

SCRUTINY OF BILLS ALERT DIGEST

NO. 1 OF 1986

12 FEBRUARY 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

D1/86

The Committee has considered the following Bills:

Aboriginal Land Rights (Northern Territory) Amendment
Bill (No. 2) 1985

Family Law Amendment Bill 1985

Nuclear Weapons (Research and Testing) Prohibition Bill
1985

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D1/86

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL
(NO. 2) 1985

This Bill was introduced into the Senate on 2 December 1985 by Senator Kilgariff.

The Bill would amend the Aboriginal Land Rights (Northern Territory) Act 1976 to establish a new regulatory regime for mining on aboriginal land, to set 1 July 1986 as a cut-off date for aboriginal land claims under the Act and to prevent land claims being made in respect of unalienated Crown Land which has been set aside for public purposes (e.g. stock routes).

The Committee draws the attention of Senators to the following clauses of the Bill:

Sub-clause 3(1) - 'Henry VIII' clause

Sub-clause 3(1) would insert a new paragraph (aa) in the definition of 'Crown land' in the Principal Act which would exclude from that definition land set aside for various public purposes other than land 'which, by proclamation, is declared to be Crown Land'. Because it would permit the content of the definition to be determined by proclamation by the Governor-General without any opportunity for parliamentary scrutiny the sub-clause may be characterized as a 'Henry VIII' clause, that is a clause which permits the effect of the legislation in which it appears to be altered by regulations, by proclamation or by some other form of Executive discretion not subject to full parliamentary scrutiny.

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

D1/86

The Committee follows the practice of drawing attention to all 'Henry VIII' clauses and it therefore draws sub-clause 3(1) to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

Clause 16 - 'Henry VIII' clause

Clause 16 would enable the Governor-General to make regulations amending the new Schedule 5 to be inserted by the Bill which excludes certain coastal land, river beds and banks and estuaries from claim. As with sub-clause 3(1), because it permits the content of the legislation to be varied by regulations it may be characterized as a 'Henry VIII' clause.

The Committee draws clause 16 to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

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

D1/86

FAMILY LAW AMENDMENT BILL 1985

This Bill was introduced into the Senate on 5 December 1985 by Senator Durack.

The Bill would amend the Family Law Act 1975 -

- (i) to prevent the Family Court, in determining a person's liability to pay maintenance, from first taking into account the eligibility of a party to the marriage for any benefit under the Social Security Act 1947 or the Repatriation Act 1920;
- (ii) to give the obligation to maintain a spouse and children from a former marriage priority over obligations subsequently acquired, whether by a subsequent marriage or by entry into a de facto relationship;
- (iii) to prevent section 87 financial agreements (which, once approved by the courts, prevent the parties from exercising any rights under the Act in respect of maintenance or property) being used as a mechanism to evade the obligation to pay maintenance for the children of a marriage; and
- (iv) to enable persons to be imprisoned for failure to comply with maintenance orders.

The Committee has no comments on this Bill.

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

DL/86

NUCLEAR WEAPONS (RESEARCH AND TESTING) PROHIBITION BILL 1985

This Bill was introduced into the Senate on 2 December 1985 by Senator Sanders.

The purpose of the Bill is to prohibit research into, and the testing of, tactical nuclear weapons, strategic nuclear weapons, transporting, launching and directional systems for nuclear weapons and anti-ballistic missile systems in Australia.

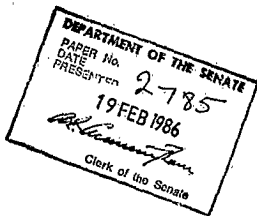
The Committee draws the attention of Senators to the following clause of the Bill:

Sub-clause 9(6) - Abrogation of customary right

Sub-clause 9(6) would abrogate the customary right of a defendant against whom an interim injunction is granted to seek an undertaking from the plaintiff as to damages in respect of any loss flowing from the grant of the interim injunction if it turns out that it should not have been made. It is customary for the courts to refuse to grant interim or interlocutory injunctions unless such an undertaking is given.

The Committee draws sub-clause 9(6) to the attention of Senators in that by abrogating this right it may be considered to trespass unduly on personal rights and liberties.

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SCRUTINY OF BILLS ALERT DIGEST

NO. 2 OF 1986

19 FEBRUARY 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
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Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

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 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

D2/86

The Committee has considered the following Bills:

Apple and Pear Export Underwriting Amendment Bill 1986
Australian Apple and Pear Corporation Amendment Bill
1986
Barley Research Levy Amendment Bill 1986
Community Employment Amendment Bill 1986
Criminology Research Amendment Bill 1986
Customs Administration (Transitional Provisions and
Consequential Amendments) Bill 1986
Dried Fruits Levy Amendment Bill 1986
Live-stock Export Charge Amendment Bill 1986
Live-stock Slaughter Levy Amendment Bill 1986
Meat Chicken Levy Amendment Bill 1986
Ministers of State Amendment Bill 1986
Pig Slaughter Levy Amendment Bill 1986
Trade Union Training Authority Amendment Bill 1986
Wool Industry Amendment Bill

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D2/86

APPLE AND PEAR EXPORT UNDERWRITING AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Minister for Primary Industry.

The Bill will extend the export underwriting for apples and pears that applied for 1981-85 for a further five years from 1 January 1986 under modified terms and conditions.

The Committee has no comments on this Bill.

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

D2/86

AUSTRALIAN APPLE AND PEAR CORPORATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Minister for Primary Industry.

The Bill provides for a change to the Corporation's export powers and a number of changes of a lesser and more machinery nature. In particular it is proposed that in future the Corporation, rather than the Minister, issue licences to exporters of apples and pears and that it be empowered to charge a licence administration fee.

The Committee has no comments on this Bill.

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

D2/86

BARLEY RESEARCH LEVY AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Minister for Primary Industry.

The Bill proposes an increase in the maximum rate of levy which can be applied for barley research purposes in accordance with the provisions of the Barley Research Act 1980.

The Committee has no comments on this Bill.

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

D2/86

COMMUNITY EMPLOYMENT AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Minister for Employment and Industrial Relations.

The purpose of the Bill is to extend by three years the life of the Community Employment Program established under the Community Employment Act 1983.

The Committee has no comments on this Bill.

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

D2/86

CRIMINOLOGY RESEARCH AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Attorney-General.

The purpose of this Bill is to make miscellaneous amendments to revise the Criminology Research Act 1971. The principal proposed amendments are as follows:

- (i) the addition of the Northern Territory as a participant in the scheme under the Criminology Research Act 1971;
- (ii) an increase in the size of the Board of Management from 6 to 8;
- (iii) the granting of specific authority to the Institute of Criminology to collect information and statistics and to provide information and advice to Commonwealth, State and Northern Territory Departments dealing with the administration of criminal justice; and
- (iv) the granting of power to the Attorney-General to request the Institute to conduct particular research or training with such priority as the Attorney-General directs.

The Committee has no comments on this Bill.

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

D2/86

CUSTOMS ADMINISTRATION (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1986

This Bill was introduced into the Senate on 12 February 1986 by the Minister for Industry, Technology and Commerce.

This Bill proposes to transfer a range of Ministerial powers in legislation administered by the Comptroller-General of Customs to the Office of the Comptroller-General of Customs. The Bill effectively completes the transfer of those powers involved in the day to day administration of the Australian Customs Service which the earlier Customs Administration (Transitional Provisions and Consequential Amendments) Act 1985 commenced after the creation of an independent Australian Customs Service on 10 June 1985 by the Customs Administration Act 1985.

The Committee has no comments on this Bill.

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

D2/86

DRIED FRUITS LEVY AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Minister for Primary Industry.

The Dried Fruits Levy Amendment Bill 1986 proposes an increase in the maximum rate of levy which can be applied for dried fruits research purposes in accordance with the provisions of the Dried Fruits Research Act 1971.

The Committee has no comments on this Bill.

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

D2/86

LIVE-STOCK EXPORT CHARGE AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Minister for Primary Industry.

This Bill provides for an amendment to the Live-stock Export Charge Act 1977 to increase the maximum research levy rate to 20 cents per head for sheep, lambs and goats and \$2.00 per head for cattle and buffaloes. The operative rates within this maximum are set by regulation on the recommendation of the Australian Meat and Live-stock Research and Development Corporation. The levy is collected at the industry's request and held in trust to fund research projects.

The Committee has no comments on this Bill.

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

D2/86

LIVE-STOCK SLAUGHTER LEVY AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Minister for Primary Industry.

The Bill proposes an increase in the maximum rate of levy which can be applied for live-stock research purposes in accordance with the provisions of the Australian Meat and Live-stock Research and Development Corporation Act 1985.

The Committee has no comments on this Bill.

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

D2/86

MEAT CHICKEN LEVY AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Minister for Primary Industry.

The Meat Chicken Levy Amendment Bill 1986 proposes an increase in the maximum rate of levy which can be applied for meat chicken research purposes in accordance with the provisions of the Chicken Meat Research Act 1969.

The Committee has no comments on this Bill.

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

D2/86

MINISTERS OF STATE AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Special Minister of State.

The purpose of this Bill is to amend the Ministers of State Act 1952 to increase the limit on the annual sum appropriated from the Commonwealth Consolidated Revenue Fund in respect of the salaries of Ministers, consequent upon the automatic flow-on, to offices within the Remuneration Tribunal's jurisdiction, of the 3.8% National Wage Case decision handed down by the Australian Conciliation and Arbitration Commission on 4 November 1985.

The Committee has no comments on this Bill.

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

D2/86

PIG SLAUGHTER LEVY AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Minister for Primary Industry.

This Bill provides for an amendment to the Pig Slaughter Levy Act 1971 to increase the maximum research levy rate to 50 cents per head. The operative rate within this maximum is set by regulation on the recommendation of the Australian Pig Industry Research Committee. The levy is collected at the industry's request and held in trust to fund research projects.

The Committee has no comments on this Bill.

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D2/86

TRADE UNION TRAINING AUTHORITY AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 February 1986 by the Minister for Employment and Industrial Relations.

The purpose of the Bill is to amend the Trade Union Training Authority Act 1975 to ensure that the staff representative on each State Regional Council established by the Act is elected by and from only those officers and employees of the Trade Union Training Authority employed in the relevant State, other than any officers and employees of the Authority employed in a State at an establishment of the Authority which operates at the national rather than at the State level.

The Committee has no comments on this Bill.

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D2/86

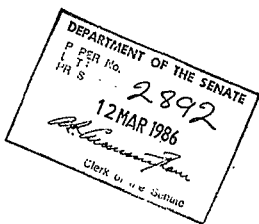
WOOL INDUSTRY AMENDMENT BILL 1985

This Bill was introduced into the House of Representatives on 12 February 1986 the Minister for Primary Industry.

The main purpose of this Bill is to implement changes to the organisational, funding and administrative arrangements for wool research which are set down in the Wool Industry Act 1972. The Bill will bring the wool industry into line with the new arrangements now operating for meat under the Australian Meat and Live-stock Research and Development Corporation Act 1985 and for other rural industries under the Rural Industries Research Act 1985. The planning of wool research and development will be the responsibility of a 9 person Wool Research and Development Council which will be required to draw up strategic 5-year plans and annual operational plans for wool research and development and to recommend individual projects for approval by the Wool Corporation.

The Committee has no comments on this Bill.

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SCRUTINY OF BILLS ALERT DIGEST

NO. 3 OF 1986

12 MARCH 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

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 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

D3/86

The Committee has considered the following Bills:

Affirmative Action (Equal Employment Opportunity for
Women) Bill 1986
Australian Citizenship Amendment Bill 1986
Australian Federal Police Amendment Bill 1986
Foreign Takeovers Amendment Bill 1986
Protection of the Sea (Prevention of Pollution from
Ships) Amendment Bill 1986

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Senators. Any Senator who wishes to draw
matters to the attention of the Committee
under its Terms of Reference is invited to do
so.

D3/86

AFFIRMATIVE ACTION (EQUAL EMPLOYMENT OPPORTUNITY FOR WOMEN)
BILL 1986

This Bill was introduced into the House of Representatives on 19 February 1986 by the Prime Minister.

The purpose of the Affirmative Action (Equal Employment Opportunity for Women) Bill 1986 is to require certain employers to promote equal opportunity for women in employment by developing and implementing an affirmative action program. All private sector employers with 100 staff or more and all higher education institutions will be required to comply with the legislation.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 4 - 'Henry VIII' clause

Clause 4 provides for the Act to extend to Norfolk Island if, and so long as, the regulations so prescribe. Because it permits the application of the Act to be varied by Executive instrument the clause may be characterized as a 'Henry VIII' clause.

The Committee observes that this form of such a clause, requiring the application of the Act to be extended by regulations (subject to tabling in Parliament and potential disallowance), is preferable to similar clauses enabling the application of an Act to be determined by proclamation or by Ministerial notice in the Gazette without any parliamentary scrutiny: see, for example, sub-section 4(2) of the Federal Airports Corporation Act 1986. However the Committee considers that the question of the application of an Act to

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D3/86

Australia's external Territories is one for the Parliament rather than for the Executive. The Parliament having determined in the first instance that an Act should not extend to those Territories it should then be for the whole of the Parliament to determine that the same Act should so extend.

In connection with the present provision the Committee notes that whereas the Sex Discrimination Act 1984 extends to all the external Territories it is apparently proposed that the present Bill will not extend to any of those Territories other than Norfolk Island and to that Territory only if so prescribed. The Committee draws clause 4 to the attention of Senators in that, as a 'Henry VIII' clause, it may be considered an inappropriate delegation of legislative power.

Paragraph 7(1)(a) - 'Henry VIII' clause

Paragraph 7(1)(a) provides that the day on which the development and implementation of affirmative action programmes is to commence in the case of higher education institutions is to be 1 August 1986 'or such later day as is prescribed'. Because it permits the effect of the Bill to be varied by Executive instrument it may be characterized as a 'Henry VIII' clause. While regulations prescribing a later date would be subject to tabling and disallowance this latter sanction could be rendered ineffective if 1 August 1986 were already past before the relevant regulations were tabled.

The Committee draws the paragraph to the attention of Senators in that, as a 'Henry VIII' clause, it may be considered an inappropriate delegation of legislative power.

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

D3/86

Clause 18 - Failure to stipulate minimum period for
furnishing information

Clause 18 provides that the Director may, by notice in writing, request an employer to provide further information 'within such period as is specified in the notice'. No minimum period is stipulated nor is it required that the period specified be reasonable.

While the only sanction for a failure to comply with a notice under clause 18 is that the Director may name the employer in a report tabled in Parliament, the Committee draws the clause to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

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

D3/86

AUSTRALIAN CITIZENSHIP AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 February 1986 by the Minister for Immigration and Ethnic Affairs.

The Australian Citizenship Amendment Bill 1986, which amends the Australian Citizenship Act 1948 (the Act), has four purposes:

- (1) to exclude children born in Australia to visitors, temporary entrants and prohibited non-citizens from automatically acquiring Australian citizenship by birth;
- (2) to amend the oath and affirmation of allegiance to remove the following requirements for persons taking such oath or affirmation:
 - . the requirement to announce one's name;
 - . the requirement to renounce all other allegiances;
- (3) to allow resumption of citizenship for persons who lost it under section 17 at any time subject to a continuing commitment to Australia;
- (4) to effect other minor and formal amendments to the Act, to remove sexist language and anomalies and to make the legislation more specific.

The Committee draws the attention of Senators to the following clause of the Bill:

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

D3/86

Clause 9 - Right of review

Paragraph 9(b) would amend section 52A of the Principal Act so as to provide that application may be made to the Administrative Appeals Tribunal for review of -

'(e) decisions of the Minister under sub-section 23AA(1) or (2) refusing to register a declaration.'

While decisions under sub-section (1) of the new section 23AA to be inserted by sub-clause 7(1) may correctly be described as decisions 'refusing to register a declaration', the Committee suggests that decisions under sub-section (2) of the new section 23AA would be more appropriately described as decisions 'refusing to include the name of a child in a declaration'.

Although it is clearly the intention of the Government that decisions under new sub-section 23AA(2) should be subject to review, the Committee considers that paragraph 9(b) as presently drafted may give rise to some doubt as to the existence of this right of review. Accordingly the Committee draws the paragraph to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

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

D3/86

AUSTRALIAN FEDERAL POLICE AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 February 1986 by the Special Minister of State.

The Australian Federal Police Amendment Bill 1986, which amends the Australian Federal Police Act 1979 (the Act) has several purposes, the most significant of which are:

- (a) to align the powers of AFP members with the functions of the AFP as presently expressed in the Act;
- (b) to overcome operational difficulties experienced by the AFP in relation to the use of police dogs;
- (c) to overcome difficulties associated with the secondment of AFP members to other bodies and the granting of special leave to members;
- (d) to permit the making of regulations in relation to:
 - the transfer of the AFP Appeals Board to the Merit Protection and Review Agency established under the Merit Protection (Australian Government Employees) Act 1984; and
 - the disposal of unclaimed property held by the AFP.

The Committee has no comments on this Bill.

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

D3/86

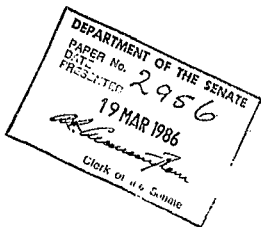
FOREIGN TAKEOVERS AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 February 1986 by the Minister Assisting the Treasurer.

The purpose of this Bill is to propose amendments to the Foreign Takeovers Act 1975 arising from the Government's review of foreign investment policy, the results of which were announced on 29 October 1985. The modifications to the policy have been designed to streamline the existing processes, facilitate certain types of investment proposals and contribute to the Government's wider aim of reducing the burden on business of government regulation.

The Committee has no comments on this Bill.

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NO. 4 OF 1986

19 MARCH 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator A.J. Missen, Deputy Chairman
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Senator R.A. Crowley
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D4/86

The Committee has considered the following Bills:

Air Navigation Amendment Bill 1986
Companies and Securities Legislation Amendment Bill 1986
Conciliation and Arbitration (Amendment) Bill 1986
Wildlife Protection (Regulation of Exports and Imports)
Amendment Bill 1986

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D4/86

AIR NAVIGATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 March 1986 by the Minister for Aviation.

The Bill amends the Air Navigation Act 1920 to enable ratification by Australia of the Protocol relating to an amendment to the Chicago Convention on International Civil Aviation signed at Montreal on 10 May 1984. The Protocol amends the Chicago Convention through the inclusion of a new Article (Article 3 bis) which prohibits the use of force against civil aircraft and provides for the regulation and interception of civil aircraft flying above the territory of a foreign country without authorisation or for any purpose inconsistent with the aims of the Chicago Convention.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 5 -

New sub-section 21A(2) - Uncertain scope of offence

New sub-section 21A(2) would make it an offence where a pilot in command of an Australian owned or operated aircraft in flight over a foreign country operates the aircraft 'for a purpose that is prejudicial to the security or public order of ... the foreign country'. The offence carries a penalty of a fine of \$5,000 or 2 years imprisonment or both.

The Committee is concerned that it is by no means clear what would constitute the operation of an aircraft for a purpose that is prejudicial to the security or public order of a foreign country. The Committee has expressed the view on a

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D4/86

number of occasions that penal provisions should be certain in their application. In the present case pilots should be able to ascertain what conduct is intended to be prohibited. The Committee suggests that this may not be possible.

Accordingly, the Committee draws new sub-section 21A(2) to the attention of Senators in that by reason of its uncertain scope it may be considered to trespass unduly on personal rights and liberties.

New sub-paragraph 21A(3)(b)(ii). -Uncertain scope of offence

New sub-section 21A(3) would require a pilot in command of an Australian owned or operated aircraft to comply with the directions of an authorised official of a foreign country if the aircraft is in flight over that foreign country and 'there are reasonable grounds for believing that the aircraft is being operated for a purpose that is prejudicial to the security or public order of, or to the safety of air navigation in relation to, the foreign country': sub-paragraph 21A(3)(b)(ii).

It is not clear who is required to have reasonable grounds for this belief and once again the Committee suggests that this results in the proposed offence provision being uncertain in its application. The Committee therefore draws new sub-paragraph 21A(3)(b)(ii) to the attention of Senators in that it may be considered to trespass unduly on personal rights and liberties.

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

D4/86

New sub-section 21A(4) - Reversal of onus of proof

New sub-section 21A(3) would create an offence where a pilot in command of an Australian owned or operated aircraft fails to comply with any direction given by an authorised official of a foreign country. Proposed new sub-section 21A(4) would provide a defence if the pilot proves that he or she believed on reasonable grounds that compliance with the direction would be more likely to endanger the safety of the aircraft or of the persons on board the aircraft than would a failure to comply with the direction.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No. 319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed on defendants in criminal proceedings but rather that they should merely be required to bear the evidential onus, that is the onus of adducing evidence of the existence of a defence, the burden of negating which will then be borne by the prosecution. Thus in the present case the pilot might be required to adduce evidence that he or she had the required belief rather than to prove the defence on the balance of probabilities.

The Committee is aware that it is the view of the Attorney-General that a reversal of the persuasive onus is permissible where a matter is peculiarly within the knowledge of the defendant or where the Crown would be put to great expense or difficulty in establishing a particular matter in issue which could be readily and cheaply proved by the defendant (see the response of the Attorney-General in relation to clause 21 of the Trade Practices Amendment Bill 1985 in the Committee's Seventeenth Report of 1985). However

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

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the Committee continues to press the view - which was the view of the Senate Standing Committee on Constitutional and Legal Affairs after lengthy inquiry - that in such cases the evidential onus alone should be imposed on the defendant. In all but the most exceptional circumstances the principle should be preserved, which has been called the 'golden thread' of English criminal law, that the prosecution must prove the guilt of the defendant rather than the defendant being required to exculpate himself or herself by establishing some statutory defence.

The Committee therefore draws new sub-section 21A(4) to the attention of Senators in that by imposing the persuasive onus of proof on the defendant it may be considered to trespass unduly on personal rights and liberties.

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

D4/86

COMPANIES AND SECURITIES LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 14 March 1986 by the Attorney-General.

The purpose of the Bill is to amend the law relating to partial take-over bids and the disclosure by substantial shareholders of changes in their holdings. The proposals in the Bill on partial take-over bids are based on recommendations made by the Companies and Securities Law Review Committee in its Report on Partial Take-over Bids. In particular partial offers will be restricted to proportional bids for each shareholder's holding, rather than the present position whereby partial bids can be made for a proportion of the total shares in the company (a pro-rata bid) or a proportion of each shareholder's holding (a proportional bid). Pro-rata bids open at the commencement of the Bill will be deemed to be proportional bids.

The Committee has no comments on this Bill.

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

D4/86

CONCILIATION AND ARBITRATION (AMENDMENT) BILL 1986

This Bill was introduced into the Senate on 14 March 1986 by Senator Boswell.

The Bill would amend the Conciliation and Arbitration Act 1904 to make it totally clear that the Conciliation and Arbitration Commission has no jurisdiction over superannuation and pension schemes.

The Committee has no comments on this Bill.

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

D4/86

WILDLIFE PROTECTION (REGULATION OF EXPORTS AND IMPORTS)
AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 March 1986 by the Minister for Arts, Heritage and Environment.

The purpose of the Bill is to amend certain provisions of the Wildlife Protection (Regulation of Exports and Imports) Act 1982 to address certain legal and administrative constraints which have surfaced in the course of administering the Act and, in particular -

- (a) to make controls on the export and import of certain specimens more appropriate to their status and the circumstances under which they enter trade;
- (b) to simplify and improve administrative procedures;
- (c) to clarify certain enforcement provisions; and
- (d) to provide for increased protection for informants in proceedings under the Act.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 16 -

New sub-sections 42A(2) and 42B(2) - Lack of parliamentary scrutiny

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

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New sub-sections 42A(2) and 42B(2) would permit the Minister, on the recommendation of the Designated Authority, to notify a class of specimens as a 'prescribed class', permission to import or export which may be granted for multiple shipments. Notifications are to be entered on a register to be maintained by the Designated Authority.

Although notifications under new sub-sections 42A(2) and 42B(2) are quasi-legislative in character they are not to be subject to any form of parliamentary scrutiny and the Committee therefore draws the provisions to the attention of Senators in that they may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 26 -

New sub-section 69A(3) - Avoidance of liability

Clause 26 would insert a new section 69A permitting an inspector, at the request of the owner of an article, to separate out from that article any specimen or specimens attracting the operation of the Act thus permitting the return of the remainder of the article to the owner. New sub-section 69A(3) provides that no action or other proceeding shall be instituted in any court to recover damages in respect of any loss alleged to have been incurred, or any damage alleged to have been suffered, because of any action taken by an inspector under the section.

The Committee is concerned that this provision would protect the inspector from liability even if the inspector wilfully causes damage or is negligent in carrying out the separation of the specimen or specimens from the article. There would seem to be no policy justification for such an avoidance of

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liability and accordingly the Committee draws new sub-section 69A(3) to the attention of Senators in that it may be considered to trespass unduly on personal rights and liberties.

Clause 27 -

New sub-section 71(4) - Unqualified power to seize goods

Clause 27 substitutes for the existing sub-section 71(4) a new sub-section which is differently worded although similar in effect. The Committee recognises that it did not comment on this aspect of the original sub-sections 71(2) and (4) when it reported on the Wildlife Protection (Regulation of Exports and Imports) Bill 1982 in its Twelfth Report of 1982. However it raises the question whether the sub-sections are to be read as subject to the powers to enter on premises, search goods and so forth in sections 63 and 67 or whether the power to seize goods may be construed as standing on its own and therefore permitting entry onto premises, vehicles and vessels without warrant if the inspector has the belief required by sub-section 71(2) or (4) respectively. The Committee notes that the various sections are not expressly related to each other in any way and that, indeed, the power to enter premises under section 63 is expressly restricted by reference to the exercise of the functions of an inspector under section 64 (which do not include the seizure of goods pursuant to section 71).

The Committee suggests that, if sub-sections 71(2) and (4) were to be read as authorising, for example, entry on premises without warrant, then new sub-section 71(4) could be considered to trespass unduly on personal rights and liberties even though the Committee recognises that in this respect it does not differ from existing sub-section 71(4).

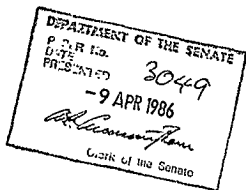
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SCRUTINY OF BILLS COMMITTEE - TABLING OF DIGEST

CHAIRMAN

MR PRESIDENT,

I SEEK LEAVE TO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST
NO. 4 DATED 19 MARCH 1986.



SCRUTINY OF BILLS ALERT DIGEST

NO. 5 OF 1986

9 APRIL 1986



ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Haines

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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The Committee has considered the following Bills:

Appropriation Bill (No.3) 1985-86

Appropriation Bill (No.4) 1985-86

Appropriation (Parliamentary Departments) Bill (No.2) 1985-86

Australian Capital Territory Council Bill 1986

Australian Capital Territory Council (Consequential Provisions) Bill 1986

Australian Wine and Brandy Corporation Amendment Bill 1986

Builders Labourers' Federation (Cancellation of Registration) Bill 1986

Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Bill 1986

Grape Research Levy Bill 1986

Grape Research Levy Collection Bill 1986

Judiciary Amendment (Class Actions) Bill 1986

Prompt Payment of Commonwealth Accounts Bill 1986

Superannuation Legislation Amendment Bill 1986

Trade Practices Revision Bill 1986

Trade Practices (Transfer of Market Dominance) Amendment Bill 1986

Wine Grapes Levy Amendment Bill 1986

Wine Research Repeal Bill 1986

NOTE: 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.

D5/86

APPROPRIATION BILL (NO. 3) 1985 - 86

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister Representing the Minister for Finance.

The purpose of the Bill is to appropriate \$755,656,000 out of the Consolidated Revenue Fund, additional to the sums appropriated by the Appropriation Act (No. 1) 1985-86, for the service of the year ending on 30 June 1986, and for other purposes.

The Committee has no comments on this Bill.

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

D5/86

APPROPRIATION BILL (NO. 4) 1985-86

The Bill was introduced into the House of Representatives on 19 March 1986 by the Minister Representing the Minister for Finance.

The purpose of the Bill is to appropriate \$183,567,000 out of the Consolidated Revenue Fund, additional to the sum appropriated by the Appropriation Act (No. 2) 1985-86, for certain expenditure in respect of the year ending on 30 June 1986, and for other purposes.

The Committee has no comments on this Bill.

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

D5/86

APPROPRIATION (PARLIAMENTARY DEPARTMENTS) BILL (NO.2) 1985-86

This Bill was introduced into the House of Representatives on 19 March 1986, by the Minister Representing the Minister for Finance.

The purpose of the Bill is to appropriate \$1,050,000 out of the Consolidated Revenue Fund, additional to the sum appropriated by the Appropriation (Parliamentary Departments) Act 1985-86, for certain expenditure, in relation to the Parliamentary Departments, in respect of the year ending on 30 June 1986.

The Committee has no comments on this Bill.

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

AUSTRALIAN CAPITAL TERRITORY COUNCIL BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Territories.

The purpose of the Bill is to establish an Australian Capital Territory Council with the function of governing the Australian Capital Territory with respect to specified municipal and territorial matters. The Council will have formal legislative and executive powers over these matters. The Council will also administer other functions that are conferred on it by the Commonwealth. The Jervis Bay Territory is a separate Commonwealth territory and is not affected by this Bill.

The Committee draws the attention of Senators to the following clauses of the Bill:

Sub-clause 6(2) - Inappropriate delegation of legislative power

Sub-clause 6(2) would confer on the proposed A.C.T. Council such other functions in addition to governing the A.C.T. with respect to prescribed matters as are vested in it by, inter alia, 'an arrangement with the Commonwealth'. The sub-clause would thus permit the functions of a statutory corporation to be increased by agreement without parliamentary scrutiny or, indeed, any form of legislative process.

The Committee draws the sub-clause to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

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

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Sub-clauses 9(1) and 12(1) and clause 19 - 'Henry VIII' clauses

Sub-clauses 9(1) and 12(1) and clause 19 would permit the number of members of the Council, the quorum at meetings of the Council and the part-time nature of members of the Council respectively to be varied by regulations. Because they would permit the terms of the Act to be varied by delegated legislation they may be characterised as 'Henry VIII' clauses.

As such, the Committee draws the provisions to the attention of Senators in that they may be considered to constitute inappropriate delegations of legislative power.

Sub-clause 37(4) and clause 41 - 'Henry VIII' clauses

Sub-clause 37(4) and clause 41 would permit the making of regulations empowering the Council to make laws with respect to the planning of land use or the development of land and laws binding the Crown in right of the Commonwealth respectively. Once again because the provisions permit the terms of the Act to be varied by delegated legislation they may be characterized as 'Henry VIII' clauses.

Accordingly the Committee draws the provisions to the attention of Senators in that they may be considered to constitute inappropriate delegations of legislative power.

Sub-clauses 38(2) and 47(1) - Inappropriate delegation of legislative power

Sub-clause 38(2) would empower the Attorney-General to veto a proposed law passed by the Council if, 'in the opinion of the Attorney-General, the Council does not have power to make the proposed law'. Sub-clause 47(1) would empower the Governor-General to disallow a Council law within 6 months after the law is made. This latter discretion is totally unfettered.

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

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While the Attorney-General's exercise of the discretion under sub-clause 38(2) could be challenged in the courts if it were considered that, for example, the Attorney General had been actuated by ulterior motives or that no reasonable person could have formed the required opinion, it would not be possible to seek review of the Attorney-General's opinion on its merits. The decision whether an exercise of power by a statutory corporation is ultra vires the corporation is usually one left to the courts. The Committee raises the question whether it is appropriate that such a power should be vested in the Attorney-General for exercise upon the Attorney-General's subjective opinion and not upon objective grounds.

With regard to the power of disallowance vested in the Governor-General by sub-clause 47(1) the Committee recognizes that it is appropriate that this power - presumably to be exercised in the national interest - should not be reviewable by the courts on its merits. However once again the Committee questions whether the power has been vested in the appropriate person, in this case the Governor-General acting with the advice of the Federal Executive Council. The Committee is aware that both section 23 of the Norfolk Island Act 1979 and section 9 of the Northern Territory (Self-Government) Act 1978 make provision in similar terms for the disallowance of laws made by the Norfolk Island and Northern Territory Legislative Assemblies. However the Committee remarks that in both cases, as in this case, a power has been transferred to the Federal Executive which was previously exercised by the Federal Parliament. If it is considered necessary that a power of disallowance should be retained over the laws made by the proposed A.C.T. Council - and it should be remembered that the Federal Parliament will always retain the power to make overriding laws for the Territories under section 122 of the Constitution - the Committee notes that this power has hitherto been vested in the Federal Parliament rather than the Federal Executive. To the extent that legislation made by such bodies remains delegated legislation it may be argued that Parliament should retain the oversight of the exercise of the legislative power which it has delegated.

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

Accordingly the Committee draws sub-clauses 38(2) and 47(1) to the attention of Senators in that by, in the case of the former, granting to the Attorney-General a power to veto proposed Council laws and, in the case of the latter, granting to the Governor-General rather than the Parliament the power to disallow such laws, they may be considered to constitute inappropriate delegations of legislative power.

Sub-clause 77(1) - Delegation

Under sub-clause 77(1) the Chairperson of the Council will be empowered to delegate to 'a person' all or any of the Chairperson's functions under the Act, other than the power of delegation or the power to make by-laws. As the Chairperson is the chief executive officer of the Council and may, subject to Council law, exercise the powers of the Council in its name and on its behalf (clause 50), and as the Council has the function of governing the Territory with respect to prescribed matters (sub-clause 6(1)), this power of delegation may be considered undesirably broad. The Committee has drawn attention on a number of occasions to similar provisions which impose no limitation on the powers or functions to be delegated and give no guidance as to the attributes of the persons to whom a delegation may be made.

The Committee draws sub-clause 77(1) to the attention of Senators in that by providing such an unrestricted power of delegation it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Paragraph 78(1)(b) - 'Henry VIII' clause

Paragraph 78(1)(b) empowers the making of regulations amending Schedules 1 and 2 of the Bill. Matters specified in Schedule 1 and the subject-matter of laws specified in Schedule 2 constitute the 'prescribed matters' with respect to which the Council has legislative power and governmental functions. Paragraph 78(1)

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

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(b) would thus enable the Government by regulation to increase (or reduce) the areas over which the Council has power. It is a classic example of a 'Henry VIII' clause, permitting the amendment of the Act by delegated legislation.

The Committee draws the paragraph to the attention of Senators in that, as a 'Henry VIII' clause, it may be considered an inappropriate delegation of legislative power.

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

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AUSTRALIAN CAPITAL TERRITORY COUNCIL (CONSEQUENTIAL PROVISIONS)
BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Territories.

The purpose of the Bill is to make essential transitional and consequential amendments relating to the establishment of the Australian Capital Territory Council. This Bill is to be read in conjunction with the Australian Capital Territory Council Bill 1986.

The Committee draws the attention of Senators to the following clauses of the Bill:

Sub-clauses 7(1), 11(3), 12(2), and 13(3) - 'Henry VIII' clauses

Sub-clauses 7(1), 11(3), 12(2) and 13(3) each provide that sections of the Act are to cease to have effect on a day to be fixed by Proclamation. Such provisions may be characterised as 'Henry VIII' clauses in that they permit the executive to determine that sections of an Act are no longer in effect without the necessity for Parliament to agree to the repeal of those sections.

The Committee draws the clauses to the attention of Senators in that they may be considered to constitute inappropriate delegations of legislative power.

Sub-clause 11(1) - 'Henry VIII' clause

Sub-clause 11(1) would permit the Minister, by notice in writing in the Gazette, to exempt from stamp duty under the Australian Capital Territory Stamp Duty Act 1969 specified instruments, or classes of instruments, relating to a transfer by the

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Commonwealth to the Council of an interest in land. Because it would permit the Minister, by executive instrument, to alter the effect of the Act, the sub-clause may be characterised as a 'Henry VIII' clause.

Accordingly the Committee draws the sub-clause to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

Sub-clause 13(1) - 'Henry VIII' clause

Sub-clause 13(1) would enable the making of regulations providing for the application of any Commonwealth Act with such exceptions, and subject to such modifications, as may be necessary or convenient in consequence of the enactment of the Australian Capital Territory Council Bill 1986. The clause is so broad as to constitute a virtual abdication of legislative power.

The Committee draws the sub-clause to the attention of Senators in that, as a 'Henry VIII' clause, it may be considered an inappropriate delegation of legislative power.

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

D5/86

AUSTRALIAN WINE AND BRANDY CORPORATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Primary Industry.

The purpose of this Bill is to reconstitute the Australian Wine and Brandy Corporation with revised functions and powers, smaller membership and funding arrangements which provide for more even distribution of funding across levy payers. Other changes will give effect to the Government's policy for reform of primary industry statutory marketing authorities.

The Committee has no comments on this Bill.

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

D5/86

BUILDERS LABOURERS' FEDERATION (CANCELLATION OF REGISTRATION)
BILL 1986

This Bill was introduced into the House of Representatives on 8 April 1986 by the Minister for Employment and Industrial Relations.

The purpose of the Bill is to cancel the registration of The Australian Building Construction Employees' and Builders Labourers' Federation under the Conciliation and Arbitration Act 1904.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 3 - Trespass on personal rights and liberties

Clause 3 provides that the registration of the Australian Building Construction Employees' and Builders Labourers' Federation ('the Federation') under the Conciliation and Arbitration Act 1904 is cancelled. By virtue of this clause, taken together with clause 4 of the Builders Labourers' Federation (Cancellation of Registration - Consequential Provisions) Bill 1986 ('the Consequential Provisions Bill'), the Federation will be deprived of the right to participate in Australia's highly structured Federal industrial relations system. The definition of "non-registered association" in clause 3 of the Consequential Provisions Bill extends this penalty to any other non-registered association formed in connection with the building industry, a majority of the members of which are or have been members of the Federation. The intention of the two Bills is thus plainly not merely to restrict the right of the Federation to participate in the Federal industrial relations system but also to restrict the right of the present membership of the Federation to participate in that system except through

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those organizations to which coverage of those members is awarded by way of regulations made pursuant to sub-clause 7(2) of the Consequential Provisions Bill.

The Committee recognizes that the Conciliation and Arbitration Commission already has broad powers to deregister organizations. However it suggests that while it may be thought appropriate for a person or organization to be deprived of rights by a court in accordance with due process of law, it may not be considered appropriate for the Parliament to deprive a person or organization of rights in this fashion. A court may, for example, declare a person guilty of murder and impose on that person a sentence of imprisonment but it would not be considered appropriate in this day and age, questions of constitutional power aside, for the Parliament to pass a law making such a declaration and imposing such a sentence. Likewise it would not be considered appropriate, for example, for the Parliament to pass a law depriving a political party of the right to participate in Federal elections and depriving the members of that party of the right to form another association for the purpose of participating in Federal elections.

In the present case the Committee suggests that it may not be considered appropriate for the Parliament to pass a law depriving a particular organization of the right to participate in the Federal industrial relations system and depriving the members of that organization of the right to participate in that system except through other registered organizations. In depriving the organization and its members of this right the Bill goes to the heart of the rationale for the existence of industrial organizations. In the view of the Committee, therefore, the Bill may be said to trespass both on the right of freedom of association and on the right to organise. While the Federation will retain the right to exist as a non-registered organization and to organise outside the confines of the Federal industrial system, it will be deprived of its rationale for existence, namely the right to participate in the Federal industrial relations system.

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

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Accordingly the Committee draws the attention of Senators to the clause in that by depriving the Federation and its members of their rights in this fashion it may be considered to trespass unduly on personal rights and liberties.

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

D5/86

BUILDERS LABOURERS' FEDERATION (CANCELLATION OF REGISTRATION -
CONSEQUENTIAL PROVISIONS) BILL 1986

This Bill was introduced into the House of Representatives on 8 April 1986 by the Minister for Employment and Industrial Relations.

The purpose of the Bill is to make provisions consequential upon the cancellation of the registration under the Conciliation and Arbitration Act 1904 of the Australian Building Construction Employees' and Builders Labourers' Federation.

The Committee has no comments on this Bill.

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

D5/86

GRAPE RESEARCH LEVY BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Primary Industry.

The purpose of this Bill is to provide for the imposition of a levy on grapes and grape juice delivered to wineries and to other processing establishments, the proceeds of which will be used to finance research on wine grapes and other processed grapes. Administrative and organisational arrangements for the scheme, including establishment of a Trust Fund and Research Council, will be in accordance with the provisions of the Rural Industries Research Act 1985. Specifically excluded from the scheme are those dried grapes in respect of which levy is payable under the Dried Fruits Levy Act 1971.

The Committee draws the attention of Senators to the following clause of the Bill:

Sub-clause 9(3) - Inappropriate delegation of legislative power

Levy is imposed on 'prescribed goods' as defined in the Grape Research Levy Collection Act 1986, being fresh grapes, dried grapes and grape juice. Sub-clause 9(3) provides that the regulations may exempt from levy prescribed goods included in a class of prescribed goods.

The Committee draws the sub-clause to the attention of Senators in that, by permitting the exemption by regulation of certain goods from the levy, it may be considered an inappropriate delegation of legislative power.

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

D5/86

GRAPE RESEARCH LEVY COLLECTION BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Primary Industry.

The purpose of this Bill is to provide the machinery necessary for collecting the levy to be imposed by the Grape Research Levy Bill 1986.

The Committee draws the attention of Senators to the following clause of the Bill:

Sub-clause 12(2) - Self incrimination

Sub-clause 12(2) provides that a person is not excused from submitting a return or providing information that the person is required by or under the Act or the regulations to submit or provide on the ground that the return or the information might tend to incriminate the person. The sub-clause also contains the usual proviso that any return or information so submitted or provided is not to be admissible against the person in criminal proceedings (other than proceedings relating to the refusal or failure to furnish a return or the provision of false or misleading returns) or proceedings for the recovery of a penalty for non-payment of the levy.

Although the sub-clause is in standard form it is the Committee's practice to draw to the attention of Senators all such provisions removing the privilege against self incrimination in that they may be considered to trespass unduly on personal rights and liberties.

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

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JUDICIARY AMENDMENT (CLASS ACTIONS) BILL 1986

This Bill was introduced into the Senate on 19 March 1986 by Senator Vigor.

The purpose of this Bill is to amend the Judiciary Act 1903 to facilitate the bringing of class actions so as to allow this right of redress to Australian consumers.

The Committee has no comments on this Bill.

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

D5/86

PROMPT PAYMENT OF COMMONWEALTH ACCOUNTS BILL 1986

This Bill was introduced into the House of Representatives on 20 March 1986 by Mr Tuckey.

The purpose of the Bill is to ensure the prompt payment of commercial accounts payable by the Commonwealth or by an authority of the Commonwealth.

The motion for the Second Reading of this Bill was negatived in the House of Representatives on 20 March 1986.

The Committee has no comments on this Bill.

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

D5/86

SUPERANNUATION LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister Representing the Minister for Finance.

The main purpose of this Bill is to amend the Superannuation Act 1976 in respect of the responsibilities and operations of the Superannuation Fund Investment Trust. Changes relating to the Trust are directed at:

- . placing the Trust on a more independent footing with the freedom and flexibility to manage and invest the Superannuation Fund in a commercial manner;
- . enhancing the accountability of the Trust, both to the Parliament and to contributors to the Commonwealth Superannuation Scheme; and
- . defining the role, objective and duties of the Trust.

The Bill re-introduces into the Parliament the bulk of the provisions of the Superannuation Legislation Amendment Bill 1985, the motion for a Third Reading of which was amended in the Senate to dispose of the Bill on 8 October 1985. It does not, however, contain those provisions concerning the composition of the Superannuation Fund Investment Trust which gave rise to opposition to that Bill.

The Committee draws the attention of Senators to the following clauses of the Bill:

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

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Clause 6 - Retrospectivity

Section 16 of the Superannuation Act 1976 requires the Commissioner to issue a benefit classification certificate in respect of an eligible employee if, following a medical examination, the Commissioner is of the opinion that the employee 'is not likely', by reason of a physical or mental condition, to continue to be an eligible employee until retiring age. Where a benefit classification certificate is in force in respect of a person the person may not be entitled to the full rate of invalidity benefit if the person retires on grounds of invalidity and the Commissioner is of opinion that the incapacity which was the ground for retirement was caused, or was substantially contributed to, by a physical or mental condition specified in the benefit classification certificate.

Clause 6 would alter the test in section 16 so that the Commissioner would be required to issue a benefit classification certificate if, in the opinion of the Commissioner, 'there is a real risk' that the person in question will not continue to be an eligible employee until retiring age. By virtue of sub-clause 2 (1) this change will be deemed to have had effect from the commencement of the Act on 1 July 1976. Sub-clause 6(2) will preserve the effect of decisions of the Administrative Appeals Tribunal with respect to the issue of benefit classification certificates made before the day on which the amending Bill receives the Royal Assent.

The reasons for this retrospectivity are fully set out in the Explanatory Memorandum. Briefly, the Commissioner has always interpreted the 'is not likely' test in section 16 as meaning that 'there is a real risk' that the person will not continue to be an eligible employee until retiring age. In 1985, however, the Administrative Appeals Tribunal held in Re Bewley that the correct test was whether it was not 'more probable than not' that the person would not continue to be an eligible employee until retiring age. The Explanatory Memorandum indicates that the new

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

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test is considered much more severe than is appropriate for the issue of benefit classification certificates and that it would render section 16 'almost unworkable'.

Nevertheless the effect of the amendments is to change the law as determined by the Administrative Appeals Tribunal with retrospective effect, thus disadvantaging contributors in respect of whom a benefit classification certificate has been issued since the inception of the scheme. Accordingly the Committee draws the clause to the attention of Senators in that it may be considered by reason of its retrospective effect to trespass unduly on personal rights and liberties.

Clause 19 - Delegation

Cause 19 is in the same form as clause 17 of the Superannuation Legislation Amendment Bill 1985 to which the Committee drew attention in its Fourth Report of 1985. The clause would insert a new section 39 empowering the principal member to delegate all or any of the principal member's powers under the Act (other than the power of delegation) to 'a person'. In its comment on clause 17 the Committee expressed concern that the new section 39 imposed no limitation, and gave no guidance, as to the attributes of the person to whom a delegation might be made.

In its Seventh Report of 1985 the Committee recorded a response from the Minister for Finance undertaking to consider the comments made by the Committee in the context of an examination of all of the delegation provisions in the Superannuation Act 1976 with any necessary amendments being made when the Act was next amended. The Committee assumes that this examination of delegation provisions has not yet been completed. However it reaffirms its concern in relation to clause 19. The Committee suggests that it may be appropriate in this case, for example, to restrict the scope of delegation to another member of the Trust or an officer or employee of the Trust as was done in the not dissimilar case of sub-section 90(2) of the Australian Trade Commission Act 1985.

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

D5/86

Clause 25 - 'Henry VIII' clause

Clause 25 would insert a new section 126A enabling the making of regulations modifying the application of the Act in relation to former contributors who become members of another superannuation scheme. Because it would permit the form of the Act to be altered by delegated legislation the new section may be characterized as a 'Henry VIII' clause.

As such, the Committee draws it to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

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

D5/86

TRADE PRACTICES REVISION BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Attorney-General.

The purpose of this Bill is to amend the Trade Practices Act 1974. The principal amendments are designed to effect significant improvements to the restrictive trade practices provisions and the consumer protection provisions of the Act. The other amendments contained in the Bill form two broad categories - amendments of a technical character necessary to close loopholes, and amendments bringing up to date provisions relating to the administration and functioning of the Trade Practices Commission and the Trade Practices Tribunal.

The Bill is in substantially the same form as the Trade Practices Amendment Bill 1985 apart from the amendment to insert a new sub-section 50(2C) which now forms the subject of the Trade Practices (Transfer of Market Dominance) Amendment Bill 1986. However the Trade Practices Revision Bill 1986 includes amendments made to the Trade Practices Amendment Bill 1985 in the House of Representatives and amendments made or which the Government proposed to move in the Senate.

The Committee's comments on clause 21 (section 51A) and clauses 16 and 34 (new section 65R) of the Trade Practices Amendment Bill 1985 in its Seventeenth Report of 1985 and its First Report of 1986 respectively apply also to clauses 21, 17 and 35 respectively of the Trade Practices Revision Bill 1986.

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

D5/86

TRADE PRACTICES (TRANSFER OF MARKET DOMINANCE) AMENDMENT BILL
1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Attorney-General.

The purpose of this Bill is to amend the Trade Practices Act 1974 to make clear that the Act does not apply to the acquisition of a body corporate with existing market dominance, provided the acquirer is not thereby in a stronger position to dominate that market.

The Committee has no comments on this Bill.

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

D5/86

WINE GRAPES LEVY AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Primary Industry.

The purpose of this Bill is to revise the levy arrangements for funding the Australian Wine and Brandy Corporation and to impose a specific levy on winemakers to provide an industry contribution for financing wine research.

The Committee has no comments on this Bill.

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

D5/86

WINE RESEARCH REPEAL BILL 1986

This Bill was introduced into the House of Representatives on 19 March 1986 by the Minister for Primary Industry.

The purpose of this Bill is to repeal the Wine Research Act 1955 and provide for the disbursement of the moneys standing to the credit of the Wine Research Trust Fund established under that Act.

The Committee has no comments on this Bill.

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

SCRUTINY OF BILLS COMMITTEE - TABLING OF REPORT

CHAIRMAN

MR PRESIDENT,

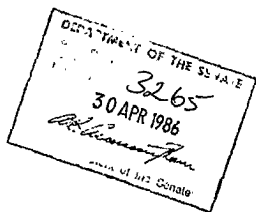
I PRESENT THE FOURTH REPORT OF 1986 OF THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS CONCERNING:

AIR NAVIGATION AMENDMENT BILL 1986

I ALSO LAY ON THE TABLE SCRUTINY OF BILLS ALERT DIGEST NO.5 DATED 9 APRIL 1986.

MR PRESIDENT,

I MOVE THAT THE REPORT BE PRINTED.



SCRUTINY OF BILLS ALERT DIGEST

NO. 6 OF 1986

30 APRIL 1986

ISSN 0729-6851



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power;
or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

D6/86

The Committee has considered the following Bills:

Aboriginal and Torres Strait Islander Heritage
(Interim Protection) Amendment Bill 1986

Australian Institute of Sport Bill 1986

Australian Institute of Sport (Consequential Provisions)
Bill 1986

Australian Meat and Live-stock Corporation
Amendment Bill 1986

Bounty and Subsidy Legislation Amendment Bill 1986

Commonwealth Electoral (Representation of the People)
Amendment Bill 1986

Companies and Securities Legislation Amendment
(Futures Industry) Bill 1986

Customs and Excise Legislation Amendment Bill 1986

Departure Tax Collection Amendment Bill 1986

Environment Protection (Impact of Proposals)
Amendment Bill 1986

Excise Tariff Amendment Bill 1986

Futures Industry Bill 1986

Futures Industry (Fees) Bill 1986

Migration Amendment Bill 1986

Oil Companies (Stock Loss Reimbursement) Bill 1986

Sex Discrimination (Consequential Amendments) Bill 1986

Social Security Legislation Amendment Bill 1986

Statute Law (Miscellaneous Provisions) Bill (No.1) 1986

Taxation Laws Amendment Bill 1986

Taxation (Interest on Underpayments) Bill 1986

Tobacco Charge (No.1) Amendment Bill 1986

Tobacco Charge (No.2) Amendment Bill 1986

Tobacco Charge (No.3) Amendment Bill 1986

Veterans' Entitlements (Transitional Provisions and
Consequential Amendments) Amendment Bill 1986

Wheat Marketing Amendment Bill 1986

NOTE: 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.

D6/86

ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE (INTERIM PROTECTION) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Minister for Aboriginal Affairs.

The Aboriginal and Torres Strait Islander (Interim Protection) Act 1984 is expressed to expire two years from the date of its commencement (24 June 1986). The Aboriginal and Torres Strait Islander Heritage (Interim Protection) Amendment Bill 1986 has the purpose of removing the limit on the duration of the operation of the present Act, giving the Act continued operation.

The Committee has no comments on this Bill.

D6/86

AUSTRALIAN INSTITUTE OF SPORT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister for Sport, Recreation and Tourism.

The purpose of the Bill is to establish the Australian Institute of Sport as a Commonwealth statutory authority.

Major features of the Bill outline the Institute's role in providing resources, services and facilities to enable Australians to pursue and achieve excellence in sport, to improve the sporting abilities of Australians generally through the improvement of the standard of sports coaches, and to foster co-operation in sport between Australia and other countries.

The Committee draws the attention of Senators to the following clauses of the Bill:

Sub-clause 39(3) - 'Henry VIII' clause

Sub-clauses 39(1) and (2) provide that the income, property and transactions of the Institute are not subject to taxation and that transactions of the Institute in respect of goods are not subject to sales tax. Sub-clause 39(3) provides that the regulations may make the Institute subject to taxation or sales tax under a specified law. Because it permits the effect of sub-clauses 39(1) and (2) to be varied by delegated legislation sub-clause 39(3) may be characterised as a 'Henry VIII' clause and as such the Committee draws it to the attention of Senators in that it may be considered to constitute an inappropriate delegation of legislative power.

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

D6/86

Sub-clause 42(1) - Delegation

Sub-clause 42(1) provides that the Minister may delegate to any person all or any of the Minister's powers under the Act other than the power of delegation, the power to give directions to the Board and the power to approve entry into contracts involving payment or receipt of amounts in excess of \$500,000 and entry into leases of longer than 10 years duration.

The Committee recognises the efforts that have been made in clauses 43 and 44 to accommodate its concerns in relation to unrestricted powers of delegation. However it notes that under sub-clause 42(1) the Minister would be able, for example, to delegate to any person -

- . the power to approve strategic plans and variations to such plans (clauses 13 and 14);
- . the power to permit a Board member with a pecuniary interest to be present during deliberations of the Board with respect to the matter in which the member has that interest and to take part in decisions on that matter (clause 20);
- . the power to approve the terms and conditions on which the Director of the Institute holds office (sub-clause 24(4)); and
- . the power to approve estimates of expenditure by the Institute (sub-clause 34(3)).

This list is not exhaustive, nor is it intended to be. However the Committee suggests, at least in respect of these powers vested in the Minister, that it cannot be the intention that they be delegated to 'any person'. Such powers should only be delegated to senior Departmental officers, if delegated at all.

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

D6/86

The Committee draws the sub-clause to the attention of Senators in that, by imposing no limitation, and giving no guidance, as to the attributes of the persons to whom a delegation may be made, it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

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

D6/86

AUSTRALIAN INSTITUTE OF SPORT (CONSEQUENTIAL PROVISIONS) BILL
1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister for Sport, Recreation and Tourism.

The purpose of this Bill is to provide for the dissolution of the public company known as the Australian Institute of Sport in consequence of the establishment of a statutory authority by that name and for related purposes. It effects the transfer of staff, assets and liabilities from the Company to the statutory authority and protects the interests and entitlements of various staff employed by the Company at the time of its dissolution.

The Committee has no comments on this Bill.

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

AUSTRALIAN MEAT AND LIVE-STOCK CORPORATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Minister for Primary Industry.

The purpose of this Bill is to amend the Australian Meat and Live-stock Corporation Act 1977 to provide increased flexibility for the Corporation in the exercise of its commercial and financial responsibilities. This will involve the removal of many of the present requirements for Ministerial approval of what might be called the day to day operations of the Australian Meat and Live-stock Corporation.

The Committee has no comments on this Bill.

D6/86

BOUNTY AND SUBSIDY LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister Representing the Minister for Industry , Technology and Commerce.

This Bill proposes a number of amendments to certain bounty and subsidy Acts administered by the Comptroller-General of Customs. In particular the Bill will amend -

- . the Bounty (Computers) Act 1984 to enable bounty to be paid on modems and multiplexers;
- . the Bounty (High Alloy Steel Products) Act 1983 to introduce separate bounty schedules for high alloy steel bar products and stainless steel flat products; and
- . the Bounty (Ships) Act 1980 to enable bounty to be paid on certain hovercraft.

The Bill also gives effect to certain undertakings given by the Minister to the Senate Standing Committee for the Scrutiny of Bills relating to rights of review in respect of certain decisions.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 15 - 'Henry VIII' clause

Clause 15 would substitute new sections 9 and 9A for the existing section 9 of the Bounty (High Alloy Steel Products) Act 1983. Sub-sections 9(1) and 9A(1) would set an amount available for payment of bounty in a given year. Sub-sections 9(2) and 9A(2) provide that the regulations may prescribe a factor by which the amount available for the payment of bounty is to be multiplied, thus decreasing or increasing the total amount available.

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

D6/86

The new sub-sections are in the same form as the existing sub-section 9(2) of the Act to which the Committee drew attention in its Seventeenth Report of 1983. The Minister responded at the time that the sub-clause was necessary to take into account any alteration to the price of raw material inputs. The Committee remarked that while it could see the need for some flexibility in establishing the amount available for payment of bounty it was nevertheless concerned that the sub-section placed no restriction on the magnitude of the changes that could be made.

The Committee remains concerned that it should be possible to make substantial variations to the amount available for the payment of bounty by delegated legislation. Accordingly it draws new sub-sections 9(2) and 9A(2) to the attention of Senators in that they may be considered to constitute inappropriate delegations of legislative power.

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

D6/86

COMMONWEALTH ELECTORAL (REPRESENTATION OF THE PEOPLE) AMENDMENT
BILL 1986

This Bill was introduced into the Senate on 17 April 1986 by
Senator Macklin.

The purpose of the Bill is to amend the Commonwealth Electoral
Act 1918 to provide for the election of members of the House of
Representatives by proportional representation and for related
purposes.

The Committee has no comments on this Bill.

D6/86

COMPANIES AND SECURITIES LEGISLATION AMENDMENT (FUTURES INDUSTRY)
BILL 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Attorney-General.

The Companies and Securities Legislation Amendment (Futures Industry) Bill 1986 will make certain amendments to companies and securities legislation that are consequent upon the Futures Industry Bill 1986.

The Committee has no comments on this Bill.

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

D6/86

CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister Representing the Minister for Industry, Technology and Commerce.

This Bill proposes various amendments to customs and excise laws to implement Government decisions which, in particular, alter the arrangements relating to concessions on goods re-imported after repair or renovation, provide for the termination of compulsory maturation for brandy, whisky and rum and remove a sex discrimination provision in the Excise Act.

The Committee has no comments on this Bill.

D6/86

DEPARTURE TAX COLLECTION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Minister for Aviation.

The purpose of this Bill is to amend the Departure Tax Collection Act 1978 to transfer the responsibility for the collection of departure tax to air operators.

The Committee draws the attention of Senators to the following clauses of the Bill:

Paragraphs 3(a) and (c) - Inappropriate delegation of legislative power

Paragraphs 3(a) and (c) insert in section 3 of the Principal Act new definitions of "aerial work operation", "charter operation" and "private operation" which incorporate by reference definitions of these expressions in paragraphs 191(b), (c) and (a) respectively of the Air Navigation Regulations "as in force from time to time". By virtue of new sections 11A, 11B and 11C to be inserted by clause 5 an international air operator will not be required to make tax stamps or exemption stamps available for supply to passengers on flights that are private operations or aerial work operations or charter operations in respect of which there is an exemption in force under section 11C.

The Committee has in the past expressed concern that the adoption by reference of regulations "as in force from time to time" may impede the proper processes of parliamentary scrutiny (see its comment on clause 13 of the Health Legislation Amendment Bill 1985 in its Eighth Report of 1985). In the present case the Parliament when examining amendments to regulation 191 of the Air Navigation Regulations may not be aware, unless it is specifically called to its attention, of the effect those amendments will have on the arrangements for the collection of departure tax.

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

D6/86

Accordingly the Committee draws the new definitions to the attention of Senators in that by adopting by reference regulations "as in force from time to time" they may be considered to constitute an inappropriate delegation of legislative power.

Clause 5 - New section 11C - Non-reviewable discretion

Clause 5 would insert a new section 11C empowering the Minister to exempt an international air operator from the requirement to make tax stamps and exemption stamps available to passengers on -

- . all international flights that are charter operations;
- . a specified international flight, being a charter operation;
or
- . international flights, being charter operations, of a specified kind.

In deciding whether to exempt an international air operator the Minister is required by new sub-section 11C(3) to have regard to the scale of operations involved and "such other matters as the Minister considers relevant".

There is no provision for review of the Minister's decisions under new section 11C. Because criteria for the exercise of the discretion vested in the Minister are not set out in the legislation the scope for review pursuant to the Administrative Decisions (Judicial Review) Act 1977 is accordingly limited. It would be possible, for example, to challenge the Minister's decision on the ground that he or she had failed to have regard to the scale of operations involved but not on the ground that the Minister had wrongly classified an operator as a large, rather than a small, charter operator and had therefore declined to grant an exemption.

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

D6/86

The Committee draws new section 11C to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

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

D6/86

ENVIRONMENTAL PROTECTION (IMPACT OF PROPOSALS) AMENDMENT BILL
1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister for Arts, Heritage and Environment.

The purpose of this Bill is to give effect to improved arrangements for administering the Environment Protection (Impact of Proposals) Act 1974 and to provide greater emphasis on public involvement in carrying out environmental assessments under the Act.

The Committee has no comments on this Bill.

D6/86

EXCISE TARIFF AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister Representing the Minister for Industry, Technology and Commerce.

The main purpose of this Bill is to incorporate into the Excise Tariff Act 1921 a number of excise tariff proposals requiring enactment following tabling in the Parliament.

The Committee draws the attention of Senators to the following clause of the Bill:

Sub-clause 2(2) - Retrospectivity

Sub-clause 2(2) provides that the amendments made by clause 3 abolishing the excise duty on wine produced with added sugar and introducing restructured tariff items dealing with brandy, whisky, rum and liqueurs shall be deemed to have come into operation on 23 May 1985, the day after the relevant Excise Tariff Proposals were tabled in the House of Representatives.

The Committee recognises the convention that changes to items of a Custom Tariff and an Excise Tariff are made by way of changes introduced into the House of Representatives and that retrospective legislation implementing a number of such changes is subsequently introduced into the Parliament making the changes with effect from the day after the relevant Proposals were tabled. However the Committee is critical of the degree of retrospectivity involved in this case. It suggests that it should not be considered acceptable for the Parliament to wait almost 11 months before legislation giving effect to Excise Tariff Proposals is introduced.

Accordingly the Committee draws sub-clause 2(2) to the attention of Senators in that the degree of retrospectivity involved may be considered to trespass unduly on personal rights and liberties.

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

D6/86

FUTURES INDUSTRY BILL 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Attorney-General.

The purpose of the Futures Industry Bill 1986 is to regulate the futures industry in the Australian Capital Territory.

The Committee draws the attention of Senators to the following clauses of the Bill:

Sub-clauses 13(3) and (4) - Lack of limitation as to reasonableness of time and place

Sub-clauses 13(3) and (4) empower the Commission or a person authorised by the Commission to require various persons to produce books relating to dealings in futures contracts and like matters at a time and place specified in the direction of the Commission or by the authorised person as the case may be. Failure to comply with a requirement without reasonable excuse is an offence punishable by a fine of \$10,000 or imprisonment for 2 years or both. It is not, however, stipulated that the time and place specified by the Commission or the authorised person be reasonable.

When the Committee commented to similar effect on sub-clauses 31(1) and (5) and 33(1) of the Australian Bill of Rights Bill 1985 the Attorney-General responded that it would be possible to challenge a requirement under the Administrative Decisions (Judicial Review) Act 1977 on the ground that it was so unreasonable that no reasonable person could have specified such a time and place (see the Committee's Seventeenth Report of 1985). The Committee suggested, however, that it was not desirable that a person should be required to challenge the reasonableness of a requirement under the Administrative Decisions (Judicial Review) Act 1977 when he or she would be liable to heavy penalties for a failure to comply with the requirement. Rather, it should be stipulated that the time and

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

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place specified be reasonable so that the court hearing a charge relating to the failure to comply with a requirement may take into account any alleged unreasonableness affecting the legality of the requirement.

The Committee therefore draws sub-clauses 13(3) and (4) to the attention of Senators in that, by failing to stipulate that the times and places at which books are to be required to be produced be reasonable, they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 15(3) - Reversal of the onus of proof

Sub-clause 15(3) provides that it is a defence in a prosecution for an offence against sub-clause 15(2) relating to furnishing information or making a statement which is false or misleading in a material particular if it is established that the defendant believed on reasonable grounds that the information or statement was true and was not misleading. The effect of the sub-clause is thus to place upon the defendant the burden of exculpating himself or herself by establishing a defence on the balance of probabilities.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No. 319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed on defendants in criminal proceedings but rather that they should merely be required to bear the evidential onus, that is the onus of adducing evidence of the existence of a defence, the burden of negating which will then be borne by the prosecution. In the present case the Committee notes that the usual form of provisions relating to false or misleading statements in Commonwealth legislation requires the prosecution to establish that the defendant made the false statement knowingly or knowing that the statement was false or misleading: see, for example,

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

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sub-clause 127(5) of the Veterans' Entitlements Bill 1985 and clause 25 of the Human Rights and Equal Opportunity Commission Bill 1985.

The Committee questions why in this case it has been considered necessary to reverse the onus of proof and, given that decision, why it has been considered necessary to impose on the defendant the persuasive onus of proof rather than merely an evidential onus. Accordingly the Committee draws the sub-clause to the attention of Senators in that by imposing the persuasive onus of proof on the defendant it may be considered to trespass unduly on personal rights and liberties.

Sub-clause 15(6) - Self incrimination

Sub-clause 15(6) provides that a person is not excused from making a statement relating to the compilation of books required to be produced under section 13 or 14 or as to any matter to which any such books relate on the ground that the statement might incriminate the person. The sub-clause also contains the usual proviso that any such statement is not to be admissible in evidence against the person in any criminal proceedings other than proceedings relating to the refusal or failure to make a statement or the furnishing of information that is false or misleading in a material particular.

The sub-clause departs from the usual form of such provisions in Commonwealth legislation, however, in that it stipulates that the proviso only applies where the person required to make a statement claims before making the statement that it may tend to incriminate the person. The Committee suggests that the requirement that a person claim the privilege is better suited to situations where a person is being examined before a court or a quasi-judicial tribunal rather than to administrative contexts like the present. If persons are to be required to claim the privilege when a statement is sought by a person authorised by the Commission then the Committee suggests that the authorised person should be required to caution the person to that effect

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

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before seeking the statement. The Committee notes that, for example, sub-clause 25(2) requires that an inspector carrying out an investigation under clause 25 inform a person whom he proposes to examine that the person must claim the privilege against self incrimination in order to obtain the limited protection accorded by sub-clause 25(10).

The Committee draws sub-clause 15(6) to the attention of Senators in that by removing the privilege against self incrimination in the first instance and by requiring that the privilege be claimed in order for the resulting self incriminating statements not to be generally available for use against the person in criminal or civil proceedings it may be considered to trespass unduly on personal rights and liberties.

Sub-clauses 18(5) and (6) - Self incrimination

Sub-clauses 18(5) and (6) are, taken together, in similar form to sub-clause 15(6) and the Committee's comments on that provision apply equally to these sub-clauses.

Sub-clause 18(10) - Reversal of the onus of proof

Sub-clause 18(10) is in similar form to sub-clause 15(3) and the Committee's comments on that provision apply equally to this sub-clause.

Sub-clauses 25(6) and (7) - Strict liability

Sub-clauses 25(6) and (7) each create offences where a person in purported compliance with a requirement of an inspector or appearing before an inspector for examination furnishes information that is false or misleading in a material particular. Neither provision contains the usual requirement that the defendant know that the information is false or misleading with the result that a person might be liable even if he or she quite innocently provided wrong information.

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

D6/86

The Committee therefore draws the sub-clauses to the attention of Senators in that they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 25(10) - Self incrimination

Sub-clause 25(10) is in similar form to sub-clause 15(6) although, as noted in the comment on the latter provision, sub-clause 25(2) requires that the effect of sub-clause 25(10) be drawn to the attention of persons who are to be examined under that clause. Nevertheless the Committee draws the sub-clause to the attention of Senators in that by removing the privilege against self incrimination it may be considered to trespass unduly on personal rights and liberties.

Sub-clause 129(10) - Reversal of the onus of proof

Clause 129 prohibits insider dealing in futures contracts concerning bodies corporate. Sub-clause 129(10) provides that, where a prosecution is instituted against a person for an offence because the person was in possession of inside information and dealt in a futures contract, it is a defence if it is established that the other party to the dealing also knew, or ought reasonably to have known, the relevant information before entering the dealing. The effect of the sub-clause is to place upon the defendant the burden of exculpating himself or herself by establishing this defence on the balance of probabilities.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No. 319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed on defendants in criminal proceedings and that provisions requiring the defendant to adduce evidence of the existence of a defence - provisions imposing an evidential onus on the defendant - should be kept to a minimum. In particular the Committee recommended that an evidential onus should only be imposed on defendants -

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

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- . where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue; or
- . where proof by the prosecution of a particular matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence.

The Committee suggests that the matter dealt with in the defence provided for in sub-clause 129(10) does not fall within either of these two categories. It deals not with the state of mind of the defendant but with the state of mind of the other party to the transaction. Accordingly the Committee is of the view that it is not an appropriate case for the imposition of an evidential onus on the defendant, and still less an appropriate case for the reversal of the persuasive burden of proof.

The Committee draws the sub-clause to the attention of Senators in that by imposing the persuasive onus of proof on the defendant it may be considered to trespass unduly on personal rights and liberties.

Sub-clause 133(2) - Reversal of the onus of proof

Paragraph 133(1)(d) creates an offence where a person induces or attempts to induce another person to deal in futures contracts by recording or storing in any mechanical, electronic or other device information that the person knows to be false or misleading in a material particular. Sub-clause 133(2) provides a defence where it is established that, at the time when the defendant so recorded or stored the information, the defendant had no reasonable grounds for expecting that the information would be available to any person.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No.319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed

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

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on defendants in criminal proceedings but rather that they should merely be required to bear the evidential onus, that is the onus of adducing evidence of the existence of a defence, the burden of negating which will then be borne by the prosecution. Thus in the present case the defendant might be required to adduce evidence that he or she had no reasonable grounds for expecting that the information would be available to any person rather than being required to establish the defence on the balance of probabilities.

The Committee draws sub-clause 133(2) to the attention of Senators in that by imposing the persuasive onus of proof on defendants it may be considered to trespass unduly on personal rights and liberties.

Sub-clauses 144(2) and 145(2) - Reversal of the onus of proof

Sub-clauses 144(1) and 145(1) create offences with regard to the destruction, mutilation or alteration of books, the sending of books out of the Territory or out of Australia, the storage of false or misleading matter in mechanical or electronic devices and the falsification of matter recorded or stored in such devices. Sub-clauses 144(2) and 145(2) provide defences where it is established -

- . in the case of clause 144, that the defendant did not act with intent to defraud, to defeat the purposes of the Act or to prevent, delay or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power or authority, under the Act; and
- . in the case of clause 145, that the defendant acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

As suggested above in relation to sub-clause 133(2), the Committee would argue that, in accordance with the recommendations of the Senate Standing Committee on

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Constitutional and Legal Affairs, sub-clauses 144(2) and 145(2) should only impose an evidential onus on defendants rather than requiring proof of the defence on the balance of probabilities.

Accordingly the Committee draws sub-clauses 144(2) and 145(2) to the attention of Senators in that by imposing the persuasive onus of proof on defendants they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 157(7) - Abrogation of customary right

Sub-clause 157(7) would abrogate the customary right of a defendant against whom an interim injunction is granted to seek an undertaking from the plaintiff as to damages in respect of any loss flowing from the grant of the interim injunction if it turns out that it should not have been made. It is customary for the courts to refuse to grant interim or interlocutory injunctions unless such an undertaking is given.

The Committee draws sub-clause 157(7) to the attention of Senators in that by abrogating this right it may be considered to trespass unduly on personal rights and liberties.

D6/86

FUTURES INDUSTRY (FEES) BILL 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Attorney-General.

The Futures Industry (Fees) Bill provides for fees payable under the Futures Industry Bill. The fees payable under this Bill impose costs on participants in the industry that relate to administrative matters (lodgement of documents etc.) handled by State and Territory Corporate Affairs Commissions.

The Committee has no comments on this Bill.

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

D6/86

MIGRATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Minister for Immigration and Ethnic Affairs.

The Bill will provide that a non-citizen child born in Australia will be deemed to be included in the temporary entry permit or to have the same immigration status as his or her parents or, if the entry permit or the status of each parent differs, to be included in the permit or have the status more favourable to the child.

The Committee has no comments on this Bill.

D6/86

OIL COMPANIES (STOCK LOSS REIMBURSEMENT) BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister Representing the Minister for Resources and Energy.

The purpose of the Bill is partially to reimburse domestic oil companies participating in the crude oil allocation scheme for inventory losses arising from the sudden fall in oil prices.

The Committee has no comments on this Bill.

D6/86

SEX DISCRIMINATION (CONSEQUENTIAL AMENDMENTS) BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Attorney-General.

This Bill proposes to amend a number of Acts to remove or alter provisions which discriminate on the ground of sex or marital status to ensure that those Acts will be consistent with the Sex Discrimination Act 1984.

The Committee has no comments on this Bill.

D6/86

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister for Social Security.

This Bill amends the Social Security Act 1947 and the Compensation (Commonwealth Government Employees) Act 1971 in several minor respects and also provides for the social security amnesty.

The Committee has no comments on this Bill.

D6/86

STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO.1) 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Attorney-General.

The amendments made by this Bill have a number of purposes such as the tidying up, correction or updating of legislation. Other amendments implement changes that are of minor policy significance or are of a routine administrative nature.

The Committee has no comments on this Bill.

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

D6/86

TAXATION LAWS AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Acting Treasurer.

This Bill will give effect to a further two of the Government's tax reform measures:

- (a) it will provide rules limiting tax deductions for interest incurred in borrowing money to finance rental property investments - so called "negative gearing"; and
- (b) it provides a depreciation allowance of 4 per cent per annum in respect of residential income-producing buildings.

This Bill also contains amendments to overcome a decision of the Federal Court that sanctioned arrangements under which future income rights could be disposed of for a non-taxable capital sum.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 25 - Retrospectivity

By virtue of sub-clauses 25(4) and (5) the amendments made by clause 11 limiting deductions for interest on money borrowed to finance rental property investments and the amendments made by clauses 12, 13, 14 and 15 deeming consideration received for the transfer of rights to receive income from property to be assessable income (rather than a capital receipt) will have effect from 17 July 1985 and 9 October 1985 respectively. The Explanatory Memorandum indicates that these were the dates on which these changes were first announced. In neither case was this announcement made to the Parliament.

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

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The Committee is critical of the practice, which is becoming increasingly prevalent in the field of taxation law, whereby changes to the law are made retrospective to the date of Ministerial announcement. The Committee recognises the special conventions associated with changes to the taxation laws announced in the Budget or in similar statements to the Parliament and the practical necessity that changes to taxation laws be made retrospective to the date of the introduction of the amending Bill into the Parliament. However, these conventions aside, the Committee deplores the practice of making changes to the law retrospective to the date of a Ministerial announcement, for example to a press conference, which carries with it the assumption that people should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. The practice treats the passage of the necessary retrospective legislation 'ratifying' the Minister's announcement, in the present case 9 months and 6 months respectively after the event, as a pure formality.

The Committee draws sub-clauses 25(4) and (5) to the attention of Senators in that the retrospectivity involved may be considered to trespass unduly on personal rights and liberties.

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

D6/86

TAXATION (INTEREST ON UNDERPAYMENTS) BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Acting Treasurer.

The purpose of the Bill is formally to impose the interest charge payable under section 170AA of the Income Tax Assessment Act 1936 which it is proposed be inserted in that Act by the Taxation Laws Amendment Bill 1986.

The Committee has no comments on this Bill.

D6/86

TOBACCO CHARGE (NO.1) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister for Primary Industry.

This Bill will amend the Tobacco Charge Act (No.1) 1955, which imposes tobacco charge on the sale of Australian tobacco leaf to manufacturers of tobacco products for smoking, to restore, with effect from 1 April 1986, the rate of charge that applied immediately before that date.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 4 - Retrospectivity

Clause 3 imposes new rates of charge on the sale of Australian tobacco leaf to manufacturers of tobacco products for smoking. Clause 4 will apply the new rates of charge with effect from 1 April 1986.

The Explanatory Memorandum explains that this retrospectivity arises from an oversight which has led to there being no rate of tobacco charge prescribed since 1 April 1986. Sub-section 48(2) of the Acts Interpretation Act 1901 prevents retrospective regulations being made in these circumstances.

While the degree of retrospectivity is small and the regulations will not result in any increase in liability to tobacco charge beyond that applying prior to 1 April 1986, the Committee nevertheless draws the clause to the attention of Senators in that the retrospective imposition of a tax may be considered to trespass unduly on personal rights and liberties.

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

D6/86

TOBACCO CHARGE (NO.2) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 April 1986 by the Minister for Primary Industry.

The Bill will amend the Tobacco Charge Act (No.2) 1955 to restore, in respect of purchases of Australian tobacco leaf by manufacturers of tobacco products on or after 1 April 1986, the rate of tobacco charge that applied immediately prior to that date.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 4 - Retrospectivity

The Committee draws the attention of Senators to clause 4 of this Bill on the same basis as it drew attention to clause 4 of the Tobacco Charge (No.1) Amendment Bill 1986 above.

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

D6/86

VETERANS' ENTITLEMENTS (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 14 April 1986 by the Minister Representing the Minister for Veterans' Affairs.

The Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Bill was passed by the Parliament last year but has not received Royal Assent. The main purpose of that Bill was to provide arrangements for the transition from the existing Repatriation Act 1920 and other supplementary legislation to the Veterans' Entitlements Bill. As Parliament did not pass the Veterans' Entitlements Bill last year the Governor-General returned the Transitional Provisions Bill to the Parliament with a recommendation that the date of effect be amended. This Bill makes certain changes consequential upon the new date of effect.

The Committee has no comments on this Bill. However the Committee notes with pleasure that certain amendments have been made to the Seamen's War Pensions and Allowances Act 1940 arising out of comments in the Committee's Sixteenth Report of 1985 on the Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Bill 1985.

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

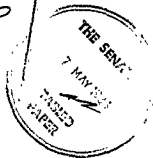
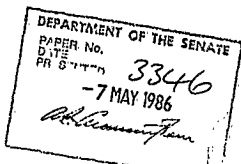
D6/86

WHEAT MARKETING AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 16 April 1986 by the Minister for Primary Industry.

The purpose of this Bill is to amend several Acts relating to aspects of the wheat industry which will further improve the ability of the Australian Wheat Board to meet the increasingly difficult world trading environment it faces.

The Committee has no comments on this Bill.



SCRUTINY OF BILLS ALERT DIGEST

NO. 7 OF 1986

7 MAY 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bills:

Australian National Maritime Museum Bill 1986

Customs Tariff Amendment Bill 1986

Fringe Benefits Tax Bill 1986

Fringe Benefits Tax (Application to the Commonwealth)
Bill 1986

Fringe Benefits Tax Assessment Bill 1986

Fringe Benefits Tax (Miscellaneous Provisions) Bill 1986

Local Government (Financial Assistance) Bill 1986

Navigation Amendment (Deregulation of Coasting Trade)
Bill 1986

States Grants (Education Assistance - Participation and
Equity) Bill 1986

States Grants (Schools Assistance) Amendment Bill 1986

States Grants (Tertiary Education Assistance)
Amendment Bill 1986

Supply Bill (No.1) 1986-87

Supply Bill (No.2) 1986-87

Supply (Parliamentary Departments) Bill 1986-87

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

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AUSTRALIAN NATIONAL MARITIME MUSEUM BILL 1986

This Bill was introduced into the House of Representatives on 30 April 1986 by the Minister for Arts, Heritage and Environment.

The purpose of the Bill is to establish the Australian National Maritime Museum. The functions of the Museum will be to develop the national maritime collection, to preserve, acquire and maintain maritime historical material and to exhibit that material both in Australia and overseas. The Museum will also be able to conduct, and assist in, research relating to Australian maritime history and to disseminate information relating to Australian maritime history. The Museum is to be a body corporate and will have all the powers necessary to perform its functions.

The Committee has no comments on this Bill.

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

D7/86

CUSTOMS TARIFF AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 30 April 1986 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Customs Tariff Amendment Bill 1986 contains significant amendments to the Customs Tariff Act 1982. The Bill contains 10 schedules which incorporate changes -

- (i) initially introduced by Gazette notice and subsequently proposed in the House of Representatives as Customs Tariff Proposals;
- (ii) introduced directly by Customs Tariff Proposals; or
- (iii) which are being introduced by the Bill.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 2 - Retrospectivity

Clause 2 gives various provisions of this Bill retrospective operation. Sub-clauses 2(2) and 2(3) would give the amendments made by clauses 3 and 4 effect from 1 July 1985 and 2 August 1985 respectively. The amendment made by clause 3 would restore duty free entry of certain parts used in the construction and modification of bountiable vessels and the amendment made by clause 4 would reduce the required wool content in the pile of carpets from New Zealand eligible for duty free entry from 80% to 78% by weight.

While the Committee recognises that in both cases this retrospectivity is beneficial it questions the length of time which it has taken to bring the necessary legislation before the

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Parliament. Accordingly the Committee draws sub-clauses 2(2) and (3) to the attention of Senators in that the degree of retrospectivity involved may be considered to trespass unduly on personal rights and liberties by reason of the climate of uncertainty which may have been created.

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

D7/86

FRINGE BENEFITS TAX BILL 1986

This Bill was introduced into the House of Representatives on 2 May 1986 by the Treasurer.

This Bill will declare the rate of fringe benefits tax and formally impose the tax on an employer in respect of fringe benefits within the meaning of the proposed Fringe Benefits Assessment Act 1986. The rate of tax is 46% for the 9 months period from 1 July 1986 to 31 March 1987 and 49% for each subsequent year ending on 31 March.

The Committee has no comments on this Bill.

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

D7/86

FRINGE BENEFITS TAX (APPLICATION TO THE COMMONWEALTH) BILL 1986

This Bill was introduced into the House of Representatives on 2 May 1986 by the Treasurer.

This Bill will ensure that departments and authorities of the Commonwealth are subject to tax liability in respect of fringe benefits provided to their employees as if they were employer corporations subject to the operation of the proposed Fringe Benefits Tax Assessment Act 1986. Departments and authorities will broadly be under the same obligations as other employers to lodge annual fringe benefits tax returns with the Commissioner of Taxation, and to remit annual amounts of fringe benefits tax, including quarterly instalments.

The Committee has no comments on this Bill.

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

D7/86

FRINGE BENEFITS TAX ASSESSMENT BILL 1986

This Bill was introduced into the House of Representatives on 2 May 1986 by the Treasurer.

This Bill provides for the assessment and collection of fringe benefits tax payable by employers. Its provisions contain specific rules for valuing the following kinds of fringe benefits provided by employers to employees on and after 1 July 1986:

- . private use of motor cars;
- . interest-free or low interest loans;
- . release of debts;
- . payment of private expenses;
- . free or subsidised residential accommodation;
- . excessive living-away-from-home allowances;
- . free or subsidised board;
- . concessional fares for airline transport;
- . entertainment (tax-exempt bodies only);
- . free or discounted goods or other property; and
- . free or discounted services or other benefits.

The Committee draws the attention of Senators to the following clauses of the Bill:

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

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Clause 69 - Failure to stipulate reasonable time

Clause 69 would empower the Commissioner, by notice in writing, to require a person to furnish a return in relation to a year of tax to the Commissioner 'in the manner and within the time specified in the notice'. Failure to furnish such a return would attract either a fine of up to \$2,000 (or more in the case of repeated offences) or a liability to pay penalty tax equal to double the amount of tax otherwise payable by the employer in respect of the year of tax (clause 114). There is no stipulation that the time within which a person is required to furnish a return must be reasonable or must be not less than some minimum period, for example 14 days.

The Committee recognises that this clause mirrors sub-section 162(1) of the Income Tax Assessment Act 1936. Nevertheless it draws the clause to the attention of Senators in that, by reason of the failure to stipulate that the time within which a person is required to furnish a return must be reasonable, it may be considered to trespass unduly on personal rights and liberties.

Clause 127 - Entry and inspection without warrant

Sub-clause 127(1) would permit an officer authorised in writing by the Commissioner to enter and remain on any land or premises at all reasonable times and to inspect and examine documents. The only constraint placed upon this power is that, under sub-clause 127(2), an officer may be required to produce an authority in writing signed by the Commissioner to the occupier of the land or premises in question. No judicial authorisation in the form of a warrant is required.

The Committee notes that a similarly unrestricted right of access to buildings, places and documents is presently provided for in section 263 of the Income Tax Assessment Act 1936. Nevertheless the Committee draws the clause to the attention of Senators in that by permitting entry on land or premises and inspection of

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documents without the need for a warrant issued by a magistrate or a justice of the peace it may be considered to trespass unduly on personal rights and liberties.

Clause 133 - Non-reviewable decisions

Sub-clause 133(1) provides that a Board constituted by the Commissioner, the Secretary to the Department of Finance and the Comptroller-General of Customs or 'such substitutes for all or any of them as the Minister appoints from time to time' may release an employer or the dependants of a deceased employer from the whole or part of any liability to tax under the Act in cases of serious hardship. Sub-clause 133(3) provides that an application for release in respect of an amount of less than \$10,000 may be referred to a Board of Review constituted under the Income Tax Assessment Act 1936 for report and that an application for release in respect of an amount of \$10,000 or more shall be so referred. However by virtue of sub-clause 133(4) for the purposes of the clause the Board of Review is to be constituted by a single person designated by the Chairman of the Board being either a member (including the Chairman) of the Board or an officer of the Department of Treasury who performs administrative duties for the Board.

While the Committee recognises that this clause mirrors section 265 of the Income Tax Assessment Act 1936 it suggests that the provision for review of decisions releasing persons from liability to pay tax in cases of serious hardship is less than effective. In the first place the Board of Review to which applications may be referred for investigation and report may be constituted by a single person who may be an administrative officer. Secondly, the Board which would be constituted under the clause to make decisions may be appointed by the Minister and may thus lack the independence required for effective decision-making. While the proposed Board would be sufficient as an internal review mechanism it is not proposed that its decisions be reviewable on their merits by an independent

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tribunal like the Administrative Appeals Tribunal. Rather, its decisions would only be reviewable as to their legality pursuant to the Administrative Decisions (Judicial Review) Act 1977.

Accordingly the Committee draws the clause to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

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

D7/86

FRINGE BENEFITS TAX (MISCELLANEOUS PROVISIONS) BILL 1986

This Bill was introduced into the House of Representatives on 2 May 1986 by the Treasurer.

This Bill will amend various laws, principally the Income Tax Assessment Act 1936, consequent upon the enactment of the proposed Fringe Benefits Tax Assessment Act 1986.

The Committee has no comments on this Bill.

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

D7/86

LOCAL GOVERNMENT (FINANCIAL ASSISTANCE) BILL 1986

This Bill was introduced into the House of Representatives on 2 May 1986 by the Minister for Local Government and Administrative Services.

The Local Government (Financial Assistance) Bill 1986 replaces the Local Government (Personal Income Tax Sharing) Act 1976 as the basis upon which general purpose financial assistance is provided to Local Government through the States and the Northern Territory. The Bill's principal objective is to allow for the allocation of funds to Local Government in such a way as to equalise each Local Government's ability to undertake its functions with respect to the average standard performance of other Local Governments in its State.

The Committee has no comments on this Bill.

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

D7/86

NAVIGATION AMENDMENT (DEREGULATION OF COASTING TRADE) BILL 1986

This Bill was introduced into the Senate on 29 April 1986 by Senator Hamer.

The purpose of the Bill is to repeal Part VI of the Navigation Act 1912, so as to remove the obligation for ships to obtain a licence or a permit to engage in the coasting trade, and to repeal other sections of that Act which relate only to the coasting trade.

The Committee has no comments on this Bill.

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

D7/86

STATES GRANTS (EDUCATION ASSISTANCE - PARTICIPATION AND EQUITY)
AMENDMENT BILL 1986.

This Bill was introduced into the House of Representatives on 30 April 1986 by the Minister Representing the Minister for Education.

The purpose of this Bill is to amend the States Grants (Education Assistance - Participation and Equity) Act 1983 to supplement for cost increases the grants available to government and non-government education authorities in the States and the Northern Territory to conduct projects and programs under the Participation and Equity Program in the years 1986 and 1987.

The Committee has no comments on this Bill.

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

D7/86

STATES GRANTS (SCHOOLS ASSISTANCE) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 30 April 1986 by the Minister Representing the Minister for Education.

The purpose of the Bill is to supplement existing financial provisions in the legislation for the 1986 calendar year to take into account increases in price levels. Similar amendments are made each Sitting and are part of the commitment by the Government to provide cost supplementation for schools programs.

The Committee has no comments on this Bill.

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

D7/86

STATES GRANTS (TERTIARY EDUCATION ASSISTANCE) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 30 April 1986 by the Minister Representing the Minister for Education.

The States Grants (Tertiary Education Assistance) Act 1984 provides grants to the States and the Northern Territory for financial assistance to universities and colleges of advanced education for the 1985-87 triennium, and for technical and further education for 1985 and 1986. The purpose of this Bill is to supplement these grants in accordance with the Government's agreed procedures to make adjustments for cost increases. The total amount of supplementaion to be provided by this Bill is \$98.43 million, comprising \$66.67 million in 1986 and \$31.76 million in 1987.

The Committee has no comments on this Bill.

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

D7/86

SUPPLY BILL (NO.1) 1986-87

This Bill was introduced into the House of Representatives on 1 May 1986 by the Minister Representing the Minister for Finance.

This Bill, together with its companion Bills, the Supply Bill (No.2) 1986-87 and Supply (Parliamentary Departments) Bill 1986-87, seeks interim appropriations for the services of the Government for the period 1 July 1986 to 30 November 1986, by which date it is expected that the equivalent Appropriation Bills, which will form part of the Budget for 1986-87, will have been enacted.

The Committee has no comments on this Bill.

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

D7/86

SUPPLY BILL (NO.2) 1986-87

This Bill was introduced into the House of Representatives on 1 May 1986 by the Minister Representing the Minister for Finance.

This Bill seeks interim appropriations, totalling \$2,116.5 million, for expenditure on capital works and services, payments to or for the States and the Northern Territory and certain other services for the period 1 July 1986 to 30 November 1986.

The Committee has no comments on this Bill.

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

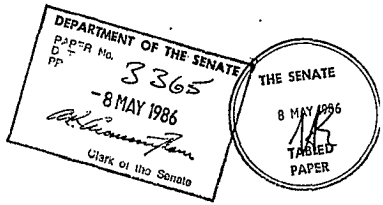
D7/86

SUPPLY (PARLIAMENTARY DEPARTMENTS) BILL 1986-87

This Bill was introduced into the House of Representatives on 1 May 1986 by the Minister Representing the Minister for Finance.

This Bill seeks interim appropriations, totalling \$21.3 million, to meet expenditures by the Parliamentary Departments during the period 1 July 1986 to 30 November 1986.

The Committee has no comments on this Bill.



SCRUTINY OF BILLS ALERT DIGEST

NO. 8 OF 1986

8 MAY 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon nonreviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bill:

Fringe Benefits Tax Assessment Bill 1986

NOTE: 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.

D8/86

FRINGE BENEFITS TAX ASSESSMENT BILL, 1986

The Committee initially commented on this Bill in its Alert Digest No.7 of 1986 (7 May 1986). Its attention has been drawn to a further aspect of the Bill falling within its Terms of Reference and it therefore draws the attention of Senators to the following provisions of the Bill:

Substantiation requirements - Trespass on rights and liberties

Paragraphs 10(3)(b) and (c), 19(1)(c) and (d), 21(d), 24(1)(c), (d), (e) and (f), 34(1)(c) and (d), 44(1)(c), (d) and (e), 47(5)(d), 52(1)(c), (d) and (e), 61(1)(b) and 63(d) and the definitions of "exempt accomodation component" and "exempt food component" in sub-section 136(1) require certain matters to be proved in particular ways - by particular documents or declarations in a form approved by the Commissioner - in order for an employer to be entitled to a reduction in the taxable value of a fringe benefit or an exemption from liability in respect of a fringe benefit. The employer does not have the opportunity to prove these matters by other evidence admissible in a court of law.

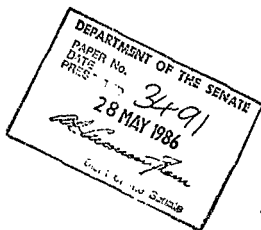
Furthermore, if the particular evidence is lost or destroyed within the six year statutory period in which it is required to be retained, clause 123 provides that the employer is to be deprived of the benefit of that evidence unless he or she has an adequate substitute document (being a copy of the relevant document or a document that records all the matters set out in the original document) or can satisfy the Commissioner that the document was lost or destroyed because of circumstances beyond the employer's control. If the employer has no such substitute document or cannot so satisfy the Commissioner, the Commissioner may issue an amended assessment on the basis that the employer is no longer entitled to the reduction in the taxable value of the fringe benefit or the exemption in respect of the fringe benefit, as the case may be.

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

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The Committee is aware that Subdivision F of Division 3 of Part III of the Income Tax Assessment Act 1936 already requires certain matters to be proved by particular documentary evidence and that it did not comment on that Subdivision when it was inserted by the Taxation Laws Amendment Act (No.4) 1985. However the Committee is concerned that such substantiation requirements modify the character and width of evidence which can normally be taken into account in a court of law. Accordingly the Committee draws this aspect of the Bill to the attention of Senators in that, by so confining the entitlement of employers to make use of evidence which would otherwise be admissible, it may be considered to trespass unduly on personal rights and liberties.

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



SCRUTINY OF BILLS ALERT DIGEST

NO. 9 OF 1986

28 MAY 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bills:

Australian Security Intelligence Organization
Amendment Bill 1986

Bounties Bill 1986

Copyright Amendment Bill 1986

Dairy Industry Stabilization Levy (Termination
of Levy) Bill 1986

Dairy Legislation (Transitional Provisions and
Consequential Amendments) Bill 1986

Dairy Produce Bill 1986

Dairy Produce Levy (No. 1) Bill 1986

Dairy Produce Levy (No. 2) Bill 1986

Dairying Industry Research and Promotion Levy
(Termination of Levy) Bill 1986

Health Legislation Amendment Bill 1986

Income Tax Assessment Amendment
(Capital Gains) Bill 1986

Income Tax (Rates) Amendment
(Capital Gains) Bill 1986

Income Tax (Securities and Agreements)
(Withholding Tax Recoupment) Bill 1986

Industry Research and Development Bill 1986

Inspector-General of Intelligence
and Security Bill 1986

Intelligence and Security
(Consequential Amendments) Bill 1986

*Parliamentary Commission of Inquiry Act 1986

Taxation Boards of Review (Transfer of Jurisdiction)
Bill 1986

Taxation Laws Amendment Bill (No.2) 1986

Taxation Laws Amendment
(Foreign Tax Credits) Bill 1986

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World Heritage Properties Conservation
Amendment Bill 1986

*Reported to the Senate 28 May 1986.

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

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AUSTRALIAN SECURITY INTELLIGENCE ORGANIZATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Attorney-General.

The Bill gives effect to recommendations made by Mr Justice Hope in the Report of the Royal Commission on Australia's Security and Intelligence Agencies. In particular the Bill will make significant changes to ASIO's jurisdiction, strengthen Ministerial control over ASIO and amend provisions concerning the review of adverse or qualified ASIO security assessments by the Security Appeals Tribunal. The Bill also provides for the establishment of a Parliamentary Joint Committee on ASIO.

The Committee has no comments on this Bill.

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

BOUNTIES BILL 1986

This Bill was introduced into the House of Representatives on 8 May 1986 by the Minister Representing the Minister for Industry, Technology and Commerce.

This Bill proposes new arrangements for the introduction and implementation of bounty assistance whenever such assistance is proposed following the Government's consideration of appropriate Industries Assistance Commission reports.

General comment - Inappropriate delegation of legislative power

The intention of this Bill is to introduce standing legislation permitting the Minister to promulgate schemes for the payment of bounty by notice in the Gazette. Notices setting out bounty schemes will be subject to disallowance as if they were regulations except that only 7 sitting days, rather than 15 sitting days, will be allowed both for the giving of notice of a motion of disallowance and for the subsequent disposal of that motion. Part III of the Bill sets out standard provisions relating to all bounty schemes but some of these provisions merely impose certain requirements as to the content of bounty schemes (eg. clauses 15, 16, 17, 18 and 19) and others contain the saving provision 'unless the scheme otherwise provides' (eg. sub-clauses 22(2) and (5), 23(2) and 24(2)). Despite the flexibility inherent in the system to be established by the Bill it has been considered necessary to provide for the content of the definition of the factory cost in sub-clause 22(5) - which may in any case be varied by the provisions of a particular scheme - to be added to by regulations: see paragraph 22(5)(zc).

While the Committee appreciates the reasons given by the Government for the proposed introduction of this standing legislation - in particular the pressures put upon parliamentary time by an ever-increasing volume of legislation - it cannot

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agree that the solution proposed is an appropriate one. It will take away from the Parliament the ability to consider the detail of each Bill providing for the payment of bounty on particular products and will leave the Parliament with only the blunt instrument of disallowance: in effect, the ability to say yes or no to the bounty scheme as a whole. While the threat of disallowance may give the Parliament leverage to require amendments to a scheme, the time normally available for negotiation in relation to such amendments would be halved to 7 sitting days under the Bill.

The Committee therefore draws this aspect of the Bill to the attention of Senators in that the proposed system for promulgating bounty schemes by Ministerial notice may be considered an inappropriate delegation of legislative power.

The Committee further draws the attention of Senators to the following clauses of the Bill:

Sub-clauses 11(2) and (3) - Retrospective resolutions

Sub-clauses 11(2) and (3) would permit the Parliament, by resolution of both Houses within 3 sitting days of the disallowance of a bounty scheme, to declare that any amount of bounty payable in accordance with the disallowed scheme shall not be paid and that persons who have received any payment of bounty in accordance with the disallowed scheme are liable to repay the whole or a part of that amount to the Commonwealth. While such a provision may be considered a necessary adjunct of a system which permits the Executive to promulgate bounty schemes without the need for the prior agreement of the Parliament it is obvious that it may operate harshly in individual cases. Where, for example, a company adjusts the prices of its products in reliance on a duly gazetted bounty scheme, it may be required to repay the amount of any bounty payments it has already received and it may

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not receive bounty payments to which it would otherwise have been entitled in respect of production occurring before the date of disallowance.

The Committee draws sub-clauses 11(2) and (3) to the attention of Senators in that by giving resolutions of the Parliament such retrospective effect they may be considered to trespass unduly on personal rights and liberties.

Sub-clause 43(1) - Powers of officers

Sub-clause 43(1) provides that a Collector or an officer appointed by the Comptroller may, by notice in writing, require a person whom he or she believes on reasonable grounds to be capable of giving 'information relevant to the operation of a bounty scheme in relation to the production (including the cost of production) of bountiable goods' to attend before him or her at a time and place specified in the notice and there to answer question and produce documents.

The Committee has two concerns with this provision. First, the class of persons who may be required to give information is very broad and may, for example, depending upon the nature of the bountiable product, include a retail purchaser or private user of bountiable goods. The Committee suggested in its Second Report of 1983 that sub-section 16(1) of the Bounty (Room Air Conditioners) Act 1983, a similar provision, might have permitted a member of the public who had merely purchased a bountiable room air conditioner to be required to answer questions. A new sub-section 16(1A) was subsequently inserted by the Bounty (Room Air Conditioners) Amendment Act 1983 to make plain that persons purchasing room air conditioners for private use should not be required to answer questions. However the Committee commented in its Fourth Report of 1984 that sub-section 16(1) of the Bounty (Two-Stroke Engines) Act 1984 had reverted to the earlier, unsatisfactory form of such provisions and could allow virtually any person having a role in the manufacture, sale or use of

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bountiable engines - including retail purchasers of lawnmowers fitted with bountiable engines - to be required to attend before a Collector and answer questions. Now it would appear that it is intended to entrench this broad provision in standing legislation.

Secondly, there is no requirement that the time or place specified by the Collector or authorised person be reasonable. Failure without reasonable excuse to attend before a Collector or authorised person, to answer questions and to produce documents as required carries a penalty of a fine of up to \$5,000 in the case of a body corporate or \$1,000 or 6 months imprisonment, or both, in the case of a natural person.

The Committee therefore draws the sub-clause to the attention of Senators in that, by reason of the broad class of persons who may be required to answer questions and produce documents and the failure to stipulate that the time and place specified for attendance before the Collector or authorised person must be reasonable, it may be considered to trespass unduly on personal rights and liberties.

Sub-clause 43(5) - Self incrimination

Sub-clause 43(5) provides that a person is not excused from answering a question or producing any documents when required to do so on the ground that the answer to the question or the production of the documents might tend to incriminate the person. The sub-clause also contains the usual proviso that any such answer or the production of any such document is not to be admissible against the person in criminal proceedings other than proceedings relating to the making of false or misleading statements or the production of false or misleading documents.

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Although the sub-clause is in standard form it is the Committee's practice to draw all such provisions removing the privilege against self incrimination to the attention of Senators in that they may be considered to trespass unduly on personal rights and liberties.

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

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COPYRIGHT AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 21 May 1986 by the Attorney-General.

The purpose of the Bill is to amend the Copyright Act 1986 to -

- . strengthen significantly the 'anti-piracy' provisions of the Act;
- . increase access to copyright materials for the handicapped and for libraries, archives and their clients;
- . extend fair dealing; and
- . make clear that broadcasts via satellite are subject to the Act.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 6 - New sub-section 47A(4) - Reversal of onus of proof

New sub-section 47A(3) would create an offence where the holder of a print-handicapped radio licence fails to retain records of a sound broadcast of a literary or dramatic work for the prescribed period. New sub-section 47A(4) would provide a defence if the person satisfies the court that he or she took all reasonable precautions, and exercised due diligence, to ensure the retention of the records.

The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No.319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed

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on defendants in criminal proceedings but rather that they should merely be required to bear the evidential onus, that is the onus of adducing evidence of the existence of a defence, the burden of negating which will then be borne by the prosecution. Thus in the present case the licence-holder might be required to adduce evidence that he or she took all reasonable precautions, and exercised due diligence, to ensure the retention of the records rather than being required to prove this defence on the balance of probabilities.

The Committee draws new sub-section 47A(4) to the attention of Senators in that by imposing the persuasive onus of proof on the defendant it may be considered to trespass unduly on personal rights and liberties.

Clause 17 - Retrospectivity

Clause 17 would substitute a new sub-section 133A(1), sub-paragraph (c)(ii) of which specifies a new penalty if the offender against the sub-section is a body corporate. Paragraph (c) applies the new penalty to the sub-section as it was in force before the coming into operation of clause 17. Thus a body corporate which would have been liable to a penalty of \$1,500 for a first offence may now be liable to a fine of up to \$7,500 even if the offence was committed before the commencement of the new sub-section.

The Committee draws the clause to the attention of Senators in that by retrospectively increasing the penalty for an offence it may be considered to trespass unduly on personal rights and liberties.

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

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DAIRY INDUSTRY STABILIZATION LEVY (TERMINATION OF LEVY) BILL 1986

This Bill was introduced into the House of Representatives on 7 May 1986 by the Minister for Primary Industry.

The purpose of this Bill is to limit the imposition of stabilization levy to the production of prescribed dairy products occurring on or before 30 June 1986.

The Committee has no comments on this Bill.

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

D9/86

DAIRY LEGISLATION (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1986

This Bill was introduced into the House of Representatives on 7 May 1986 by the Minister for Primary Industry.

This Bill is one of six Bills whose purpose is to establish new market support arrangements for the Australian dairy industry. The provisions of the Bill are in the nature of transitional or amending provisions consequent upon the enactment of the proposed Dairy Produce Act 1986 and the other related legislation.

The Committee has no comments on this Bill.

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

DAIRY PRODUCE BILL 1986

This Bill was introduced into the House of Representatives on 7 May 1986 by the Minister for Primary Industry.

The purpose of this Bill and five other related Bills is to enhance the capacity of the Australian dairy industry to market its produce. Measures are proposed to make the industry more market responsive. Government regulation of marketing is to be reduced. Assistance presently provided to export sales by stabilization payments funded by a levy on domestic sales is to be replaced by market support payments funded by a levy on all milk production and supplementary market support payments funded by levies on domestic sales of certain dairy products. The Dairy Produce Bill 1986 includes provisions to reform the Australian Dairy Corporation, to control the export of Australian dairy products, to enable the collection of the levies referred to above, to establish Funds for market support and promotion purposes and to reform the Dairying Industry Stabilization Fund.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 111 - Power to call for returns

Clause 111 empowers a person appointed by the Minister to require, by notice in writing, returns or information to be furnished within a time specified in the notice. There is no stipulation that the time set be reasonable or that it be not less than a statutory minimum period, for example 14 days. Failure to comply with such a requirement without reasonable excuse carries a penalty of a fine of up to \$10,000 in the case of a body corporate or \$2,000 or imprisonment for 12 months, or both, in the case of a natural person.

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

The Committee draws the clause to the attention of Senators in that the failure to stipulate that the time set be reasonable or that it be not less than a statutory minimum may be considered to trespass unduly on personal rights and liberties.

Sub-clause 113(2) - Self incrimination

Sub-clause 113(2) provides that a person is not excused from submitting a return or providing information that the person is required to submit or provide on the ground that the return or information might tend to incriminate the person. The sub-clause also contains the usual proviso that any return or information so submitted or provided is not to be admissible against the person in criminal proceedings (other than proceedings relating to the refusal or failure to submit a return or provide information or the provision of false or misleading returns or information) or proceedings for the recovery of a penalty for non-payment of a levy.

Although the sub-clause is in standard form it is the Committee's practice to draw all such provisions removing the privilege against self incrimination to the attention of Senators in that they may be considered to trespass unduly on personal rights and liberties.

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

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DAIRY PRODUCE LEVY (NO.1) BILL 1986

This Bill was introduced into the House of Representatives on 7 May 1986 by the Minister for Primary Industry.

The purpose of this Bill and the complementary Dairy Produce Levy (No.2) Bill 1986 is to impose various levies. These levies are required to finance the operations of the Australian Dairy Corporation including its activities in promoting dairy produce, to finance new market support arrangements and to raise moneys from the dairy industry for dairy research. The Dairy Produce Levy (No.1) Bill 1986 imposes two types of levies: levies on milk fat produced on or after 1 July 1986, and levies on certain types of dairy products produced on or after 1 July 1986.

The Committee draws the attention of Senators to the following clauses of the Bill:

Sub-clause 4(1) -

Definition of 'dairy product' - Inappropriate delegation of legislative power

Clause 9 imposes a levy on 'dairy products'. Under sub-clause 4(1) 'dairy products' are defined as butter, butteroil, cheese and -

- '(d) any other product that is declared by the regulations to be a dairy product for the purpose of this Act, being a product that is produced from milk or from a constituent part of milk'.

By enabling the class of products on which the levy is imposed to be extended by regulations the definition may be seen as an indirect means of imposing taxation by such regulations. The Committee takes the view that Parliament should not lightly delegate its taxing powers and accordingly draws the attention of

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Senators to paragraph (d) of the definition of 'dairy product' in sub-clause 4(1) in that it may be considered to constitute an inappropriate delegation of legislative power.

Paragraph 5(2)(b) - Inappropriate delegation of legislative power

Paragraph 5(2)(b) provides that the Minister may, by notice in the Gazette, extend the period during which the market support levy is imposed on the milk fat content of relevant dairy produce beyond 1 July 1992. Sub-clause 5(3) provides that the Minister may only act under this provision if the Minister is of the opinion that the amount of money that is likely to be standing to the credit of the Market Support Fund on 1 July 1992 will not meet all of the payments that, under the proposed Dairy Produce Act 1986, are to be paid from that Fund.

Despite the limitation imposed by sub-clause 5(3) the Committee is concerned that the Minister should be able to extend the period during which a levy is imposed by Gazette notice with no form of parliamentary scrutiny. Because it would permit the Minister, in effect, to impose a tax by Executive instrument the Committee draws the paragraph to the attention of Senators in that it may be considered to constitute an inappropriate delegation of legislative power.

Clause 6 - Inappropriate delegation of legislative power

Sub-clause 6(1) requires the Minister, by notice in the Gazette, to suspend the imposition of the market support levy on the milk fat content of relevant dairy produce at the request of any member of the Australian Agricultural Council unless a majority of the members of that Council determine that the request should not be complied with. Sub-clause 6(3) provides that the Minister may at any time, by notice in the Gazette, revoke a notice under sub-clause 6(1), thus reimposing the levy with effect from a day specified in the notice, not being a day earlier than the day on which the notice is published.

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As with paragraph 5(2)(b), there is no form of parliamentary scrutiny of Gazette notices under sub-clauses 6(1) and (3). Because the sub-clauses would permit the Minister to remove and reimpose a form of tax by Executive instrument the Committee draws them to the attention of Senators in that they may be considered to constitute an inappropriate delegation of legislative power.

Clause 10 - Inappropriate delegation of legislative power

Clause 10 provides that the rate of levy imposed on dairy products by clause 9 is to be the rate prescribed by the regulations from time to time. The Committee has consistently drawn attention to such open-ended provisions permitting the rate of a levy or similar tax to be fixed by regulations without fixing a statutory maximum rate: see, for example, its comment on clause 7 of the Dairy Industry Stabilization Levy Amendment Bill 1985 in its Seventh Report of 1985.

Accordingly the Committee draws clause 10 to the attention of Senators in that by leaving the rate of levy to be prescribed in regulations it may be considered to constitute an inappropriate delegation of legislative power.

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

DAIRY PRODUCE LEVY (NO.2) BILL 1986

This Bill was introduced into the House of Representatives on 7 May 1986 by the Minister for Primary Industry.

The purpose of this Bill is to complement the Dairy Produce Levy (No.1) Bill 1986 by imposing certain levies on the import of dairy produce that has been exported from Australia and subsequently imported back into Australia. The Bill is necessary to close off an opportunity to exploit the market support arrangements that would otherwise be possible through an export/reimport procedure.

Two levies are imposed. The levy on exempted dairy products is designed to reimpose a levy in respect of which an exemption was given on export of the product. The levy on supported dairy product is designed to avoid reimports of Australian dairy products from obtaining the benefit of the market support payments made on export as well as the supported domestic price.

The Committee has no comments on this Bill.

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

DAIRYING INDUSTRY RESEARCH AND PROMOTION LEVY (TERMINATION OF
LEVY) BILL 1986

This Bill was introduced into the House of Representatives on
7 May 1986 by the Minister for Primary Industry.

The purpose of this Bill is to limit the imposition of levies on
whole milk or butterfat produced in Australia and sold by the
producer to production occurring before 1 July 1986. The Dairy
Produce Levy (No.1) Bill 1986 provides for new levies which will
apply to milk fat produced on or after 1 July 1986.

The Committee has no comments on this Bill.

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

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HEALTH LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 8 May 1986 by the Minister for Health.

The purpose of this Bill is to amend several Acts, being the Health Insurance Act 1973, the Health Insurance Commission Act 1973, the National Health Act 1953, the States Grants (Nurse Education Transfer Assistance) Act 1985 and the Tuberculosis Act 1948. The major amendments proposed by this Bill relate to the provision of pathology services. These amendments are designed to improve arrangements for the payment of Medicare benefits for pathology services. They flow from the findings by the Joint Parliamentary Committee on Public Accounts in its Report (No. 236) on Medical Fraud and Overservicing - Pathology, and are designed to introduce significant new controls over the provision of pathology services and thus greatly to reduce the capacity for fraud and overservicing in the pathology industry.

The Committee draws the attention of Senators to the following clause of the Bill:

Sub-clause 19(1) -

New paragraphs 23DC(6)(j) and 23DF(7)(h) - Open-ended discretion

New paragraphs 23DC(6)(j) and 23DF(7)(h) permit the Minister, in determining whether a person is a fit and proper person to be an approved pathology practitioner or authority, to have regard to 'such other matters as the Minister considers relevant'. While the Minister's decision to refuse an undertaking under section 23DC or 23DF is reviewable by the Administrative Appeals Tribunal and while in such a review the Tribunal would have all the powers and discretions which the Minister had in making the original decision, it is suggested that the Tribunal would have difficulty in determining how the discretion afforded by paragraphs 23DC(6)(j) and 23F(7)(h) should be exercised in the absence of

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any statutory guidelines. Moreover, given that paragraphs 23DC(6)(h) and 23DF(7)(g) permit the matters to which the Minister is to have regard to be added to by regulations, it is difficult to see the need for an additional, open-ended discretion in the Minister to have regard to 'such other matters as the Minister considers relevant'.

Accordingly the Committee draws new paragraphs 23DC(6)(j) and 23DF(7)(h) to the attention of Senators in that by affording the Minister such an open-ended discretion they may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

New paragraph 23DN(1)(d) - Non-reviewable decision

New paragraph 23DN(1)(d) provides that the Minister, in approving premises as an accredited pathology laboratory, shall specify the period for which the approval has effect, being a period not exceeding three years. While a decision by the Minister under sub-section 23DN(1) approving or refusing to approve premises would be reviewable pursuant to paragraph 23DO(5)(a), it does not appear that this review would extend to the period of effect of the approval. By contrast the period for which an undertaking under section 23DC or 23DF is to have effect is to be reviewable pursuant to paragraph 23DO(5)(c).

The Committee therefore draws new paragraph 23DN(1)(d) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

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

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INCOME TAX ASSESSMENT AMENDMENT (CAPITAL GAINS) BILL 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Treasurer.

The Bill will amend the Income Tax Assessment Act 1936 to introduce a tax on capital gains in relation to assets acquired on or after 20 September 1985 and to modify provisions relating to the taxation of benefits associated with employee share acquisition schemes, in consequence of the introduction of the tax on capital gains.

The Committee has no comments on this Bill.

D9/86

INCOME TAX (RATES) AMENDMENT (CAPITAL GAINS) BILL 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Treasurer.

The Bill will amend the Income Tax (Rates) Act 1982 to insert provisions allowing for the calculation of the rates of tax applicable to taxpayers who derive assessable income which comprises or includes a capital gain.

The Committee has no comments on this Bill.

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

D9/86

INCOME TAX (SECURITIES AND AGREEMENTS) (WITHHOLDING TAX
RECOUPMENT) BILL 1986

This Bill was introduced into the House of Representatives on
22 May 1986 by the Treasurer.

The Bill will impose on residents a liability to pay withholding
tax -

- . where a resident buys a security from a non-resident and the Commissioner is satisfied that the parties were not dealing with each other at arm's length, resulting in a reduction of the amount of the withholding tax arising from the sale; and
- . where interest paid before the commencement of the changes to the withholding tax provisions to be made by the Taxation Laws Amendment Bill (No.2) 1986 would otherwise have been payable after the commencement of those changes and that interest has been paid with the purpose of avoiding withholding tax.

The Committee has no comments on this Bill.

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

INDUSTRY RESEARCH AND DEVELOPMENT BILL 1986

This Bill was introduced into the Senate on 8 May 1986 by the Minister for Industry, Technology and Commerce.

This Bill proposes a new scheme to encourage research and development (R&D) in industry. The Government's main scheme for assistance to R&D in industry is the 150 per cent tax concession to be provided under section 73B of the Income Tax Assessment Act 1936. However, the tax concession will not assist all worthwhile R&D. This Bill is designed to support worthwhile R&D which would not be assisted by the tax concession. There are three main elements in the new scheme which will become effective on 1 July 1986:

- . Discretionary grants for R&D, providing a similar level of support as the tax scheme provides. These grants would be aimed at firms such as new innovative companies or firms wishing to restructure their activities which have insufficient tax liability to benefit from the tax scheme;
- . Generic technology grants to support R&D on technologies of fundamental and wide-ranging significance for industry competitiveness in the 1990s, eg. biotechnology, new materials. These grants would bridge the gap between research centres and industry by funding the development of research in collaboration with industry to a stage where the private sector would take up further development;
- . National interest agreements to be awarded for projects with significant national benefits which would not be undertaken by industry on a commercial basis.

The Committee draws the attention of Senators to the following clause of the Bill:

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

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Clause 5 - Inappropriate delegation of legislative power

Clause 5 provides that the Minister may, by notice in writing published in the Gazette, declare that the Act extends to a specified external Territory. The Committee has stated on a number of occasions its view that the question whether legislation should extend to the external Territories is one for the Parliament, not the Executive, to determine: see most recently its comment on clause 4 of the Affirmative Action (Equal Employment Opportunity for Women) Bill 1986 in its Sixth Report of 1986 (30 April 1986).

The Committee draws clause 5 to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

D9/86

INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY BILL 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Acting Prime Minister.

The purpose of the Bill is to create an office of Inspector-General of Intelligence and Security. The Inspector-General's principal role will be to assist Ministers in ensuring that the public interest in the proper functioning of Australia's intelligence and security agencies is adequately safeguarded.

The Committee draws the attention of Senators to the following clause of the Bill:

Sub-clause 18(6) - Self incrimination

Sub-clause 18(6) provides that a person is not excused from answering questions or producing documents when required to do so by the Inspector-General on the ground that the answer or the production of the document might tend to incriminate the person. The sub-clause contains the usual proviso that the answer or the production of the document is not to be admissible in evidence against the person in any court except in a prosecution arising out of a refusal or failure to comply with a requirement of the Inspector-General to furnish information or the furnishing of information pursuant to such a requirement that is false or misleading in a material particular.

Although the sub-clause is in standard form the Committee draws it to the attention of Senators in that by removing the privilege against self incrimination it may be considered to trespass unduly on personal rights and liberties.

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

D9/86

INTELLIGENCE AND SECURITY (CONSEQUENTIAL AMENDMENTS) BILL 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Attorney-General.

The Bill provides for an amendment to the Crimes Act 1914 and for the amendment of other Acts consequential upon the provisions of the ASIO Amendment Bill 1986 and the Inspector-General of Intelligence and Security Bill 1986.

The Committee has no comments on this Bill.

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

TAXATION BOARDS OF REVIEW (TRANSFER OF JURISDICTION) BILL 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Treasurer.

The Bill will, with minor departures, implement the recommendations of the Administrative Review Council in its Report entitled Review of Taxation Decisions By Boards of Review (Report No.17, 6 June 1983). The Bill will, with effect from 1 July 1986, abolish the Taxation Boards of Review and transfer the present jurisdiction to the Administrative Appeals Tribunal.

The Committee has no comments on this Bill.

D9/86

TAXATION LAWS AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Treasurer.

The Bill will amend the Income Tax Assessment Act 1936 to give effect to two major proposals announced in December 1984, namely -

- . to tax each year the income accruing to resident taxpayers from discounted, deferred interest and capital indexed securities issued after 16 December 1984; and
- . to strengthen the application of the interest withholding tax provisions in relation to such securities held by non-residents and other non-traditional financing arrangements.

The Committee draws the attention of Senators to the following clause of the Bill:

Sub-clause 30(4) - Retrospectivity

Sub-clause 30(4) would give the amendment made by clause 16, introducing a new Division 16E in Part III of the Income Tax Assessment Act 1936, retrospective effect to 17 December 1984, apparently the day after the relevant proposal to change the law was announced. The Explanatory Memorandum further records that some modifications to the original proposal to change the law were announced on 20 December 1985.

The Committee has now drawn attention on a number of occasions to clauses making changes to the law retrospective to the date of their announcement, usually at a press conference or by way of a press release: see, for example, its comments on sub-clause

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D9/86

34(6) of the Taxation Laws Amendment Bill (No.2) 1985 in its Thirteenth Report of 1985 and on clause 25 of the Taxation Laws Amendment Bill 1986 in its Eighth Report of 1986. The Committee's criticism of such provisions is that the retrospectivity involved carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. This criticism is especially pertinent in the present case since there have apparently been two relevant announcements, the second modifying the first, even though the relevant legislation is to be retrospective to the day following the first announcement. The Committee questions how persons may be expected to know the content of a law when the terms of that law are not publicly available but may only be ascertained from a reading of Ministerial announcements and when the Minister himself makes a further announcement modifying the terms of the original announcement.

The Committee draws sub-clause 30(4) to the attention of Senators in that the retrospectivity involved may be considered to trespass unduly on personal rights and liberties.

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

TAXATION LAWS AMENDMENT (FOREIGN TAX CREDITS) BILL 1986

This Bill was introduced into the House of Representatives on 22 May 1986 by the Treasurer.

The Bill will give effect to the proposal announced in the September 1985 Tax Reform statement to replace the present double taxation relief provisions of the Income Tax Assessment Amendment Act 1936 with a general foreign tax credit system.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 24 - New section 160AFF - Inappropriate delegation of legislative power

Clause 24 would insert a new Division 18 in Part III of the Income Tax Assessment Act 1936. New section 160AFF would enable the terms of the foreign tax credits system to be introduced by that Division to be modified by regulations in relation to income derived from sources in a particular foreign country. In so permitting the terms of the Act to be modified by delegated legislation the clause may be characterised as a 'Henry VIII' clause. Further, new sub-section 160AFF(4) would permit regulations made under the section to modify the legislation with retrospective effect.

The Explanatory Memorandum indicates that such provision for modification of the tax credits system is considered necessary because many developing countries offer tax incentives for foreign investors and the tax credits system would effectively cancel out these incentives for Australian investors in the absence of 'tax sparing' provisions of the sort contemplated by new section 160AFF. While the aim is laudable the Committee questions whether issues of such importance should be dealt with by delegated legislation. Accordingly the Committee draws new

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sub-section 160AFP to the attention of Senators in that it may be considered to constitute an inappropriate delegation of legislative power.

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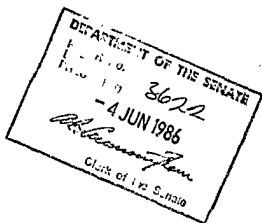
D9/86

WORLD HERITAGE PROPERTIES CONSERVATION AMENDMENT BILL 1986

This Bill was introduced into the Senate on 7 May 1986 by Senator Macklin.

The purpose of the Bill is to amend the World Heritage Properties Conservation Act 1983 to make more effectual provision for proper protection and conservation of property to which that Act applies.

The Committee has no comments on this Bill.



SCRUTINY OF BILLS ALERT DIGEST

NO. 10 OF 1986

4 JUNE 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power;
or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bills:

Aboriginal Land Grant (Jervis Bay Territory) Bill 1986

Environment Protection (Sea Dumping) Amendment Bill 1986

Hazardous Goods Bill 1986

Income Tax Assessment Amendment
(Research and Development) Bill 1986

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

ABORIGINAL LAND GRANT (JERVIS BAY TERRITORY) BILL 1986

This Bill was introduced into the House of Representatives on 29 May 1986 by the Minister for Aboriginal Affairs.

The purpose of the Bill is to provide for the grant of inalienable freehold title to the Wreck Bay Aboriginal Community over an area of some 403 hectares in the Jervis Bay Territory. The Wreck Bay Aboriginal Community is an established community comprising mainly descendants of the Jervis Bay and other tribes who once inhabited the general area. The land concerned at one time was gazetted as an Aboriginal reserve and administered by arrangement with the New South Wales Aborigines Protection Board. The land has always been regarded as a distinct Aboriginal area separate from other land in the Jervis Bay Territory.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 9 - Lack of parliamentary scrutiny or review

Clause 9 would permit the Minister, by notice in writing published in the Gazette, to declare that vacant Crown land in the Jervis Bay Territory shall become Aboriginal Land vested in the Wreck Bay Aboriginal Community Council if the Minister is satisfied that the land is of significance to Aborigines who are members of the Community and that it would be appropriate to grant the land to the Council. There is no provision for such a declaration to be subject to parliamentary scrutiny nor is the Minister's decision to be reviewable on its merits by a body such as the Administrative Appeals Tribunal. While it would be open to a person aggrieved by a decision of the Minister to make or to refuse to make a declaration under the clause to seek review of that decision under the Administrative Decisions (Judicial Review) Act 1977, such review would be limited to the legality of the decision only: that is, it would extend to allegations

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that, for example, the Minister took into account an irrelevant consideration or acted with an ulterior motive but not to allegations that the land in question is or is not in fact of significance to the Wreck Bay Aboriginal Community.

The Committee draws the clause to the attention of Senators in that it may be considered either to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions or to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Sub-clause 17(2) - Non-reviewable decision

Sub-clause 17(2) provides that the initial Register of Members of the Wreck Bay Aboriginal Community Council is to be comprised of persons who the Department is satisfied are Aborigines who resided in the Territory on 24 May 1986 and who have attained the age of 18 years. Once again there is no review of this decision on its merits and, while the decision would be reviewable pursuant to the Administrative Decisions (Judicial Review) Act 1977, such review is limited to grounds going to the legality of the decision.

Accordingly the Committee draws sub-clause 17(2) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Sub-clause 48(1) - Lack of parliamentary scrutiny or review

Sub-clause 48(1) would permit the Minister, by notice in writing published in the Gazette, to declare a place on Aboriginal land to be a significant place (and so one entry into which by persons other than members of the Wreck Bay Aboriginal Community is prohibited) if the Minister is satisfied that the place is of special significance to members of the Community. As with clause 9 there is no provision for such a declaration to be subject to

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parliamentary scrutiny nor is there provision for a person aggrieved by a decision of the Minister making or refusing to make such a declaration to seek review of the Minister's decision on its merits.

The Committee therefore draws sub-clause 48(1) to the attention of Senators in that it may be considered either to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions or to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Sub-clause 49(1) - Non-reviewable decision

Sub-clause 49(1) empowers the Minister to declare that a place on Aboriginal Land is one to which the public shall have a right of access if the Minister is satisfied that the public had access to the place immediately before it became Aboriginal Land and that it is desirable that the public should continue to have access to the land. Once again there is no review of this decision on its merits and a person aggrieved by a decision of the Minister making or refusing to make a declaration would be limited to challenging the legality of the decision pursuant to the Administrative Decisions (Judicial Review) Act 1977.

Accordingly the Committee draws sub-clause 49(1) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

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

ENVIRONMENT PROTECTION (SEA DUMPING) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 27 May 1986 by the Acting Minister for Arts, Heritage and Environment.

The primary purpose of the Bill is to amend certain provisions of the Environment Protection (Sea Dumping) Act 1981 to prohibit the dumping at sea of radioactive material. By this amendment the existing legislation for the regulation of sea dumping will be made to reflect the Government's policy of vigorous opposition to the dumping of radioactive material at sea, and further to conform with international obligations Australia will assume under the South Pacific Nuclear Free Zone Treaty and the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 5 - Strict liability offences

Clause 5 would insert new sections 9A, 9B and 9C creating offences where radioactive material is dumped, incinerated or loaded for dumping or incineration, at sea. In each case it would appear that the owner and the person in charge of the vessel, aircraft or platform and the owner of the radioactive material in question may be liable notwithstanding that they did not cause or permit the dumping, loading or incineration and that they had no knowledge of it. Moreover it appears that they would be liable even if they had no reason to believe that the material being loaded, dumped or incinerated was radioactive.

The Committee acknowledges that the existing offences in the Principal Act are similarly constructed. Nevertheless it draws the clause to the attention of Senators in that by creating

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offences of strict liability with such heavy penalties (fines of up to \$50,000 in the case of a natural person and \$100,000 in the case of a body corporate) it may be considered to trespass unduly on personal rights and liberties.

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

HAZARDOUS GOODS BILL 1986

This Bill was introduced into the Senate on 5 May 1986 by Senator Vigor.

The purpose of this Bill is to provide for the protection of consumers from the sale of hazardous goods.

The Committee draws the attention of Senators to the following clauses of the Bill:

Paragraph 3(3)(c) - Inappropriate delegation of legislative power

Paragraph 3(3)(c) permits the content of the definition of 'hazardous goods' for the purposes of the Bill to be enlarged by regulations. As the concept of 'hazardous goods' is central to the scheme of the Bill, and in particular to the various clauses carrying heavy penal consequences, it may be suggested that the content of the concept should not be capable of being enlarged by delegated legislation.

Accordingly the Committee draws the paragraph to the attention of Senators in that it may be considered to constitute an inappropriate delegation of legislative power.

Sub-clause 17(1) - Delegation

Sub-clause 17(1) provides that the Minister may delegate all or any of the Minister's powers under the Act, other than the power of delegation, to 'a person'. Since the only powers of the Minister under the Act relate to the appointment of the Registrar and Deputy Registrars and the determination of the location of the office of the Registrar and branch offices throughout Australia this power would appear to be unnecessarily broad. If

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these powers are to be delegated at all it is suggested that they should only be delegated to senior officers of the Minister's Department.

The Committee therefore draws sub-clause 17(1) to the attention of Senators in that by imposing no limitation and giving no guidance as to the attributes of the persons to whom powers may be delegated it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Clause 24 - Non-reviewable administrative decisions

Clause 24 requires the Registrar to register goods if the Registrar is satisfied that the goods are hazardous goods. Paragraph 3(3)(b) provides that a reference to hazardous goods includes a reference to goods the supply of which is prohibited by or under an enactment of a State or Territory, being an enactment that provides for prohibiting the supply of goods likely to cause the death of, or injury to, any person.

Paragraph 36(a) provides for review on the merits by the Administrative Appeals Tribunal of decisions of the Registrar registering goods as hazardous goods. While this would enable the Tribunal to examine whether the supply of particular goods is in fact prohibited under a relevant State or Territory enactment it would not enable the review on the merits of the decision by the State or Territory authorities to prohibit the supply of the goods concerned. However doubtful this decision may have been, the Registrar, once satisfied that the supply of goods of a particular kind is prohibited in any State or Territory, would be required to register those goods and the Tribunal would not be able to go behind the initial decision to examine it on its merits.

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

Accordingly the Committee draws clause 24 to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Clause 30 - Seizure of goods

Clause 30 provides for the seizure of goods by an officer of police where a person or corporation has been charged with an offence against the Act in relation to the goods or where the officer has reasonable grounds for believing that such an offence has been committed in relation to the goods. Clauses 32 and 33 set out a procedure for the owner or the person who had the possession, custody or control of the goods to request the return of the goods provided that the person gives security to keep the goods safely and to produce them in court whenever necessary. Clause 35 provides for the forfeiture by order of a court of goods in respect of which an offence has been committed.

The Bill is silent, however, on the length of time for which goods which have been seized under clause 30 may be retained if proceedings are not instituted for an offence against the Act in respect of the goods or if such proceedings are instituted but do not result in a conviction or an order for the forfeiture of the goods (compare sub-sections 69(2), 71(2) and 71(4) of the Wildlife Protection (Regulation of Exports and Imports) Act 1982). In the absence of any provision dealing with this matter it would appear that goods seized under clause 30 could be retained indefinitely and that the owner of the goods would be forced to bring a civil action for their return. Accordingly the Committee draws clause 30 to the attention of Senators in that by failing to impose limits on the retention of seized goods it may be considered to trespass unduly on personal rights and liberties.

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

Clause 34 - Destruction of goods

Clause 34 provides that goods which have been seized under clause 30 may be destroyed 'where the Commissioner of Police or a Deputy Commissioner of Police is satisfied that the holding at an approved place of any goods in accordance with sub-section 31(3) would be likely to involve the risk of the death of, or injury to, persons at that place'.

In the view of the Committee it would be preferable if the test were to be stated in objective terms - if the Commissioner or Deputy Commissioner were required to be satisfied 'on reasonable grounds', for example - rather than in subjective terms as presently drafted. Whereas at present a person challenging the Commissioner's decision would have to show, for example, that no reasonable person could have been so satisfied, if the test were stated in objective terms it would be sufficient to show that there were no reasonable grounds for concluding that death or injury was likely to result.

The Committee therefore draws clause 34 to the attention of Senators in that by failing to state the test for the destruction of goods in objective terms it may be considered to trespass unduly on personal rights and liberties.

INCOME TAX ASSESSMENT AMENDMENT (RESEARCH AND DEVELOPMENT) BILL
1986

This Bill was introduced into the Senate on 30 May 1986 by the Minister for Industry, Technology and Commerce.

The Bill will implement the proposal, announced on 29 May 1985, to provide an income tax deduction of up to 150% of expenditure incurred on or after 1 July 1985 and before 1 July 1991 in respect of research and development activities carried on in Australia that do not otherwise attract government assistance.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 7

General comment - Retrospectivity

Clause 7 would insert a new section 73B in the Principal Act which would provide eligible companies with a deduction from their assessable income in respect of certain expenditure on research and development incurred on or after 1 July 1985. This implements a proposal announced by way of press release on 29 May 1985.

The Committee is critical of the increasing practice whereby changes to the law, especially taxation law, are backdated to the time when the proposal to change the law was first announced, usually by way of a press release. The practice assumes that people should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. To act in this way treats the passage of the necessary retrospective legislation 'ratifying' the Minister's announcement, in this case some 12 months after the date of the original announcement, as a pure formality.

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

D10/86

The present clause differs from provisions to which the Committee has previously drawn attention on this basis in that new section 73B provides a deduction rather than imposing additional tax liabilities and the retrospectivity may thus be seen as beneficial to the eligible companies involved. However the Committee remains concerned that for almost the whole of the first financial year during which the relevant deduction may be claimed companies attempting to bring their expenditure within the terms of the Government's proposals have had only the press release of 29 May 1985 to guide them. In the view of the Committee this 12 month hiatus with all its attendant uncertainties for the companies involved tends to support the Committee's contention that reliance on retrospective legislation validating an announcement to the press of a proposal to change the law is inherently undesirable.

The Committee therefore draws the clause to the attention of Senators in that the retrospectivity involved may be considered to trespass unduly on personal rights and liberties because of the uncertainty which may have been created in the minds of companies during the twelve months which elapsed between the announcement of the proposal and the introduction of the Bill.

New sub-section 73B(12) - Non-reviewable decision

New sub-section 73B(12) provides that the Industry Research and Development Board to be established by the Industry Research and Development Bill 1986 shall register an eligible company which applies to the Board for registration and provides such information relating to the research and development activities of the company as the Board reasonably requires. The Board is, however, given a discretion as to the year or years of income in relation to which a company is registered. Pursuant to sub-section 73B(10) a deduction is not allowable under the section from the assessable income of an eligible company in a year of income unless the company is registered under sub-section (12) in relation to that year of income.

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

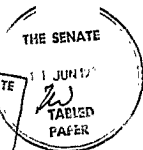
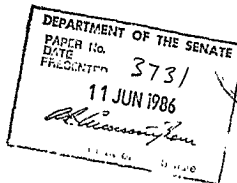
Review of the decision of the Board is limited to review as to the legality of the decision pursuant to the Administrative Decisions (Judicial Review) Act 1977. It would not extend, for example, to a review on the merits of a decision of the Board not to register a company in relation to a year of income in respect of which the company had applied for registration. Since registration is central to the entitlement to the deduction under new section 73B the Committee draws new sub-section 73B(12) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

New sub-sections 73B(34) and (35) - Non-reviewable decision

New sub-section 73B(34) provides that the Commissioner may request the Industry Research and Development Board to determine in writing whether particular activities carried on by or on behalf of a company during a year of income were research and development activities. New sub-section 73B(35) provides that a determination by the Board under sub-section (34) is binding on the Commissioner and therefore, it would appear, on any person standing in the shoes of the Commissioner for the purpose of a review on the merits of the Commissioner's assessment. Thus a decision of the Board under sub-section 73B(34) would be reviewable only as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977 and not on its merits.

Given, once again, that a decision under sub-section 73B(34) may affect the entitlement of an eligible company to a deduction under new sub-section 73B, the Committee draws the sub-section to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

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



SCRUTINY OF BILLS ALERT DIGEST

NO. 11 OF 1986

11 JUNE 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bills:

Fertilizers (Subsidy) Amendment Bill 1986

Nuclear Non-Proliferation (Safeguards) Bill 1986

Prompt Payment of Commonwealth Accounts Bill 1986

South Pacific Nuclear Free Zone Treaty Bill 1986

Telecommunications (Interception) Amendment Bill 1986

NOTE: 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.

FERTILIZERS (SUBSIDY) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 5 June 1986 by the Minister for Primary Industry.

The purpose of this Bill is to extend the operation of the nitrogenous fertilizer subsidy and the phosphate fertilizer subsidy schemes at current rates for a further three years until 30 June 1989.

The Committee has no comments on this Bill.

NUCLEAR NON-PROLIFERATION (SAFEGUARDS) BILL 1986

This Bill was introduced into the Senate on 4 June 1986 by the Minister for Resources and Energy.

The Bill gives effect to Australia's international non-proliferation obligations requiring domestic legislation. These obligations arise under the Nuclear Non-Proliferation Treaty, Australia's safeguards agreement with the International Atomic Energy Agency, Australia's bilateral nuclear safeguards agreements with other countries and Euratom, and the Physical Protection Convention (not yet ratified). The Bill also provides the legislative basis for the operation of the Australian Safeguards Office in administering Australia's safeguards system.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 4 - 'Henry VIII' clauses

Clause 4 is the definition clause of the Bill. The definitions of "Agency Agreement", "Agency Statute", "Non-Proliferation Treaty", "Physical Protection Convention" and "prescribed international agreement" each permit the variation by regulations of the terms of the Schedules of the Bill setting out these international agreements where the agreements in question are amended. The last of the five definitions also permits additional international agreements to be prescribed for the purposes of that definition. Sub-clause 4(4) permits the definition of "nuclear material" - defined by reference to the 'Agency Agreement' which in turn refers to the definitions of 'source material' and 'special fissionable material' in Article XX of the 'Agency Statute' - to be varied by the adoption by regulations of determinations by the Board of Governors of the International Atomic Energy Agency

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adding new material to the content of the definitions of 'special fissionable material' and 'source material' in Article XX of the 'Agency Statute'.

The definition of "associated item" refers to the definitions of "associated equipment", "associated material" and "associated technology". The first two of these refer to equipment or plant and material respectively included in a class of equipment or plant or material declared by the Minister to be associated equipment or associated material, as the case may be. "Associated technology" is defined as any document containing certain information applicable primarily to the design, production, operation, testing or use of nuclear weapons or information 'to which a prescribed international agreement applies and that is of a kind declared by the Minister to be information to which this definition applies'. It will be recalled that the definition of "prescribed international agreement" is itself capable of extension by regulations. Declarations made by the Minister under each of these definitions are subject to tabling and disallowance as if they were regulations.

The definitions identified above are central to the Bill. Indeed it purports to rely on giving effect to obligations under the various international agreements for part of its constitutional validity: see clause 8. It imposes controls on 'nuclear material' and 'associated items'. Because each of the definitions identified above permits the variation of the terms of the Bill, and in some cases the content of the relevant definition, by delegated legislation they may be characterised as 'Henry VIII' clauses. As such, the Committee draws the definitions to the attention of Senators in that they may be considered an inappropriate delegation of legislative power.

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

Clauses 9, 10 and 11 - 'Henry VIII' clauses

Paragraphs 9(c) and 10(b) provide that the regulations may specify nuclear material and associated items to which Part II of the Bill is not to apply. Paragraphs 9(a) and (b) and 10(a), in conjunction with sub-clauses 11(1), (3) and (7), provide that the Minister may, by declaration, exempt specified nuclear material or associated items from the application of Part II of the Bill. Sub-clauses 11(5) and (9) provide that the Minister may also vary or revoke such declarations, which are to be subject to tabling and disallowance as if they were regulations. Although the exemptions are expressed to be from the application of Part II they will affect the application of other clauses of the Bill such as the offence provisions in Part III: see, for example, paragraphs 23(1)(a) and 27(2)(a).

Because these provisions enable the application of the Bill to 'nuclear material' and 'associated items' to be varied by regulations or by Ministerial declarations they may be characterised as 'Henry VIII' clauses. As such, the Committee draws them to the attention of Senators in that they may be considered an inappropriate delegation of legislative power.

Sub-clause 22(3) - Notification of decisions

Sub-clause 22(1) provides for the notification of decisions relating to the granting or variation of permits or authorities and sub-clause 22(2) provides that such notice shall include a statement that application may be made to the Administrative Appeals Tribunal for review of the relevant decision. Sub-clause 22(3) states that a failure to comply with the requirements of sub-clauses 22(1) and (2) shall not be taken to affect the validity of a decision.

The Committee is concerned that sub-clause 22(3) provides that the failure to notify a person of a decision affecting that person should not affect the validity of the relevant decision.

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

For example, failure to notify the holder of a permit to possess nuclear materials of a decision varying the permit may have serious consequences for the permit holder. While the Committee has accepted in the past that failure to include in the notification of a decision a statement relating to rights of appeal should not affect the validity of the decision in question, it does not believe that the failure to notify persons of decisions affecting them should be treated in the same way.

Accordingly the Committee draws sub-clause 22(3) to the attention of Senators in that by providing that the failure to notify a decision in accordance with sub-clause 22(1) is not to affect the validity of that decision it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Paragraph 24(1)(b) - 'Henry VIII' clause

Clause 23 creates an offence in respect of the possession of nuclear material or an associated item without a permit. Paragraph 24(1)(b) provides an exemption from this offence if a person is in possession of the material or item solely as a carrier and 'the material or item is of a kind prescribed by the regulations' for the purposes of the provision.

In so permitting the application of an offence provision to be varied by regulations the provision may be characterised as a 'Henry VIII' clause. As such, the Committee draws the paragraph to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

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

PROMPT PAYMENT OF COMMONWEALTH ACCOUNTS BILL 1986

This Bill was introduced into the Senate on 2 June 1986 by Senator Archer.

The purpose of the Bill is to ensure the prompt payment of commercial accounts payable by the Commonwealth or by an authority of the Commonwealth.

The Bill is in the same form as the similarly titled Bill introduced into the House of Representatives by Mr W. Tuckey M.P. on 20 March 1986 (see Scrutiny of Bills Alert Digest No.5 of 1986, 9 April 1986). The Committee takes this opportunity to correct the statement in that Alert Digest that the motion for the Second Reading of this Bill was negatived in the House of Representatives on 20 March 1986. In fact only the motion for the closure of the debate was negatived and the Bill remains on the House of Representatives Notice Paper.

The Committee has no comments on this Bill.

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

SOUTH PACIFIC NUCLEAR FREE ZONE TREATY BILL 1986

This Bill was introduced into the House of Representatives on 5 June 1986 by the Minister for Foreign Affairs.

The Bill gives domestic legislative effect to certain of Australia's obligations under the South Pacific Nuclear Free Zone Treaty (also known as the Treaty of Rarotonga). This Bill is supplemented by the proposed amendments to the Environment Protection (Sea Dumping) Act 1981 relating to the dumping of radioactive waste, and the provisions of the Nuclear Non-Proliferation (Safeguards) Bill 1986, relating to the application of safeguards to nuclear material, which cover Treaty obligations referred to but not provided for in this Bill.

The Committee has no comments on this Bill.

TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 4 June 1986 by the Attorney-General.

The Bill amends the Telecommunications (Interception) Act 1979 for the following main purposes:

- . to extend the present interception powers of the Australian Federal Police under the Act (in relation to narcotics offences punishable under the Customs Act) to cover, in addition, 'serious trafficking offences' (ie. offences against Commonwealth laws involving narcotic drugs and punishable by imprisonment for life or a maximum period of 7 years or longer);
- . to make telecommunications interception powers available to State and Territory police forces in relation to 'serious trafficking offences' against State and Territory laws; and
- . to make telecommunications interception powers available to the National Crime Authority and the State Drug Crime Commission of New South Wales in relation to 'serious trafficking offences' the subject of an investigation under their respective Acts.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 4 -

New section 6C - Conclusive evidentiary certificates

Clause 4 would insert a new section 6C in similar form to the present section 25A to which the Committee drew attention in its Seventh Report of 1985. New section 6C would permit the Managing

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Director of Telecom to issue certificates setting out 'such facts as the Managing Director considers relevant with respect to acts or things done by, or in relation to, officers of the Commission for the purpose of enabling a warrant issued under section 20, 33 or 44 [authorising the interception of communications made to or from a telecommunications service] to be executed'. Such a certificate would be conclusive evidence of the matters stated in it.

Section 25A was defended in debate in the Senate on the ground that the conclusive evidence went only to formal matters and was therefore unobjectionable. However, while the Committee has been prepared to accept the tendering of prima facie evidentiary certificates as to purely formal matters in criminal proceedings, conclusive certificates are a very different thing. The former place on the defendant the burden of adducing evidence displacing the contents of the certificate while the latter remove the issues dealt with in the certificate from the scrutiny of the court in their entirety.

The Committee therefore draws new section 6C to the attention of Senators in that by so removing the facts stated in the certificate from the scrutiny of the court in criminal proceedings it may be considered to trespass unduly on personal rights and liberties.

New sub-section 7AB(7) - Waiver of non-compliance with warrant

New sub-section 7AB(7) would permit the Attorney-General to waive non-compliance with the procedures for the granting of a warrant at the request of the Director-General of Security and to approve the admission of evidence obtained by the interception of telecommunications purportedly in compliance with a warrant granted under section 11A but in fact in contravention of the prohibition in sub-section 7(1) of the Act. The provision contrasts with the power to waive similar non-compliance in the grant of warrants to the Australian Federal Police in new

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sub-section 7AB(3) in that this latter power is conferred on the courts and restricted to the waiver of insubstantial defects or irregularities.

As the power to grant warrants under section 11A is vested in the Attorney-General it appears that the Attorney-General might be waiving his own non-compliance with the provisions of that section. Moreover the failure to restrict the ambit of the waiver to insubstantial defects or irregularities would appear to have the effect that, even if the Attorney-General could not have been satisfied at the time of granting the warrant that the collection of intelligence relating to a particular matter was important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs (the test set out in paragraph 11A(1)(b)), the Attorney-General may nevertheless approve the admission in evidence of information obtained in purported reliance on the relevant warrant.

The Committee therefore draws the new sub-section to the attention of Senators in that, by permitting the requirements for the grant of a warrant in section 11A to be evaded, it may be considered to trespass unduly on personal rights and liberties.

Clause 18 - New sub-section 43(1) - Lack of parliamentary scrutiny

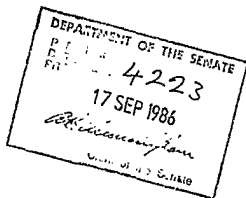
Clause 18 would insert a new sub-section 43(1) which would permit the Minister, by notice in the Gazette, to extend telephone-tapping powers to the State police forces. New sub-section 43(2) requires the Minister to be satisfied of certain matters before so extending those powers. While the Minister's decision to extend powers would be amenable to challenge pursuant to the Administrative Decisions (Judicial Review) Act 1977, it is difficult to think of a person who would have standing to challenge such a decision. A private citizen who merely feared that his telephone might be tapped would not have. Nor is the Minister's decision to be subject to parliamentary

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scrutiny by way of tabling and disallowance of the Minister's declaration in the Gazette as it would be, for example, if the extension of telephone-tapping powers were to be required to be accomplished by regulations.

Accordingly the Committee draws the new sub-section to the attention of Senators in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

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



SCRUTINY OF BILLS ALERT DIGEST

NO. 12 OF 1986

17 SEPTEMBER 1986

ISSN 0729-6851



SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bills:

Advisory Council for Inter-government Relations Repeal Bill
1986

Appropriation Bill (No.1) 1986-87

Appropriation Bill (No.2) 1986-87

Appropriation (Parliamentary Departments) Bill 1986-87

Australian Capital Territory Effective Self-Government Bill
1986

Australian Institute of Multicultural Affairs Repeal Bill
1986

Australian Land Transport (Financial Assistance) Amendment
Bill 1986

Australian National University Amendment Bill 1986

Australian Reinsurance Market Bill 1986

Canberra College of Advanced Education Amendment Bill 1986

Customs Tariff Amendment Bill (No.2) 1986

Freedom of Information Laws Amendment Bill 1986

Income Tax Bill 1986

Income Tax Rates Bill 1986

Loans Bill 1986

Maritime College Amendment Bill 1986

Medicare Levy Bill 1986

Overseas Students Charge Amendment Bill 1986

Overseas Students Charge Collection Amendment Bill 1986

Parliamentary Commission of Inquiry (Repeal) Bill 1986

Remuneration and Allowances Alteration Bill 1986

Sales Tax Acts Amendment Bill 1986

Sales Tax (Exemptions and Classifications) Amendment Bill
1986

Sales Tax Laws Amendment Bill 1986

Social Security Amendment (Reciprocity with Italy) Bill 1986

States Grants (Tertiary Education Assistance) Amendment Bill
(No.2) 1986

Taxation Laws (Miscellaneous Provisions) Bill 1986

NOTE: 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.

ADVISORY COUNCIL FOR INTER-GOVERNMENT RELATIONS REPEAL BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Assisting the Prime Minister.

The purpose of the Bill is to repeal the Advisory Council for Inter-government Relations Act 1976, and so abolish the ACIR.

The Committee has no comments on this Bill.

APPROPRIATION BILL (NO.1) 1986-87

This Bill was introduced into the House of Representatives on 19 August 1986 by the Treasurer.

The purpose of the Bill is to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of Government provided for in the 1986-87 Budget.

The Committee has no comments on this Bill.

APPROPRIATION BILL (NO.2) 1986-87

This Bill was introduced into the House of Representatives on 19 August 1986 by the Treasurer.

The purpose of the Bill is to appropriate money from the Consolidated Revenue Fund for expenditure on various goods and services, for making advances and loans, and grants to the States and the Northern Territory.

The Committee has no comments on this Bill.

APPROPRIATION (PARLIAMENTARY DEPARTMENTS) BILL 1986-87

This Bill was introduced into the House of Representatives on 19 August 1986 by the Treasurer.

The purpose of the Bill is to appropriate sums from the Consolidated Revenue Fund for the purposes of the Parliamentary Departments during the 1985-86 financial year.

The Committee has no comments on this Bill.

AUSTRALIAN CAPITAL TERRITORY EFFECTIVE SELF-GOVERNMENT BILL 1986

This Bill was introduced into the Senate on 22 August 1986 by Senator Vigor.

The Bill makes provision for the self-government of the Australian Capital Territory by the establishment of a 21-member House of Assembly elected by the Hare-Clark method of proportional representation. The Assembly will take on municipal responsibilities immediately, responsibility for health, education and land planning and development in 1990 and the remainder of Territorial functions in 1992. The Bill proposes a guarantee of Commonwealth funding to the Territory at a level no less than that determined by the Commonwealth Grants Commission to be fair and equitable.

Sub-clauses 5(2) and 78(1) and paragraph 79(1)(b) of this Bill are in the same form as sub-clauses 6(2) and 77(1) and paragraph 78(1)(b) of the Australian Capital Territory Council Bill 1986 to which the Committee drew attention in its Sixth Report of 1986 (and see now the response of the Minister for Territories in the Twelfth Report of 1986). The Committee also draws the attention of Senators to the following clause of the Bill:

Clause 51 - Trespass on personal rights and liberties

Clause 51 provides that all laws in force in the Territory at the commencement of the Act (other than Commonwealth Acts) are to cease to have effect 5 years after that date. While the intention of the provision is that the existing law of the Territory should be reviewed and replaced within that period, if this intention is not fulfilled the Territory may, at the expiration of 5 years, be suddenly deprived of a large part of its legislation (including, for example, Magna Carta).

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

The Committee suggests that it is unsatisfactory for the Parliament to be asked, in effect, to repeal a large number of laws without knowing what these laws are. Such a course may also place in jeopardy rights and liberties which the citizens of the Territory have enjoyed in the past under such laws. Accordingly the Committee draws clause 51 to the attention of Senators in that it may be considered, by its arbitrary effect, to trespass unduly on personal rights and liberties.

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

AUSTRALIAN INSTITUTE OF MULTICULTURAL AFFAIRS REPEAL BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister for Immigration and Ethnic Affairs.

The purpose of the Bill is to repeal the Australian Institute of Multicultural Affairs Act 1979 and the Australian Institute of Multicultural Affairs Amendment Act 1985, thereby abolishing the Australian Institute of Multicultural Affairs.

The Committee has no comments on this Bill.

AUSTRALIAN LAND TRANSPORT (FINANCIAL ASSISTANCE) AMENDMENT BILL
1986

This Bill was introduced into the House of Representatives on 20 August 1986 by the Minister for Transport.

The purpose of the Bill is to amend the Australian Land Transport (Financial Assistance) Act 1985 to give effect to announcements made by the Government on 12 June 1986. It reduces the rate of duty and excise on petrol and diesel at which payments are to be made to the Australian Land Transport Program Trust Fund.

The Committee has no comments on this Bill.

AUSTRALIAN NATIONAL UNIVERSITY AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Representing the Minister for Education.

The purpose of this Bill is to amend the Australian National University Act 1946 to require the University to impose the higher education administration charge announced in the Budget.

The Committee has no comments on this Bill.

AUSTRALIAN REINSURANCE MARKET BILL 1986

This Bill was introduced into the Senate on 13 June 1986 by Senator Vigor.

The purpose of the Bill is to establish an Australian Reinsurance Authority to carry on the business of reinsurance in Australia.

The Committee has no comments on this Bill.

CANBERRA COLLEGE OF ADVANCED EDUCATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Representing the Minister for Education.

The purpose of this Bill is to amend the Canberra College of Advanced Education Act 1967 to require the College to impose the higher education administration charge announced in the Budget.

The Committee has no comments on this Bill.

CUSTOMS TARIFF AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Assisting the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to remove the 2% revenue duty applicable to imports from general tariff sources under item 71.07 in Schedule 3 to the Customs Tariff Act 1982. This item covers gold, including platinum-plated gold, unwrought or semi-manufactured.

The Committee has no comments on this Bill.

FREEDOM OF INFORMATION LAWS AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Attorney-General.

The purpose of the Bill is to amend the Freedom of Information Act 1982 and the Freedom of Information (Charges) Regulations to reduce administrative costs and increase revenues. The main amendments are:

- . to introduce application fees for requests for access to documents and for internal review of decisions;
- . to increase the hourly charge for search and retrieval of documents;
- . to introduce an hourly charge for decision-making time;
- . to exempt persons seeking personal income maintenance documents from all charges and fees;
- . to maintain after 1 December 1986 the present 45 day time limit for processing requests;
- . to strengthen provisions for refusal of requests on workload grounds;
- . to reduce the grounds for remission of charges; and
- . to reduce the obligations on agencies to publish s.8 and s.9 statements and to report statistics.

The Committee draws the attention of Senators to the following clause of the Bill:

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

Clause 11 - Retrospectivity; lack of administrative review

Clause 11 would amend section 24 of the Principal Act to expand the class of requests which may be refused on the grounds that to satisfy the request would substantially divert the resources of the agency involved. The class of requests is to be known as 'multi-document requests', defined in new sub-section 24(1A) to mean, inter alia, a request that is one of a series of related requests. By virtue of paragraph 24(1A)(b) a request may be taken to be one of a series of related requests if it is one of a number made by the same person or by persons whom the agency or Minister to whom the request is made believes on reasonable grounds to be acting in concert.

The Committee is concerned that these amendments may have retrospective effect in that requests made prior to the commencement of the Act may be grouped with requests made after that date to form a 'multi-document request' and so to be refused. Given that section 11 of the Act provides that, subject to the Act, every person has a legally enforceable right to obtain access to documents in accordance with the Act, it appears to the Committee that the refusal of requests made prior to the commencement of the amendments on this basis may be considered to infringe an existing statutory right. Accordingly the Committee draws new paragraph 24(1A)(b) to the attention of Senators in that, by reason of its potential retrospective effect, it may be considered to trespass unduly on personal rights and liberties.

Although a decision to refuse to grant access to a document is subject to review by the Administrative Appeals Tribunal, the Committee is also concerned that such review may not extend to a decision under paragraph 24(1A)(b) that a request is one of a series of related requests and so a 'multi-document request' for the purposes of sub-section 24(1). While it may be argued that the decision that the request is a 'multi-document request' is an essential step in the decision to refuse to grant access it may

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be desirable that this aspect of the operation of the rights of review under the legislation should be clarified. Accordingly the Committee also draws new paragraph 24(1A)(b) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

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

INCOME TAX BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Assisting the Treasurer.

The Bill will -

- . formally impose tax payable for the 1986-87 financial year by individuals, and by trustees generally, at the rates to be declared by the Income Tax Rates Act 1986;
- . formally impose tax payable for the 1986-87 financial year by companies and registered organizations, and by trustees of prescribed unit trusts, superannuation funds and certain other trusts, at the rates to be declared by the Income Tax Rates Act 1986;
- . formally impose provisional tax for the 1986-87 year of income; and
- . authorise the collection of instalments of tax payable by companies and prescribed unit trusts on income of the 1986-87 year of income.

The Committee has no comments on this Bill.

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

INCOME TAX RATES BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Assisting the Treasurer.

This Bill will:

- . declare the rates of tax payable by individuals, and by trustees generally, for the 1986-87 financial year and for the 1987-88 and subsequent financial years to give effect to the September 1985 Taxation Reform announcement, as modified by the 1986-87 Budget, to reform the personal income tax rate scale;
- . declare new rates of tax payable by individuals, and by trustees, on the unearned income of minors above \$35,000 for 1986-87;
- . give effect to the September 1985 Tax Reform announcement to allow the tax-free threshold only on a pro-rata basis to certain taxpayers; and
- . declare the rates of tax payable for the 1986-87 financial year by companies and registered organizations and by trustees of prescribed unit trusts, superannuation funds and certain other trusts.

The Committee has no comments on this Bill.

LOANS BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Representing the Minister for Finance.

The purpose of the Bill is to make provision for the financing of the prospective Budget deficit in 1986-87 and subsequent years together with the associated prospective deficits in the Consolidated Revenue Fund.

The Committee has no comments on this Bill.

MARITIME COLLEGE AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Representing the Minister for Education.

The purpose of the Bill is to amend the Maritime College Act 1978 to require the College to impose the higher education administration charge announced in the Budget.

The Committee has no comments on this Bill.

MEDICARE LEVY BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Assisting the Treasurer.

The purpose of the Bill is to declare the basic rate of Medicare levy for 1986-87 and, until the Parliament otherwise provides, for 1987-88.

The Committee has no comments on this Bill.

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

OVERSEAS STUDENTS CHARGE AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Representing the Minister for Education.

The purpose of the Bill is to amend the Overseas Students Charge Act 1979 to: -

- . extend charge liability to diplomatic and consular representatives, their staff and dependants, undertaking tertiary studies;
- . impose charges on overseas students who enrol in Government and private secondary schools;
- . impose charges on overseas students who undertake courses at technical and further education institutions (TAFEs) and all other TAFE level institutions for which Commonwealth funding is received; and
- . fix the charge rates for the 1987 academic year.

The Committee draws the attention of Senators to the following clause of the Bill:

Paragraph 4(d) - Lack of parliamentary scrutiny

Paragraph 4(d) inserts a new definition of a technical and further education institution as a technical and further education institution within the meaning of the Commonwealth Tertiary Education Commission Act 1977 or -

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

'(b) an institution declared by the Minister in writing to be a technical and further education institution for the purposes of this Act;'

Declaration of such an institution will result in overseas students undertaking courses at the institution becoming liable to pay an annual charge of up to \$740 a year. There is no provision for parliamentary scrutiny of such declarations by the Minister as there would be, for example, if the declarations were required to be made by regulations, subject to tabling and potential disallowance. The Committee notes that declarations of courses as university or advanced education courses under section 4A of the Act for the purposes of paragraph (d) of the definition of such courses are required to be made by regulations.

Accordingly the Committee draws paragraph 4(d) to the attention of Senators in that paragraph (b) of the new definition of a 'technical and further education institution' may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

OVERSEAS STUDENTS CHARGE COLLECTION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Representing the Minister for Education.

The purpose of the Bill is to amend the Overseas Students Charge Collection Act 1979 to: -

- . insert in the Principal Act those categories of students exempt from the charge;
- . restrict the application of the provision for the discharge of liability to the charge.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 3 - Non-reviewable decisions

Clause 3 inserts a new section 4A dealing with exemptions from payment of the overseas students charge. Paragraph 4A(1)(e) provides that a student in respect of whom an officer of the Department of Immigration and Ethnic Affairs authorised by the Minister for Education for the purpose has issued a certificate stating that the student is a refugee or stateless person is exempt. Paragraph 4A(1)(j) provides that a student who undertakes a course for which the institution at which the course is undertaken charges a fee the amount of which is, in the opinion of the Minister, greater than or equal to the whole of the cost of the course is likewise exempt.

In neither case is the decision of the Departmental officer or the Minister subject to review otherwise than as to its legality pursuant to the Administrative Decisions (Judicial Review) Act

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

1977. Accordingly the Committee draws new paragraphs 4A(1)(e) and (j) to the attention of Senators in that they may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

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

PARLIAMENTARY COMMISSION OF INQUIRY (REPEAL) BILL 1986

This Bill was introduced into the House of Representatives on 20 August 1986 by the Attorney-General.

The purpose of the Bill is to provide for the repeal of the Parliamentary Commission of Inquiry Act 1986. The Bill will also make consequential and savings provisions, in particular providing for the custody, care and confidentiality of documents in the possession of the Commission immediately before the commencement of the repealing Act and making it an offence to publish allegations relating to Mr Justice Murphy derived from the Commission's work.

The Committee has no comments on this Bill.

REMUNERATION AND ALLOWANCES ALTERATION BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Special Minister of State.

The purpose of the Bill is to amend the relevant Remuneration Tribunal determinations to disallow the 11.7% catch-up salary increase for parliamentarians retrospective to 1 July 1986. To the extent necessary, the legislation implements other aspects of the Tribunal's Review. In particular it amends the Judicial and Statutory Officers (Remuneration and Allowances) Act 1984 to give effect to the Tribunal's recommendations with regard to the salaries and allowances of judges and the President and members of the Inter-State Commission.

The Committee has no comments on this Bill.

SALES TAX ACTS AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Assisting the Treasurer.

The purpose of the Bill is to amend relevant Sales Tax Rates Acts to remove references to the Sixth Schedule to the Sales Tax (Exemptions and Classifications) Act 1935, to be repealed by the Sales Tax (Exemptions and Classifications) Bill 1986.

The Committee has no comments on this Bill.

SALES TAX (EXEMPTIONS AND CLASSIFICATIONS) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Assisting the Treasurer.

The purpose of the Bill is to amend the Sales Tax (Exemptions and Classifications) Act 1935 -

- . to increase from 10% to 20% the rate of sales tax on alcoholic wine and cider and other similar alcoholic beverages;
- . to tax at the 10% rate presently exempt non-alcoholic beverages;
- . to increase from 20% to 30% the rate of sales tax on motor cars and station wagons (including four wheel drive vehicles) with wholesale prices (for sales tax purposes) above \$19,892; and
- . to correct, in association with the Sales Tax Laws Amendment Bill 1986, a range of anomalies and inconsistencies that presently exist in the sales tax law.

The Committee has no comments on this Bill.

SALES TAX LAWS AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Assisting the Treasurer.

The purpose of the Bill is to amend the Sales Tax Assessment Acts (Nos.1-9) 1930, the Sales Tax Assessment Act (No.10) 1985 and the Sales Tax Regulations -

- . to treat as "manufacture" for sales tax purposes the copying of sounds, visual images or computer programs onto goods, e.g., tapes, discs, etc.;
- . to ensure that the taxable sale value of goods containing sounds, visual images or computer software includes both the value of the goods and any consideration payable in relation to a right to use the sounds, visual images or computer software;
- . to treat the construction of the container or shell of an in-ground swimming pool constructed in situ as the manufacture and sale of goods for sales tax purposes;
- . to treat as "manufacture" for sales tax purposes the processing of exposed film to produce film negatives, transparencies or film strips; and
- . to exempt from sales tax goods imported into Australia on a temporary basis (for less than 12 months) for use in connection with an America's Cup yacht race held in Australia or the bicentennial celebrations.

The Committee has no comments on this Bill.

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

SOCIAL SECURITY AMENDMENT (RECIPROCITY WITH ITALY) BILL 1986

This Bill was introduced into the House of Representatives on 20 August 1986 by the Minister for Social Security.

The purpose of the Bill is to provide for the implementation of the reciprocal agreement on social security signed with Italy on 23 April this year. The Bill will also effect minor amendments to the Social Security Act 1947 to ensure that the agreement meshes with the Act.

The Committee has no comments on this Bill.

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STATES GRANTS (TERTIARY EDUCATION ASSISTANCE) AMENDMENT BILL
(NO.2) 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Representing the Minister for Education.

The purpose of the Bill is to amend the States Grants (Tertiary Education Assistance) Act 1984 to require institutions which receive Commonwealth funds for higher education places to impose the higher education administration charge announced in the Budget.

The Committee draws the attention of Senators to the following clause of the Bill:

Paragraph 3(c) - Lack of parliamentary scrutiny

Paragraph 3(c) inserts in section 3 a definition of 'relevant enrolment', paragraph (d) of which excludes from the definition the enrolment of a person who is in receipt of a pension, benefit or allowance from the Commonwealth, being a person included in a class of persons specified by the Minister for the purposes of the paragraph by notice in writing published in the Gazette. The States and the Northern Territory are required to ensure that relevant institutions impose the new \$250 administration charge in respect of each 'relevant enrolment' and the exclusion in paragraph (d) is also incorporated by reference in the Australian National University Amendment Bill 1986, the Canberra College of Advanced Education Amendment Bill 1986 and the Maritime College Amendment Bill 1986 which deal with the imposition of the new administration charge by those institutions.

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

Notices specifying classes of persons to be excluded under paragraph (d) are not subject to tabling and disallowance as they would be, for example, if the Minister were required to specify the classes of persons excluded in regulations. The Committee therefore draws paragraph (d) of the definition of 'relevant enrolment' to the attention of Senators in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

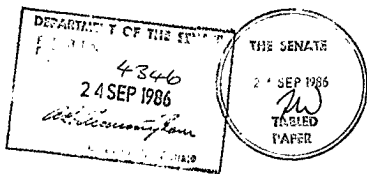
Any Senator who wishes to draw matters to the attention of the Committee under its Terms of Reference is invited to do so.

TAXATION LAWS (MISCELLANEOUS PROVISIONS) BILL 1986

This Bill was introduced into the House of Representatives on 19 August 1986 by the Minister Assisting the Treasurer.

The purpose of the Bill is to amend various Acts to make a number of changes to rates of tax and rebates of tax mainly as a consequence of the changes proposed to the personal rates of tax by the Income Tax Rates Bill 1986.

The Committee has no comments on this Bill.



SCRUTINY OF BILLS ALERT DIGEST

NO. 13 OF 1986

24 SEPTEMBER 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bills:

Bank Account Debits Tax Amendment Bill 1986

Customs Amendment (Prohibition of the Exportation of Uranium to France) Bill 1986

Customs and Excise Legislation Amendment Bill (No.2) 1986

Health Legislation Amendment Bill (No.2) 1986

Science and Industry Research Legislation Amendment Bill 1986

Superannuation and Other Benefits Legislation Amendment Bill 1986

Taxation Laws Amendment Bill (No.3) 1986

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BANK ACCOUNT DEBITS TAX AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 September 1986 by the Minister Assisting the Treasurer.

The purpose of the Bill is to increase the rates of tax on debits made to cheque accounts kept with banks outside the Australian Capital Territory (1986-87 Budget announcement).

The Committee has no comments on this Bill.

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

CUSTOMS AMENDMENT (PROHIBITION OF THE EXPORTATION OF URANIUM TO FRANCE) BILL 1986

This Bill was introduced into the Senate on 17 September 1986 by Senator Sanders.

The purpose of the Bill is to amend the Customs Act 1901 to give effect to the policy whereby Australia will refuse to allow the supply of Australian uranium to France until France ceases testing nuclear weapons in the South Pacific region.

The Committee has no comments on this Bill.

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CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 17 September 1986 by the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to amend the Excise Act 1901 to give effect to the Government's decision to introduce revised excise rebate arrangements on exports and domestic free market sales of Bass Strait crude oil, and to effect various technical amendments to both the Customs Act 1901 and the Excise Act 1901.

The Committee has no comments on this Bill.

HEALTH LEGISLATION AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 17 September 1986 by the Minister for Health.

The purpose of the Bill is to:

1. Amend the Health Insurance Act 1973 to:
 - (a) increase the maximum gap payment between the Medicare rebate and the schedule of fees from \$10 to \$20; and
 - (b) provide for the deregulation of Commonwealth controls over private hospitals and the abolition of bed day payments to private hospitals.
2. Amend the National Health Act 1953 to:
 - (a) abolish the present Isolated Patients' Travel and Accommodation Assistance Scheme; and
 - (b) provide for new arrangements under the Pharmaceutical Benefits Scheme.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clauses 41 and 42 - Ill-defined administrative powers

Clauses 41 and 42 insert new sections 23DA and 23EA respectively in the Therapeutic Goods Act 1966. The new sections provide that the Secretary to the Department of Health 'may', by notice in writing, require a manufacturing corporation to give notice in writing to the Secretary of each batch of a biological product produced or to be produced in Australia by the corporation and to furnish samples of such batches of biological products

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respectively. 'Biological products' are goods for therapeutic use produced from organisms or the tissue or body fluids of organisms (including vaccines).

Although the new sections are both cast in the form of a discretion conferred on the Secretary, neither sets out any criteria for the exercise of the power and no provision has been made for review of the exercise of the discretion by the Administrative Appeals Tribunal. This raises two questions. First, is it intended that all manufacturing corporations will be required to furnish information and samples in accordance with the new sections (in which case the new sections might be better cast in a form which does not leave the Secretary a discretion in making requirements)? Secondly, if it is intended that some, but not all, manufacturing corporations will be required to furnish information and samples, on what basis is this discretion to be exercised?

The latter question could be of importance in two ways. A corporation which is required to furnish information and samples may consider the requirement onerous and may be justifiably dismayed if it discovers that similar requirements are not being imposed on its competitors. Equally, a consumer group which discovers that a particular corporation is not being required to furnish samples of its biological products to the Secretary for testing may consider that the Department of Health is shirking its responsibilities. In either case, in the absence of provision for review by the Administrative Appeals Tribunal or criteria for the exercise of the discretion it would be difficult to challenge the Secretary's use of the power conferred by the two new sections.

Accordingly the Committee draws clauses 41 and 42 to the attention of Senators in that they may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

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

SCIENCE AND INDUSTRY RESEARCH LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 September 1986 by the Minister for Science.

The purpose of the Bill is to amend the Science and Industry Research Act 1949 and Science and Industry Endowment Act 1926. The Bill will implement the Government's response to recommendations contained in the Australian Science and Technology Council report on Future Directions for the Commonwealth Scientific and Industrial Research Organization.

The Bill provides for the Organization's primary function to be applicatio: oriented research in support of major industry sectors an selected areas of community interest, with a commitment to the effective transfer of its results to users. The Bill also extends the Organization's functions to include encouraging the application of the results of scientific research whenever conducted and making the Organization's facilities and services available to other bodies or persons.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 10 -

News section 10J - Delegation

Clause 10 adds a new Part IIA to the Science and Industry Research Act 1949 dealing with the Chief Executive of the Commonwealth Scientific and Industrial Research Organisation. New section 10J in that Part provides that the Chief Executive may delegate to a person or a committee of persons all or any of the Chief Executive's powers under the Act or the regulations other than the power of delegation.

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The Committee has been critical of such provisions which permit the unrestricted delegation of administrative powers by imposing no limitations, and giving no guidance, as to the powers which may be delegated or the persons to whom a delegation may be made (see Chapter 4 of the Committee's Annual Report 1985-86). There would appear to be no reason in the present case why the scope of the power of delegation should not be restricted to members of the Board of the Organisation and officers of the Organisation. The Committee therefore draws new section 10J to the attention of Senators in that by so permitting the unrestricted delegation of administrative powers it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

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

SUPERANNUATION AND OTHER BENEFITS LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 17 September 1986 by the Minister Representing the Minister for Finance.

The purpose of the Bill is to amend the Defence Force Retirement and Death Benefits Act 1973, the Defence Forces Retirement Benefits Act 1948, the Superannuation Act 1922, the Superannuation Act 1976 and the Papua New Guinea (Staffing Assistance) (Superannuation) Regulations to discount the increases that applied in July 1986 to pensions payable under that legislation.

Pensions payable under that legislation are increased in July each year in accordance with the relevant provisions of the legislation. Generally, the increase is based on the increase during the 12 months to the previous March quarter in the weighted average of the Consumer Price Index for the 6 State capital cities first published by the Australian Statistician. Pensions payable on 30 June 1986 were increased in July 1986 on the basis of the 9.2% increase in the Consumer Price Index between the March quarter 1985 and the March quarter 1986.

The Bill provides for the rates of all pensions payable under the legislation referred to above which were subject to the July 1986 increase to be reduced, from and including 10 October 1986, to the rate that would have applied had the increase in the Consumer Price Index been 7.2% instead of 9.2%.

The Committee has no comments on this Bill.

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

TAXATION LAWS AMENDMENT BILL (NO.3) 1986

This Bill was introduced into the House of Representatives on 17 September 1986 by the Minister Assisting the Treasurer.

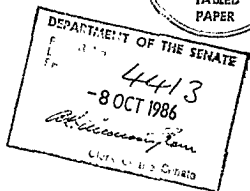
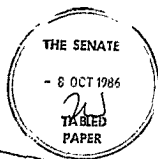
The purpose of the Bill is to amend the income tax law to give effect to several of the taxation measures announced in the 1986-87 Budget.

In that regard, it will vary in some respects the trading stock valuation arrangements relevant to horse breeders, restore the income tax exemption of the pay of Defence Force Reservists and provide income tax deductions for certain gifts.

Other amendments contained in the Bill will authorise deductions in respect of cash bids for off-shore petroleum exploration permits, provide a more generous basis for the offsetting of profit on the disposal of animals under the brucellosis and tuberculosis eradication campaign and effect changes to the withholding tax on interest on overseas borrowings.

The Committee has no comments on this Bill.

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



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NO. 14 OF 1986

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 - (iv) inappropriately delegate legislative power; or
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The Committee has considered the following Bills:

Affirmative Action (Equal Employment Opportunity for Women)
Amendment Bill 1986

Banking Legislation Amendment Bill 1986

Independent and Multicultural Broadcasting Corporation Bill
1986

Independent and Multicultural Broadcasting Corporation
(Transitional Provisions and Consequential Amendments) Bill
1986

Standing Appropriations Abolition Bill 1986

States (Works and Housing) Assistance Amendment Bill 1986

Taxation Administration Amendment (Recovery of Tax Debts)
Bill 1986

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to the attention of the Committee under its Terms
of Reference is invited to do so.

AFFIRMATIVE ACTION (EQUAL EMPLOYMENT OPPORTUNITY FOR WOMEN)
AMENDMENT BILL 1986

This Bill was introduced into the Senate on 25 September 1986 by Senator Powell.

The purpose of the Bill is to amend the Affirmative Action (Equal Employment Opportunity for Women) Act 1986 -

- . to bring forward to 1 December 1986 the date on which employers (other than higher education institutions) who participated in the Affirmative Action Pilot Program are required to commence the development of affirmative action programs;
- . to add to the functions of the Director of Affirmative Action the promotion of the development of special programs to meet the needs of women of Aboriginal descent, women from non-English-speaking backgrounds and disabled women; and
- . to require the Director of Affirmative Action to name in reports to the Parliament employers who, without reasonable excuse, fail to lodge reports, provide information or meet forward estimates made in the employer's affirmative action program.

The Bill would also tighten reporting requirements and would address a concern raised by the Scrutiny of Bills Committee in relation to the original Bill.

The Committee has no comments on this Bill.

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

BANKING LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 24 September 1986 by the Minister Assisting the Treasurer.

The principal purpose of the Bill is to amend the Reserve Bank Act 1959 and the Banking Act 1959 to provide for the winding up of the activities of the Rural Credits Department of the Reserve Bank and, when its operations have ceased, to allow for the termination of the Department.

The Committee has no comments on this Bill.

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

INDEPENDENT AND MULTICULTURAL BROADCASTING CORPORATION BILL 1986

This Bill was introduced into the Senate on 24 September 1986 by Senator Vigor.

The purpose of the Bill and the related Independent and Multicultural Broadcasting Corporation (Transitional Provisions and Consequential Amendments) Bill 1986 is to establish a solid and sympathetic legislative framework for the SBS to guarantee the continuance of its work in developing a strong, independent, multicultural broadcasting service in Australia. The two Bills should be considered cognately, since this Bill establishes the Independent and Multicultural Broadcasting Corporation (IMBC), while the related Bill provides the legislative means for handing over SBS functions to the new IMBC.

The Committee has no comments on this Bill.

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

INDEPENDENT AND MULTICULTURAL BROADCASTING CORPORATION
(TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1986

This Bill was introduced into the Senate on 24 September 1986 by Senator Vigor.

The purpose of the Bill is to enact certain transitional provisions and make certain amendments in consequence of the enactment of the Independent and Multicultural Broadcasting Corporation Act 1986.

The Committee has no comments on this Bill.

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

STANDING APPROPRIATIONS ABOLITION BILL 1986

This Bill was introduced into the Senate on 24 September 1986 by Senator Vigor.

The Bill would have the effect of abolishing all existing standing or special appropriations and requiring that the money required for the operation of all Acts be appropriated annually by the Parliament.

The Committee has no comments on this Bill.

STATES (WORKS AND HOUSING) ASSISTANCE AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 24 September 1986 by the Minister Assisting the Treasurer.

The main purpose of the Bill is to obtain the approval of Parliament for the amendment of the States (Works and Housing) Assistance Act 1985, in accordance with the new arrangements agreed at the 13 June 1986 Loan Council Meeting, for:

- . the payment in 1986-87 of interest free capital grants to the States of \$429,426,000 as part of the 1986-87 State Governments' Loan Council programs; and
- . the payment in 1986-87 of amounts States may nominate from their Loan Council programs (and the Northern Territory from its equivalent general purpose capital advances) as being for the purpose of public housing and payable under the concessional loan terms and conditions of the Commonwealth State Housing Agreement.

The Committee has no comments on this Bill.

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

TAXATION ADMINISTRATION AMENDMENT (RECOVERY OF TAX DEBTS) BILL
1986

This Bill was introduced into the House of Representatives on 24 September 1986 by the Minister Assisting the Treasurer.

The purpose of the Bill is to amend the Taxation Administration Act 1953 to modify, in relation to the recovery of unpaid tax, any application of the law of a State or Territory dealing with the limitation of actions to recover debts.

The modification of State and Territory limitation laws will enable an action for the recovery of a taxation debt to be commenced within the appropriate period specified in the relevant limitation law measured not from the due date of the debt, but from the date on which all proceedings arising out of the lodgment of an objection disputing the debt are finalised. In so modifying State and Territory limitation laws, the Bill overcomes the decision of the Queensland Full Supreme Court in Deputy Commissioner of Taxation v Moorebank Pty Ltd.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 3 - New section 14ZKA - Retrospectivity

New paragraph 14ZKA (2)(a) provides that, if a State or Territory statute of limitations applies to an action by the Commissioner of Taxation for the recovery of a taxation debt (a matter which the Commonwealth does not concede), the relevant limitation period shall run from the conclusion of the determination of any objection lodged against the assessment or the decision of the Commissioner rather than from the time at which the assessment or decision was initially made. New paragraph 14ZKA(2)(b) provides that tax debts payable under provisions imposing additional tax for the making of false or misleading statements, the late

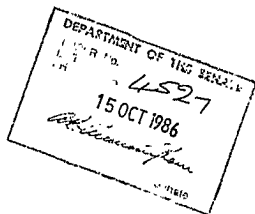
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lodgment of returns or for participation in tax avoidance schemes shall be taken to be ordinary debts rather than penalties, thus attracting a longer limitation period than would otherwise apply (assuming, once again, that State or Territory statutes of limitations apply, a point which the Commonwealth does not concede). The new provisions will apply to all causes of action, whether accruing before or after the commencement of the new section 142KA, other than those which, before the introduction of the Bill into Parliament, had been determined on the basis of the application of a State or Territory statute of limitations.

As is explained in the Second Reading speech, the view has previously been held that taxation debts (whether in the nature of penalties or otherwise) may, by virtue of Crown prerogative, be recovered at any time. In Deputy Commissioner of Taxation v Moorebank Pty Ltd, however, the Full Court of the Supreme Court of Queensland held that the relevant limitation periods applicable under State or Territory statutes of limitations applied to actions for the recovery of taxation debts. The Commissioner of Taxation has sought special leave to appeal this decision to the High Court but, in the meanwhile, it has been considered necessary to introduce this Bill to prevent the revenue from being endangered by a failure to recover outstanding taxation debts. In other words the retrospectivity involved is fully intended and the new section may trespass on person's rights to the extent that taxation debts which would otherwise be barred from recovery - supposing the decision in DCT v Moorebank Pty Ltd to be upheld by the High Court - may now be able to be recovered.

Accordingly the Committee draws new section 142KA to the attention of Senators in that by reason of its retrospective effect it may be considered to trespass unduly on personal rights and liberties.

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NO. 15 OF 1986

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MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
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or
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The Committee has considered the following Bills:

Home Deposit Assistance Amendment Bill 1986

Parliamentary Privileges Bill 1986

Plant Variety Rights Bill 1986

Protection of the Sea Legislation Amendment Bill 1986

Social Security and Veterans' Affairs (Miscellaneous Amendments) Bill 1986

Standing (Federal and Territory Jurisdiction) Bill 1986

Student Assistance Amendment Bill 1986

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HOME DEPOSIT ASSISTANCE AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 8 October 1986 by the Minister for Housing and Construction.

The Bill amends the Home Deposit Assistance Act 1982 -

- (1) to set a final date of 31 December 1986 for lodgement of an application under the Home Deposit Assistance Act 1982; and
- (2) to require that the Minister report to Parliament on the administration of the Act in respect of the 1986/87 financial year.

The Committee has no comments on this Bill.

PARLIAMENTARY PRIVILEGES BILL 1986

This Bill was introduced into the Senate on 7 October 1986 by the President of the Senate, Senator the Hon. D. McClelland.

The main purpose of the Bill is to overcome the consequences of the narrow interpretation of Article 9 of the Bill of Rights, 1688, dealing with the freedom of speech in Parliament, contained in the judgments of Mr Justice Cantor and Mr Justice Hunt in the successive trials of Mr Justice Murphy before the N.S.W. Supreme Court. The Bill would also make a number of changes to the law arising out of the Final Report of the Joint Select Committee on Parliamentary Privilege (Parliamentary Paper No.219/1984).

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 7 - Lack of definition of offences

Clause 7 sets out to codify the power of a House to impose a penalty by way of a fine or imprisonment where it determines that a person has committed an offence against that House. At the same time, however, clause 5 leaves the powers, privileges and immunities of each House undefined. Thus in determining whether an offence against a House has been committed the House concerned may determine not only whether, as a matter of fact, acts constituting such an offence have been committed, but also whether, as a matter of law, such acts in fact constitute an offence. The Committee does not challenge the established right of each House to be prosecutor, judge and jury in its own cause where offences against a House are concerned. It does however raise the issue of the lack of definition of such offences and the resultant uncertainty which this creates in the criminal law.

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

The Committee recognises that in so codifying the power to punish for offences by way of fines or imprisonment while leaving those offences undefined the Bill is in accordance with the views of the Joint Select Committee on Parliamentary Privilege (see its Final Report, Parliamentary Paper No.219/1984, at paragraphs 6.1 to 6.10). That Committee adopted the statement of the House of Commons Select Committee on Parliamentary Privilege in 1967 that:

'The very definition of "contempt" which [your Committee] have proposed for the future guidance of the House clearly indicates that new forms of obstruction, new functions and new duties may all contribute to new forms of contempt. They are convinced therefore that the House ought not to attempt by codification to inhibit its powers.'

The Joint Select Committee drew an analogy with the power of superior courts to punish for contempt. However, as that Committee noted, the lack of definition of what constitutes contempt of court and the consequent latitude afforded individual judges has been the subject of considerable criticism. Contempt of court has been given some statutory definition in the United Kingdom by the Contempt of Court Act 1981 but not to the extent recommended by the Phillimore Committee. Similar proposals have been made by the Canadian Law Reform Commission and the question is, of course, under consideration by the Australian Law Reform Commission.

The Committee raised this same issue in relation to Mr Spender's Parliament (Powers, Privileges and Immunities) Bill 1985 (see its Alert Digest No.7 of 1985) and in relation to Senator Macklin's Parliamentary Powers, Privileges and Immunities Bill 1985 (see its Twelfth Report of 1985). In response to these comments both Mr Spender and Senator Macklin stressed that their Bills did not propose any alteration to the law in respect of offences against the Houses. They merely set out to make certain worthwhile reforms to the power of the Houses to imprison and to place

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beyond doubt the powers of the Houses to impose fines. In addition Senator Macklin observed that many common law and statutory offences, such as attempting to pervert the course of justice, give no guidance as to the acts covered by such offences. This is true only in the sense that neither the common law nor statute law set out to provide exhaustive definitions of all the factual situations which may come within the ambit of an offence. The law does not attempt, for example, an exhaustive catalogue of all the ways in which the offence of murder may be committed. The content of the offence itself is certain, however, and it would not be open to a court, for example, to find as a matter of fact that a person has committed an unlawful killing but to convict that person of attempting to pervert the course of justice. It is this which distinguishes the function of a court in determining whether the specific fact situation before it constitutes a particular offence as a matter of law and the function of a House of the Parliament in determining whether specific acts constitute an offence against that House since, as the Joint Select Committee recognised, the House in question 'is the ultimate arbiter of what constitutes contempt and is bound neither by the courts nor by precedent'.

The Committee recognises the force of the argument that the Houses must always have the power to deal with new forms of contempt as they arise. However it is concerned that the lack of any authoritative statement of the content of offences against the House leaves the law in a state of uncertainty. The Committee believes that it is a principle of fundamental importance that the criminal law should be certain. Accordingly the Committee draws clause 7 to the attention of Senators in that by codifying the power to punish for offences against a House by way of fines or imprisonment while leaving those offences undefined it may be considered to trespass unduly on personal rights and liberties.

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

PLANT VARIETY RIGHTS BILL 1986

This Bill was introduced into the House of Representatives on 8 October 1986 by the Minister for Primary Industry.

The purpose of the Bill is to establish a national scheme which would allow plant breeders to apply for a grant of proprietary rights over any new variety which they may develop.

The Bill is based on the following principles:

- . Participation of breeders is to be voluntary.
- . The grant of a right would only be given where a new variety can be clearly distinguished by one or more important characteristics from any other known plant variety.
- . All plant species are to be potentially eligible for inclusion in the scheme but species or genera to which the scheme is to apply at any time are to be declared by regulation after receipt by the Minister of advice from a broad based Advisory Committee.
- . Ownership rights are to include the right to collect royalties including those from other persons who grow and sell protected varieties under licence, for commercial purposes.
- . Nothing in the Bill will prevent the retention of seed of protected varieties for sowing of crops or sale for human and animal consumption. Protected varieties will also be freely available for research purposes and to plant breeders for use in breeding programmes.

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

- . Protection of a right, once granted, will be the responsibility of the owner of the new variety, through the normal legal process.

- . Appeals against decisions of the registration authority will be able to be made to the Administrative Appeals Tribunal.

The Committee draws the attention of Senators to the following clause of the Bill:

Sub-clause 34(1) - Insufficiently defined administrative powers

Sub-clause 34(1) provides that the Minister may impose on a grant of plant variety rights conditions restricting the assignment of those rights, conditions requiring, or relating to, the licensing of persons to sell, or produce for sale, plants, or reproductive material of plants, of that variety or other conditions if 'the Minister considers it necessary, in the public interest'. A decision by the Minister to impose conditions under this sub-clause is to be subject to review by the Administrative Appeals Tribunal: see paragraph 53(1)(m). However if the Minister decides on a case by case basis what is or is not in the public interest it may be difficult to challenge his or her opinion. If, on the other hand, the Minister develops guidelines for the exercise of this discretion - guidelines to which the A.A.T. may also refer in reviewing the initial decision - there would seem to be no good reason why such guidelines should not be set out in the legislation as criteria for the exercise of the discretion.

The Committee's fundamental concern is that what is in the public interest is, in essence, a matter for the Parliament to determine. It should not, in a scheme of legislation such as that under consideration, abdicate its responsibility in this regard to a judicial or quasi-judicial body like the A.A.T. simply because it is unable itself to arrive at any clear conception of the meaning of 'the public interest' in this context. Consideration must have been given in the development of this

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legislation to the way in which the discretion in sub-clause 34(1) would be administered in practice and it should not therefore be impossible to specify appropriate criteria even if provision is made for further criteria to be prescribed or for the Minister to have regard to other matters if the Minister considers them to be relevant.

The Committee is aware that there are precedents for the grant of very broad discretions to Ministers which are reviewable by the A.A.T. It is also aware, however, that the Tribunal has been critical of the failure by bodies upon which such discretions have been conferred to develop more detailed criteria to guide them in the exercise of their discretion. It suggests that similar criticism may apply to the Parliament if it has resort in this case to a criterion as vague as 'the public interest'. Accordingly the Committee draws sub-clause 34(1) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

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

PROTECTION OF THE SEA LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 8 October 1986 by the Minister for Transport.

The purpose of the Bill is to amend four Commonwealth Acts to facilitate the implementation of a number of anti-pollution incentives which have been incorporated in international conventions. Those Acts are the Navigation Act 1912, the Protection of the Sea (Civil Liability) Act 1981, the Protection of the Sea (Shipping Levy Collection) Act 1981 and the Protection of the Sea (Prevention of Pollution from Ships) Act 1983.

In addition, the Bill contains amendments to penalties provided for in the Navigation Act 1912 and the Protection of the Sea (Prevention of Pollution from Ships) Act 1983. The amendments form part of a general review of penalties contained in Commonwealth legislation.

General comment

The Committee notes that new sub-section 267ZQ(5), to be inserted in the Navigation Act 1912 by clause 11, and new sub-sections 26B(4) and (6), 26AB(7), 26D(10) and 26F(12), to be inserted in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 by clauses 25, 26 and 28, all impose the persuasive onus of proof on defendants in criminal proceedings. Ordinarily the Committee would draw such clauses reversing the persuasive onus of proof to the attention of Senators in that they might be considered to trespass unduly on personal rights and liberties. However the Committee accepted in its Sixteenth Report of 1985 in relation to sub-sections 11(2) and (4) and 22(2) and (4) of the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (which were inserted in that Act by the Statute Law (Miscellaneous Provisions) Act (No.1) 1985) that the reversal of the persuasive onus of proof was necessary in this legislation

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for Australia to comply with its obligations under the International Convention for the Prevention of Pollution from Ships, 1973 (the MARPOL Convention). For the same reason the Committee accepts that the reversals of the persuasive onus of proof noted above are appropriate in light of the need to ensure Australia's compliance with the MARPOL Convention.

However the Committee draws the attention of Senators to the following clauses of the Bill:

Clause 11 - New sub-section 267ZM(3) - 'Henry VIII' clause

Clause 11 would insert new Divisions 12B and 12C in Part IV of the Navigation Act 1912. New section 267ZM in Division 12C creates offences where the master or the owner of an Australian ship to which the Division applies takes the ship to sea or permits the ship to be taken to sea if a sewage certificate is not in force in respect of the ship. New sub-section 267ZM(3) provides, however, that the regulations may exempt ships included in a prescribed class of ships from the application of these offences, either absolutely or subject to conditions.

As the new sub-section would permit the application of the offences in section 267ZM to be varied by regulations, it may be characterised as a 'Henry VIII' clause and, as such, the Committee draws it to the attention of Senators in that it may be considered to constitute an inappropriate delegation of legislative power.

Clause 25 - New sub-section 26B(10) - Strict liability

Clause 25 would insert a new Part IIIA in the Protection of the Sea (Prevention of Pollution from Ships) Act 1983. New sub-section 26B(10) in that Part would create an offence where a person notifying or reporting an incident involving the discharge of harmful substances makes a statement that is false or misleading in a material particular. The sub-section departs from

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the normal form of such provisions in Commonwealth legislation in that it does not require that the statement be false or misleading to the knowledge of the person making it. In so doing it creates an offence of strict liability: that is, a person may be convicted of the offence even though he or she lacked any guilty intent.

The Committee recognises that the new sub-section does not differ in this respect from the existing sub-sections 11(9) and 22(10) of the Act on which the Committee did not comment in its Alert Digest No.2 of 1983. Nevertheless it draws the new sub-section to the attention of Senators in that by creating an offence of strict liability it may be considered to trespass unduly on personal rights and liberties.

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SOCIAL SECURITY AND VETERANS' AFFAIRS (MISCELLANEOUS AMENDMENTS)
BILL 1986

This Bill was introduced into the House of Representatives on 10 October 1986 by the Minister for Social Security.

The Bill amends the Social Security Act 1947 and the Veterans' Entitlements Act 1986 to implement decisions made in the Budget affecting pensions and benefits payable under those Acts including the deferral for six weeks of the indexation increases in those pensions and benefits. The Bill will also defer from 1 November 1986 to 1 July 1987 the changes contained in the Social Security (Poverty Traps Reduction) Act 1985 and will correct various errors and omissions in the Veterans' Entitlements Act 1986.

The Committee draws the attention of Senators to the following clauses of the Bill:

Paragraph 34(d) and clause 35 -
New sub-sections 107(6) and 108(1C) - Lack of parliamentary scrutiny

Paragraph 34(d) and clause 35 would insert new sub-sections 107(6) and 108(1C) respectively in the Social Security Act 1947. The new sub-sections provide that where, on or after 1 November 1986, the Secretary is satisfied that a person who is included in a class of persons specified by the Minister by notice in writing published in the Gazette may reasonably be expected to fulfil, or has fulfilled, the requirements of the preceding provisions of the respective sections (relating to qualifications to receive unemployment and sickness benefits respectively) in respect of a period, the person is to be qualified to receive unemployment benefit or sickness benefit, as

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the case requires, in respect of that period. Such a person will be able to be paid in advance for the relevant period, rather than in arrears, as is customary.

The Explanatory Memorandum indicates that one class of persons which the Minister might specify by notice under new sub-section 107(6) would be 'suitable persons over 55 years of age who have been in receipt of an income security payment for at least one year'. The Committee is concerned, however, that no provision has been made for parliamentary scrutiny of notices published by the Minister under either of the two new sub-sections. Such notices clearly have legislative effect and, prima facie, should be subject to tabling and disallowance as if they were regulations. Accordingly the Committee draws the new sub-sections to the attention of Senators in that they may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 62 - Lack of parliamentary scrutiny

Clause 62 would insert a new sub-section 5(13) in the Veterans' Entitlements Act 1986 which would empower the Minister, by notice in writing in the Gazette, to determine that the Act, or specified provisions of the Act, apply to and in relation to a person, or a person included in a class of persons, as if -

- (a) the person was, while rendering service of a kind specified in the notice, a member of the Defence Force who was rendering continuous full-time service;
- (b) the person, being a member of the Defence Force, was, while rendering service of a kind specified in the notice, rendering continuous full-time service; or
- (c) the person was, while rendering service of a kind specified in the notice, a member of a specified unit of the Defence Force.

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The new sub-section would thus enable the Minister by determination to extend the ambit of the Act to cover persons who would not otherwise be eligible to receive pensions, benefits and allowances and treatment under the Act.

The Committee is concerned, once again, that no provision has been made for parliamentary scrutiny by way of tabling and potential disallowance of notices published by the Minister under the new sub-section. The Committee therefore draws the clause to the attention of Senators in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

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

STANDING (FEDERAL AND TERRITORY JURISDICTION) BILL 1986

This Bill was introduced into the Senate on 8 October 1986 by Senator Vigor.

The Bill is based on the Draft Standing (Federal and Territory Jurisdiction) Bill 1985 in Appendix A of the Law Reform Commission Report No.27 on "Standing in Public Interest Litigation". Its purpose is two-fold:

- . to give people and organisations the ability to resolve issues of public interest by legal means through widening the standing rules that presently apply in 'public interest litigation'; and
- . to improve the accountability of the government and of law enforcement agencies by allowing private prosecution of indictable offences when the public prosecution has not been followed through, subject always to the right of the Attorney-General, the Director of Public Prosecutions and Special Prosecutors to take prosecutions over and terminate them.

The Committee has no comments on this Bill.

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

STUDENT ASSISTANCE AMENDMENT BILL 1986

This Bill was introduced into the Senate on 8 October 1986 by the Minister for Education.

The Bill amends the Student Assistance Act 1973 to provide for the granting of assistance to students in secondary education.

The Principal Act and its regulations currently cover the granting of assistance to tertiary and postgraduate students only, under the Tertiary Education Assistance Scheme (TEAS) and the Postgraduate Awards Scheme (PGA). The Bill will not affect PGA but will allow the introduction of a single scheme of assistance covering both secondary and tertiary students. This new scheme, to be known as AUSTUDY, will replace TEAS, the Adult Secondary Education Assistance Scheme (ASEAS) and the Secondary Allowances Scheme (SAS). ASEAS and SAS are not currently covered by legislation.

The Committee draws the attention of Senators to the following clauses of the Bill:

Paragraphs 4(a), (c) and (e) - 'Henry VIII' clauses

Paragraphs 4(a), (c) and (e) insert new definitions of 'education institution', 'secondary school' and 'university' in section 5 of the Principal Act. The term 'education institution' is defined to include any educational institution or any other institution, authority or body in Australia that, under the regulations, is to be treated as an education institution for the purposes of the Act. The terms 'secondary school' and 'university' are similarly defined to mean secondary schools and universities respectively that, under the regulations, are to be treated as secondary schools or universities for the purposes of the Act. Education

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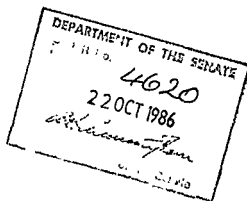
assistance is only available to persons undertaking a course of study or instruction at an education institution (which includes a university and a secondary school).

By so leaving the content of definitions which are central to the Bill to be filled in by regulations the relevant paragraphs may be characterised as 'Henry VIII' clauses. The Committee is aware that in this respect the new definitions do not differ from the existing definitions in the Act. Nevertheless it draws the paragraphs to the attention of Senators in that the new definitions may be considered to constitute an inappropriate delegation of legislative power.

Clause 5 - New section 10 - 'Henry VIII' clause

Clause 5 would insert a new Part III in the Principal Act relating to Education Assistance. New section 10 in that part would provide that such assistance is only available to a person undertaking a course, or part of a course, which the Minister has determined in writing to be a secondary or tertiary course for the purposes of the section. Once again, because it leaves the entire effect of the statutory provision to be determined by the Minister, the new section may be characterised as a 'Henry VIII' clause although, as before, the Committee recognises that in this respect it does not differ from the previous scheme of the Act. The Committee draws the new section to the attention of Senators in that, as a 'Henry VIII' clause, it may be considered to constitute an inappropriate delegation of legislative power.

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



SCRUTINY OF BILLS ALERT DIGEST

NO. 16 OF 1986

22 OCTOBER 1986

ISSN 0729-6851



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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bills:

Australian Capital Territory Stamp Duty Amendment Bill 1986
Australian Capital Territory Tax (Transfers of Marketable Securities) Bill 1986
Australian Protective Service Bill 1986
Excise Tariff Amendment Bill (No.2) 1986
International Financial Institutions (Share Increase) Bill 1986
Nursing Homes and Hostels Legislation Amendment Bill 1986
Sales Tax (Exemptions and Classifications) Amendment Bill (No.2) 1986
Statute Law (Miscellaneous Provisions) Bill (No.2) 1986
Taxation Laws Amendment Bill (No.4) 1986

NOTE: 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 STAMP DUTY AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Assisting the Treasurer.

The Bill will amend the stamp duty law applicable in the Australian Capital Territory (including Jervis Bay) -

- . to increase, for conveyances of real property interests, the marginal rate of duty on the value of the property, or on any consideration for the conveyance, that exceeds \$100,000;
- . to impose duty on grants of leases of land by the Commonwealth;
- . to include, in the value for stamp duty purposes of conveyances of residential property, the value of chattels conveyed with the property; and
- . to align the rate of duty on the non-rent component of consideration for leases of land with the rate of duty on the rent component.

The Committee has no comments on this Bill.

ny 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 TAX (TRANSFERS OF MARKETABLE SECURITIES) BILL 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Assisting the Treasurer.

The Bill will impose Australian Capital Territory tax on the registration, by a company incorporated in the ACT, of transfers of marketable securities listed on a register kept outside the ACT.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 2 - Retrospectivity

Clause 2 provides that the Act is to be deemed to have come into operation on 10 June 1986, that being, according to the Explanatory Memorandum, the date on which the proposed imposition of this new tax was announced. Certain associated provisions of the Australian Capital Territory Stamp Duty Amendment Bill 1986 and amendments to the Australian Capital Territory Taxation (Administration) Act 1969 contained in the Taxation Laws Amendment Bill (No.4) 1986 will also be retrospective to 10 June 1986.

The Committee has now criticised on a number of occasions the practice whereby changes to the law are made retrospective to the date on which they were 'announced', not to the Parliament, but presumably by way of a press release or at a press conference: see most recently its comments on the Taxation Laws Amendment Bill (No.2) 1986 in its Ninth Report of 1986 (4 June 1986). This practice carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by

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the Executive rather than in accordance with the laws made by the Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality.

Accordingly the Committee draws clause 2 to the attention of Senators in that the retrospectivity involved may be considered to trespass unduly on personal rights and liberties.

Paragraph 6(1)(a) - 'Henry VIII' clause

Paragraph 6(1)(a) provides that tax is not to be imposed on the registration of a transfer of a marketable security that is a transfer of a kind prescribed for the purposes of the paragraph. Because it enables the Executive, by regulations, to alter the incidence of the tax imposed by the Act, the paragraph may be characterised as a 'Henry VIII' clause. Although the Explanatory Memorandum indicates that the paragraph is intended to be used to provide an exemption for marketable security transfers which are subject to a broadly equivalent tax in the jurisdiction of registration, the paragraph is not so restricted in its terms.

The Committee therefore draws paragraph 6(1)(a) to the attention of Senators in that, as a 'Henry VIII' clause, it may be considered to constitute an inappropriate delegation of legislative power.

AUSTRALIAN PROTECTIVE SERVICE BILL 1986

This Bill was introduced into the House of Representatives on 16 October 1986 by the Minister for Local Government and Administrative Services.

The purpose of the Bill is to give legislative recognition to the Australian Protective Service as a body within the Public Service providing personal and property security and custodial services for and on behalf of the Commonwealth.

The Committee draws the attention of Senators to the following clause of the Bill:

Sub-clause 19(4) - Reversal of the onus of proof

Sub-clause 19(3) provides that it is to be an offence if a protective service officer does not, at all times when in uniform, wear his or her identification number on, or attached to, the front of the uniform. A penalty of a maximum fine of \$500 is provided. By virtue of sub-clause 19(4) it is to be a defence to a prosecution for an offence against sub-clause 19(3) if the defendant proves that the contravention resulted from -

- (a) an act of another person done without the consent of the defendant; or
- (b) an unintentional omission of the defendant.

In other words, once the prosecution establishes that a protective service officer was not wearing his or her identification number, the onus is cast upon the officer concerned to establish one of the defences contained in paragraph 19(4)(a) or (b) on the balance of probabilities.

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The Senate Standing Committee on Constitutional and Legal Affairs recommended in its Report, The Burden of Proof in Criminal Proceedings (Parliamentary Paper No.319/1982), that the burden of establishing a defence (the persuasive onus) should not be placed on defendants in criminal proceedings but rather that they should merely be required to bear the evidential onus, that is the onus of adducing evidence of the existence of a defence, the burden of negating which will then be borne by the prosecution. Thus in the present case the protective service officer might be required to adduce evidence of one of the defences contained in paragraph 19(4)(a) or (b) rather than being required to prove those defences on the balance of probabilities.

The Committee therefore draws sub-clause 19(4) to the attention of Senators in that by reversing the persuasive onus of proof it may be considered to trespass unduly on personal rights and liberties.

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

EXCISE TARIFF AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Assisting the Minister for Industry, Technology and Commerce.

The main purpose of the Bill is to amend the Excise Tariff Act 1921 to incorporate into that Act various Excise Tariff Proposals tabled in the House of Representatives as at 1 October 1986.

The majority of the Excise Tariff Proposals altered the duties of excise on petroleum products either as a consequence of changes in world prices of indigenous crude oil (and the effect of those prices on the Government's import parity pricing policy) or as a consequence of the increases announced in the 1986/87 Budget.

The Bill will also remove from excise control stabilized crude petroleum oil, LPG and condensate produced from the Territory of Ashmore and Cartier Islands where the Jabiru project is located.

The Committee has no comments on this Bill.

INTERNATIONAL FINANCIAL INSTITUTIONS (SHARE INCREASE) BILL 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Assisting the Treasurer.

The Bill empowers the Treasurer to make the necessary agreements on behalf of Australia to purchase:

- (a) 815 additional shares of the capital stock of the International Bank for Reconstruction and Development; and
- (b) 14,560 additional shares of the capital stock of the International Finance Corporation.

The Bill empowers the Treasurer to make these agreements on such terms and conditions as the Treasurer determines and, where appropriate, to issue securities in payment. The Bill also appropriates the funds necessary to make payments under these agreements.

The Committee has no comments on this Bill.

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

NURSING HOMES AND HOSTELS LEGISLATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Representing the Minister for Community Services.

The Bill implements Budget measures requiring amendments to nursing homes and hostels legislation administered by the Minister for Community Services, namely the Aged or Disabled Persons Homes Act 1954, the National Health Act 1953 and the Nursing Homes Assistance Act 1974. In particular the Bill would -

- . enable grants to be made up to the amount of the full capital cost of a home for aged or disabled people where the home is to be used exclusively for the accommodation of members of financially disadvantaged groups; and
- . introduce new growth control arrangements over the approval mechanisms for new nursing homes and new nursing home beds in existing nursing homes.

The Committee draws the attention of Senators to the following clauses of the Bill:

Paragraph 4(a) - Non-reviewable decision

Paragraph 4(a) substitutes a new sub-section 4(1) in the Aged or Disabled Persons Homes Act 1954 which would permit the Secretary to the Department of Community Services to make grants to eligible organisations up to the full capital cost of an approved home 'in a case where the Secretary is satisfied that the approved home is intended to be used exclusively or almost exclusively for the accommodation of financially disadvantaged persons'. No provision has been made for review on the merits of

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the exercise of this discretion conferred on the Secretary so that it could only be challenged as to its legality pursuant to the Administrative Decisions (Judicial Review) Act 1977.

The Committee recognises that this lack of review is consistent with the present structure of the Act which leaves the making of capital grants to the discretion of the Secretary. However the Committee nevertheless draws paragraph 4(a) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Paragraph 4(b) - Lack of parliamentary scrutiny

Paragraph 4(b) inserts a new sub-section 9(3) in the Aged or Disabled Persons Homes Act 1954 which defines the term 'financially disadvantaged person' for the purposes of the new paragraph 9(1) relating to capital grants to approved homes. New sub-section 9(3) would provide that the term means an aged or disabled person included in a class of persons determined by the Secretary, in writing, to be a class of financially disadvantaged persons. No provision has been made for such determinations by the Secretary to be subject to parliamentary scrutiny by way of tabling and disallowance.

Accordingly the Committee draws paragraph 4(b) to the attention of Senators in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Sub-clause 7(2) and paragraph 25(1)(a) - Lack of parliamentary scrutiny

Sub-clause 7(2) and paragraph 25(1)(a) amend the definitions of 'nursing home care' in section 4 of the National Health Act 1953 and section 3 of the Nursing Homes Assistance Act 1974 respectively with the effect that new services previously included in those definitions by way of regulations will now be

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able to be included by the publication of a Ministerial notice in the Gazette. No provision has been made for these notices to be subject to tabling and disallowance although such provision has been made in relation to notices specifying 'Government nursing homes' for the purposes of the two Acts where Ministerial notices have similarly been substituted for regulations: see clauses 22 and 38.

The Committee draws sub-clause 7(2) and paragraph 25(1)(a) to the attention of Senators in that they may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 18 - Lack of parliamentary scrutiny

Clause 18 removes from parliamentary scrutiny the qualifications which nurses on Christmas Island and the Cocos (Keeling) Islands are required to have in order to be 'registered nurses' for the purposes of the supervision and certification of domiciliary nursing care for which benefits are payable. Such qualifications, previously prescribed by regulations, are now to be determined by the Minister by notice in the Gazette.

The Committee draws clause 18 to the attention of Senators in that, once again, it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

Clause 19 and 32 - Non-reviewable decisions

Clauses 19 and 32 substitute a new sub-section 105AAB(1) in the National Health Act 1953 and a new definition of 'reviewable decision' in sub-section 11A(1) of the Nursing Homes Assistance Act 1974 respectively, withdrawing from review by the Administrative Appeals Tribunal certain decisions of the Minister relating to the approval of nursing homes. The Explanatory Memorandum justifies the withdrawal of these decisions from review on the basis that, following the proposed introduction of

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maximum bed numbers, such decisions will involve the apportionment of a limited resource among a number of claimants and are therefore inappropriate for review by the Administrative Appeals Tribunal.

The Committee recognises that it is the view of the Administrative Review Council that decisions which involve apportioning a finite resource are not appropriate for review on the merits because in assessing the merits of an individual applicant's case it would be necessary also to assess the relative merits of all successful applicants who received a portion of the limited resource (see paragraph 41 of the Council's Eighth Annual Report 1983-84). Nevertheless the Committee draws clauses 19 and 32 to the attention of Senators in that they may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions. In so doing the Committee hopes to promote a fuller consideration of this aspect of policy in relation to the review of administrative decisions at the relevant stage of debate in the Parliament.

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

SALES TAX (EXEMPTIONS AND CLASSIFICATIONS) AMENDMENT BILL (NO.2)
1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Assisting the Treasurer.

The Bill will amend the Sales Tax (Exemptions and Classifications) Act 1935 -

- (a) to remove the existing sales tax exemptions available in respect of -
 - (i) articles for the personal use of the Governor-General, the Governor of a State or a member of the family of the Governor-General or a State Governor; and
 - (ii) articles for the personal or official use of a member of the staff of the Governor-General or a State Governor; and
- (b) to make it clear that a specific taxing item or sub-item in a Schedule to the Act prevails over a general exemption item or sub-item.

The Committee has no comments on this Bill.

STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Attorney-General.

The amendments made by this Bill have a number of purposes such as the tidying up, correction or updating of legislation. Other amendments implement changes that are of minor policy significance or are of a routine administrative nature.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 3 - Delegation

Clause 3 would amend various Acts as set out in Schedule 1. In particular, that Schedule would amend paragraph 12(2)(d) of the Bankruptcy Act 1966 to enable the Inspector-General in Bankruptcy to appoint a Registrar, a Deputy Registrar 'or any other person' to conduct an inquiry or investigation on behalf of the Inspector-General. Although it is expressed as a power of appointment the power may be characterised as a power of delegation and the Committee has been critical of such powers which impose no limitation, and give no guidance, as to the attributes of the person to whom a delegation may be made.

The Committee therefore draws the amendment to paragraph 12(2)(d) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

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

TAXATION LAWS AMENDMENT BILL (NO.4) 1986

This Bill was introduced into the House of Representatives on 15 October 1986 by the Minister Assisting the Treasurer.

The Bill will amend various taxation and other laws to give effect to decisions of the Government announced in the Budget. In particular it will advance the due dates for payment of instalments of company tax by early balancing companies and introduce measures to overcome arrangements to avoid provisional tax by the manipulation of income distributions of closely-held partnerships and trust estates.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 25 - Retrospectivity

Clause 25 would insert a new section 6CA in the Income Tax Assessment Act 1936 dealing with the source of certain natural resource income derived by a non-resident. Sub-section 6CA(1) defines 'natural resource income' as income calculated, in whole or in part, by reference to the value or quantity of natural resources produced, recovered or produced and recovered in Australia after 7 April 1986. Sub-section 6CA(3) deems such income to have an Australian source and so to be subject to Australian tax. Once again the Committee observes that a change to the taxation law is being made retrospective the date of an announcement, not to the Parliament but presumably by way of a press release or press conference. As it commented in its Ninth Report of 1986 in relation to the Taxation Laws Amendment Bill (No.2) 1986 this practice carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by Parliament. Such retrospectivity might be considered justifiable if it were feared that otherwise the

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revenue would suffer a significant haemorrhage but no such justification is advanced here. Reliance on a series of 'announcements' to support retrospective legislation can only add to the very considerable problems already attendant upon the interpretation of the taxation laws because of their complexity and the many amendments which have recently been made to them as part of the Government's programme of reform.

The Committee therefore draws new section 6CA to the attention of Senators in that by reason of its retrospective effect it may be considered to trespass unduly on personal rights and liberties.

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

12 NOV 1986

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DEPARTMENT OF THE SENATE	
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SCRUTINY OF BILLS ALERT DIGEST

NO. 17 OF 1986

12 NOVEMBER 1986

ISSN 0729-6851

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bills:

- Aboriginal Land Rights (Northern Territory) Amendment Bill 1986
- Administrative Decisions (Judicial Review) Amendment Bill 1986
- Australia Card Bill 1986
- Bounty and Subsidy Legislation Amendment Bill (No.2) 1986
- Customs Tariff Amendment Bill (No.3) 1986
- Jurisdiction of Courts (Cross-vesting) Bill 1986
- Jurisdiction of Courts (Miscellaneous Amendments) Bill 1986
- Mutual Assistance in Criminal Matters Bill 1986
- Mutual Assistance in Criminal Matters (Consequential Amendments) Bill 1986
- Olympic Insignia Protection Bill 1986
- Pig Industry Bill 1986
- Pig Industry (Transitional Provisions) Bill 1986
- Pig Slaughter Levy Amendment Bill (No.2) 1986
- Privacy Bill 1986
- Privacy (Consequential Amendments) Bill 1986
- Public Service Legislation (Streamlining) Bill 1986
- States Grants (Education Assistance - Participation and Equity) Amendment Bill (No.2) 1986
- States Grants (Schools Assistance) Amendment Bill (No.2) 1986
- States Grants (Tertiary Education Assistance) Amendment Bill (No.3) 1986
- Subsidy (Cultivation Machines and Equipment) Bill 1986
- Superannuation Legislation Amendment Bill (No.2) 1986

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

ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Minister for Aboriginal Affairs.

The Bill will amend the Aboriginal Land Rights (Northern Territory) Act 1976 for various purposes, including to add to the functions, powers and duties of Land Councils, to provide a scheme for the amalgamation of Land Trust areas, and to revise the scheme for the grant of estates or interests in Aboriginal land. Other amendments would add to and vary some aspects of the functions of an Aboriginal Land Commission, further limit the categories of land which can be the subject of a traditional land claim and prevent the alienation of land which is subject to a traditional land claim.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 33 - New paragraphs 67A(1)(a) and (3)(a) - Retrospectivity

Clause 33 would insert a new section 67A. New paragraphs 67A(1)(a) and (3)(a) would invalidate any grant of an estate or interest in, and any reservation, dedication or setting aside of, an area of land purportedly effected after 28 May 1986 and prior to the commencement of the new section, where the area of land in question was the subject of a traditional land claim which had not been finally disposed of.

The Explanatory Memorandum provides no explanation for the retrospective application of this section or the selection of 29 May in particular as the date of effect. The Committee draws new paragraphs 67A(1)(a) and (3)(a) to the attention of Senators in that by reason of their retrospective effect they may be considered to trespass unduly on personal rights and liberties.

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

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Attorney-General.

The Bill amends the Administrative Decisions (Judicial Review) Act 1977 with three main purposes:

- (i) to strengthen the provisions in the Act under which the Federal Court has a discretion to refuse to grant an application for review where provision is made by another law for review of the relevant decision by a tribunal, authority or person;
- (ii) to discourage the disruption of administrative proceedings by narrowing the scope for resort to the Act during the course of those proceedings where legislative provision exists for the review of the decision complained of at the conclusion of those proceedings; and
- (iii) to make specific provision in relation to the Court's general discretion under the Act to refuse to grant an application.

The Committee has no comments on this Bill.

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

AUSTRALIA CARD BILL 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Minister for Health.

The purpose of the Bill is to create a national system of identification to facilitate the administration and operation of Commonwealth laws relating to taxation, social security, medical and hospital benefits and immigration.

The Bill provides for the operation of the national system of identification by the establishment of the Australia Card Register and the issue of an Australia Card. The Health Insurance Commission will be the administering authority for the Australia Card program.

The Committee draws the attention of Senators to the following clauses of the Bill:

Sub-clause 12(15) - Lack of parliamentary scrutiny

Sub-clause 12(15) provides that persons included in a class of persons specified by the Minister by notice in the Gazette are not to be obliged to comply with requirements made by an issuing agency with respect to the making of photographs, the provision of specimen signatures and attendance at interviews. No provision has been made for parliamentary scrutiny of such notices and they are therefore not subject to tabling and disallowance as would be the case if the classes of persons to be exempted were to be prescribed by regulations.

The Committee draws sub-clause 12(15) to the attention of Senators in that it may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

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

Sub-clause 25(6) - Availability of personal information for public access

Sub-clause 25(6) provides that the provisions of the Act, other than, inter alia, sub-sections 55(1) and (3), apply in relation to applications and requests made to the Authority and documents given to the Authority to verify the identity and eligibility of persons as if those documents formed part of the Australia Card Register. Such applications and documents will contain personal information to be included on the Register and it is therefore important that they be given the same protection with regard to unauthorised access and improper disclosure as is given to the Register itself. However sub-sections 55(1) and (3) are the provisions which exempt the Register from the application of the Freedom of Information Act 1982 and (except to the extent that the Register contains information that relates only to persons who are dead) the Archives Act 1983. It is therefore apparently intended that, subject to the exemptions specified in those Acts, access will be available to the applications and documents referred to above pursuant to those Acts even though the Register itself will be exempt.

It seems clear that the relevant applications and documents, to the extent that they contain personal information, would be exempt from disclosure under the two Acts on the ground that to make them available would involve an unreasonable disclosure of information relating to the personal affairs of a person (see section 41 of the Freedom of Information Act 1982 and paragraph 33(1)(g) of the Archives Act 1983). However the Committee raises the question why it has been chosen to rely on these exemptions, which may be uncertain in their application, rather than to include the applications and other documents in the blanket exception to be provided by sub-clauses 55(1) and (3). Such applications and other documents by their very nature can only contain personal information required to be entered on the Register, information relevant to such information or to the verification of such information and information relating to the

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identity of a person or the eligibility of a person for the issue of a Card. The Committee therefore draws sub-clause 25(6) to the attention of Senators in that by leaving open the possibility that such personal information may be made available for public access it may be considered to trespass unduly on personal rights and liberties.

Sub-clauses 121(1), 145(1) and 147(1) - Lack of limitation as to reasonableness of time or place

Sub-clauses 121(1) and 145(1) provide that a member of the Data Protection Agency or an Associate Commissioner conducting an inquiry in relation to a reviewable decision or an investigation into a complaint may require a person, by notice in writing, to furnish information and produce documents or records relevant to the inquiry or investigation 'at such place, and within such period or on such day and at such time, as are specified in the notice'. Sub-clause 147(1) provides that the Agency may, by notice in writing, require a complainant, the body about which a complaint has been made and any other person who, in the opinion of the Agency, is likely to be able to provide information relevant to the matter to which the complaint relates to attend a compulsory conference 'at a time and place specified in the notice'. Failure to comply with a notice under sub-clause 121(1) or 145(1) without reasonable excuse is an offence punishable by a fine of \$2,000 or imprisonment for 12 months or both in the case of a natural person and by a fine of \$10,000 in the case of a body corporate. Failure to attend a compulsory conference as required under sub-clause 147(1) without reasonable excuse is an offence punishable by a fine of \$1,000 or imprisonment for 6 months or both in the case of a natural person and by a fine of \$5,000 in the case of a body corporate.

In none of the three sub-clauses is it specified that the times and places at which persons may be required to attend or to furnish information or produce documents must be reasonable. As the Committee has stated previously in regard to similar

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provisions, it does not consider that the defence of reasonable excuse for non-compliance is a sufficient safeguard and it does not believe that such powers should be read as subject to an implicit requirement of reasonableness. The highest that this latter argument can be put in the Committee's view is that relief could be granted if the power were to be exercised in such a manner that no reasonable person could have exercised the power in that fashion. This is rather different from a positive stipulation in the legislation that the times and places at which persons may be required to attend should be reasonable. The Committee therefore draws sub-clauses 121(1), 145(1) and 147(1) to the attention of Senators in that by failing to contain such a stipulation they may be considered to trespass unduly on personal rights and liberties.

Clause 186 - Delegation

Sub-clause 186(1) provides that the chief executive officer of the administering Authority and the President of the Agency may each delegate to 'a person' all or any of their powers under the Act, other than the power of delegation. The Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made. Given the nature of the powers to be delegated in the present case, the Committee would think it unlikely that it would be necessary for the scope of the delegation to extend beyond the confines of the staff of the Authority and office-holders and staff of the Agency respectively.

The Committee therefore draws sub-clause 186(1) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

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

BOUNTY AND SUBSIDY LEGISLATION AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Minister Assisting the Minister for Industry, Technology and Commerce.

This Bill proposes to amend a series of Bounty and Subsidy Acts to give effect to Government decisions relating to the general 20% reduction in bounty and subsidy expenditure by means of a reduction to all bounty and subsidy rates, and amendments to the Bounty (Ships) Act 1980 to provide for a single cash-limited bounty for all eligible vessels, regardless of market destination.

The Committee has no comments on this Bill.

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

CUSTOMS TARIFF AMENDMENT BILL (NO.3) 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Minister Assisting the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to enact a range of changes to the Customs Tariff Act 1982, including adjustments to customs tariff rates applicable to imported petroleum products, removal of customs duty from certain agricultural chemicals and cultivation equipment, permitting duty free entry of certain lawnmowers imported from New Zealand and making tariff changes arising from the Government's decision on the Industries Assistance Commission Report on Electric Motors and Generating Sets.

The Committee has no comments on this Bill.

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

JURISDICTION OF COURTS (CROSS-VESTING) BILL 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Attorney-General.

The purpose of the Bill is to establish a system of cross-vesting of jurisdiction between federal, State and Territory courts.

The reasons for the proposed scheme are that litigants have occasionally experienced inconvenience and have been put to unnecessary expense as a result of uncertainties as to the jurisdictional limits of federal, State and Territory courts, particularly in the areas of trade practices and family law and the lack of power in these courts to ensure that proceedings which are instituted in different courts, but which ought to be tried together, are tried in the one court.

The primary objective of the cross-vesting scheme is to overcome these problems by vesting the federal courts with State jurisdiction and by vesting State courts with federal jurisdiction so that no action will fail in a court through lack of jurisdiction, and that as far as possible no court will have to determine the boundaries between federal, State and Territory jurisdiction.

The Committee has no comments on this Bill.

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

JURISDICTION OF COURTS (MISCELLANEOUS AMENDMENTS) BILL 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Attorney-General.

The purpose of the Bill is to make some adjustments to the jurisdiction of the courts in the hearing of matters arising under federal jurisdiction.

The Bill confers on the Federal Court of Australia civil jurisdiction in intellectual property matters, and jurisdiction to hear and determine appeals by taxpayers against decisions under Commonwealth taxation laws. The federal jurisdiction is, under existing legislation, exercisable by State and Territory Supreme Courts.

The Bill also confers on State and Territory courts federal original and appellate jurisdiction, concurrent with the Federal Court, in civil matters arising under Divisions 1 and 1A of Part V of the Trade Practices Act 1974. These Divisions relate to consumer protection.

The Committee has no comments on this Bill.

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

D17/86

MUTUAL ASSISTANCE IN CRIMINAL MATTERS BILL 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Attorney-General.

This Bill provides a legislative basis for Australia to enter into arrangements with other countries whereby it can request and grant assistance in criminal matters. The assistance relates to the investigation and prosecution of crime.

At present assistance between Australia and other countries is rendered informally through Interpol and is limited to investigations. Australia can take evidence with the aid of compulsory measures under its extradition legislation but this is done unilaterally and brings about no obligation on the other country to reciprocate.

This Bill will provide legislative authority for Australia to give effect to obligations which it will be undertaking with other countries in the area of mutual assistance. When Australia concludes arrangements with other countries those countries will be obliged under international law to render assistance at the request of Australia.

The Committee has no comments on this Bill.

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

MUTUAL ASSISTANCE IN CRIMINAL MATTERS (CONSEQUENTIAL AMENDMENTS)
BILL 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Attorney-General.

This Bill repeals the sections in the Australian extradition legislation which permit the taking of evidence at the request of a foreign country. The reason for the repeal is that the substance of those sections has been transferred to the Mutual Assistance in Criminal Matters Bill 1986. The reason for the transfer is that the taking of evidence for use in a foreign country is more appropriately dealt with in mutual assistance than in extradition legislation.

The Committee has no comments on this Bill.

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

OLYMPIC INSIGNIA PROTECTION BILL 1986

This Bill was introduced into the House of Representatives on 23 October 1986 by the Minister for Sport, Recreation and Tourism.

The purpose of the Bill is to enable the Australian Olympic Federation to regulate the use of the Olympic symbol (the five interlocking rings) and other nominated Olympic designs within Australia.

The Committee has no comments on this Bill.

D17/86

PIG INDUSTRY BILL

This Bill was introduced into the House of Representatives on 23 October 1986 by the Minister for Primary Industry.

The Bill provides the basis for the restructuring of statutory pig industry organisations. It replaces the present Pork Promotion Committee with an Australian Pork Corporation and at the same time expands the functions of the new body. The new Corporation, as well as having all the present functions of the Pork Promotion Committee, will have the additional functions of improving the production and sale of pork and pigs in Australia and encouraging, assisting and promoting the export of pork and pigs from Australia. It will consult and co-operate with other persons and organisations in connection with the industry to achieve these objectives.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 32 - Delegation

Sub-clause 32(1) provides that the proposed Australian Pork Corporation may delegate to 'a person' all or any of its powers under the Act or the regulations, other than the power of delegation. The Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made. If the powers to be conferred on the proposed Corporation are to be delegated away from that body the Committee would suggest that the persons to whom those powers are to be delegated should be specified with a reasonable degree of particularity.

The Committee therefore draws sub-clause 32(1) to the attention of Senators in that it may be considered to make rights,

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liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

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PIG INDUSTRY (TRANSITIONAL PROVISIONS) BILL 1986

This Bill was introduced into the House of Representatives on 23 October 1986 by the Minister for Primary Industry.

This Bill provides for the repeal of certain legislation and for the smooth transition from the Pork Promotion Committee to the Australian Pork Corporation. The Bill repeals the Pig Promotion Act 1975, the Pig Meat Promotion Amendment Act 1980 and the Pig Meat Legislation Amendment Act 1984.

The Committee has no comments on this Bill.

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

PIG SLAUGHTER LEVY AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 23 October 1986 by the Minister for Primary Industry.

The Bill provides for the portion of the pig slaughter levy previously collected for the Pork Promotion Committee to be collected for the Australian Pork Corporation and raises the maximum levy which can be imposed for the purposes of the Corporation from \$1 to \$1.50 per pig.

The Committee has no comments on this Bill.

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

PRIVACY BILL 1986

This Bill was introduced into the House of Representatives on 23 October 1986 by the Attorney-General.

The purpose of the Bill is to establish rules of conduct, called Information Privacy Principles (IPPs), for the collection and retention of, access to, and correction, use and disclosure of, personal information about individuals. The IPPs, which are based on a recommendation of the Australian Law Reform Commission in its Report on Privacy (ALRC Report No.22, Parliamentary Paper No.304/1983), will apply to Commonwealth departments and agencies. A breach of the IPPs will be deemed to be an 'interference with privacy'. Commonwealth agencies will be required to avoid doing things that amount to an interference with privacy, although such interferences will not give rise to any civil liability in damages or criminal penalty. An individual alleging an interference with privacy will be able to complain to the Data Protection Agency to be established by the Australia Card Bill 1986.

The Committee has no comments on this Bill.

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

PRIVACY (CONSEQUENTIAL AMENDMENTS) BILL 1986

This Bill was introduced into the House of Representatives on 23 October 1986 by the Attorney-General.

The Bill will make amendments to the Freedom of Information Act 1982 to require that, where reasonably practicable, a person whose personal affairs are dealt with in a document to which another person has sought access is to be consulted before access is granted. That first-mentioned person will be able to object to provision of access (i.e. the amendments will confer 'reverse FOI' rights on that person).

The Bill will also prevent Departments claiming exemption under the Act from disclosure of a document to a person, insofar as it deals with that person's personal affairs, merely on the ground that the document is covered by a general secrecy provision in legislation.

The Bill will further make amendments to the Ombudsman Act 1976, the Merit Protection (Australian Government Employees) Act 1984 and the Human Rights and Equal Opportunity Commission Act 1986 to require the Ombudsman, HREOC and the Merit Protection and Review Agency to refer complaints made to them to the Data Protection Agency where they conclude that the complaints are in effect complaints of interference with privacy and the Agency could better deal with them.

The Committee has no comments on this Bill.

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

PUBLIC SERVICE LEGISLATION (STREAMLINING) BILL 1986

This Bill was introduced into the House of Representatives on 23 October 1986 by the Minister Assisting the Prime Minister for Public Service Industrial Matters.

The principal purpose of this Bill is to implement the decisions that the Government has taken to streamline the Australian Public Service. The most significant amendments relate to revised redeployment and retirement arrangements, and revised provisions relating to promotions and promotion appeals. In addition, a number of other amendments are made to streamline the administration of the Service.

The Committee draws the attention of Senators to the following clauses of the Bill:

Paragraph 11(1)(a) - Delegation

Paragraph 11(1)(a) would insert in the Public Service Act 1922 new sub-sections 16(1A) and (1B) permitting a Secretary to whom the Board had delegated a power or function to sub-delegate that power or function to 'a person' who may, with the approval in writing of the Board, be a person other than an officer or employee or a statutory office-holder. In other words the Board through the agency of a Secretary may delegate its powers or functions to unspecified persons.

The Committee recognises that in this regard the new sub-sections do not differ in effect from existing sub-section 16(1) which provides that the Board may delegate all or any of its powers and functions to 'a person'. Sub-section 26(1), relating to the powers of delegation of Secretaries is in similar form. However the Committee has been critical of such unrestricted powers of delegation which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be

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made. In the present case it is clearly not the intention that the powers of the Public Service Board with respect to public service employment will be delegated to persons generally but the terms in which the legislation has been drafted would permit this.

The Committee therefore draws paragraph 11(1)(a) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

Sub-clauses 33(2) and (3) - Retrospectivity

Clause 33 would insert a new section 47 in the Public Service Act 1922 dealing with the appointment of officers to the Australian Public Service on probation. Sub-clauses 33(2) and (3) will deem the new section 47 to apply, and to have applied at all times, to persons appointed on probation before the commencement of the new section and to persons engaged as fixed-term employees pending their obtaining Australian citizenship who are now to be deemed to have been appointed on probation on a similar basis.

While the terms of the new section 47 may be considered to be advantageous to some of those persons affected by its retrospective application, the Committee is concerned that some disadvantage may be suffered by others. In particular, whereas the old section 47 did not set out the grounds on which the appointment of a person might be annulled while that person was on probation, new sub-section 47(11) sets out with some specificity the grounds upon which an appointment may now be terminated. The Committee considers that Secretaries may be more ready to exercise this power now that the criteria have been spelled out. Even in the case of persons engaged as fixed-term employees who are now to be deemed to have been appointed on probation and who may thereby be considered to have been advantaged there will be the possibility, for example, that their

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appointment may be terminated if the Secretary is satisfied that they are not seeking a grant of Australian citizenship 'with appropriate diligence'.

The Committee therefore draws sub-clauses 33(2) and (3) to the attention of Senators in that by retrospectively applying the new section 47 to persons appointed or engaged prior to its commencement the sub-clauses may, to the extent that this results in any disadvantage to those persons, be considered to trespass unduly on personal rights and liberties.

Sub-clause 50(2) - Retrospectivity

Sub-clause 50(2) provides that Subdivision C of Division 6 of Part III of the Public Service Act 1922 - dealing with disciplinary action against officers other than Secretaries of Departments - applies after the commencement of the amendments to be made by the Bill as if a reference to a charge included a reference to a charge made before the commencement of the amendments unless that charge had been finally disposed of. In other words charges still being dealt with at the time the amendments take effect are to be dealt with under the amended provisions.

Transitional provisions relating to certain of the amendments to be made to Subdivision C - for example sub-clause 55(2) which retains certain pre-existing appeal rights in respect of directions given before the commencement of sub-clause 55(1) - ameliorate this retrospective effect to some extent. However it appears that officers charged before the commencement of the amendments and whose charges have not been finally disposed of before that commencement will be significantly disadvantaged by the application of significantly higher penalties - \$500 as against \$40 - and reduced rights of appeal. Ordinarily section 45A of the Acts Interpretation Act 1901 would have the effect that any increase in a penalty would apply only to offences committed after the commencement of the provision in the amending

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Act increasing the relevant penalty. However the Committee doubts that section 45A applies here, since disciplinary charges are not strictly speaking 'offences' and the deduction of salary is not strictly speaking a 'penalty'. Moreover sub-clause 50(2) may be sufficient to displace the effect of section 45A.

The Committee therefore draws sub-clause 50(2) to the attention of Senators in that by reason of its retrospective effect it may be considered to trespass unduly on personal rights and liberties.

Clauses 111 and 114 - Trespass on personal rights

Clauses 111 and 114 amend sections 19 and 25, respectively, of the Merit Protection (Australian Government Employees) Act 1984. These sections presently provide for the reconstitution of a Disciplinary Appeal Committee or a Redeployment and Retirement Appeal Committee where, in the course of determining an appeal, one of the members of the Committee is, for any reason, unable to take part. The sections presently provide that 'with the consent of the parties' the two remaining members may constitute the Committee for the purpose of determining the appeal. Clauses 111 and 114 would substitute for this requirement the consent of the Agency only.

The proposed amendments would mark a significant departure from similar provisions in other Commonwealth legislation relating to judicial and quasi-judicial bodies which require the agreement of the parties for the 2 remaining members of a 3 person tribunal to continue the hearing of any proceeding: see for example section 23 of the Administrative Appeals Tribunal Act 1975 and sub-section 14(3) of the Federal Court of Australia Act 1976. Moreover, given that the relevant committees are both constituted on a tripartite basis - the Convenor being appointed by the Agency, one member representing the Board or the Secretary whose action is appealed against and one member representing an

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appropriate staff organisation - it would seem important that the consent of the parties should be required for any two of these members to continue to determine an appeal.

The Committee therefore draws clauses 111 and 114 to the attention of Senators in that by removing the requirement for the consent of the parties to the reconstitution of appeal committees it may be considered to trespass unduly on personal rights and liberties.

Clause 128 - Delegation

Clause 128 would insert a new section 32 in the Members of Parliament (Staff) Act 1984 enabling Ministers, parliamentary office-holders, Senators and Members to authorise some other person to exercise, on their behalf, the powers to employ officers under Parts III and IV of the Act. Although the power is not expressed as such it amounts to a power of delegation and the Committee has been critical of such powers which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made. In the present case the Committee would think it unlikely that the staffing power would be delegated beyond the personal staff of the Minister, office-holder, Senator or Member.

The Committee therefore draws clause 128 to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

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

D17/86

STATES GRANTS (EDUCATION ASSISTANCE - PARTICIPATION AND EQUITY)
AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Minister Representing the Minister for Education.

The purpose of this Bill is to amend the States Grants (Education Assistance - Participation and Equity) Act 1983 to supplement for cost increases the grants available to government and non-government education authorities in the States and the Northern Territory to conduct projects and programs under the Participation and Equity Program (PEP) in the years 1986 and 1987 and to allocate 1987 funds among the States, the Northern Territory and education sectors.

The Committee has no comments on this Bill.

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

STATES GRANTS (SCHOOLS ASSISTANCE) AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Minister Representing the Minister for Education.

The purpose of the Bill is to supplement existing financial provisions relating to the 1986, 1987 and 1988 calendar years to take into account increases in price levels, to extend annual programs to the 1987 calendar year and provide financial allocations in respect of these programs in 1987, to implement Government decisions on the operation of the Ethnic Schools Program, and to provide for an additional \$4 million in 1987 to support English language teaching under the English as a Second Language Program.

The Committee has no comments on this Bill.

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

D17/86

STATES GRANTS (TERTIARY EDUCATION ASSISTANCE) AMENDMENT BILL
(NO.3) 1986

This Bill was introduced into the House of Representatives on 22 October 1986 by the Minister Representing the Minister for Education.

The purpose of this Bill is to amend the States Grants (Tertiary Education Assistance) Act 1984 which provides grants to the States and Northern Territory for tertiary education for the 1985-87 triennium. Amongst the Bill's provisions are:

- (i) additional recurrent grants for 1986 and 1987 for higher education institutions, an additional category of recurrent grants for institutes of tertiary education, and grants for 1987 for the TAFE sector;
- (ii) adjustments, including cost increases, to the grants already provided under the 1984 Act in accordance with the Government's agreed procedures; and
- (iii) the extension of the Special Assistance for Students program to include students in advanced education courses in institutes of tertiary education, at TAFE institutions and at Northern Territory tertiary education institutions.

The Committee has no comments on this Bill.

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

SUBSIDY (CULTIVATION MACHINES AND EQUIPMENT) BILL 1986

This Bill was introduced into the Senate on 22 October 1986 by the Minister for Industry, Technology and Commerce.

This Bill proposes the introduction of new assistance arrangements for certain farm machinery, by replacing the current tariff protection with a subsidy to local producers of soil preparation and cultivation machinery and parts and a subsidy equivalent to the net Customs duty payable on such imported machines and parts, imported prior to 15 April 1986 and sold on or after that date. The Bill seeks to implement the Government's undertaking in the Rural Economic Policy Statement of 15 April 1986 that the tariffs on certain cultivation machinery would be replaced with direct assistance to local producers from that date until 31 December 1990, and gives effect, in the main, to the Industries Assistance Commission's recommendations on this industry, contained in its report of 16 June 1986.

The Committee draws the attention of Senators to the following clause of the Bill:

Sub-clause 6(1) - 'Henry VIII' clause

The subsidy payable on relevant equipment will be determined on the basis of the sales value of the equipment. Sub-clause 6(1) sets out the formula for determining the sales value being $A - (B + C)$, where A is the price charged for the equipment, B is the amount included in that price in respect of a freight charge for delivery and C is 'such cost or amount (if any) as is prescribed'. Because it permits the variation by regulations of the factor C in the formula on which the determination of the sales value of equipment and, in turn, the subsidy payable in respect of that equipment, is based, the sub-clause may be characterised as a 'Henry VIII' clause. As such, the Committee

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draws it to the attention of Senators in that it may be considered to constitute an inappropriate delegation of legislation power.

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

SUPERANNUATION LEGISLATION AMENDMENT BILL (NO.2) 1986

This Bill was introduced into the House of Representatives on 23 October 1986 by the Minister Representing the Minister for Finance.

The Bill contains provisions which will require invalidity pensioners under the Commonwealth Superannuation Scheme to report any employment. Invalidity pensions will be adjusted where annual earnings exceed a prescribed limit. In addition the Bill contains a large number of essentially technical provisions intended to update and clarify the operation of the Superannuation Acts 1922 and 1976 and to improve the administration of the scheme. In particular the Bill will amend two delegation provisions (sections 38 and 39 of the Superannuation Act 1976; see clauses 15 and 16) in accordance with an undertaking given by the Minister for Finance to this Committee (see the Committee's Twelfth Report of 1986).

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 32 - New sub-section 73A(1) -
Definition of 'prescribed maximum rate' - 'Henry VIII' clause

Clause 32 would insert a new section 73A in the Superannuation Act 1976 providing for the rate of invalidity pensions to be reduced in relation to the amount of any earnings of the pensioner. New sub-section 73A(4) would provide for pensions to be reduced at any time at which the sum of the pension rate and the personal earnings of the pensioner exceeds the 'prescribed maximum rate'. New sub-section 73A(1) defines the 'prescribed maximum rate' as an amount specified in, or ascertained in accordance with, the regulations as in force from time to time.

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Because it permits the variation by regulations of this threshold figure, the definition may be characterised as a 'Henry VIII' clause, and as such the Committee draws it to the attention of Senators in that it may be considered to constitute an inappropriate delegation of legislative power.

Clause 74 - Retrospective regulation-making powers

Clause 74 would insert new sub-sections 168(4), (5), (6), (7) and (8) enabling the making of retrospective regulations. New sub-section 168(4) would enable the making of regulations under section 14A expressed to take effect from 15 March 1981 and by virtue of sub-section 14A(3) such regulations would be able to modify the application of the Act in respect of certain classes of persons re-appointed to the Service. Similarly new sub-section 168(6) would enable the making of regulations under sub-section 126(2) retrospective to 31 March 1977 and that sub-section permits such regulations to modify the application of the Act, in this case in relation to certain teachers in the Commonwealth Teaching Service.

The Committee draws new sub-sections 168(4) and (6) to the attention of Senators in that, because they would enable the making of retrospective regulations which may have substantive effects on the rights of superannuants, the sub-clauses may be considered to constitute an inappropriate delegation of legislative power.

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



DEPARTMENT OF THE SENATE	
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SCRUTINY OF BILLS ALERT DIGEST

NO. 18 OF 1986

19 NOVEMBER 1986

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bills:

ABC/SBS Amalgamation Bill 1986

Australian Industry Development Corporation Amendment Bill
1986

Bounty (Ship Repair) Bill 1986

Broadcasting Amendment Bill 1986

Commonwealth Guarantees (Charges) Bill 1986

Disability Services Bill 1986

Disability Services (Transitional Provisions and
Consequential Amendments) Bill 1986

Fertilisers Subsidy Bill 1986

Navigation Amendment Bill 1986

Television Licence Fees Amendment Bill 1986

NOTE: 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.

ABC/SBS AMALGAMATION BILL 1986

This Bill was introduced into the House of Representatives on 12 November 1986 by the Minister for Communications.

The purpose of this Bill is to implement the Government's decision to amalgamate the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). Amongst other things it makes significant amendments to the Australian Broadcasting Corporation Act 1983 and repeals Part IIIA of the Broadcasting Act 1942 under which the SBS is constituted.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 29 - Termination of office of staff-elected Director

Clause 29 provides for members of the ABC Board, other than the Managing Director, to cease to hold office on 1 January 1987 or, in the case of the staff-elected Director, on the election of a person to that office at elections to be held by the Board as soon as practicable after 1 January 1987. In the ordinary course of affairs the Committee would not see such a provision as objectionable, since all the members of the present Board would be eligible for re-appointment. However in the present case the person currently holding office as the staff-elected Director, Mr Thomas Molomby, will, by virtue of sub-sections 4(4) and 5(4) of the Broadcasting and Television Legislation Amendment Act 1986, be ineligible for election for a further term.

Sub-sections 4(4) and 5(4) are transitional provisions linked to amendments limiting a person to no more than two 2-year terms as staff-elected Director. The Committee understands that Mr Molomby was elected for his second 2-year term on 15 December 1985 and therefore could have expected to hold office until

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15 December 1987. Because the effect of the clause, taken together with the provisions of existing legislation, is to halve Mr Molomby's term of office as staff-elected Director while leaving him ineligible to stand again for that office the Committee draws clause 29 to the attention of Senators in that it may be considered to trespass unduly on personal rights and liberties.

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

AUSTRALIAN INDUSTRY DEVELOPMENT CORPORATION AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 14 November 1986 by the Minister Assisting the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to amend the Australian Industry Development Corporation Act 1970 by providing for the current Commonwealth statutory guarantee on borrowings and raisings of money by the Corporation to become optional at the Corporation's discretion.

The Committee has no comments on this Bill.

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

BOUNTY (SHIP REPAIR) BILL 1986

This Bill was introduced into the Senate on 12 November 1986 by the Minister for Community Services at the request of the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to introduce new assistance arrangements for certain repair work carried out in Australia on international trading vessels, whether Australian or foreign owned. The Bill is part of a new ship repair assistance package announced by the Government on 10 October 1986, the major elements of which are a bounty payable to registered ship repairers for 3 years, and the clarification of the Government's ship safety inspection powers via amendments to the Navigation Act 1912.

The Committee draws the attention of Senators to the following clauses of the Bill:

Clause 2 - Retrospectivity

Clause 2 provides that the Act is to be deemed to have commenced on 10 October 1986, the date on which the new ship repair assistance package was announced by the Government. However the Bill does not contain the usual saving provision to the effect that the offence provisions do not operate so as to render unlawful anything done, or omitted to be done, before the day on which the Act receives the Royal Assent (compare, for example, section 38 of the Bounty (Agricultural Tractors and Equipment) Act 1985). The Committee therefore draws clause 2 to the attention of Senators in that by reason of giving potential retrospective operation to the offence provisions it may be considered to trespass unduly on personal rights and liberties.

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

Clause 4 - Definition of 'eligible repair' - 'Henry VIII' clause

Paragraph (c) of the definition of 'eligible repair' in clause 4 provides that the expression may mean 'a repair of the ship included in a class of repairs declared by the regulations to be a class of eligible repairs'. Bounty is payable in respect of the carrying out of 'eligible repairs' on bountiable ships.

The Committee has in the past recognised the need for flexibility in legislation providing financial assistance to industry to take account of technological advances and changing market conditions. However in the present case the Committee notes that the concept of 'eligible repair', which is central to the legislation, would be capable of indefinite enlargement by regulations. In so permitting the effect of the Act to be varied by delegated legislation the definition may be characterised as a 'Henry VIII' clause and, as such, the Committee draws it to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

Clause 11 - Declaration that bounty not payable

Clause 11 provides that the Minister may declare that bounty is to cease to be payable to ship repairers if the Minister becomes satisfied that a voyage of a ship is being prevented by trade union activity. The Explanatory Memorandum indicates that the clause has been included to ensure that the ship repair and maritime unions uphold their agreement not to recommence their ship repair detention campaign (which agreement was a pre-condition to the implementation of the package of assistance for ship repair).

However the Committee is concerned that the clause may penalize ship repairers - who will be deprived of bounty payments while a declaration is in force - even though they may have no part in, and no control over, the relevant industrial action. The

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Committee therefore draws clause 11 to the attention of Senators in that by reason of its potentially capricious application to ship repairers it may be considered to trespass unduly on personal rights and liberties.

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

BROADCASTING AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 November 1986 by the Minister for Communications.

The purpose of the Bill is to provide mechanisms for achieving the following objectives:

- . to provide three commercial television services in regional areas of Australia as soon as practicable;
- . to bring regional commercial television licences to serve larger and more viable markets; and
- . to bring regional licensees to provide services on a competitive basis.

The Committee has no comments on this Bill.

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

COMMONWEALTH GUARANTEES (CHARGES) BILL 1986

This Bill was introduced into the House of Representatives on 14 November 1986 by the Minister Assisting the Treasurer.

The purpose of the Bill is to give effect to the decision by the Government, announced by the Treasurer in the 1986 Budget Speech, that from 1986-87 an annual charge should be applied to borrowings or other raisings of money by Commonwealth semi-government authorities which are guaranteed by the Commonwealth.

The Committee draws the attention of Senators to the following clauses of the Bill:

Sub-clause 4(1) - Retrospectivity

Sub-clause 4(1) provides that the Act is to apply to borrowings undertaken on or after 1 July 1986 by the Commonwealth authorities listed in the Schedule. Thus, although the proposal to impose an annual charge on such borrowings guaranteed by the Commonwealth was announced in the Budget, it is to take effect from the beginning of the financial year.

Not only is the retrospective operation of the proposal obviously to the disadvantage of the Commonwealth authorities concerned, but to the extent that it is anticipated that the charge will be passed on to persons dealing with those authorities it may be said to be to the disadvantage of those persons also. The Committee therefore draws sub-clause 4(1) to the attention of Senators in that by giving the Bill retrospective operation to 1 July 1986 it may be considered to trespass unduly on personal rights and liberties.

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

Sub-clause 4(3) - 'Henry VIII' clause

Sub-clause 4(3) provides that the regulations may amend the Schedule by inserting or omitting Commonwealth authorities or otherwise and may make 'any necessary consequential amendments of any provision of this Act'. In so permitting the entire operation of the Act to be varied by regulations the sub-clause may be characterised as a 'Henry VIII' clause and, as such, the Committee draws it to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

Sub-clauses 5(1) and 6(1) - Lack of parliamentary scrutiny

Sub-clauses 5(1) and 6(1) provide that the Treasurer may make determinations requiring the payment by an authority to the Commonwealth of a charge calculated in the manner provided in the determination in respect of borrowings and raisings of money the repayment of which is guaranteed by the Commonwealth. Paragraphs 5(2)(c) and 6(2)(d) limit the maximum amount of charge which may be imposed to 0.5% per annum of the amount in respect of which the charge is payable.

No provision has been made for parliamentary scrutiny of the Treasurer's determinations as would have been the case, for example, had the matters dealt with in those determinations been required to be included in regulations. The Committee therefore draws sub-clauses 5(1) and 6(1) to the attention of Senators in that they may be considered to subject the exercise of legislative power insufficiently to parliamentary scrutiny.

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

DISABILITY SERVICES BILL 1986

This Bill was introduced into the Senate on 12 November 1986 by the Minister for Community Services.

The purposes of the Bill are -

- (a) to provide for funding of services for persons with disabilities by replacing provisions of the Handicapped Persons Assistance Act 1974 with provisions that are more flexible and more responsive to the needs and aspirations of persons with disabilities; and
- (b) to enable the provision of rehabilitation services by the Commonwealth by replacing provisions contained in Part VIII of the Social Security Act 1947 with provisions that are more flexible and more responsive to the needs and aspirations of persons with disabilities.

The Committee has no comments on this Bill.

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

DISABILITY SERVICES (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1986

This Bill was introduced into the Senate on 12 November 1986 by the Minister for Community Services.

The purpose of the Bill is to amend a number of Acts to make consequential amendments to the Disability Services Bill 1986 and to make transitional arrangements in relation to certain provisions of the Handicapped Persons Assistance Act 1974 and the Social Security Act 1947 repealed by this Bill as a consequence of the Disability Services Bill 1986.

The Committee has no comments on this Bill.

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

FERTILISERS SUBSIDY BILL 1986

This Bill was introduced into the Senate on 12 November 1986 by the Minister for Community Services at the request of the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to make new assistance arrangements for fertilisers by giving effect to the Government's decision to remove the subsidies payable on imported fertilisers and reallocating those savings by increased subsidy payments on locally produced phosphatic fertilisers. The Bill amalgamates the Phosphate Fertilizers Subsidy Act 1963 and the Nitrogenous Fertilizers Subsidy Act 1966 into one composite Act.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 2 - Retrospectivity

Clause 2 provides that the Act is to be deemed to have come into operation on 20 August 1986, the day after the Budget. However the Bill does not contain the usual saving provision to the effect that the offence provisions do not operate so as to render unlawful anything done, or omitted to be done, before the day on which the Act receives the Royal Assent (compare, for example, section 38 of the Bounty (Agricultural Tractors and Equipment) Act 1985). The Committee therefore draws clause 2 to the attention of Senators in that by reason of giving retrospective operation to the offence provisions it may be considered to trespass unduly on personal rights and liberties.

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

NAVIGATION AMENDMENT BILL 1986

This Bill was introduced into the Senate on 12 November 1986 by the Minister for Community Services at the request of the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to extend the Minister's power of detention of ships which are, or which appear to the Minister to be, unseaworthy, to 'substandard' ships which present clear hazards to safety or health but are 'seaworthy' as defined.

The Committee draws the attention of Senators to the following clause of the Bill:

Clause 4 - New sub-section 207A(2) - 'Henry VIII' clause

New sub-section 207A(2), to be inserted by clause 4, would provide that in determining whether a ship is substandard regard is to be had to 'such matters as are prescribed'. While new sub-section 207A(1) provides that a ship is substandard if conditions on board the ship are 'clearly hazardous to safety or health' the lack of any more detailed definition contrasts markedly with the definition of a seaworthy ship in sub-section 207(1). A mariner may claim discharge from a 'substandard' ship and the Minister may detain such ships.

Because the new sub-section would leave the content of the term 'substandard' to be delimited by regulations it may be characterised as a 'Henry VIII' clause. In respect of the matters to which regard is to be had in determining whether a ship is 'substandard' the Parliament would have available to it only the negative action of disallowance rather than the positive power of amendment. Accordingly the Committee draws new sub-section 207A(2) to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

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

TELEVISION LICENCE FEES AMENDMENT BILL 1986

This Bill was introduced into the House of Representatives on 12 November 1986 by the Minister for Communications.

The purpose of the Bill is to make amendments to the Television Licence Fees Act 1964 to support provisions contained in the Broadcasting Amendment Bill 1986 dealing with equalisation of commercial television services.

The Committee draws the attention of Senators to the following clause of the Bill:

Paragraph 4(b) - New sub-section 5(2) - 'Henry VIII' clause

New sub-section 5(2), to be inserted by paragraph 4(b), would permit the regulations to make provision for rebates of fees payable by licensees. The Explanatory Memorandum indicates that this is intended to allow for financial incentives proposed to be offered to licensees moving towards aggregation.

Because it permits the variation by regulations of the incidence of the fees imposed by the Act, the new sub-section 5(2) may be characterised as a 'Henry VIII' clause. The Committee has consistently drawn attention to such clauses permitting the remission by regulations of fees and charges imposed by Acts. Accordingly the Committee draws new sub-section 5(2) to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

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



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DEPARTMENT OF THE SENATE
PAPER No. 4990
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SCRUTINY OF BILLS ALERT DIGEST

NO. 19 OF 1986

26 NOVEMBER 1986

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SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator M.C. Tate, Chairman
Senator J. Haines, Deputy-Chairman
Senator M. Baume
Senator B. Cooney
Senator R.A. Crowley
Senator J. Newman

TERMS OF REFERENCE

Extract

- (1) (a) That a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, 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 and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;
 - (iv) inappropriately delegate legislative power; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee has considered the following Bills:

Bounty (Books) Bill 1986

Disallowance Provisions Amendment Bill 1986

Human Rights and Equal Opportunity Commission Bill 1985

NOTE: 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.

BOUNTY (BOOKS) BILL 1986

This Bill was introduced into the Senate on 20 November 1986 by the Minister for Community Services at the request of the Minister for Industry, Technology and Commerce.

The purpose of the Bill is to introduce new assistance arrangements for the book printing industry in Australia for the period 1 January 1987 to 30 June 1989 to give effect to the Government's decision to continue bounty assistance to that industry.

The major proposed changes to the scheme operating under the existing Bounty (Books) Act 1969, which terminates on 31 December 1986, are:

- . the extension of bounty to Australian guides and directories (other than telephone, trade, business, professional and other accommodation directories and timetables);
- . the exclusion from eligibility for bounty of books published by the Australian Government Publishing Service, books published by State and Territory Government Printers, and books which, if imported, would be classifiable to tariff items on which Customs duty is payable;
- . the limitation of applications for bounty to one claim per production run, with a minimum claim of \$200 per title; and
- . the provision that imported typesetting in any pre-printed plate form will not disqualify an otherwise eligible publication.

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

The Committee draws the attention of Senators to the following clauses of the Bill:

Sub-clause 4(1)

Definition of 'recognised educational institution' - 'Henry VIII' clause

Sub-clause 4(1) defines a 'recognised educational institution' as an education institution for the purposes of the Student Assistance Act 1973, a school for the purposes of the Commonwealth Schools Commission Act 1973 or 'any other educational institution, authority or body that the Comptroller declares in writing to be a recognised educational institution for the purposes of this Act'. A book that is intended for use solely or principally in connection with education provided at a 'recognised educational institution' is defined as a 'textbook' for the purposes of the Act and bounty is not payable in relation to a 'textbook' that is not casebound and that has fewer than 16 printed pages or the printed material in which could, without altering the character of the book, be published in a book of fewer than 16 pages.

Because it would permit the substance of the definition of 'recognised educational institution' to be extended by declaration by the Comptroller, the definition may be characterized as a 'Henry VIII' clause and, as such, the Committee draws it to the attention of Senators in that it may be considered to constitute an inappropriate delegation of legislative power.

Paragraph 4(2)(f) - 'Henry VIII' clause

For the purposes of the Act, 'book' means a publication in book form. Sub-clause 4(2) provides that a publication shall not be taken to be in book form unless it is bound by various specified methods or -

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'(f) other means approved by the Comptroller for the purposes of this sub-section, not being the use of flexible adhesive affixed to one edge of the publication.'

Once again, because it would permit the effect of the provision to be extended by approval by the Comptroller, paragraph 4(2)(f) may be characterized as a 'Henry VIII' clause and, as such, the Committee draws it to the attention of Senators in that it may be considered to constitute an inappropriate delegation of legislative power.

Paragraph 5(7)(b) - Non-reviewable decision

By virtue of paragraph 5(1)(s) bounty is not payable on a book that is a 'prohibited import'. Sub-clause 5(7) defines a book as a 'prohibited import' if, in the event of its being outside Australia, its importation would be prohibited absolutely by a law of the Commonwealth or -

'(b) its importation into Australia would be prohibited by a law of the Commonwealth unless permission for the purposes of that law were obtained and the Comptroller is satisfied that unconditional permission to import an unlimited number of copies of the book would not be granted for the purposes of that law.'

Sub-clause 5(8) provides that the regulations may provide that the Comptroller may obtain a report in relation to a book from any board or other body established under a law of the Commonwealth for the purpose of giving advice in relation to the importation of books and that provision may be made by the regulations for the review of any report so furnished.

No provision has been made for review of a decision by the Comptroller under paragraph 5(7)(b) and the absence of any reference to such decisions in sub-clause 33(2) may be taken to

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indicate that such a decision is not regarded as an integral part of the process of approving or refusing to approve a payment of bounty and so reviewable under paragraph 33(1)(a) or (b). The Committee suggests that it would be preferable for provision to be made in the Act for review of such decisions, which directly affect the entitlement to bounty, rather than for provision to be made in the regulations for review of a report by an advisory body the advice of which the Comptroller may accept or reject. Accordingly the Committee draws paragraph 5(7)(b) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

Sub-clause 19(4) - Non-reviewable decision

Sub-clause 19(4) provides that the registration of a person for the purposes of the Act has effect from the day on which the notice registering the person is signed or 'such earlier day, not being a day earlier than the first day of the bounty period, as is specified for the purpose in the notice'.

No provision has been made for review of a decision of the Comptroller refusing to register a person from a day earlier than the day on which the notice registering a person is signed although such provision is customary in bounty legislation (compare, for example, paragraph 34(1)(h) of the Bounty (Ship Repair) Bill 1986). Bounty is not payable to a person unless the person is registered. The Committee therefore draws sub-clause 19(4) to the attention of Senators in that it may be considered to make rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions.

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

DISALLOWANCE PROVISIONS AMENDMENT BILL 1986

This Bill was introduced into the Senate on 19 November 1986 by Senator Vigor.

The purpose of the Bill is to rectify certain defects in provisions in statutes relating to the disallowance of delegated legislation and to provide for certain delegated legislation to be issued in draft form before it is actually made.

The Committee has no comments on this Bill.

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION BILL 1985

The Committee commented on this Bill in its Seventeenth Report of 1985 (4 December 1985). Although the Bill has since been agreed to by the Senate with amendments it remains in the Senate because it is tied up with the Australian Bill of Rights Bill package. The Government now proposes to move for the reconsideration of the Human Rights and Equal Opportunity Commission Bill 1985 and to move certain further amendments to that Bill. The attention of the Committee has been drawn to a clause of the Bill on which it did not comment in its Seventeenth Report of 1985 which falls within its Terms of Reference and the Committee has also identified a clause in the proposed amendments as falling within its Terms of Reference.

The Committee therefore draws the attention of Senators to the following clauses of the Bill:

Sub-clause 3(1) -

Definition of 'discrimination' - 'Henry VIII' clause

Sub-clause 3(1) provides that 'discrimination' means any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation and -

'(b) any other distinction, exclusion or preference that -

- (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (ii) has been determined by the Minister under sub-section 31(2) to constitute discrimination for the purposes of this Act,'

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

but does not include any distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job. Sub-clause 31(2) provides that the Minister may, by notice in the Gazette, determine that a distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation constitutes discrimination for the purposes of the Act. Under paragraph 31(1)(b) the proposed Human Rights and Equal Opportunity Commission is to have the function of inquiring into any act or practice that may constitute 'discrimination' as defined.

The Explanatory Memorandum indicates that grounds for discrimination which have been developed by the previously existing Employment Discrimination Committees and which may be promulgated in determinations by the Minister under sub-clause 31(2) include criminal record, age, marital status, medical record, personal attributes, nationality, trade union activities, physical disability and sexual preference. Because paragraph (b) of the definition of discrimination, taken together with sub-clause 31(2), permits the content of the definition to be extended by Ministerial determination, the provision may be characterized as a 'Henry VIII' clause, and, as such, the Committee draws it to the attention of Senators in that it may be considered an inappropriate delegation of legislative power.

Proposed new clause 19 - Delegation

The Government proposes to substitute a new clause 19 providing that the Commission may delegate all or any of its powers (other than the power of delegation) to a member of the Commission, a member of the staff of the Commission or 'another person or body of persons' and that a member of the Commission may likewise delegate all or any of the powers exercisable by the member to a member of the staff of the Commission or 'any other person or body of persons' approved by the Commission.

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

The Committee recognises that, as it relates to the power of delegation conferred on the Commission, the proposed new clause 19 does not differ from the existing clause 19 on which it did not comment in its Seventeenth Report of 1985. However the Committee has been critical of such powers of delegation which impose no limitation, and give no guidance, as to the attributes of the persons to whom a delegation may be made. The Committee therefore draws proposed new clause 19 to the attention of Senators in that by providing for such unrestricted delegation of administrative powers it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

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