

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



Alert Digest

No. 4 of 2002

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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.

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This Digest is circulated to all Honourable Senators.
Any Senator who wishes to draw matters to the attention of the
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- **The Committee has commented on these bills**

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Australian Radiation Protection and Nuclear Safety (Licence Charges) Amendment Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Parliamentary Secretary to the Minister for Health and Ageing. [Portfolio responsibility: Health and Ageing]

The bill proposes to amend the *Australian Radiation Protection and Nuclear Safety (Licence Charges) Act 1998* (the Act) to confirm that the charges imposed by the Act are payable even by Commonwealth entities that are otherwise exempt from taxation, unless the relevant exemption explicitly refers to the Act. The Australia New Zealand Food Authority, the Australian Nuclear Science and Technology Organisation, the Commonwealth Science and Industrial Research Organisation, the Australian Institute of Marine Science, the Australian National University, the Federal Airports Corporation, the Australian War Memorial and the Director of National Parks are Commonwealth entities that hold single or multiple licences issued under the Act. These entities are also exempt from taxation.

Retrospective commencement

Clause 2

Clause 2 of this bill provides that it is to commence retrospectively on 5 February 1999, immediately after the commencement of the Principal Act. The purpose of the bill is to ensure that various Commonwealth Government entities are liable to pay the charges that have been levied against private sector entities under the Principal Act.

The Explanatory Memorandum states that the bill has “no financial impact on the Commonwealth”. However, it presumably has a financial impact on the Government entities which will now be liable for these charges. Given this, the Committee **seeks the Minister’s advice** as to why these charges have been imposed retrospectively.

Pending the Minister’s response, 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.

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Australian Security Intelligence Organisation Act 1979* to strengthen the counter-terrorism capacity of the Australian Security Intelligence Organisation (ASIO). In particular, the bill gives ASIO the ability to seek a warrant to detain and question persons for a period of up to 48 hours for the purposes of investigating terrorism offences. The bill also provides for safeguards in relation to these new powers.

The bill also proposes to amend the *Telecommunications (Interception) Act 1979* in relation to the authorisation of communication of intelligence by persons other than ASIO officers.

Warrants in relation to possible terrorism Proposed new subsections 34C(3) and (5)

Item 24 of Schedule 1 to this bill proposes to insert new subsection 34C(3) in the *Australian Security Intelligence Organisation Act 1979*. This provision will enable the Director-General of Security to seek the Attorney-General's consent to the issue of a warrant for the detention and questioning of a person on the grounds that the Attorney-General is satisfied:

- that the issue of the warrant “will substantially assist the collection of intelligence that is important in relation to a terrorism offence”, and
- that relying on other methods of collecting that intelligence would be ineffective; and
- (where the warrant authorises the detention of a person) that there are reasonable grounds for believing that, if the person is not detained, he or she may alert a person involved in a terrorism offence to the investigation of that offence, or may not appear before the prescribed authority or may destroy or damage something required to be produced under the warrant.

Each warrant may authorise detention for a maximum period of 48 hours. Proposed subsection 34C(5) provides that, if the Director-General is seeking a

further warrant in relation to a person who has already been detained under two consecutive warrants, then the Director-General must seek this warrant from a Deputy President of the Administrative Appeals Tribunal.

These provisions seem to suggest that there is no need for anyone involved in seeking or issuing such a warrant to form a reasonable belief that the relevant person has committed any offence. Indeed that person is to be detained for the purpose of collecting intelligence, not for the purpose of having an offence investigated. A person might be detained, apparently for a number of consecutive periods of 48 hours, simply because he or she may be able to provide information about, for example, the possible future commission of an offence.

In his Second Reading Speech, the Attorney-General justifies these provisions on the basis that it is “necessary to enhance the powers of ASIO to investigate terrorism offences.” While terrorism provides obvious law enforcement challenges, these provisions allow what is, in effect, a new basis for detaining people who need not themselves be suspects and, in any event, are being detained for intelligence gathering rather than investigatory purposes. The Committee, therefore, **seeks the Attorney’s advice** as to the following matters:

- whether ASIO currently has the power to detain persons for questioning or the gathering of intelligence;
- whether any other Australian intelligence or investigatory body has such a power;
- whether any other Australian law enforcement body has such a power; and
- why such a power is necessary.

Pending the Attorney’s response, 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.

Rights of persons in detention

Proposed new subsections 34F(8) and (9)

Proposed new subsection 34F(8) provides that a person who has been taken into custody or detained is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention. However, proposed new subsection 34F(9) preserves the right of a detainee to communicate with the Inspector-General of Intelligence and Security (if the person wishes to make a complaint about ASIO) and the Ombudsman (if the person wishes to complain about the Australian Federal Police).

Proposed new subsection 34D(4) states that a warrant may specify someone whom the detainee is permitted to contact by reference to the fact that he or she is the person's legal adviser, but this does not limit the ways in which the warrant may specify persons whom the detainee is permitted to contact. In addition, proposed new paragraph 34F(1)(d) states that a prescribed authority may make a direction permitting the detainee to contact a specified person (emphasis added).

The Explanatory Memorandum states that these provisions have been included because the person detained "may have critical information concerning terrorism offences and contact could alert other persons involved in such activities ... the security of the community, rather than the ordinary rights of the individual ... are paramount".

Clearly, under these provisions, it is possible that a person may be detained, with no right to seek legal advice or communicate with anyone else, under a series of consecutive warrants, even though there is no suggestion that they themselves have committed any offence.

In addition, where a person has been detained, the bill authorises a police officer to conduct a strip search of a person if the police officer suspects on reasonable grounds that the person has a "seizable item", and that it is necessary to conduct a strip search in order to recover that item, and if a prescribed authority has approved the conduct of the search. Necessary and reasonable force may be used. A seizable item is defined as "anything that could present a danger to a person or that could be used to assist a person to escape from lawful custody". Under this provision detained persons would, again, appear to be subject to the same (if not greater) search powers than are persons suspected of criminal offences.

The Committee notes that the Chief Justice of the High Court, in a keynote address delivered to the International Conference on Regulation Reform Management and Scrutiny of Legislation in July 2001, observed that:

crackdown legislation is rarely opposed and rarely scrutinised, and this is the area that that produces above all, in my experience, the unintended consequence. Indeed, there is a kind of rule of parliamentary democracy or of the nature of parliamentary democracy that I think would be formulated: the more popular the legislation the more likely the unintended consequence.

The protection of the community from terrorism is obviously a vital concern. However a community that fails to accord its citizens due process, and to protect their rights, even in extreme circumstances, runs the risk of becoming a community different in nature from that which currently exists.

While the Attorney-General expresses his confidence that this bill “recognises the need to maintain the balance between the security of the community and individual rights and to avoid the potential for abuse,” the Committee remains concerned about the potential for unintended consequences in such ‘exceptional’ legislation. The Committee, therefore, **seeks the Attorney’s advice** as to the following matters:

- whether there are any other provisions in Australian criminal law which deny persons access to legal representation or the right to communicate with anyone;
- why it is appropriate that what are essentially police powers (including detention and strip search) should be extended to organisations concerned with the collection of intelligence; and
- (given the Committee’s recommendation in its *Fourth Report of 2000* that, unless there are exceptional circumstances involving clear physical danger, persons subject to a search should be provided with written information as to their rights and responsibilities in relation to the search), why this bill makes no provision for detainees to be provided with this information.

Pending the Attorney’s response, 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.

**Abrogation of the privilege against self-incrimination
Proposed new subsections 34G(8) and (9)**

Proposed new subsection 34G(8) of this bill will abrogate the privilege against self-incrimination for a person from whom a “prescribed authority” has sought information under proposed new subsection 34G(3).

In addition, proposed new subsection 34G(9) does not impose the usual limits on the circumstances in which information so provided is admissible in evidence in proceedings against the person who has been compelled to provide it. In general terms, any such information, or any document or thing produced, is not admissible in criminal proceedings other than proceedings for an offence against section 34G, or a terrorism offence. The section also permits any information acquired indirectly from the information gained by the operation of subsection (8) to be used for any purpose whatever.

The Explanatory Memorandum justifies this provision by asserting that the “protection of the community from [the violence of terrorism] is, in this special case, considered to be more important than the privilege against self-incrimination.” While the protection of the community from the violence of terrorism is obviously of vital concern, the Committee **seeks the Attorney’s advice** as to why this can only be achieved by removing the long-standing protections of use and derivative use immunity.

Pending the Attorney’s response, 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.

Bankruptcy (Estate Charges) Amendment Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Bankruptcy (Estate Charges) Act 1997* to close a loophole by imposing the realisations charge and the interest charge on amounts received by solicitors who are controlling trustees.

The bill also amends the *Bankruptcy (Estate Charges) Amendment Act 2001* to provide for commencement of the Act (as the existing commencement provision is tied to commencement of the Bankruptcy Legislation Amendment Bill 2001 which lapsed last Parliament), and contains application provisions.

The Committee has no comment on this bill.

Bankruptcy Legislation Amendment Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Bankruptcy Act 1966* to make changes to bankruptcy law and practice aimed at ensuring that the interests of debtors and creditors are better balanced, and in particular to:

- give Official Receivers discretionary powers to reject a debtor's petition;
- abolish early discharge arrangements;
- strengthen the objection-to-discharge provisions;
- clarify that bankruptcies can be annulled by the Court; and
- raise the current income threshold for debt agreements by 50%.

The bill also proposes amendments, consequential on the above measures, that streamline the operations of the Act or are a consequence of the Insolvency and Trustee Service of Australia (ITSA) having become an executive agency; makes technical and machinery amendments; and contains transitional provisions.

The Committee has no comment on this bill.

Broadcasting Services Amendment (Media Ownership) Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the *Broadcasting Services Act 1992* to repeal provisions that restrict foreign ownership of commercial television and subscription television interests, and to allow the Australian Broadcasting Authority to:

- grant cross-media exemption certificates on application, provided certain editorial separation requirements and conditions are met;
- investigate complaints in relation to breaches of certain licence conditions; and
- require regional broadcasters to meet certain local news and information content standards.

The Committee has no comment on this bill.

Customs Tariff Amendment Bill (No. 1) 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

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

- ensure that inserted Additional Notes have the same legal force as international Section and Chapter Notes;
- clarify the classification of “salsas” and ensure their treatment is consistent with international practice;
- insert a post-2005 phasing rate of duty for the importation of second hand passenger motor vehicles’ rubber pipes and tubes used in passenger motor vehicles; and
- correct the duty rate for certain mittens and mitts.

The bill also amends the *Customs Tariff Act 1995* and the *Customs Tariff Amendment Act (No. 5) 2001* to correct formatting and typographical errors.

Retrospective commencement

Subclause 2(1)

By virtue of items 3, 4 and 5 in the table in subclause 2(1) of this bill, various provisions will commence retrospectively on 1 January 2002. The Explanatory Memorandum states that the bill has two main purposes: to “clarify the legality of Additional Notes vis-a-vis the international Section and Chapter Notes, and ensure that Australia’s treatment of ‘salsa’ is consistent with international practice”. The amendments proposed are expected to have no financial impact.

With regard to the intended ‘clarification’, the Explanatory Memorandum goes on to explain that:

the legality of Australian Additional Notes vis-à-vis the international Section and Chapter Notes was raised in a recent case before the Administrative Appeals Tribunal. Although Customs

decision in that matter was affirmed, it was considered prudent to amend section 7(3) to prevent future legal challenges of this nature.

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

Financial Sector Legislation Amendment Bill (No. 1) 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

Schedule 1 to the bill proposes to amend the *Australian Prudential Regulation Authority Act 1998* in relation to financial institutions supervisory levies to ensure that outstanding levies are recognised on an accrual basis and clarify that the Treasurer's determination is specific to each levy.

Schedule 2 proposes to amend the *Financial Institutions Supervisory Levies Collection Act 1998* to address concerns raised by the Australian National Audit Office (ANAO), and to ease the administration of the collection of financial institutions supervisory levies by the Australian Prudential Regulation Authority (APRA).

Schedule 3 proposes to amend the *Financial Sector (Transfers of Business) Act 1999* to provide that APRA must consult with the Commissioner of Taxation on the taxation implications of a proposed transfer of a business before approving transfers between regulated bodies.

Schedule 4 proposes to amend the *Insurance Act 1973* in relation to general insurance matters to complement proposed changes in the *Banking Act 1959* to be included in the proposed *Financial Sector Legislation Amendment Bill (No.2) 2002*. The bill also corrects a drafting error in the *General Insurance Reform Act 2001*.

Schedule 5 proposes to amend the *Insurance Acquisitions and Takeovers Act 1991* to remove the 30 day time limit for the Minister to make a decision to allow APRA to undertake necessary investigations prior to allowing a merger or acquisition to proceed; and makes consequential amendments.

Schedule 6 proposes to amend the *Life Insurance Act 1995* to remove sunset clauses on the right to appeal prudential decisions to the Administrative Appeals Tribunal.

Schedule 7 proposes to amend the *Reserve Bank Act 1959* in relation to the superannuation provisions and procedures for Reserve Bank, Reserve Bank Board and Payments System Board appointments, terminations and resignations; location of the head office; and to repeal unnecessary service provisions in the Act.

Schedule 8 proposes to amend the *Superannuation Industry (Supervision) Act 1993* in relation to winding up procedures for superannuation funds with less than five members; and to align the secrecy provisions applying to the Australian Tax Office with equivalent provisions applying to APRA.

Schedule 9 proposes to amend the *Superannuation Supervisory Levy Imposition Act 1998* to remove uncertainty about the levy payable by a superannuation entity that becomes a superannuation entity during a fiscal year, but was unregulated the previous year.

Commencement

Subclause 2(1)

By virtue of item 3 in the table to subclause 2(1) of this bill, the amendments proposed to be made by items 1 to 17 of Schedule 4 will apparently commence on 1 July 2002 (being the date of commencement of Schedule 1 to the *General Insurance Reform Act 2001*).

By virtue of item 4 of the same table, the amendment proposed to be made by item 18 of Schedule 4 will commence on 19 September 2001 (being the date of commencement of Schedule 2 to the *General Insurance Reform Act 2001*).

Paragraph 3.2 of the Explanatory Memorandum states that “More details [as to commencement] are provided in the notes on items relating to the respective Schedules”. However, the only ‘additional’ information concerning commencement which is provided in the notes on Schedule 4 is at paragraph 7.16. This paragraph simply repeats the terms of items 3 and 4 in the table to subclause 2(1), but does not, for example, indicate when the relevant Schedules to the *General Insurance Reform Act 2001* commenced, or will commence, nor does it indicate – should it turn out that the amendments proposed by items 1 to 17 of Schedule 4 are to commence retrospectively – whether that retrospectivity would disadvantage any person other than the

Commonwealth. The Committee, therefore, **seeks the Minister's advice** as to why these matters are not explained in the Explanatory Memorandum.

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.

Great Barrier Reef Marine Park (Boundary Extension) Amendment Bill 2002

This bill was introduced into the Senate on 21 March 2002 by Senator Bartlett as a Private Senator's bill.

The bill proposes to amend the *Great Barrier Reef Marine Park Act 1975* to extend the boundaries of the Great Barrier Reef Marine Park to Australia's exclusive economic zone, and to protect the Reef from oil exploration and exploitation.

The Committee has no comment on this bill.

Health Insurance Commission Amendment Bill 2002

This bill was introduced into the Senate on 21 March 2002 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Health and Ageing]

The bill proposes to amend the *Health Insurance Commission Act 1973* to:

- remove the special budget estimates and investment provisions applying to the Health Insurance Commission (HIC), and instead apply the general provisions of the *Commonwealth Authorities and Companies Act 1997*, concerning budget estimates and investment of surplus moneys;
- enable the HIC to borrow money for the purposes of its functions, with the written approval of the Finance Minister, but remove the ability of the Commission to enter into ‘hedging’ arrangements; and
- provide for an increase in the size of the Commission, to now be comprised of the Chairperson, Managing Director and 7 additional Commissioners.

The Committee has no comment on this bill.

Health Legislation Amendment (Private Health Industry Measures) Bill 2002

This bill was introduced into the Senate on 21 March 2002 by the Parliamentary Secretary to the Treasurer. [Portfolio responsibility: Health and Ageing]

Schedule 1 to the bill proposes to amend the *National Health Act 1953* to:

- align legislative provisions relating to gap cover schemes with those applicable to contractual methods of addressing the gap;
- clarify the obligations of registered health funds to provide information to the public and the Health Insurance Commission;
- remove a restriction on the Minister to approve ‘top up’ schemes as operating under certain employee health benefits schemes; and
- allow health funds to offer discounts where premiums are paid three or more months in advance.

Schedule 2 proposes to amend the *Health Insurance Act 1973* to transfer responsibility for registration of billing agents from the Private Health Insurance Administration Council to the Health Insurance Commission.

The bill also contains transitional provisions.

The Committee has no comment on this bill.

International Tax Agreements Amendment Bill (No. 1) 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *International Tax Agreements Act 1953* to give legislative authority to the following tax treaties:

- an Agreement between the Government of Australia and the Government of the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income; and
- a Protocol amending the Convention of 6 August 1982 between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.

The bill also extends existing rules that exclude royalties taxable on a net basis under a tax treaty from the scope of the royalty withholding tax provisions.

The Committee has no comment on this bill.

Research Agencies Legislation Amendment Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Minister for Science. [Portfolio responsibility: Education, Science and Training]

Schedule 1 to the bill proposes to amend the *Australian Institute of Marine Science Act 1972* (AIMS Act) to:

- allow the Australian Institute of Marine Science (the Institute) to engage in the development and commercialisation of both marine and non-marine applications of marine science and technology;
- confirm that the Institute is able to produce goods, participate in the development of marine technology and to sell that technology for profit;
- remove certain financial limitations on the functions of the Institute, affirm stamp duty exemption entitlements and increase the Institute's level of responsibility and accountability consistent with the *Commonwealth Authorities and Companies Act 1997* in respect of contracts and intellectual property management; and
- streamline administrative procedures and requirements relating to Institute staff.

Schedule 2 proposes to amend the *Australian Nuclear Science and Technology Organisation Act 1987* (ANSTO Act) to:

- allow the Australian Nuclear Science and Technology Organisation (ANSTO) to engage in the development and commercialisation of both nuclear and non-nuclear applications of nuclear science and technology;
- clarify ANSTO's ability to construct and lease buildings to third parties;
- to harmonise section 31 of the ANSTO Act with section 50 of the *Science and Industry Research Act 1949* (the CSIRO's enabling legislation) by providing that regulations can prescribe a higher contract value threshold than that prescribed for in the Act before Ministerial approval is needed; and

- clarify that ANSTO can produce and acquire goods, in addition to providing and selling goods and providing services.

The Committee has no comment on this bill.

Taxation Laws Amendment Bill (No. 3) 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

Part 1 of Schedule 1 to the bill proposes to amend the *A New Tax System (Goods and Services Tax) Act 1999* so that the GST does not apply to a supply made in return for a supply, by an Australian government agency, of a right to develop land. GST will also not apply to the corresponding supply of the right to develop land.

Part 2 of Schedule 1 amends the *A New Tax System (Goods and Services Tax Transition) Act 1999* and *Income Tax Assessment Act 1997* to provide a one-off credit to businesses that held rental cars on 1 July 2000.

Part 3 of Schedule 1 amends the *A New Tax System (Goods and Services Tax) Act 1999* to ensure that certain transferred tax losses, net capital losses, and excess foreign tax credits relating to the 2001-2002 income years and later income years are not subject to GST.

Schedule 2 proposes to amend the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* in relation to taxation of general insurance companies and workers' compensation self-insurers.

Schedule 3 proposes to amend the *Income Tax Assessment Act 1936* to broaden the eligibility criteria for accessing the intercorporate dividend rebate.

The bill also contains application and transitional provisions.

Retrospective application Schedule 1, Parts 1 and 3

Parts 1 and 3 of Schedule 1 to this bill are to apply retrospectively from 1 July 2000, as provided for by items 6 and 19 of that Schedule.

Part 1 of Schedule 1 amends the GST Act so that it does not apply to a supply made in return for a supply by an Australian government agency, of a right to develop land. GST will also not apply to the corresponding supply of the right

to develop land. Part 3 of the same Schedule allows companies to “transfer tax losses, net capital losses and excess foreign tax credits without attracting GST”.

These amendments appear to be beneficial to taxpayers. In addition, the Explanatory Memorandum indicates that they will have only a negligible financial impact.

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

Retrospective application Schedule 2

The amendments proposed in Schedule 2 to the bill affect general insurance companies and are intended to ensure that the provision for outstanding claims is worked out on a present value basis, and that gross premium income is included in assessable income in the year it is received or receivable – net premium income that relates to risk exposure in subsequent years is to be deferred.

By virtue of a series of application provisions (specifically clauses 321-30, 321-35, 321-65 and 323-25 of proposed new Schedule 2J to the *Income Tax Assessment Act 1936*), these amendments are to apply retrospectively to various years of income, from 1991-92, 1995-96, 1999-2000 and 1996-97.

The Explanatory Memorandum states that the methodology underlying the amendments “is consistent with the methodology used to determine outstanding claims for accounting purposes and was accepted by the general insurance industry as being appropriate for income tax purposes”. However, the use of this methodology was challenged in the Mercantile Mutual case (*FCT v Mercantile Mutual Insurance (Workers Compensation) Ltd*), where the court concluded that the law allowed a current year deduction for the nominal amount that is estimated to be paid out in the future rather than the present value of that amount, which is what is actually set aside.

While the Explanatory Memorandum indicates that these amendments will have no financial impact, it also observes that they “confirm a long standing

view of the law and protect the revenue that otherwise would be at risk". It is not clear whether anyone will be detrimentally affected by provisions, some which will apply to income years 10 years ago. The Committee, therefore, **seeks the Minister's advice** as to whether anyone may be detrimentally affected by the retrospective operation of these provisions.

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

Retrospective application Schedule 3

The amendment proposed in Schedule 3 will apply from 1 July 2000 (see item 2 of that Schedule). However, the Explanatory Memorandum indicates that this amendment is beneficial to taxpayers.

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

Therapeutic Goods and Other Legislation Amendment Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Parliamentary Secretary to the Minister for Health and Ageing. [Portfolio responsibility: Health and Ageing]

Schedule 1 proposes to amend the *Therapeutic Goods Act 1989* to clarify the powers, functions and duties of Commonwealth officials and authorities within the Commonwealth-State cooperative scheme for the regulation of therapeutic goods as a consequence of the High Court decision in *R v Hughes*.

Schedule 2 proposes to amend the *Industrial Chemicals (Notification and Assessment) Act 1989* and the *National Occupational Health and Safety Commission Act 1985* to reflect new administrative and financial arrangements required as a result of changed portfolio responsibilities.

Schedule 3 proposes to amend the *Therapeutic Goods Act 1989* to:

- enable the implementation of the mutual recognition agreement entered into between Australia and Singapore relating to the manufacture of medicines;
- provide for implementation of other similar mutual recognition agreements;
- enable collection of information and documents in relation to blood and blood component manufacturing processes and practices; and
- clarify the timeframe for payment of evaluation fees.

Schedule 3 also proposes to amend the proposed *Therapeutic Goods Amendment (Medical Devices) Act 2002*, if it commences after this proposed Act, in relation to the definition of “conformity assessment certificate”.

Schedule 4 proposes to amend the *Therapeutic Goods Act 1989* to allow the Minister to impose conditions for the listing of goods on the Australian Register of Therapeutic Goods.

The Committee has no comment on this bill.

Veterans' Affairs Legislation Amendment Bill (No. 1) 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Minister for Veterans' Affairs. [Portfolio responsibility: Veterans' Affairs]

Schedules 1 and 2 to the bill propose to amend the *Social Security Act 1991* and the *Social Security (Administration) Act 1999* respectively, as a consequence of the income support supplement to war widows and widowers introduced in 1994 under the *Veterans' Entitlements Act 1986*.

Schedules 3, 4, 5 and 6 propose to amend the *Aged Care (Consequential Provisions) Act 1997*, the *Social Security and Veterans' Affairs Legislation Amendment (Family and Other Measures) Act 1997*, the *Veterans' Affairs Legislation Amendment (Budget and Compensation Measures) Act 1997* and the *Veterans' Affairs Legislation Amendment Act (No. 1) 2000*, respectively, to correct misdescribed amendments that resulted in intended amendments not being made.

Schedule 6 also proposes to amend the *Veterans' Entitlements Act 1986* to correct certain references, omissions and other typographical errors and omit redundant provisions.

Retrospective commencement Subclause 2(1)

By virtue of items 3 to 69 of the table in subclause 2(1) to this bill, the amendments proposed in Schedules 3, 4, 5 and 6 will commence at various times, many of them prior to the date on which the bill is likely to be assented to. However, the Explanatory Memorandum indicates that all of these amendments will have "no financial impact". In addition, the Minister's Second Reading Speech states that the bill makes a series of consequential amendments "removing some minor anomalies which may have had an adverse effect on some widows and their partners. Some of these anomalies have resulted in a small number of instances where it has been necessary to make an 'Act of Grace' payment to the surviving partner of a widow or widower, because they have been ineligible for a bereavement payment". It is,

therefore, unlikely that the possible retrospective commencement of these amendments will disadvantage anyone.

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

**Incorporation of material as in force from time to time
Schedule 6, items 20, 55, 58, 59, 63, 66 and 68**

A number of items in Schedule 6 to the bill will enable documents prepared by the Repatriation Commission to “apply, adopt or incorporate matter contained in any other instrument or writing whatever” as in force or existing at a particular time, or from time to time “even if the other instrument or writing does not yet exist when the document or instrument varying the document is made”. These items explicitly overturn the intention of section 49A of the *Acts Interpretation Act 1901*.

The Committee usually expresses concern where provisions enable the incorporation of extrinsic material ‘as in force from time to time’. Such provisions enable persons or organisations outside the Parliament to change the obligations imposed on people without the Parliament’s knowledge, and without the opportunity for Parliament to scrutinise (and, if so minded) disallow the variation.

The Explanatory Memorandum notes that these provisions “will provide for more flexibility in the operation of the provisions and will prevent the need for amendments to the instruments when there are changes to the specifications referred to in non-legislative documents that have been incorporated into provisions of the instruments”.

In addition, on 24 April 2002 the Minister for Veteran’s Affairs wrote to the Committee in advance of the publication of this *Digest* (a copy of the Minister’s letter is attached to this *Digest*). In that letter, the Minister stated that only the following instruments would be able to incorporate non-legislative documents as in force from time to time:

- The *Guide to the Assessment of Rates of Veterans' Pensions* made under section 29 of the Veterans Entitlements Act (VEA);
- The *Treatment Principles* made under section 90 of the VEA;
- The *Repatriation Private Patient Principles* made under section 90A of the VEA;
- The *Repatriation Pharmaceutical Benefits Scheme* made under section 91 of the VEA;
- The *Vehicle Assistance Scheme* made under section 105 of the VEA;
- The *Veterans' Vocational Rehabilitation Scheme* made under section 115B of the VEA; and
- The *Veterans' Children Education Scheme* made under section 117 of the VEA.

The Minister states that these instruments are all required to be tabled in the Parliament, but there is no indication that they are themselves disallowable.

While it is currently envisaged that only the *Treatment Principles* and the *Repatriation Pharmaceutical Benefits Scheme* will incorporate material as in force from time to time, it is considered that the other instruments should also have this facility.

The Minister also states that the incorporation of documents that 'do not yet exist' would be used to incorporate draft or interim documents before they had been formally made. However, the bill itself does not contain any limitations on the power to incorporate, simply referring to the incorporation of "any other instrument or writing whatever".

While the incorporation of non-legislative documents by reference – as and when they may be amended – clearly maximises flexibility in the law, it also maximises uncertainty and minimises scrutiny.

Notwithstanding the Department's commitment to making information about amendments available directly to service providers, and available generally through its website, the Committee remains concerned about the likelihood that information about the applicable law at any particular time might be open to dispute, to the disadvantage of veterans, particularly where 'non-existent' documents are concerned.

And the Committee is also concerned where extrinsic material may be incorporated in documents which are themselves not subject to parliamentary scrutiny. The Committee therefore **seeks the Minister's advice** as to whether the VEA instruments listed above are disallowable instruments and (if not) why they should not be – particularly where it is proposed that they incorporate extrinsic material in this form.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions as they may be considered to insufficiently subject the exercise of delegated legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.

Workplace Relations Amendment (Improved Protection for Victorian Workers) Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Minister for Employment and Workplace Relations. [Portfolio responsibility: Employment and Workplace Relations]

The bill proposes to amend the *Workplace Relations Act 1996* to enhance the safety net entitlements for employees in Victoria not covered by federal awards or agreements. The measures proposed will ensure that the safety net is updated in line with changing community values, whilst protecting the single system of regulation applying in Victoria.

Abrogation of the privilege against self incrimination Proposed new subsections 86(4B) and 542(8)

Item 5 of Schedule 1 to this bill proposes to insert a new subsection 86(4B) in the *Workplace Relations Act 1996* and Item 3 of Schedule 2 proposes to insert a new subsection 542(8) in the same Act. Each of these provisions will abrogate the privilege against self-incrimination for a person from whom an inspector has sought information under proposed new paragraphs 86(1A)(c) and 542(2)(c) respectively of the Act.

However, proposed new subsections 86(4C) and 542(9) will limit the circumstances in which any information so provided may be admissible in evidence in proceedings against the person compelled to provide it. In general terms, giving the information, or any information, document or thing obtained as a direct or indirect consequence, is not admissible in evidence against the person in criminal proceedings (other than proceedings for providing false information etc).

The Committee has previously been prepared to accept that provisions which provide use and derivative use immunity strike a reasonable balance between the competing interests of obtaining information and protecting individuals' rights.

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

Workplace Relations Amendment (Transmission of Business) Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Minister for Employment and Workplace Relations. [Portfolio responsibility: Employment and Workplace Relations]

The bill proposes to amend the *Workplace Relations Act 1996* to empower the Australian Industrial Relations Commission to make an order that a certified agreement does not bind a new employer as a result of a transfer of a business, or only binds the new employer to a specified extent.

The Committee has no comment on this bill.

Workplace Relations (Registration and Accountability of Organisations) Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Minister for Employment and Workplace Relations. [Portfolio responsibility: Employment and Workplace Relations]

The bill proposes to incorporate into a separate piece of legislation, provisions of the *Workplace Relations Act 1996* which relate to the registration, amalgamation and internal administration and regulation of registered organisations, including election processes and duties of officers and employees of those organisations.

The bill also amends those provisions, particularly in relation to financial accountability and disclosure and democratic control; and in relation to penalties for breaches of the proposed Act.

Abrogation of the privilege against self-incrimination Subclauses 51(5), 258(4) and 337(4)

Subclauses 51(5), 258(4) and 337(4) of this bill will abrogate the privilege against self-incrimination for a person who is required to provide information under other provisions of the Bill. However, subclauses 51(6), 258(5) and 337(5) limit the circumstances in which information so provided is admissible in evidence in proceedings against the person required to provide it. In general terms, giving the information, or any information, document or thing obtained as a direct or indirect consequence, is not admissible in evidence against the person in criminal proceedings (other than proceedings for providing false information etc).

The Committee has previously been prepared to accept that provisions which provide use and derivative use immunity strike a reasonable balance between the competing interests of obtaining information and protecting individuals' rights.

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

Strict liability offences
Subclauses 258(2), and 337(2)

Subclauses 258(2) and 337(2) specify that strict criminal liability applies to aspects of the offences (non-compliance with an order to provide information or documents) created by those clauses. The Explanatory Memorandum provides no reason for this departure from the normal principle of the criminal law, ie that liability depends upon proof of the intention or recklessness of the accused person. The Committee, therefore, **seeks the Minister advice** as to why strict liability has been applied to this element of these offences.

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.

Workplace Relations (Registration and Accountability of Organisations) (Consequential Provisions) Bill 2002

This bill was introduced into the House of Representatives on 21 March 2002 by the Minister for Employment and Workplace Relations. [Portfolio responsibility: Employment and Workplace Relations]

Further to the Workplace Relations (Registration and Accountability of Organisations) Bill 2002, the bill proposes to:

- amend the *Workplace Relations Act 1996* (the Act) to make consequential amendments, including the repeal of certain provisions of the Act; correct errors and omissions; and remove obsolete references; and
- provide transitional and savings provisions for the transition to the proposed *Workplace Relations (Registration and Accountability of Organisations) Act 2002*.

The bill also makes consequential amendments to 24 other Acts.

Retrospective commencement

Subclause 2(1)

By virtue of the table in subclause 2(1) of this bill, the amendments proposed in items 8, 10, 11, 12, 15, 16, 19, 21, 24, 25, 27 and 31 will commence retrospectively, immediately after the commencement of item 1 of Schedule 19 to the *Workplace Relations and Other Legislation Amendment Act 1996*. However, the only effect of each of these amendments is to change references to the “Industrial Relations Act” to references to the “Workplace Relations Act”. The amendments make no substantive change in the law.

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

PROVISIONS OF BILLS WHICH IMPOSE CRIMINAL SANCTIONS FOR A FAILURE TO PROVIDE INFORMATION

REPORT NO 4/2002

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

<i>Bill/Act</i>	Section/ Subsection	Offence	Penalty
<i>Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002</i>	Proposed new subsection 34G(3)	Fail to give information requested in accordance with warrant	Imprisonment for 5 years
<i>Workplace Relations(Registration and Accountability of Organisations) Bill 2002</i>	subclause 51(2)	Fail to provide information to an electoral official	30 penalty units
	subclause 258(1)	Fail to produce document to auditor	30 penalty units
	subclause 337(1)	Fail to provide information to Registrar	30 penalty units

BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

Recent discussions between the Chairs and Deputy Chairs of Commonwealth, State and Territory Scrutiny Committees have again noted difficulties in the identification and scrutiny of national schemes of legislation. Essentially, these difficulties arise because ‘national scheme’ bills are devised by Ministerial Councils and are presented to Parliaments as agreed and uniform legislation. Any requests for amendment are seen to threaten that agreement and that uniformity.

To assist in the early identification of national schemes of legislation, the Committee proposes to note bills that give effect to such schemes as they come before the Committee for consideration.

Therapeutic Goods and Other Legislation Amendment Bill 2002

This bill includes new provisions to address constitutional issues raised by the High Court in the *Hughes* case. In that case the High Court raised issues about a number of Commonwealth and state cooperative schemes that are underpinned by legislation. Specifically, the *Hughes* case raised questions about the capacity of a Commonwealth authority to perform functions or exercise powers under state laws when the function or power conferred on the Commonwealth authority is coupled with a duty – particularly a duty that has the potential to affect the rights of individuals.

To minimise the risk that any aspect of the cooperative scheme for the regulation of therapeutic goods may be held to be invalid, the bill provides for a series of alternatives for the treatment of state or territory provisions that purport to impose a duty on Commonwealth officers. These alternatives are designed to maximise the validity of both existing and any future complementary legislation enacted by states and territories to complement the Principal Act.

PARLIAMENTARY AMENDMENTS AND THE COMMITTEE'S TERMS OF REFERENCE

AMENDMENTS IN THE HOUSE OF REPRESENTATIVES (11 March – 21 March)

Migration Legislation Amendment (Transitional Movement) Bill 2002: On 14 March, the House of Representatives agreed to amend this bill. This amendment raised no issues within the Committee's terms of reference.

Migration Legislation Amendment (Transitional Movement) Bill 2002: On 21 March, the House of Representatives agreed to a Senate amendment to this bill. This amendment raised no issues within the Committee's terms of reference.

Quarantine Amendment Bill 2002: On 21 March, the House of Representatives agreed to a Senate amendment to this bill. This amendment raised no issues within the Committee's terms of reference.

Regional Forest Agreements Bill 2002: On 21 March, the House of Representatives agreed to Senate amendments to this bill. These amendments raised no issues within the Committee's terms of reference.

States Grants (Primary and Secondary Education Assistance) Amendment Bill 2002: On 21 March, the House of Representatives agreed to a Senate amendment to this bill (and disagreed with certain other amendments). The amendment agreed to raised no issues within the Committee's terms of reference.

Taxation Laws Amendment Bill (No 1) 2002: On 21 March, the House of Representatives agreed to certain Senate amendments to this bill. These amendments raised no issues within the Committee's terms of reference.

Taxation Laws Amendment (Film Incentives) Bill 2002: On 13 March, the House of Representatives agreed to amend this bill. This amendment raised no issues within the Committee's terms of reference.

Therapeutic Goods Amendment Bill (No 1) 2002: On 21 March, the House of Representatives agreed to certain Senate amendments to this bill. These amendments raised no issues within the Committee's terms of reference. One amendment addressed the issue of non-disallowable declarations which was raised by the Committee in its *Alert Digest No 2 of 2002*.

AMENDMENTS IN THE SENATE

(11 March – 21 March)

Migration Legislation Amendment (Transitional Movement) Bill 2002: On 20 March, the Senate agreed to amend this bill. This amendment raised no issues within the Committee's terms of reference.

Protection of the Sea (Prevention of Pollution From Ships) Amendment Bill 2002: On 14 March, the Senate agreed to amend this bill. This amendment raised no issues within the Committee's terms of reference.

Quarantine Amendment Bill 2002: On 21 March, the Senate agreed to amend this bill. This amendment raised no issues within the Committee's terms of reference.

Regional Forest Agreements Bill 2002: On 14 March, the Senate agreed to amend this bill. These amendments raised no issues within the Committee's terms of reference.

States Grants (Primary and Secondary Education Assistance) Amendment Bill 2002: On 20 March, the Senate agreed to amend this bill. These amendments raised no issues within the Committee's terms of reference.

Taxation Laws Amendment (Baby Bonus) Bill 2002: On 21 March, the Senate agreed to amend this bill. This amendment raised no issues within the Committee's terms of reference.

Taxation Laws Amendment Bill (No 1) 2002: On 21 March, the Senate agreed to amend this bill. These amendments raised no issues within the Committee's terms of reference.

Therapeutic Goods Amendment Bill (No 1) 2002: On 21 March, the Senate agreed to amend this bill. These amendments raised no issues within the Committee's terms of reference. One amendment addressed the issue of non-disallowable declarations which was raised by the Committee in its *Alert Digest No 2 of 2002*.

Veterans' Affairs Legislation Amendment (Further Budget 2000 and Other Measures) Bill 2002: On 21 March, the Senate agreed to amend this bill. This amendment raised no issues within the Committee's terms of reference.



MINISTER FOR VETERANS' AFFAIRS
MINISTER ASSISTING THE MINISTER FOR DEFENCE

RECEIVED

24 APR 2002

Senate Standing C'ttee
for the Scrutiny of Bills

The Secretary
Senate Standing Committee for the Scrutiny of Bills
SG 49, Parliament House
CANBERRA ACT 2600

Dear Secretary

***VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL (No. 1)
2002***

My attention has been drawn to an issue of apparent concern relating to seven items in Schedule 6 to the above Bill. Items 20,55,58,59,63 and 68 of Schedule 6 all deal with the proposed inclusion of a power in the *Veterans' Entitlements Act 1986* that would enable the incorporation of documents in legislative instruments.

I am advised that the above provisions have given rise to some concern regarding the scope of the proposed power and the manner in which it would be exercised.

In an attempt to assist with addressing these concerns, I have caused the attached Paper to be prepared which outlines the intended operation of the proposed power and identifies the types of documents that are likely to be specified in the disallowable instrument made pursuant to this power.

Yours sincerely

DANNA VALE MP

23 APR 2002

Encl

Veterans' Affairs Legislation Amendment Bill (No.1) 2002

An Explanation of “Incorporation by Reference” Provisions

Background

1. The purpose of this Paper is to provide additional information on a number of clauses contained in the *Veterans' Affairs Legislation Amendment Bill (No.1) 2002* ('the Bill'). Those clauses have already been explained in the Explanatory Memorandum that accompanies the Bill.
2. The impetus for this document arose out of concerns being expressed by the veteran community about the clauses in question. It is anticipated that this document will be widely published to all interested parties in an attempt to address any concerns and to ensure that any debate is fully informed.

What clauses are we talking about?

3. The clauses in the Bill that have apparently given rise to some concern can loosely be described as “Incorporation by Reference” provisions. There are seven of these clauses in the Bill. They all have the same purpose which is to enable certain Instruments made under the *Veterans' Entitlements Act 1986* ('the VEA') to be able to incorporate documents in force from time to time.
4. The clauses involved are all contained in Schedule 6 to the Bill and involve:
 - item 20 – which amends section 29 of the VEA which deals with the “Guide to the Assessment of Rates of Veterans’ Pensions”;
 - item 55 – which amends section 90 of the VEA which deals with the “Treatment Principles”;
 - item 58 – which amends section 90A of the VEA which deals with the “Repatriation Private Patient Principles”;
 - item 59 – which amends section 91 of the VEA which deals with the “Repatriation Pharmaceutical Benefits Scheme”;
 - item 63 – which amends section 105 of the VEA which deals with the “Vehicle Assistance Scheme”;
 - item 66 – which amends section 115B of the VEA which deals with the “Veterans’ Vocational Rehabilitation Scheme”; and
 - item 68 – which amends section 117 of the VEA which deals with the “Veterans’ Children Education Scheme”.

Why do we want to incorporate documents into Instruments?

5. Usually legislation is self-contained and set out in one text. But if all the relevant aspects of a piece of legislation were contained in the one document it could become unwieldy and virtually impossible to use. To overcome these problems it is often convenient to set out brief items in the body of the legislation and refer to the more detailed items as being contained in other documents. This practice is known as incorporation by reference.
6. An example of the above practice is where other legislation is referred to in the primary document. For example, the "Treatment Principles" made under section 90 of the VEA incorporate by reference the Medicare Benefits Schedule made under the *Health Insurance Act 1973*. A further example is where an Australian Standard is being referred to in legislation. The relevant legislation will say that an object or good is to comply with AS 12345, but the legislation will not contain the full text of the Australian Standard because it is voluminous. The document containing the detailed requirements of the standard will not be included in the legislation.
7. By referring to other documents in the main body of the legislation, the legal principle is that these other documents then become incorporated by reference into the main body of the legislation and become part of the legislation. This is a standard legislative procedure that is utilised in many pieces of legislation and is currently used in Instruments made under the VEA.
8. However, while it is permissible for Instruments to incorporate documents by reference, there is a rule that, generally speaking, such external documents are "frozen in time". Thus, if an Instrument refers to Australian Standard 12345 then only the terms of that Standard as they existed at the time the relevant Instrument was made are incorporated into the Instrument. This results in any subsequent amendment to the Standard not being part of the Instrument. In order to make the amended Standard part of the Instrument, the Instrument would need to be amended to refer to the new amended Standard. The rule governing the incorporation of documents into Instruments is contained in section 49A of the *Acts Interpretation Act 1901* ('the AIA').
9. The primary reason for the rule relating to the incorporation of documents is that the law should be certain and if Instruments refer to documents that keep changing then those affected by the Instrument might have difficulty in learning of those changes (see Chapters 22 and 24 in "Delegated Legislation in Australia" by Pearce and Argument, 2nd Edition, Butterworths).

The rule in the AIA can be very inconvenient in some circumstances

10. The AIA recognises that the rule can operate negatively and hinder effective administration so it provides an override mechanism. It allows for a Statute to provide that an Instrument made under the Statute can incorporate documents in force from time to time (ie. amended) and that is what is proposed to be done to the VEA by this Bill. Put simply, the purpose of the provisions of the Bill under discussion is to override section 49A of the AIA which prohibits Instruments from incorporating non-legislative documents in force from time to time.

Will veterans be disadvantaged in any way?

11. Veterans will NOT be disadvantaged by these provisions. Repatriation Law is not regulatory law in the sense that the activities of veterans are regulated. Rather, Repatriation Law mainly regulates the Department of Veterans' Affairs (DVA) and the Repatriation Commission in their dealings with veterans meaning that Repatriation Law is more an internal-working tool for DVA/Commission than a body of rules that veterans must observe. Thus, if an incorporated document is amended and becomes part of an Instrument, it is highly unlikely that a veteran will be disadvantaged in some way because he or she does not have immediate access to the changed document.

12. In addition, the invariable practice of both DVA and the Commission is to ensure that information relating to eligibility and entitlements is widely published. Accordingly, if the Instrument was to include a reference to a document that was not widely available, DVA would undertake to make the document available through either an office of the Department or through the Department's Internet Site.

What about service providers?

13. Unlike veterans, service providers are regulated by Repatriation Law and would need to know about changes to incorporated documents. However, it is not envisaged that any difficulties will arise in this regard and this assumption is based on current DVA arrangements. Under these arrangements, service providers are notified promptly of any changes that affect them and the system works well. This is particularly the case as most service providers also have contractual obligations with DVA and the Commission. These contracts and service agreements contain mechanisms for the notification and variation of the terms of the agreements. Unless

these mechanisms are complied with, any such variation would not be legally effective.

How could the public generally be aware of changed incorporated documents?

14. All of DVA's legislation, including Instruments, are available on the DVA Internet Home Page and consideration is being given to providing links on that page to documents incorporated in DVA Instruments so that a member of the public will always have access to a changed incorporated document.

What other pieces of legislation incorporate documents in force from time to time?

15. Other legislation which enables the incorporation of non-legislative documents that are in force from time to time include:

- *Public Service Act 1999* (section 23)
- *Radiocommunications Act 1992* (section 314A)
- *Telecommunications Act 1997* (section 589)

What are the VEA Instruments that will incorporate documents in force from time to time?

16. Only the following seven Instruments identified in the Bill will be able to incorporate non-legislative documents in force from time to time. These Instruments are all made by the Commission, approved by the Minister and are required to be tabled before both Houses of the Parliament. The Instruments are:

- The *Guide to the Assessment of Rates of Veterans' Pensions* made under section 29 of the VEA;
- The *Treatment Principles* made under section 90 of the VEA;
- The *Repatriation Private Patient Principles* made under section 90A of the VEA;
- The *Repatriation Pharmaceutical Benefits Scheme* made under section 91 of the VEA;
- The *Vehicle Assistance Scheme* made under section 105 of the VEA;
- The *Veterans' Vocational Rehabilitation Scheme* made under section 115B of the VEA; and
- The *Veterans' Children Education Scheme* made under section 117 of the VEA.

What sort of documents will be incorporated from time to time in these Instruments?

17. At present it is envisaged that only two of the abovementioned Instruments will incorporate non-legislative documents in force from time to time. However, it is considered that the other Instruments should also have that facility to incorporate such documents.
18. The two Instruments that are currently proposed to incorporate documents in force from time to time are the *Treatment Principles* and the *Repatriation Pharmaceutical Benefits Scheme*.
19. The *Treatment Principles* are intended to incorporate at least the following documents as in force from time to time:
 - the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, being the standard for assessing post-traumatic stress disorder. Paragraph 2.4.2A currently only incorporates the 4th Edition;
 - Memorandum of Understanding between the Commonwealth, the Repatriation Commission and the Australian Medical Association Ltd setting out, among other things, doctor's fees. Currently only the MOU of 10 December 1995 is incorporated;
 - Notes for Local Medical Officers setting out the terms for doctors' contracts with the Repatriation Commission. Currently only the Notes of December 1995 are incorporated (see paragraph 4.1.2);
 - Dental Officer Scheme setting out the terms for dentists' contracts with the Repatriation Commission. Currently only the conditions in force at 1 June 1993 are incorporated (see paragraph 5.1.2);
 - Dental Schedules setting out the dental services that may be provided to veterans etc (see paragraph 5.2.1);
 - Guidelines for the Provision of Community Nursing Care which contain the standards of care to be provided. Currently only the Guidelines in force at 1 May 2001 are incorporated (see paragraphs 7.3.2 and 7.3.5);
 - The Schedule of Prescribable Items for optometrical services (see paragraph 7.4.2);
 - Rehabilitation Appliance Schedule setting out the appliances that may be provided to veterans etc to assist with their rehabilitation;
 - The Schedule of Prescribable Items for visual aids (see paragraph 11.4.1);

20. The *Repatriation Pharmaceutical Benefits Scheme* is intended to incorporate at least the following documents as in force from time to time:

- Schedule of Pharmaceutical Benefits for Approved Pharmacists and Medical Practitioners dated 1 February 2002 setting out, among other things, notices to doctors and pharmacists;
- Repatriation Pharmaceutical Benefits Schedule dated 1 February 2002 setting out the Pharmaceutical Benefits that may be prescribed and supplied to veterans etc.

How would the Instruments refer to the incorporated documents?

21. It is envisaged that the *Treatment Principles* and the *Repatriation Pharmaceutical Benefits Scheme* would be amended in a manner similar to that described in Attachment A. In essence, the incorporated document would need to be identified with sufficient certainty to enable each document and its contents to be readily identified.

How do you incorporate a document that “does not yet exist”?

22. This power would be used to incorporate a draft or interim document before it has been formally made. For example, in relation to Australian Standards, there is a process that must be followed before a new Standard is said to formally exist. Interim Standards can exist that are yet to be formally made by Standards Australia. Similarly, in relation to the Medicare Benefits Schedule, DVA has been made aware of some recommendations made by the Medicare Benefits Advisory Committee to amend the Medicare Benefits Schedule to include a new item. The Commission may wish to include the new item for treatment to veterans prior to its inclusion in the Medicare Benefits Schedule. The terms of the proposed amendment contained in the Bill would enable this to be actioned.

23. The common law rules relating to “uncertainty” impact on the exercise of this power. Clearly the Commission could not make an Instrument that referred to a document that could not be identified or the terms of which could not be ascertained. The incorporated document would need to be identified with some degree of detail and be made available to the public. This would be achieved through either direct publication by DVA or via the DVA Internet Site.

Conclusion

24. The circumstances involving the relevant DVA Instruments are such that it is appropriate for the rule in section 49A of the *Acts Interpretation Act 1901* to be overridden. Those circumstances being:

- the need to provide new services to veterans quickly without having to amend the relevant Instrument to refer to an updated incorporated document;
- the fact that Repatriation Law does not regulate the activities of veterans etc meaning that they are unlikely to be disadvantaged by not being aware of changed incorporated documents;
- the effective arrangements in place for informing service-providers (who are regulated by Repatriation Law) of changed incorporated documents; and
- the proposal to publicise incorporated documents on DVA's Internet Site.

Further queries

25. The above information has been prepared by the Legal Services Group in the Department of Veterans' Affairs. As you will appreciate, both the legal issues and details are complex. Further queries on the legal issues can be directed to the Branch Head of the Legal Services Group, Mr Paul Pirani on 6289 6003.

DANNA VALE MP
Minister for Veterans' Affairs

Attachment A

Treatment Principles

Fourth Edition American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders

2.4.2A The Commission will provide, arrange, or accept financial responsibility for, treatment of a veteran under paragraph 2.4.1 in respect of post-traumatic stress disorder if the veteran has been assessed and diagnosed as suffering from post-traumatic stress disorder, by a psychiatrist, in accordance with the criteria for such assessment and diagnosis as set out in the ~~fourth edition of the~~ American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (commonly known as DSM-IV) in force from time to time.

Memorandum of Understanding

3.5.1 The extent of the financial responsibility accepted by the Commission for the provision of treatment for eligible persons is, subject to the Act and these Principles, as follows:

- (a) in respect of the fees payable to DVA Registered Local Medical Officers — the fees set out in clauses 18 and 29 of the Memorandum of Understanding;

"Memorandum of Understanding" means the Memorandum of Understanding between the Commonwealth of Australia as represented by the Department of Veterans' Affairs, the Repatriation Commission and the Australian Medical Association Ltd, relating to the provision of medical services by Local Medical Officers to entitled persons, ~~dated 10 December 1995~~ in force from time to time;

Notes for Local Medical Officers of December 1995

4.1.2 Compliance with the conditions of the Local Medical Officer Scheme set out in the Notes for Local Medical Officers ~~of December 1995~~ in force from time to time is a condition of the contract for services with each Local Medical Officer, including a DVA Registered Local Medical Officer.

Dental Officers Scheme

5.1.2 Compliance with the Local Dental Officer Scheme, ~~as in force at 1 June 1993~~ in force from time to time, is a condition of the contract for services with each Local Dental Officer.

Dental Schedules

5.2.1 The Commission may, from time to time, prepare Dental Schedules A, B and C and a Dental Prosthetist Schedule, that list dental services provided or arranged by the Commission and the limits of financial responsibility accepted by the Commission.

Note: Copies of the Local Dental Officer and Dental Prosthetists Fees Bulletins that contain details of these Schedules may be obtained from any office of the Department.

Rehabilitation Appliance Schedule

11.1.1 The Commission may, from time to time, prepare a RAP Schedule that lists the surgical appliances and appliances for self-help and rehabilitation that may be provided by a health provider to an entitled person and for which the Commission may accept financial liability.

~~(a) surgical appliances; and~~

~~(b) appliances for self-help and rehabilitation purposes;~~

Repatriation Pharmaceutical Benefits Scheme

Schedule of Pharmaceutical Benefits for Approved Pharmacists and Medical Practitioners

4. Where it is provided for the Department or the Commission to notify of certain matters, the publication of the Explanatory Notes shall be taken to constitute such notification to the extent that the Explanatory Notes are relevant and are not inconsistent with other notification given by the Department or the Commission.

“Explanatory Notes” means the text entitled “Explanatory Notes” and the text entitled “RPBS Explanatory Notes” that is published, from time to time, in the document, *Schedule of Pharmaceutical Benefits for Approved Pharmacists and Medical Practitioners*, having the International Standard

Serial Number 1037-3667, ~~and dated 1 November 2000~~, to the extent that that text is not inconsistent with this Scheme;

Repatriation Pharmaceutical Benefits Schedule

7. Restrictions apply to the prescribing of certain items. These include:

- (a) **items — quantities and repeats:** those listed in the RPBS Schedule or PBS Schedule; ...

“RPBS Schedule” means the Schedule of Pharmaceutical Benefits prepared by the Department of Veterans’ Affairs, entitled “Repatriation Schedule of Pharmaceutical Benefits” ~~and dated 1 November 2000~~ in force from time to time;

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2002

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
		HOUSE	SENATE				
Bills dealt with in 2001							
<i>Air Passenger Ticket Levy (Collection Act 2001</i>	14(26.9.01)	20.9.01	26.9.01	Transport and Regional Services	27.9.01	31.12.01	1(20.2.02)
<i>Border Protection (Validation and Enforcement Powers) Act 2001</i>	13(20.9.01)	18.9.01	20.9.01	Immigration and Multicultural Affairs	20.9.01	6.02.02	1(20.2.02)
<i>Defence Legislation Amendment (Application of Criminal Code) Act 2001</i>	12(19.9.01)	29.8.01	24.9.01	Defence	20.9.01	8.11.01	1(20.2.02)
<i>Electoral and Referendum Amendment Act (No. 1) 2001</i>	4(28.3.01)	7.3.01	2.4.01	Finance and Administration	29.3.01	4.5.01	6(23.5.01)
Environment and Heritage Legislation Amendment Bill (No. 2) 2000 [2001]	1(7.2.01) 8(27.6.01)		7.12.00	Environment and Heritage	28.6.01	20.8.01	10(22.8.01)
<i>Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001</i>	9(8.8.01)	25.6.01	24.5.01	Further response required Environment and Heritage re Amendments	23.8.01	26.9.01	1(20.2.02)
<i>Health and Aged Care Legislation Amendment (Application of Criminal Code) Act 2001</i>	10(22.8.01)	8.8.01	23.8.01	Health and Aged Care	23.8.01	18.10.01	1(20.2.02)
					23.8.01	8.10.01	1(20.2.02)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
<i>Migration Amendment (Excision from Migration Zone) Act 2001</i>	13(20.9.01)	18.9.01	20.9.01	Immigration and Multicultural Affairs	20.9.01	6.2.02	1(20.2.02)
<i>Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001</i>	13(20.9.01)	18.9.01	20.9.01	Immigration and Multicultural Affairs	20.9.01	6.2.02	1(20.2.02)
<i>Migration Legislation Amendment Act (No. 6) 2001</i>	13(20.9.01)	28.8.01	24.9.01	Immigration and Multicultural Affairs	20.9.01	6.2.02	1(20.2.02)
<i>Taxation Laws Amendment Act (No. 5) 2001</i>	11(29.8.01)	23.8.01	26.9.01	Treasurer	30.8.01	18.9.01	1(20.2.02)
<i>Trade Practices Amendment (Telecommunications) Act 2001</i>	10(22.8.01)	9.8.01	19.9.01	Communications, Information Technology and the Arts	23.8.01 20.9.01	17.9.01 25.9.01	12(19.9.01) FRR13(26.9.01) 1(20.2.02)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Bills being dealt with in 2002							
Aboriginal and Torres Strait Islander Commission Amendment Bill 2002	3(20.3.02)	13.3.02		Immigration and Multicultural and Indigenous Affairs	21.3.02	13.5.02	
Airports Amendment Bill 2002	1(20.2.02)	14.2.02		Transport and Regional Services	21.2.02	6.5.02	
Border Security Legislation Amendment Bill 2002	3(20.3.02)	12.3.02	14.3.02	Attorney-General	21.3.02	23.4.02	4(15.5.02)
<i>Coal Industry Repeal Act 2001</i>	1(20.2.02)	28.6.00	5.4.01	Industry, Science and Resources	21.2.02	11.3.02	2(13.3.02)
<i>Coal Industry Repeal (Validation of Proclamation) Act 2002</i>	2(13.3.02)	20.2.02	13.3.02	Industry, Tourism and Resources	14.3.02	22.3.02	4(15.5.02)
Copyright Amendment (Parallel Importation) Bill 2002	3(20.3.02)	13.3.02		Attorney-General	21.3.02		
Corporate Responsibility and Employment Security Bill 2002	3(20.3.02)	11.3.02		Mr McClelland	21.3.02		
Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002	1(20.2.02)	13.2.02	11.3.02	Attorney-General	21.2.02	8.3.02	2(13.3.02)
					14.3.02	19.3.02	3(20.3.02)
					21.3.02	4.4.02	4(15.5.02)
Criminal Code Amendment (Espionage and Related Offences) Bill 2002	3(20.3.02)	13.3.02		Attorney-General	21.3.02		
Electoral and Referendum Amendment (Roll Integrity and Other Measures) Bill 2002	3(20.3.02)	14.3.02		Special Minister of State	21.3.02	30.4.02	

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Financial Corporations (Transfer of Assets and Liabilities) Amendment Bill 2002	3(20.3.02)	12.3.02		Treasury	21.3.02	3.5.02	4(15.5.02)
Financial Services Reform Bill 2001	6(23.5.01) 11(29.8.01)	9.8.01	5.4.01	Treasurer re Amendments	24.5.01 30.8.01	7.8.01 13.5.02	9(8.8.01) 4(15.5.02)
Financial Services Reform (Consequential Provisions) Bill 2001	7(20.6.01)	9.8.01	7.6.01	Treasurer Further response requested	21.6.01 9.8.01	7.8.01 13.5.02	9(8.8.01) 4(15.5.02)
Higher Education Legislation Amendment Bill (No. 1) 2002	1(20.2.02)	13.3.02	14.2.02	Education, Science and Training		12.3.02	2(13.3.02)
Migration Legislation Amendment Bill (No. 1) 2002	3(20.3.02)		13.3.02	Immigration and Multicultural and Indigenous Affairs	21.3.02		
Migration Legislation Amendment (Transitional Movement) Bill 2002	3(20.3.02)	20.3.02	13.3.02	Immigration and Multicultural and Indigenous Affairs	21.3.02		
Plant Breeder's Rights Amendment Bill 2002	3(20.3.02)	13.3.02		Agriculture, Fisheries and Forestry	21.3.02		
Proceeds of Crime Bill 2002	3(20.3.02)		13.3.02	Justice and Customs	21.3.02	9.5.02	
Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002	3(20.3.02)		13.3.02	Justice and Customs	21.3.02	9.5.02	
Quarantine Amendment Bill 2002	3(20.3.02)	21.3.02	14.3.02	Agriculture, Fisheries and Forestry	21.3.02		
Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]	3(20.3.02)	14.3.02	13.3.02	Attorney-General	21.3.02	14.5.02	4(15.5.02)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
		HOUSE	SENATE				
Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002	2(13.3.02)	21.2.02		Finance and Administration	14.3.02		
Suppression of Financing of Terrorism Bill 2002	3(20.3.02)	12.3.02	14.3.02			14.5.02	4(15.5.02)
Taxation Laws Amendment Bill (No. 2) 2002	3(20.3.02)	14.3.02		Treasury	21.3.02		
Telecommunications Interception Legislation Amendment Bill 2002	3(20.3.02)	12.3.02	14.3.02			14.5.02	4(15.5.02)
Therapeutic Goods Amendment Bill (No. 1) 2002	2(13.3.02)	20.2.02	20.3.02	Health and Ageing	14.3.02	19.3.02	3(20.3.02)
Transport and Regional Services Legislation Amendment (Application of Criminal Code) Bill 2002	2(13.3.02)	20.2.02	14.3.02	Transport and Regional Services	14.3.02		
Veterans' Affairs Legislation Amendment (Further Budget 2000 and Other Measures) Bill 2002	2(13.3.02)	21.2.02	21.3.02	Veterans' Affairs	14.3.02	19.3.02	3(20.3.02)
Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002	2(13.3.02)	20.2.02		Employment and Workplace Relations	14.3.02		

