

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



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Members of the Committee

Senator J McLucas (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator T Crossin
Senator D Johnston
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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- **The Committee has commented on these bills**

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

Australian Capital Territory Legislation Amendment Bill 2002

This bill was introduced into the House of Representatives on 28 August 2002 by the Minister for Regional Services, Territories and Local Government. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to amend:

- the *Australian Capital Territory (Self-Government) Act 1988* to remove inconsistencies following the passage of the 1997 amendments in the *Electoral Act 1992*, and to make other technical amendments; and
- the *Australian Capital Territory (Planning and Land Management) Act 1988* to provide for a quorum at National Capital Authority meetings when the full-time member is precluded from being present because of the conflict of interest provisions in section 42 of the Act.

The Committee has no comment on this bill.

Dairy Industry Legislation Amendment Bill 2002

This bill was introduced into the House of Representatives on 28 August 2002 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *Dairy Produce Act 1986* to:

- expand the functions of the Australian Dairy Corporation (ADC) to include the planning, facilitation, and participation in the reform or privatisation of the ADC and the Dairy Research and Development Corporation;
- allow the ADC to fund the process of reform; and
- allow the Minister, or delegate, to issue written directions to the ADC in relation to these new functions.

The bill also proposes to amend the *Dairy Produce Act 1986* and the *Farm Household Support Act 1992* to enable holders of entitlements under the Dairy Structural Adjustment Program scheme and Supplementary Dairy Assistance scheme to apply for exit assistance under the Farm Help Re-establishment Grant scheme.

The Committee has no comment on this bill.

Education Services for Overseas Students Amendment Bill 2002

This bill was introduced into the House of Representatives on 28 August 2002 by the Minister for Education, Science and Training. [Portfolio responsibility: Education, Science and Training]

The bill proposes to amend the *Education Services for Overseas Students Act 2000* to:

- clarify the definition of a ‘registered provider’;
- explain to whom a refund of student monies should be paid in the case of student default;
- provide greater flexibility to impose the full range of sanctions in the case of non-compliance, including the ability to impose lesser sanctions; and
- correct technical anomalies.

The Committee has no comment on this bill.

Egg Industry Service Provision Bill 2002

This bill was introduced into the House of Representatives on 28 August 2002 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

Introduced with the Egg Industry Service Provision (Transitional and Consequential Provisions) Bill 2002, the bill proposes to create an egg industry company to be known as the Australian Egg Corporation Limited (AECL), to provide generic promotion, research and development (R&D), and other industry services to the egg industry. The new company will:

- be limited by guarantee under the Corporations Act;
- assume the R&D functions that are currently provided to the egg industry under a sub-program of the Rural Industries Research and Development Corporation (RIRDC); and
- be not for profit.

All levy payers who pay a new statutory promotional levy will be eligible to register for membership of the new company and have full voting rights.

The Minister will have the power to enter into a funding contract with an eligible body to enable it to receive and administer levies collected by the Commonwealth for industry promotion and R&D, and the Commonwealth's matching funding for eligible R&D expenditure. The Minister may then declare the body with which the contract is made to be the industry services body.

The contract between the body and the Commonwealth will set certain obligations and accountability requirements for the industry services body, including provisions relating to the use of levies, matching R&D funding and transfer of assets and liabilities from the RIRDC.

Parliamentary scrutiny of ministerial discretion

Clause 7

Clause 7 would permit the Minister to enter into a funding contract with the egg industry company which is being created by this bill. Although clause 7

sets out, in broad terms, some of the matters which the Minister may include in that contract, there is no prescription as to any matter which either must or must not be included and no indication as to whether it is intended that any matters will be kept confidential. Indeed, the Explanatory Memorandum notes, on page 2 (with emphasis added), that “The detail of the new industry services body’s accountability arrangements to its members *and to the Commonwealth* will be outlined in [that] contract”. However, there does not appear to be any provision by which the Parliament may (or must) be informed of these contractual details. The power to settle on the terms of this funding agreement may be regarded either as an administrative one or as a legislative power. It may therefore be argued that clause 7 either makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or the clause insufficiently subjects the exercise of legislative power to parliamentary scrutiny. In either event, the Committee **seeks the Minister’s advice** as to what means will be available to the Parliament to be informed of – and, it would be hoped, have the power to review – the terms of the funding agreement.

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

Egg Industry Service Provision (Transitional and Consequential Provisions) Bill 2002

This bill was introduced into the House of Representatives on 28 August 2002 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

Introduced with the Egg Industry Service Provision Bill 2002, this bill is the second of two bills proposing the creation of an egg industry company to provide generic promotion, research and development (R&D), and other industry services to the egg industry.

The bill provides for the transfer of assets and liabilities associated with the egg sub-program of the Rural Industries Research and Development Corporation (RIRDC) to the new industry services body. There are no Commonwealth staff, and hence no employee entitlements, affected by the legislation.

The bill also makes consequential amendments to the *Primary Industries (Excise) Levies Act 1999*.

The Committee has no comment on this bill.

Health Care (Appropriation) Amendment Bill 2002

This bill was introduced into the House of Representatives on 29 August 2002 by the Minister representing the Minister for Health and Ageing. [Portfolio responsibility: Health and Ageing]

The bill proposes to amend the *Health Care (Appropriation) Act 1998* to:

- increase the maximum amount the Minister may grant by way of financial assistance to a State, or to a hospital or other person under section 4 from \$29 655 056 000 to \$31 800 000 000; and
- require that the Minister for Health and Ageing present a statement of the total amount of the financial assistance paid under section 4, to both Houses of the Parliament as soon as practicable after 30 June 2003.

The increased funding ceiling has been made necessary as a consequence of increases in Commonwealth financial responsibilities since the current Act commenced on 30 June 1998. If the amendments are not made, the current ceiling will be reached in early 2003.

The Committee has no comment on this bill.

Trade Practices Amendment (Liability for Recreational Services) Bill 2002

This bill was introduced into the House of Representatives on 27 June 2002 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Trade Practices Act 1974* to allow individuals to waive their contractual right to sue in relation to injury suffered while undertaking hazardous recreational activities.

Provision of incorrect print of bill and late provision of correct print of bill

The Committee commented on this bill in *Alert Digest No. 7 of 2002*, basing its comments on the print of the bill which had been supplied to it in the usual way. Although the bill was debated and passed in the House of Representatives on 28 August 2002, it was not until 9 September 2002 that the Committee secretariat received a substituted “First Reading Print” which was, apparently, the version which was debated in the House of Representatives. Among other differences between the two versions of the bill, one difference is that the substituted version does not contain the proposed new paragraph 68B(1)(d) of the Principal Act upon which the Committee commented in *Alert Digest No. 7 of 2002*.

The differences between the two versions are significant. The Committee, therefore, **seeks the Treasurer’s advice** as to why the Committee was not provided with the correct version of the bill until 10 weeks after the bill had been first introduced on 27 June 2002.

Hereunder is the extract from *Alert Digest No. 7 of 2002* in relation to the initial version of the bill, followed by the comments the Committee has made in relation to the substituted version of the bill.

COMMENTS IN RELATION TO FIRST VERSION OF THE BILL

Dilution of liability for death or personal injury Proposed new section 68B

Proposed new section 68B of the *Trade Practices Act 1974* would enable a corporation to exclude, restrict or modify the obligation, currently imposed by section 74 of the Act, that services will be rendered with due care and skill, and that any materials supplied in connection with those services will be reasonably fit for their purpose. Although the ability of the corporation to exclude, restrict or modify that obligation is limited to the supply of recreational services (as defined in proposed new subsection 68B(2)), the provision may be seen as coming within the Committee's Terms of Reference, especially because the exclusion, restriction or modification of liability is confined to liability for death or personal injury, two interests which are generally given all possible protection. The Parliamentary Secretary who introduced the bill asserted in his second reading speech that the bill "seeks to achieve that balance [between protecting consumers and allowing them to take responsibility for themselves] in a way that will benefit consumers and the many small businesses that are involved in recreational activities." The Committee brings this provision to the attention of Senators, but leaves for consideration by the Senate as a whole whether the bill trespasses unduly on the personal rights currently provided by section 74 of the Act.

Other than this, the Committee makes no further comment on this provision.

Uncertain operation Proposed new paragraph 68B(1)(d)

Proposed new paragraph 68B(1)(d) would prevent a corporation from excluding, restricting or modifying its liability in cases where the corporation has been grossly negligent. The concept of "gross negligence" is one that the common law has never been asked to define, at least in relation to conduct causing death or personal injury. The Committee, therefore, brings to the

attention of Senators the fact that this bill may be productive of considerable uncertainty for a number of years after it has been in force.

Other than this, the Committee makes no further comment on this provision.

COMMENTS IN RELATION TO THE SUBSTITUTED VERSION OF THE BILL

Dilution of liability for death or personal injury Proposed new section 68B

The comments which the Committee made about the version of proposed paragraph 68B(1)(d) which was before it when *Alert Digest No. 7 of 2002* was considered, are now clearly not applicable. However the Committee makes the following comments about the correct version of proposed new section 68B as a whole, being a provision which lessens the liability of corporations for death and personal injury.

While the original version of the bill would have prevented a corporation from excluding its liability for its own gross negligence, the current version of the bill would permit such an exclusion of liability. Under the Bill as passed by the House of Representatives, a corporation which provides recreational services will be permitted to completely exclude any liability for death or personal injury which it might otherwise have been under to those to whom it provides such recreational services, even though the death or personal injury is caused by the gross and wilful lack of care of those acting for the corporation. Furthermore, while the original version of the bill made the ability to exclude, restrict or modify liability subject to the implementation by the corporation of a “reasonable risk management strategy”, this limitation has been omitted from the current version of the bill. Those corporations which provide recreational services may knowingly act in a way which is contrary to any reasonable means of managing the risks of the activity, but exclude their liability for any resultant death or personal injury suffered by their customers.

The one possible saving grace of the current version of the bill is that a corporation will still not be able to exclude its liability for death or personal

injury suffered by a minor (ie, a person under eighteen years of age) to whom it provides recreational services. However, that saving grace is the product solely of common law principles of contract law, and not of the bill passed by the House of Representatives.

The Committee, therefore, **seeks the Treasurer's advice** on these aspects of the bill.

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

Workplace Relations Amendment (Unfair Dismissal - Lower Costs, Simpler Procedures) Bill 2002

This bill was introduced into the House of Representatives on 26 August 2002 by the Leader of the Opposition, the Hon Simon Crean MP as a Private Member's bill.

The bill proposes to establish an alternative, low cost and streamlined unfair dismissals appeals framework for Australian workers.

The Committee has no comment on this bill.

PARLIAMENTARY AMENDMENTS AND THE COMMITTEE'S TERMS OF REFERENCE

AMENDMENTS IN THE HOUSE OF REPRESENTATIVES (26-29 August)

Criminal Code Amendment (Espionage and Related Offences) Bill 2002: This bill was introduced into the House of Representatives on 13 March 2002 and dealt with in *Alert Digest No. 3 of 2002*, which advised that two proposed new subsections to be inserted in the *Criminal Code*, reversed the onus of proof in a prosecution for an offence of taking or recording soundings. The Committee asked the Attorney-General for the reasons for the inclusion of the provisions.

The Attorney-General responded in a letter dated 12 June 2002, which advised that the provisions, which did not change the existing law, were appropriate and within Commonwealth policy for reversal of proof. The Committee reported on this response in its *Ninth Report of 2002*, which advised that the Committee continued to draw the provisions to the attention of Senators 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.

Subsequent to the Attorney-General's letter, the Government introduced amendments to respond to the report on the bill by the Senate Legal and Constitutional Legislation Committee. On 26 August 2002, the House of Representatives agreed to the amendments which, among other things, removed the new offence relating to soundings and, as a consequence, removed the new reversal of the onus of proof provisions. The result of this is that the existing *Crimes Act 1914* provisions relating to soundings will remain in force, including the reversal of the onus of proof.

Another amendment, proposed new section 91.2 of the *Criminal Code*, provides an additional defence to espionage offences, although the defence itself reverses the onus of proof.

The Committee thanks the Attorney-General for introducing these amendments which, among other things, remove provisions raised by the Committee.

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

Veterans' Affairs Legislation Amendment Act (No. 1) 2002: The Committee commented on the bill for this Act in *Alert Digest No. 4 of 2002* in relation to the incorporation of non-legislative material as in force from time to time. On 27 August 2002, the House of Representatives agreed to amend the bill. The Committee thanks the Minister for introducing these amendments which, among other things, remove those provisions raised by the Committee.

New Business Tax System (Consolidation, Value Shifting, Demergers and Other Measures) Bill 2002: On 28 August 2002, the House of Representatives agreed to amend this bill. The amendments raised no issues within the Committee's terms of reference.

Research Involving Embryos and Prohibition of Human Cloning Bill 2002: On 29 August 2002, the House of Representatives agreed to divide this bill into the Prohibition of Human Cloning Bill 2002 and the Research Involving Embryos Bill 2002. The division raised no issues within the Committee's terms of reference.