order people in breach of the new offence provision to pay compensation to employees who have suffered loss or damage because of the agreements or transactions; and
- deem that a company incurs a debt for the purposes of the insolvent trading provisions when it enters into an uncommercial transaction, thereby extending the current duty on directors.

The Committee has no comment on this bill.

Customs Legislation Amendment (Criminal Sanctions and Other Measures) Bill 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the following Acts:

Australian Postal Corporation Act 1989 to provide Customs officers with the power to open international postal articles reasonably believed to consist of, or contain, drugs or certain other chemical compounds;

Customs Act 1901 to:

- provide for increased penalties for certain import and export offences;
- enable new technology to be used for personal searches (eg. bodyscan x-ray, particle detectors, thermal imaging and swabbing kits) as alternatives to removing articles of clothing and enable the use of photos and videotapes;
- extend the power of arrest for new offences;
- enable Customs to retain evidential material and/or seized goods for 180 days (currently 60 days); and
- amend provisions relating to the disposal of abandoned goods; and

Customs Administration Act 1985 to allow for the appointment of the Chief Executive Officer of Customs for periods up to five years.

The Committee previously considered this bill in *Alert Digest No 19 of 1999*. Since the publication of that *Digest* the Committee has reconsidered the following provisions.

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

The opening of drug-related postal articles
Schedule 1

Schedule 1 to this bill proposes certain amendments to the *Australian Postal Corporation Act 1989*. That Act currently requires that an employee of Australia Post open an article of mail for examination by Customs. The Minister's Second Reading Speech states that this requirement "restricts Customs' ability to examine mail articles covertly, which is an important element in the success of a controlled delivery of illicit drugs imported into Australia".

In general terms, the proposed amendments will give Customs officers the power to open international postal articles reasonably believed to consist of, or to contain, drugs or other chemical compounds.

Specifically, the bill proposes to insert a new section 90T in the *Australian Postal Corporation Act 1989*. This section will apply to any article that is in the course of the post between Australia and a place outside Australia, and that is reasonably believed by a Customs officer to consist of, or to contain, drugs or other chemical compounds being imported or exported in contravention of a Commonwealth law. A customs officer may remove any such article from the normal course of carriage "following such procedures (if any) as are prescribed" and may open and examine the article.

Under proposed subsection 90T(5), if the article is found to consist of, or contain, such drugs or other chemical compounds, or any other thing on which Customs duty or sales tax on imports is payable, or any thing that is being carried in contravention of a Commonwealth law relating to its importation or exportation, the Customs officer must deal with the article in accordance with any relevant applicable Commonwealth law. If the article does not consist of or contain any such thing, the Customs officer must close up the article and return it to the normal course of carriage.

Under proposed subsection 90T(6), regulations may be made to determine the procedure for removing and returning articles by Customs officers. Under proposed subsection 90ZC(2), Customs officers will enjoy the same immunity from liability for actions in good faith in performing their duties as is enjoyed by postal officers.

These amendments raise a number of questions. First, it is not clear why the current procedures, which require 'suspicious' articles to be opened by Australia Post employees, should have affected the efficient operation of Customs.

Secondly, the amendments require that the Customs officer must "reasonably" believe that an article is drug-related. It is not clear how the reasonableness of such a belief will be tested, or how the amendments will prevent the possibility of a systematic opening of postal articles simply to check whether they contain anything drug-related or dutiable.

Thirdly, the bill authorises "a Customs officer" to remove and open postal articles. Given that the opening of personal and business mail is a serious matter, it may be appropriate to place some limit on the class of officers entitled to exercise this power, whether by reference to seniority or experience and training.

Finally, the Committee notes that any procedures for removing articles from the normal course of carriage by post, and for returning articles, are to be determined by regulation. These are matters of significance and, arguably, should be dealt with in the bill itself rather than left as discretionary matters to be dealt with in regulations. While the Committee recognises and shares concerns about the import and export of illicit drugs, it **seeks the Minister's advice** about the matters set out above and the potential impact of the new search procedures on the carriage of ordinary mail.

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

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

Customs Tariff Amendment Bill (No. 1) 2000

This bill was introduced into the House of Representatives on 17 February 2000 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Justice and Customs]

The bill, which has been introduced with the Excise Tariff Amendment Bill (No. 1) 2000, proposes to amend the *Customs Tariff Act 1995* to:

- apply a per-stick rate of customs duty of $0.18872 on certain tobacco products and a rate of customs duty on all other tobacco products of $235.90 per kilogram of tobacco content; and
- to remove certain tariff items which provide concessional rates of customs duty for non-transport fuel usage.

Retrospective application
Subclauses 2(2) and (3)

Subclause 2(2) of this bill provides that the amendments made in Schedule 1 are to be taken to have commenced on 1 November 1999. Subclause 2(3) states that the amendments made in Schedule 2 are to be taken to have commenced on 15 November 1999.

In each case, the amendments proposed are Customs Tariff proposals which have been tabled in each House of the Parliament and which are now to be incorporated in the *Customs Tariff Act 1995*. The Committee has been prepared to accept a measure of retrospectivity in these circumstances.

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

Dairy Adjustment Levy (Customs) Bill 2000

This bill was introduced into the House of Representatives on 16 February 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill is one of a package of three bills that impose the Dairy Adjustment Levy. The other bills are the Dairy Adjustment Levy (Excise) Bill 2000 and the Dairy Adjustment Levy (General) Bill 2000.

The bill proposes:

- the imposition of the Dairy Adjustment Levy to the extent that the levy is a duty of customs;
- the rate at which the levy will apply; and
- provisions by which the Governor-General is be able to make regulations concerning the levy.

The Committee has no comment on this bill.

Dairy Adjustment Levy (Excise) Bill 2000

This bill was introduced into the House of Representatives on 16 February 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill is one of a package of three bills that impose the Dairy Adjustment Levy. The other bills are the Dairy Adjustment Levy (Customs) Bill 2000 and the Dairy Adjustment Levy (General) Bill 2000.

The bill proposes:

- the imposition of the Dairy Adjustment Levy to the extent that the levy is a duty of excise;
- the rate at which the levy will apply; and
- provisions by which the Governor-General is be able to make regulations concerning the levy.

The Committee has no comment on this bill.

Dairy Adjustment Levy (General) Bill 2000

This bill was introduced into the House of Representatives on 16 February 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill is one of a package of three bills that impose the Dairy Adjustment Levy. The other bills are the Dairy Adjustment Levy (Customs) Bill 2000 and the Dairy Adjustment Levy (Excise) Bill 2000.

The bill proposes:

- the imposition of the Dairy Adjustment Levy to the extent that the levy is neither a duty of excise or a duty of customs;
- the rate at which the levy will apply; and
- provisions by which the Governor-General is be able to make regulations concerning the levy.

The Committee has no comment on this bill.

Dairy Industry Adjustment Bill 2000

This bill was introduced into the House of Representatives on 16 February 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes the framework for the implementation of the Dairy Industry Adjustment Program. The main object of the program is to assist the dairy industry to deregulate by providing for:

- dairy structural adjustments payments, made under the *Dairy Produce Act 1986*, as amended by Schedule 1; and
- dairy exit payments, made under Part C of the *Farm Household Support Act 1992*, as amended by Schedule 2.

The bill also proposes transitional provisions and consequential amendments to the *Bankruptcy Act 1966*, the *Income Tax Assessment Act 1997*, the *Remuneration Tribunal Act 1973*, and the *Social Security Act 1991*.

Abrogation of the privilege against self-incrimination
Clauses 39 and 112

Among other things, this bill proposes to insert a new Schedule 2 in the *Dairy Produce Act 1986*. Among other things, this Schedule contains the Dairy Industry Adjustment Program. Clause 37 in this Schedule authorises the Dairy Adjustment Authority to obtain information, documents and evidence from certain persons. Clause 39 states that this information must be provided even though it might tend to incriminate the person or expose them to a penalty. However, subclause 39(2) states that the information, evidence or documents provided, and any information, document or thing obtained as a direct or indirect consequence, is not admissible in criminal proceedings except proceedings for a failure to provide information, or for giving false or misleading information or evidence or documents.

Similarly, this Schedule includes a proposed new Part 4, which provides for the collection of dairy adjustment levy. Under clause 110, "an authorised officer" (defined as an APS employee who has been authorised by the Secretary under clause 125) may require "a person" to provide a return or information in relation to matters relevant to the collection of the levy. Clause

112 states that such a return or information must be provided even though it might tend to incriminate the individual concerned. However, subclause 112(3) states that the return or information, or anything obtained directly or indirectly as a result, is not admissible against the individual in criminal proceedings except proceedings for a failure to provide information, or for giving false or misleading information or evidence or documents.

The Committee has previously accepted that provisions in this form strike a reasonable balance between the need to obtain information and the need to protect individual rights.

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

Reversal of the onus of proof
Subclause 42(3)

Clause 42 restricts what a person may do with protected information or protected documents that he or she has obtained in the course of official employment. Under subclause 42(2) it is an offence to record or disclose its information. However, subclause 42(3) states that is not an offence if:

- the information is recorded or disclosed for the purposes of the Dairy Structural Adjustment Program Scheme;
- the recording or disclosure happens in the course of the person's official duties;
- the disclosure is not likely to enable the identification of a particular entity;
- the disclosure is to an entity which, at the relevant time, had an eligible interest in a dairy farm enterprise and the information relates to that enterprise; or
- the recording or disclosure is in connection with the administration of a scheme under the Dairy Exit Program.

A Note to subclause 42(3) states that a defendant bears an evidential burden in relation to a matter in this subclause. The usual reason for imposing an evidential burden in these circumstances is that the matter to be raised is

peculiarly within the knowledge of the defendant. While some of the matters in this subclause are peculiarly within the defendant's knowledge, others (for example, disclosure to an entity with an interest in a dairy farm enterprise, or disclosure that is unlikely to enable the identification of a particular entity) would not seem to be. The Committee, therefore, **seeks the Minister's advice** as to why the defendant bears an evidential burden of raising all of the matters set out in subclause 42(3).

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

Excise Tariff Amendment Bill (No. 1) 2000

This bill was introduced into the House of Representatives on 17 February 2000 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

This bill, which was introduced with the Customs Tariff Amendment Bill (No. 1) 2000, proposes amendments to the *Excise Tariff Act 1921* to vary the per stick tobacco excise and the petroleum products excise by:

- defining "tobacco";
- applying a per-stick rate of excise duty of $0.18872 on certain tobacco products and a rate of excise duty on all other tobacco products of $235.90 per kilogram of tobacco content; and
- removing certain tariff items which provide concessional rates of excise duty for non-transport fuel usage.

Retrospective application
Subclauses 2(2) and (3)

Subclause 2(2) of this bill provides that the amendments made in Schedule 1 are to be taken to have commenced on 1 November 1999. Subclause 2(3) states that the amendments made in Schedule 2 are to be taken to have commenced on 15 November 1999.

In each case, the amendments proposed are Excise Tariff Proposals which have been tabled in each House of the Parliament and which are now to be incorporated in the *Excise Tariff Act 1921*. The Committee has been prepared to accept a measure of retrospectivity in these circumstances.

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

Health Legislation Amendment (Gap Cover Schemes) Bill 2000

This bill was introduced into the House of Representatives on 17 February 2000 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the:

National Health Act 1953 to:

- enable a registered organisation to prepare a gap cover scheme under which it can offer no gap and/or known gap policies;
- provide Ministerial approval of gap cover schemes;
- provide that much of the machinery related to the gap cover schemes will be contained in regulations;
- empower the Private Health Insurance Administration Council (PHIAC) to obtain regular reports from registered organisations and matters relating to the operation of gap cover schemes and to provide advice to the Minister on the operation of those schemes; and
- allow a registered a registered organisation to pay a benefit in excess of the Schedule fee, subject to meeting the amended requirements of Schedule 1 to the Act.

Health Insurance Act 1973 to provide the automatic assignment of a contributor's Medicare benefit to certain agents or prescribed persons as provided for under the scheme when that benefit relates to a professional service rendered by a practitioner pursuant to an approved scheme.

The Committee has no comment on this bill.

Medicare Levy Amendment (Defence—East Timor Levy) Bill 2000

This bill was introduced into the House of Representatives on 17 February 2000 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Medicare Levy Act 1986* and *Income Tax Assessment Act 1936* to introduce a levy for the 2000-2001 financial year to partially offset Australia's defence costs in East Timor. It is proposed that the levy be imposed on all taxpayers, including members of the ADF, at the progressive rates of 0.5% for taxable income greater than $50 000 and 1% for taxable income greater than $100 000. It is not proposed to apply the levy to reportable fringe benefits.

The Committee has no comment on this bill.

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

Primary Industries (Excise) Levies (GST Consequential Amendments) Bill 2000

This bill was introduced into the House of Representatives on 16 February 2000 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

As a consequence of the introduction of the Goods and Services Tax (GST), the bill proposes to amend the *Primary Industries (Excise) Levies Act 1999* to exclude the GST from the base for calculating the deer velvet and goat fibre levies.

The Committee has no comment on this bill.

Superannuation (Entitlements of same sex couples) Bill 2000

This bill was introduced into the Senate on 15 February 2000 by Senator Conroy as a Private Senator's bill.

The bill proposes to amend the *Superannuation Industry (Supervision) Act 1993* to enable same sex couples to receive the same superannuation benefits as heterosexual couples.

The Committee has no comment on this bill.

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

Taxation Laws Amendment Bill (No. 11) 1999

This bill was introduced into the House of Representatives on 9 December 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

International Tax Agreements Act 1953 to ensure that the taxing right afforded to Australia under the relevant provision of a double taxation agreement over income, profits or gains arising from the alienation of Australian real property, including mining rights, is fully effective;

Income Tax Assessment Act 1997 to extend the period of time within which gifts to the Australian National Korean War Memorial Trust Fund, the St Patrick's Cathedral Parramatta Rebuilding Fund and the Shrine of Remembrance Restoration and Development Trust are tax deductible;

Income Tax Assessment Act 1936 to remove exemptions, from income tax, available to certain sportspersons and sporting clubs or associations; and

Income Tax Assessment Act 1936, *Income Tax Assessment Act 1997* and *Income Tax (Transitional Provisions) Act 1997* to make minor technical amendments.

The Committee previously dealt with this bill in *Alert Digest No 1 of 2000* in which it made certain comments concerning legislation by press release and retrospectivity. Since the publication of that *Digest* the Committee has received a submission from the Corporate Tax Association which raises a number of additional matters in relation to Schedule 1 to the Bill (copy attached to this *Digest*). These matters are dealt with below.

Retrospectivity, certainty and Australia's double taxation treaties Schedule 1

Introduction

As noted in *Alert Digest No 1 of 2000*, Schedule 1 to this bill proposes to amend the *International Tax Agreements Act 1953* to overcome the 1997 Full Federal Court decision in *Commissioner of Taxation v Lamesa Holdings BV*

(1997) 77 FCR 597. In that decision, the Court considered a situation in which a Dutch resident company disposed of shares in an Australian company which owned a subsidiary company which owned land in Australia.

In that case, the Court held that the Alienation of Property Article in the Australia/Netherlands Double Tax Agreement (DTA) entitled Australia to tax a Dutch resident which sold land in Australia, or a Dutch resident which sold shares in an Australian company where that company's assets consisted principally of land in Australia, but did not extend to the disposal of land owned through a chain of companies.

Schedule 1 to this bill proposes to overcome this decision by inserting a new section 3A in the *International Tax Agreements Act 1953*. This section will amend the Australia/Netherlands DTA (and 30 other such Agreements) to enable Australia to tax alienations or dispositions of shares or comparable interests in companies the value of whose assets is wholly or principally attributable (whether directly or indirectly) to land in Australia.

These amendments are to apply to gains from alienations or dispositions after 12 noon on 27 April 1998 – the date of a Press Release issued by the Treasurer.

In *Alert Digest No 1 of 2000* the Committee raised the issue of the '6 month rule'. The Corporate Tax Association (CTA) has since raised three further issues:

- the retrospective effect of the provision on transactions commenced before 27 April 1998, but completed after that date;
- the unilateral abrogation of Australia's treaty obligations by amending domestic law; and
- the lack of certainty which may result from leaving the term "alienation or disposition" undefined.

Retrospectivity and transactions in progress

The CTA notes that transactions involving the disposal of shares in a company are negotiated and implemented over a lengthy period of time. Such transactions may not have been completed by the date of a press release, but

may have been well under way (and may have become commercially irrevocable) by that date.

The importance of including adequate transitional provisions to ensure that such transactions were not penalised by retrospective legislation has been recognised in other taxation legislation (for example, in relation to share buy-backs in Taxation Laws Amendment Bill (No 1) 1996 and in relation to debt forgiveness rules in Taxation Laws Amendment Bill (No 2) 1996). The CTA suggests that the established concept of an 'excluded transitional arrangement' should also be applied in the case of this bill where there is objective evidence that a relevant transaction was under way at the date of the press release.

If the six month rule were to be applied to alter the bill's commencement date, then this would also alter the relevant date for such 'excluded transitional arrangements'.

Australia's international obligations

The CTA expresses concern at the use of 'legislation by press release' to unilaterally alter Australia's treaty obligations, and its possible effect on Australia's international reputation. It notes that the Vienna Convention on the Law of Treaties (to which Australia is a Party) states that a party may not evoke the provisions of its internal law as justification for its failure to perform a treaty.

The CTA submits that the changes announced on 27 April 1998 should be effected not in this bill, but by way of bilaterally agreed amendments to Australia's DTAs – a course recently adopted in relation to other DTAs.

Uncertainty

Finally, the CTA states that the term "alienation or disposition" is not defined either in the DTA or in Australia's domestic tax legislation. This entails a risk that the lack of certainty regarding these words may lead to ambiguity in the application of proposed new section 3A. Given that this section will be operative from 27 April 1998 until such time as an 'alienation of property article' in a relevant DTA is amended, unless taxpayers know precisely when an alienation or disposition occurs they "will not be able to determine whether to apply section 3A or the DTA".

The Committee draws these concerns to the Treasurer's attention, and **seeks the Treasurer's advice** as to their effect.

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

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

Taxation Laws Amendment Bill (No. 5) 2000

This bill was introduced into the House of Representatives on 17 February 2000 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the:

Sales Tax Assessment Act 1992 to provide a sales tax exemption for certain modifications to vehicles driven by, or used for transporting disabled persons; and the

Income Tax Assessment Act 1936 to:

- provide an alternative method for determining the market value of shares acquired under an employee share scheme;
- allow extensions of time for lodgment of ultimate beneficiary statements, correction of such statements and recovery of ultimate beneficiary non-disclosure tax by trustees in certain circumstances; and
- clarify the application of section 254 of the Act (responsibilities etc. of agents and trustees).

Retrospective application
Schedule 1

The amendments proposed in Schedule 1 to this bill are to apply retrospectively from 26 June 1998. However, these amendments are beneficial to taxpayers in effectively reducing the rate of sales tax on certain vehicles used by or for disabled people.

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

Retrospective application
Schedule 2

The amendments proposed in Schedule 2 to this bill are to apply retrospectively from 2 September 1999 – this being the date of a Press Release issued by the Treasurer. However, these amendments, which insert an

alternative method for determining the market value of shares acquired under an employee share scheme, do not impose any extra burden of taxation on any group of persons.

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

Retrospective application
Schedule 3

The amendments proposed in Schedule 3 to this bill are to apply retrospectively from 13 August 1998. However, the Explanatory Memorandum states that these amendments have no financial impact, and are intended to ease the compliance burden on the trustees of closely held trusts.

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.

Timor Gap Treaty (Transitional Arrangements) Bill 2000

This bill was introduced into the House of Representatives on 17 February 2000 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to amend the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990* retrospectively to reflect the fact that the United Nations Transitional Administration in East Timor replaced Indonesia as Australia's partner in the Timor Gap Treaty on 26 October 1999.

The bill also proposes consequential amendments to 10 other Acts, and amendments to the *Crimes at Sea Act 2000* (not yet in force) but these will not operate retrospectively.

Retrospective application
Subclause 2(2)

Subclause 2(2) of this bill provides that most of the amendments to be made by the bill are to apply retrospectively from 26 October 1999. The Explanatory Memorandum observes that this is the date on which the United Nations Security Council adopted a resolution to establish a transitional administration in East Timor.

Clause 6 ensures that the bill does not retrospectively impose criminal liability, and clause 7 preserves any immunity from prosecution under subsection 9A(3) of the *Crimes at Sea Act 1979*.

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

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were "more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties". The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for "administration of justice offences". The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest.* The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	**Section/Subsection**	**Offence**	**Penalty**
Dairy Industry Adjustment Bill 2000	Clause 37 of proposed schedule 2	Failure to provide information and documents	30 penalty units
	Clause 110 of proposed schedule 2	Failure to provide returns or information	60 penalty units

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

7 March 2000

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

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

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Bills Carried over from 1999							
Convention on Climate Change (Implementation) Bill 1999	14(22.9.99)		2.9.99	Senator Brown	23.9.99		
Copyright Amendment (Digital Agenda) Bill 1999	14(22.9.99)	2.9.99		Attorney-General	23.9.99		
Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999	19(1.12.99)	24.11.99		Justice and Customs	2.12.99		
Fair Prices and Better Access for All (Petroleum) Bill 1999	14(22.9.99)	30.8.99		Mr Fitzgibbon	23.9.99	23.12.99	
Fisheries Legislation Amendment Bill (No. 1) 1999	14(22.9.99)	1.9.99	14.10.99	Agriculture, Fisheries and Forestry	23.9.99		1(16.2.00) Act No. 143
Migration Legislation Amendment Act (No. 1) 1999 (previous citation: Migration Legislation Amendment Bill (No. 2) 1998)	1(15.2.99)	30.6.99	3.12.98	Immigration and Multicultural Affairs	16.2.99 25.3.99 24.6.99	23.3.99 22.6.99 20.12.99	4(24.3.99) 10(23.6.99) 1(16.2.00)
Telecommunications (Interception) Amendment Bill 1999	14(22.9.99)	2.9.99	14.10.99	Attorney-General	23.9.99 21.10.99	19.10.99	17(20.10.99) Act No 151

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Bills being dealt with during 2000							
Broadcasting Services Amendment Bill (No. 3) 1999	1(16.2.00)	6.12.99		Communications, Information and the Arts	17.2.00		
Broadcasting Services Amendment Bill (No. 4) 1999	1(16.2.00)	9.12.99		Communications, Information and the Arts	17.2.00		
Pooled Development Funds Amendment Bill 1999	1(16.2.00)	8.12.99		Industry, Science and Resources	17.2.00	2.3.00	
Sydney Harbour Federation Trust Bill 1999	1(16.2.00)		8.12.99	Environment and Heritage	17.2.00		
Taxation Laws Amendment Bill (No. 11) 1999	1(16.2.00)	9.12.99		Treasurer	17.2.00		

CORPORATE TAX
ASSOCIATION
of Australia incorporated

6 March 2000

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

Dear Senator

Taxation Laws Amendment Bill (No 11) 1999

We are writing regarding *Taxation Laws Amendment Bill (No 11) 1999* ("TLAB 11") which was introduced into Federal Parliament on 9 December 1999. The Bill includes amendments ("the Amendments") to the *International Tax Agreements Act 1953* to give effect to the Treasurer's Press Release issued on 27 April 1998.

Whilst raising no objection in this submission to the policy intention of the Amendments, we have concerns about the way the Amendments seek to implement that policy.

We note with interest that the Senate Standing Committee for The Scrutiny of Bills ("the Committee") has issued Alert Digest No. 1 of 2000 which addresses TLAB 11.

The Committee raised the "six month rule" for consideration by Senators and is currently seeking the Treasurer's advice on the matter. We agree that it is appropriate to bring the "six month rule" to the attention of Senators.

We also wish to raise a number of other matters for consideration by the Committee.

We are concerned at the potential for the Amendments to be retrospective. There is a clear precedent for the Government to include transitional measures where a company has already embarked on a particular transaction, which necessarily takes time to complete. We urge the Senate to include similar transitional measures to prevent any retrospective operation.

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We are concerned about a number of the interpretational issues contained in TLAB 11. We recommend that TLAB 11 be amended to provide certainty and clarify its operation.

Finally, we are concerned about the manner in which the Government has proceeded in effectively amending Australia's Double Tax Agreements ("DTAs") unilaterally. This action has the potential to adversely affect future DTA negotiations.

We attach an amended "date of application" clause which addresses the concerns raised above. We ask the Committee to consider the matters raised so that the Amendments, if implemented, operate in a fair and certain manner without any retrospectivity.

Summary

In summary, we consider that the Government should give effect to its intention by way of amending relevant DTAs, rather than making unilateral amendments to domestic taxation law.

If, however, the Government intends to proceed with the Amendments, we urge the Senate to amend the proposals so as to include the amended date of application clause. This will eliminate the risk of retrospectivity and provide greater certainty. In accordance with the Senate Standing Order, we assume the Senate will enforce the six month rule.

These changes will remove the prospect of retrospectivity and, it is hoped, encourage adherence to the six month rule.

Thank you for the opportunity to bring these matters to your attention. Please contact myself or David Watkins on 02 9335 8710 if you would like to discuss the matter further.

Yours faithfully

John Gonsalves

(John L Gonsalves)

Assistant Director

Taxation Laws Amendment Bill (No 11) 1999

Background

The proposed amendments to the *International Tax Agreements Act 1953* are intended to "overcome the decision in 1997 of the Full Federal Court in *Commissioner of Taxation v Lamesa Holdings BV*" (refer Explanatory Memorandum to TLAB 11).

Lamesa decision

The *Lamesa* decision involved a situation like Scenario 3 in the Appendix. In *Lamesa*, the taxpayer (a Dutch resident called "Dutch Co" in the Appendix) disposed of shares in an Australian company (called "Aust Co 1" in the Appendix) which in turn owned a subsidiary (called "Aust Co 2" in the Appendix) which owned land in Australia.

The Australian Taxation Office ("ATO") asserted that under the Australia/ Netherlands DTA ("the Dutch DTA"), Australia had a right to tax the gain on the sale of the shares in Aust Co 1.

The Dutch DTA reflects that Australia and the Netherlands have agreed that Australia has a right to tax a Dutch resident which sells:

- real property situated in Australia (refer Appendix - Scenario 1); and
- shares in an Australian company, where that company's assets consist principally of land situated in Australia (refer Appendix - Scenario 2).

The ATO argued that under the Dutch DTA, Australia was able to tax Dutch Co on the disposal of the shares in Aust Co 1 on the basis that, on a "look through" basis, the underlying assets of Aust Co 1 consisted of land.

The Full Federal Court rejected that argument and held that the only assets of Aust Co 1 consisted of shares in Aust Co 2, and not land. On this basis, the Full Federal Court confirmed that Australia was not able to tax the Dutch resident company, Dutch Co.

Proposed Amendments

A new section 3A(2) is to be inserted into the *International Tax Agreements Act 1953*. This amendment effectively expands the operation of "alienation of property" articles in 31 Double Tax Agreements ("DTAs") which Australia has previously entered into.

For example, Article 13 of the Dutch DTA states that "income from the alienation of real property may be taxed in the State in which that property

is situated". The Article goes on to provide that for the purposes of Article 13, the term "real property" shall include shares or comparable interests in a company, the assets of which consist wholly or principally of direct interests in or over land in [Australia] or of rights to exploit, or to explore, natural resources in [Australia].

The effect of the Amendments is to expand Article 13 of the Dutch DTA and in so doing, increase Australia's right to tax. The intention of the Government's amendments is that the Dutch DTA is to be taken to extend "to the alienation or disposition of shares [in a company] .... the value of whose assets is wholly or principally attributable, whether directly, or indirectly through one or more interposed companies or other entities, to such real property or interest".

In other words, the intention is that the Dutch DTA is to be amended such that Australia's rights to tax income from the alienation of real property will include the situation where a non-resident disposes of shares in an Australian company (which itself does not own any land) but which owns shares in subsidiaries, where those subsidiaries have interests in land (including rights to exploit or to explore for natural resources located in Australia (refer Appendix - Scenario 3).

The Amendments similarly seek to amend the scope of 30 other DTAs which Australia has signed.

TLAB 11 states that the Amendments applies to income, profits or gains from the alienation or disposition of shares or interests after 12 noon on 27 April 1998.

Six month rule

We endorse the comments made by the Committee in relation to the six month rule.

Taxpayers need to be provided with certainty beyond scant details contained in press releases. This is particularly so in an increasingly complex taxation environment involving significant business tax reforms together with the introduction of the Goods and Services Tax.

We endorse the principle of the Senate resolution of 8 November 1988 under which the Senate shall amend the Bill to provide that the commencement date of the Bill should be a date that is no earlier then the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill. In the current case, the date of the commencement of the Bill should therefore be 9 December 1999.

It is submitted that an effective date of 9 December 1999 should not frustrate the Government's intention. The issue of the Press Release has

already had the effect of discouraging properly advised taxpayers from commencing a "*Lamesa*-style" transaction after 27 April 1998. Accordingly, even if the legislation is introduced with effect from 9 December 1999, the effect of the Press Release will be that, practically speaking, the Government's intention will have been widely known and regarded as "de facto" law from 27 April 1998.

Retrospectivity

We are also concerned at the potential for the Amendments to be retrospective.

During the period prior to 27 April 1998, taxpayers were entitled to act in accordance with settled law, including the decision in *Lamesa*. As you will appreciate, transactions involving the disposal of shares in a company are negotiated and implemented over a lengthy period of time. Accordingly, even though transactions may not be technically completed until a particular date, the transaction is well under way, and may well be, commercially speaking, unstoppable prior to that particular date. Examples of lengthy completion processes are where shares are disposed of under takeover transactions or Schemes of Arrangement.

The Government has acknowledged this fact in previous amendments. For example, amendments were made in *Taxation Laws Amendment Bill (No 1) 1996* which changed the share buy-back rules. The amendments were stated to "apply to buy-backs of shares taking place after the starting time", where starting time was defined as a particular date. However, the application clause included the concept of an "excluded transitional arrangement". The Explanatory Memorandum to *Taxation Laws Amendment Bill (No 1) 1996* stated that:

> *"Some companies may, prior to the announcement of these proposed amendments, have already embarked on a particular share buy-back arrangement. To avoid unnecessary disruption to commercial arrangements, the proposed amendments will not apply to buy-backs occurring under an excluded transitional arrangement.*
>
> *An excluded transitional arrangement is an arrangement, plan or proposal that was announced and began to be implemented before [a particular date]. The arrangement need not be the actual buy-back itself, rather it can be a series of related transactions, one of which is an off-market share buy-back.*
>
> *The requirement that the arrangement began to be implemented prior to [the relevant date] means that something integral to the arrangement (not necessarily the buy-back itself) must have been done before that time. The announcement of the arrangement needed to be:*

- *made at a general meeting of the company;*
- *in writing and available to all shareholders in the company; or*
- *in writing to the Commissioner of Taxation or one of his officers acting in his or her official capacity.*

However, taxpayers who have sought to gain undue tax advantages by relying on the buy-back provisions as they existed prior to these amendments should not be able to take advantage of these transitional arrangements. Therefore, if it is the purpose, or one of the purposes, of the arrangement, or of any party to the arrangement, to enter into the arrangement to create or increase a tax loss, this transitional measure will not apply to the arrangement."

Summary

We submit that it is appropriate that a similar excluded transitional arrangement concept be introduced into the Amendments. Where:

- a course of action has been commenced prior to 27 April 1998;
- the commencement of the course of action can be established by objective verifiable facts; and
- the disposal occurs after 27 April 1998,

such disposals should be excluded from the Amendments. Failure to do so will mean that the Amendments are retrospective in their effect.

We do not consider that the reference to obtaining "undue tax advantages" in relation to share buy-backs is relevant in the present case where taxpayers were relying on settled law contained in Australia's DTAs and as interpreted by the Full Federal Court in the *Lamesa* decision.

Taxpayers are entitled to plan their affairs based on settled law existing at the time and once a course of action is determined, but subject to the completion of formalities, it is inappropriate that the taxation law be changed in a manner which will apply to that arrangement, once completed.

The Government has acknowledged this principle in previous amendments made by it and we submit that it is appropriate that the principle be reflected in the Amendments.

To this end, we attach an amended date of application clause, which addresses the concerns raised above.

Certainty

Given the unusual nature of the amendments, in that it is sought to effectively unilaterally amend many of Australia's DTAs, it is imperative that the amendments be made with certainty. We are concerned about a number of the terms contained in TLAB 11 and we recommend that TLAB 11 be amended to overcome the deficiencies.

Alienation and disposition

Introduction

The *International Tax Agreements Act 1953* and the DTAs forming part of that Act refer to the "alienation" or to the "alienation or disposition" of real property. Neither the *International Tax Agreements Act 1953* nor the DTAs, however, define the words "alienation" or "disposition".

Instead, where a term is not defined in a DTA, the DTAs provide that the term should have the meaning which it has under the domestic laws of Australia. However, the words "alienation" or "disposition" are not expressly defined in Australia's domestic tax legislation.

We consider that there is a risk that the lack of certainty regarding the words "alienation" and "disposition" will lead to ambiguity as to the application of Section 3A and any future amendment to give effect to an amended DTA.

Timing considerations

The use of the words "alienation" and "disposition" in Section 3A are critical to the application of Section 3A. Section 3A does not only provide for a date of commencement. It also provides for a date of cessation. In other words, the operation of Section 3A is limited by a "sunset clause".

Future amendments to a DTA

Section 3A will be operative from 27 April 1998 until such time as an "alienation of property article" in a relevant DTA is renegotiated (in any respect) and such renegotiation is reflected in a subsequent amendment to the *International Tax Agreement Act 1953*.

Any future amendments to an "alienation of property article" in a relevant DTA will not necessarily reflect the content and purpose of Section 3A. As a result, there could be a change in law at the time that Section 3A ceases and the amended DTA comes into effect.

Where a subsequent amendment to an "alienation of property article" in a DTA operates differently to Section 3A, taxpayers must

know with certainty, the exact timing of when an "alienation or disposition" occurs. Where this certainty is not provided, taxpayers will not be able to determine whether to apply Section 3A or the DTA.

Therefore, the application of Section 3A is dependent on the exact timing of the "alienation or disposition". In applying Section 3A, it will be necessary to know when an "alienation or disposition" occurs to determine whether it took place:

- before 27 April 1998; or
- after 27 April 1998 when Section 3A applies; or
- after 27 April 1998 at a time when the amended DTA applies.

The precise timing associated with the words "alienation" and "disposition" is therefore critical to the application of Section 3A both at the commencement (ie, April 1998) and at the cessation of Section 3A (ie, when a DTA is amended).

Section 3A and any future amendments to DTAs will not operate as intended if the timing of their application is ambiguous.

The attached amended application clause will prevent any future uncertainty with regard to the application of the Government's intention.

Australia's international obligations

In addition, we are concerned that the Government's Amendments amount to the unilateral abrogation of Australia's treaty obligations.

There are significant international public policy issues and related legal issues, which arise from the international nature of the changes announced on 27 April 1998 and contained in TLAB 11. The Government's "amendment by Press Release" concerns Australia's international treaties, and amounts to the unilateral abrogation of those treaties by Australia. The proposal ignores the provisions available to vary the treaties as well as the complaint procedures.

What is more, the treaties are part of Australian domestic law by reason of the *International Tax Agreements Act 1953*, with Section 4 of that Act providing that treaties have effect notwithstanding anything inconsistent in the *Income Tax Assessment Act* or in an Act imposing Australian tax.

This is a clear indication of the primacy of international obligations in this field. As was said in *Lamesa*, "Double tax treaties . . . are . . . made part of municipal law, and in the case of Australia, override municipal law" (at page 4758).

Australia is a party to the Vienna Convention on the Law of Treaties. Article 26 of that Treaty states that "Every Treaty in force is binding upon the parties to it and must be performed by them in good faith". Article 27 provides that "A party may not evoke the provisions of its internal law as justification for its failure to perform a Treaty...".

Damage may be done to Australia's international reputation as a result of the Amendments. There could also be significant legal questions arising out of any such course. A clear disposition of the current Hight Court to respect and enforce Australia's international obligations where possible is exemplified in the recent decision in *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 72 ALJR 841 (see also *Minister of State for Immigration v Teoh* (1994) 183 CLR 273).

In light of the above, if the change to the law announced on 27 April 1998 is to be introduced, it is submitted that it should be effected by way of bilaterally agreed amendments to Australia's DTAs.

We note that the Government has recently adopted this course of action in recent amendments made to existing DTAs (eg. the Malaysia/Australia DTA), as well as in the new DTAs recently introduced. We commend the Government for adopting this approach.

The Government has effectively acknowledged in TLAB 11 that its course of action in unilaterally amending DTAs is not viable on a long term basis. TLAB 11 contains provisions which provide for a date of cessation of the Amendments. In other words, the Government intends to seek to amend the relevant DTAs to achieve the Government's desired outcome.

However, given that the Government has introduced TLAB 11 in its current form and is proposing to act unilaterally, it appears that the Government is not persuaded by the above arguments. However, given the broader implications, it is necessary that the Amendments be implemented in a fair and certain manner without any retrospective operation.

Proposed application clause

Application

1 Subject to item 2, the amendment made by this Schedule applies to income, profits or gains from the alienation or disposition of shares or interests after the starting time.

2 The amendments made by this Schedule do not apply to the alienation or disposition of shares or interests under an excluded transitional arrangement.

3 An excluded transitional arrangement is an arrangement, plan or proposal where:

(a) If the alienation or disposition was made pursuant to a Scheme of Arrangement regulated by Part 5.1 of the Corporations Law - the court order convening the meetings required to effect the Scheme of Arrangement was made before the starting time; or

(b) If the alienation or disposition was made pursuant to a Takeover Announcement or Takeover Scheme regulated by Chapter 6 of the Corporations Law - the Part A Statement or Part C Statement of the Offeror was registered before the starting time; and

the arrangement, plan or proposal began to be implemented before the starting time.

1 Starting time means 12 noon, by legal time in the Australian Capital Territory, on 27 April 1998 [*or 9 December 1999*].

2 In this item, an alienation or disposition happens at the earlier of:

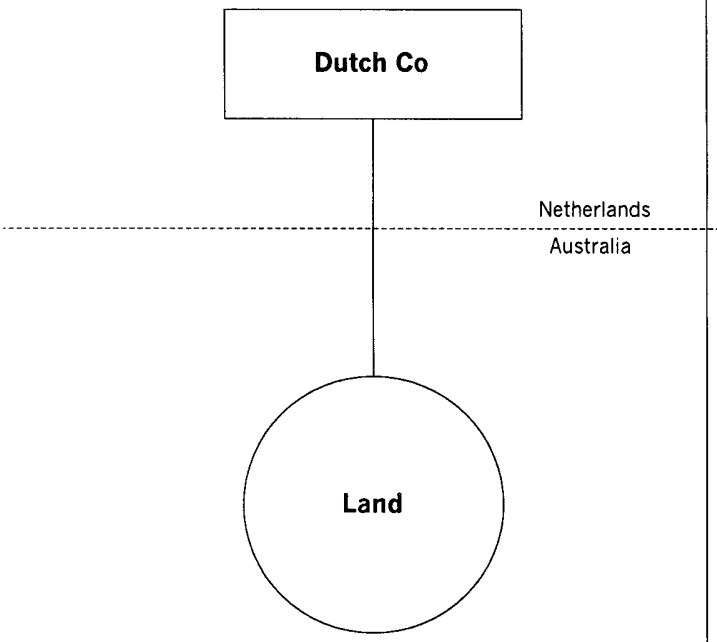
(a) if the alienation or disposition was made under a contract - the time you enter into the contract

(b) if the alienation or disposition was made pursuant to a Scheme of Arrangement regulated by Part 5.1 of the Corporations Law - the time of the court order convening the meetings required to effect the Scheme of Arrangement; or

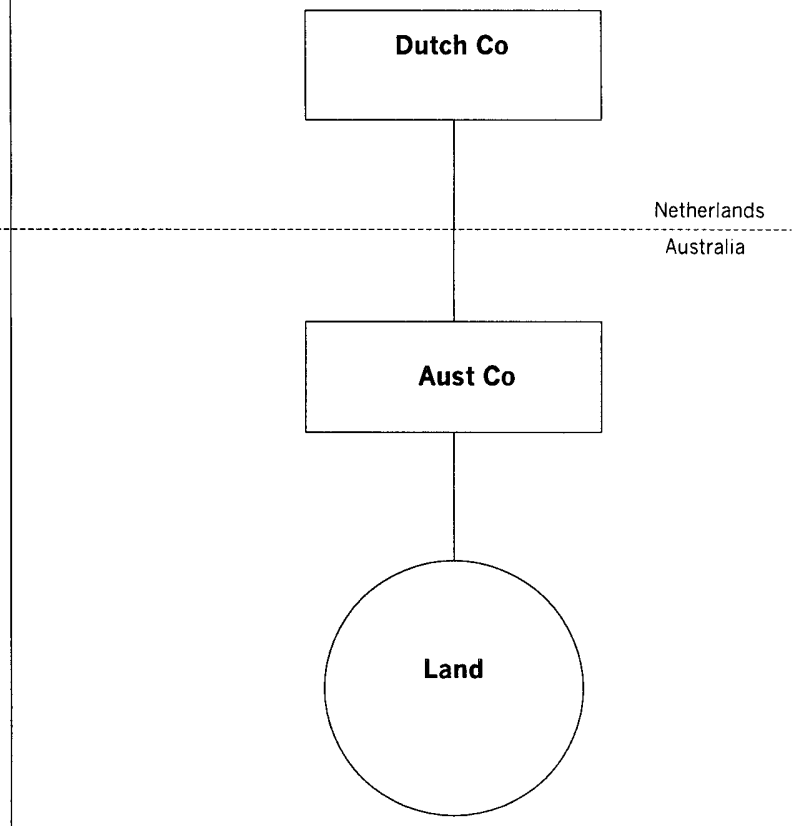
(c) if the alienation or disposition was made pursuant to a Takeover Announcement or Takeover Scheme regulated by Chapter 6 of the Corporations Law - the time of registration of the Part A Statement or Part C Statement of the Offeror; and

(d) Otherwise - the time you cease to be the owner.

Scenario 1



Scenario 2



Scenario 3