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**SCRUTINY OF BILLS ALERT DIGEST**



**NO. 1 OF 1990**

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**ISSN 0729-6851**

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

**MEMBERS OF THE COMMITTEE**

Senator B. Cooney (Chairman)  
Senator R. Crowley  
Senator J. Faulkner  
Senator J. McGauran  
Senator J.F. Powell  
Senator A. Vanstone

**TERMS OF REFERENCE**

Extract

- (1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -
- (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
  - (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) 1989-90
- Appropriation Bill (No. 4) 1989-90
- Appropriation (Parliamentary Departments) Bill (No.2) 1989-90
- Australian Securities Commission Amendment Bill 1990
- Bounty (Textile Yarns) Amendment Bill 1990
- \* Civil Aviation Amendment Bill 1990
- \* Commonwealth Legal Aid Amendment Bill 1990
- Export Market Development Grants Amendment Bill 1990
- Federal Airports Corporation Amendment Bill 1990
- Great Barrier Reef Marine Park Amendment Bill 1990
- Income Tax Assessment Amendment Bill 1990
- \* Occupational Superannuation (Reasonable Benefit Limits) Amendment Bill 1990
- \* Parliamentary Entitlements Bill 1990
- \* Petroleum (Australia-Indonesia Zone of Cooperation) Bill 1990
- \* Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Bill 1990
- \* Sales Tax Laws Amendment Bill 1990
- \* Sales Tax (No. 1) Amendment Bill 1990
- \* Sales Tax (No. 2) Amendment Bill 1990
- \* Sales Tax (No. 3) Amendment Bill 1990
- \* Sales Tax (No. 4) Amendment Bill 1990
  
- \* The Committee has commented on these Bills.

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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- \* Sales Tax (No. 5) Amendment Bill 1990
- \* Sales Tax (No. 6) Amendment Bill 1990
- \* Sales Tax (No. 7) Amendment Bill 1990
- \* Sales Tax (No. 8) Amendment Bill 1990
- \* Sales Tax (No. 9) Amendment Bill 1990
- \* Social Security and Veterans' Affairs Legislation Amendment Bill 1990
- \* Superannuation Benefits (Supervisory Mechanisms) Bill 1990
- \* Superannuation Bill 1990
- \* Superannuation Legislation Amendment Bill 1990
  - Supply Bill (No 1) 1990-91
  - Supply Bill (No 2) 1990-91
  - Supply (Parliamentary Departments) Bill 1990-91
- \* Taxation Laws Amendment Bill 1990
- \* Taxation Laws Amendment Bill (No. 2) 1990
- \* Taxation Laws Amendment Bill (No. 3) 1990
- \* Trade Practices (Misuse of Trans-Tasman Market Power) Bill 1990
  - Training Guarantee Bill 1990
- \* Training Guarantee (Administration) Bill 1990
  - Wool Tax (No. 1) Amendment Bill 1990
  - Wool Tax (No. 2) Amendment Bill 1990
  - Wool Tax (No. 3) Amendment Bill 1990
  - Wool Tax (No. 4) Amendment Bill 1990
  - Wool Tax (No. 5) Amendment Bill 1990
- \* The Committee has commented on these Bills.

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.

**APPROPRIATION BILL (NO. 3) 1989-90**

This Bill was introduced into the House of Representatives on 8 May 1990 by the Minister for Finance.

The Bill proposes to appropriate a sum out of the consolidated Revenue Fund additional to the sums appropriated by the Appropriation Act (No. 1) 1989-90, for the service of the current financial year.

The Committee has no comment on this Bill.

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APPROPRIATION BILL (NO. 4) 1989-90

This Bill was introduced into the House of Representatives on 8 May 1990 by the Minister for Finance.

The Bill proposes to appropriate a sum out of the Consolidated Revenue Fund, additional to the sum appropriated by the Appropriation Act (No. 2) 1989-90, for certain expenditure for the current financial year.

The Committee has no comment on this Bill.

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

**APPROPRIATION (PARLIAMENTARY DEPARTMENTS) BILL (NO.2)  
1989-90**

This Bill was introduced into the House of Representatives on 8 May 1990 by the Minister for Finance.

The Bill proposes to appropriate a sum out of the Consolidated Revenue Fund, additional to the sums appropriated by the Appropriation (Parliamentary Departments) Act 1989-90, for certain expenditure, in relation to the Parliamentary Departments for the current financial year.

The Committee has no comment on this Bill.



**AUSTRALIAN SECURITIES COMMISSION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Attorney-General.

The Bill proposes to provide for transitional administrative arrangements for the regulation of companies and the securities and futures industries in Australia after 1 July 1990. Those arrangements are considered necessary because of the delay in the commencement of the new Australian Securities Commission.

The Committee has no comment on this Bill.

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

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**BOUNTY (TEXTILE YARNS) AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 8 May 1990 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Bill proposes to amend the Bounty (Textile Yarns) Act 1981 to provide persons currently available for bounty assistance under the Act with an alternative assistance scheme, in the form of a once-off capitalisation grant paid in lieu of possible future bounty receipts.

The Committee has no comment on this Bill.

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**CIVIL AVIATION AMENDMENT BILL 1990**

This Bill was introduced into the Senate on 9 May 1990 by the Minister for Shipping and Aviation Support.

The Bill proposes to implement administrative reforms to the Civil Aviation Authority as well as a number of minor unrelated operational amendments.

**RETROSPECTIVITY**  
**Subclause 2(3)**

Subclause 2(3) of the Bill would amend paragraph 3(a) of the Principal Act to make it retrospective to 1 July 1988. As the retrospectivity is to correct a drafting oversight the Committee has no further comment.

**IMMUNITY OF AUTHORITY FROM STATE AND TERRITORY LAWS**  
**Proposed subsections 11A(1) and (2)**

Proposed subsections 11A(1) and (2) of the Principal Act would grant to the Civil Aviation Authority an immunity from State laws in certain circumstances. The Explanatory Memorandum states that the immunity applies only to functions of the Authority that relate directly to regulating the safety of air navigation.

The Committee notes that proposed subsection 11A(3) phrases the immunity to cover any acts of the Authority unless they are wholly unconnected with the safety of air navigation.

The Committee seeks the views of the Minister on why it is necessary for the immunity to be drafted in such wide terms.

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

**TERMINATION OF APPOINTMENT**  
**Clause 21**

Clause 21(b) of the Bill would amend section 42 of the Principal Act to allow the Minister to terminate the appointment of a board member, where the Minister is of the opinion that the performance of the member has been unsatisfactory for a significant period of time.

As what constitutes unsatisfactory performance may be a matter of opinion, the Committee regards it as appropriate that a board member facing the termination of an appointment should be given the opportunity to show cause to the Minister why the appointment should not be terminated.

Accordingly, the Committee draws the clause to Senators' attention, as it may breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

**IMMUNITY FROM LEGAL ACTION**  
**Clause 33**

Clause 33 would insert proposed paragraph 80(1)(c), which would extend the immunity from legal action currently enjoyed by the Authority. As the immunity is only available when the Authority acts without recklessness or negligence, the Committee has no further comment.

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

**COMMONWEALTH LEGAL AID AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Attorney-General.

The Bill proposes to ensure that the preservation of rights provisions which are currently available to officers of the Australian Legal Aid Office who transfer to a State Legal Aid Commission will apply to officers who transfer on 1 July 1990 to the proposed Northern Territory Legal Aid Commission.

**RETROSPECTIVITY**  
**Subclause 2(2)**

Subclause 2(2) provides that there will be a period of retrospectivity, from the commencement of the amending Act back to 8 May 1990. However, as the purpose of the Act is to protect the rights of persons who may transfer to the Northern Territory Legal Aid Commission, the Committee has no further comment.

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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**EXPORT MARKET DEVELOPMENT GRANTS AMENDMENT BILL, 1990**

This Bill was introduced into the Senate on 9 May 1990 by the Minister for Industry, Technology and Commerce.

The Bill proposes to amend the Export Market Development Grants Act 1974 to extend its term from 1 July 1990 to 31 December 1990, pending the introduction of further substantive amendments to the Principal Act by the Government in the 1990 Budget Settings.

The Committee has no comment on this Bill.

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

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**FEDERAL AIRPORTS CORPORATION AMENDMENT BILL 1990**

This Bill was introduced into the Senate on 9 May 1990 by the Minister for Shipping and Aviation Support.

The Bill proposes to implement administrative reforms to the Federal Airports Corporation, as well as removing a provision which prevents the Corporation engaging in anti-hijack activities.

The Committee has no comment on this Bill.

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

**GREAT BARRIER REEF MARINE PARK AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Minister for Arts, Sport, the Environment, Tourism and Territories.

The Bill proposes to provide for the inclusion of definitions which are intended to clarify the operation of the statutory marine park zoning plans. This arises out of court decisions which have limited the effect of several terms used in the zoning plans.

The Committee has no comment on this Bill.

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



**INCOME TAX ASSESSMENT AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend the Income Tax Assessment Act 1936 to require, from June 1990, instalments of tax deducted from the salary or wages of employees to be remitted by certain employers to the Commissioner of Taxation twice monthly.

The Committee has no comment on this Bill.

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

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**OCCUPATIONAL SUPERANNUATION (REASONABLE BENEFIT LIMITS)  
AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend the Occupational Superannuation Standards Act 1987 and the Income Tax Assessment Act 1936 to introduce new arrangements for the administration of reasonable benefit limits. The effect of the changes would be to transfer the power for determining the reasonable benefit limits from the Insurance and Superannuation Commissioner to the government of the day. The Bill would establish arrangements whereby the Insurance and Superannuation Commissioner can administer these limits.

**STRICT LIABILITY OFFENCES**

**Clause 8**

Clause 8 would insert proposed subsections 15G(2) and (9) and 15S(2), which appear to create offences of strict liability in relation to a failure to give notice to the Insurance and Superannuation Commissioner in certain circumstances. The clause is brought to Senators' attention as possibly breaching principle 1(a)(i) of the terms of reference and unduly trespassing on an individual's 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.**

**PARLIAMENTARY ENTITLEMENTS BILL 1990**

This Bill was introduced into the House of Representatives on 8 May 1990 by the Minister Representing the Minister for Administrative Services.

The Bill proposes to authorise expenditure to or on behalf of members of the Parliament including Ministers and Office Holders of the Parliament on certain entitlements and to validate any payments made in respect of their entitlements before the commencement of the Bill. An entitlement listed in Schedule 1 of the Bill may be varied or omitted either by reference to the Remuneration Tribunal for determination or by regulation made under the Bill.

**RETROSPECTIVITY**

**Clause 8**

Clause 8 proposes to validate certain actions taken before the commencement of the Act, entitling persons to a benefit under the Act as if the Act had been in force at that time. The clause provides for an unlimited period of retrospectivity. However, as the clause appears to confer a benefit on the persons concerned, the Committee has no further comment.

**'HENRY VIII' CLAUSE**

**Clause 9**

Clause 9 is a 'Henry VIII' clause, as it provides for the alteration of the Schedule to the Act by the Remuneration Tribunal by regulations and also provides that a determination or regulation 'may make such consequential or

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transitional provisions as are necessary'. The regulations will, of course, be numbered, published, disallowable and accessible to the public. Similarly, the determinations will be subject to the tabling and disallowance provisions of section 7 of the Remuneration Tribunals Act 1973.

Senators' attention is drawn to the clause as it may be considered to be in breach of principle 1(a)(iv) and 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.**

**PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION) BILL  
1990**

This Bill was introduced into the House of Representatives on 8 May 1990 by the Minister for Resources.

The Bill proposes to give effect to the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation between the Indonesian Province of East Timor and Northern Australia, which was signed on 11 December 1989. The treaty provides a framework for the exploration for and exploitation of petroleum resources in the zone.

**STRICT LIABILITY OFFENCES**

Clauses 7 and 8

Clauses 7 and 8 create offences of strict liability for unauthorised prospecting for petroleum and undertaking petroleum operations respectively.

The clauses are drawn to Senators' attention as they may breach principle 1(a)(i) and unduly trespass 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.**

**PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION)  
(CONSEQUENTIAL PROVISIONS) BILL 1990**

This Bill was introduced into the House of Representatives on 8 May 1990 by the Minister for Resources.

The Bill proposes to provide a series of amendments to legislation which would otherwise be inconsistent with the Petroleum (Australia-Indonesia Zone of Cooperation) Bill 1990.

**STRICT LIABILITY OFFENCES**

**Clause 9**

Clause 9 proposes to insert new section 58B into the Crimes at Sea Act 1979. The proposed new section creates a number of strict liability offences relating to journeys between resources installations and 'external places'.

Senators' attention is drawn to the clause as it may breach principle 1(a)(i) and unduly trespass on personal rights and liberties.

**GENERAL COMMENT**

As the Committee has noted above, this Bill proposes to amend various other pieces of legislation which would otherwise be inconsistent with the Bill. The Committee has been concerned that amendment of legislation in this way can make it difficult for persons who have to refer to a particular piece of legislation to ascertain all its current provisions, because its various provisions are contained in more than one Act. In this case, the total provisions of the legislation can be ascertained with reasonable facility and, accordingly, the Committee does not raise objections to it.

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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SALES TAX LAWS AMENDMENT BILL 1990  
SALES TAX (NO. 1) AMENDMENT BILL 1990  
SALES TAX (NO. 2) AMENDMENT BILL 1990  
SALES TAX (NO. 3) AMENDMENT BILL 1990  
SALES TAX (NO. 4) AMENDMENT BILL 1990  
SALES TAX (NO. 5) AMENDMENT BILL 1990  
SALES TAX (NO. 6) AMENDMENT BILL 1990  
SALES TAX (NO. 7) AMENDMENT BILL 1990  
SALES TAX (NO. 8) AMENDMENT BILL 1990  
SALES TAX (NO. 9) AMENDMENT BILL 1990

These Bills were introduced into the House Representatives on 9 May 1990 by the Minister Assisting the Treasurer.

The Bills propose to increase the rate of sales tax on motor cars and station wagons (including 4WD vehicles) with wholesale prices above \$28,793 from 30% to 50%. The Bills would also reduce from 30% to 20% the rate of sales tax on motor vehicles that have been specially fitted out for transporting disabled persons seated in wheelchairs.

**RETROSPECTIVITY**  
Clause 2

Clause 2 of each of these Bills makes the Bill's operation retrospective from the commencement of the Act to 1 May 1990.

The Committee draws Senators' attention to these clauses in accordance with its policy of drawing attention to examples of 'legislation by press release'. Legislation by press release is a practice whereby a Minister announces by way of press release or press conference the intention to change a law, with effect from the date of the announcement. At a

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later date, the Minister then introduces legislation giving effect to the change. The legislation is expressed to have effect from the date of the announcement.

The Committee has always been concerned by this practice [see paragraphs 3.17-19 of the Committee's Annual Report for 1987-88]. Accordingly, Senators' attention is drawn to the clauses as they may breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

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**SOCIAL SECURITY AND VETERANS' AFFAIRS LEGISLATION AMENDMENT  
BILL 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Minister Representing the Minister for Social Security.

The Bill proposes a number of amendments to the Social Security Act 1947 and the Veterans' Entitlements Act 1986. The rules relating to postponement and similar non-payment periods for unemployment benefits would be changed. The benefits assets test would be extended to beneficiaries under 25 years of age as well as a number of other amendments to unemployment benefit provisions. Other areas affected by the Bill would include maintenance, portability of pensions, sickness benefits, family payments, compensation, double payment of benefits and certain income assessment provisions.

**RETROSPECTIVITY**

Clauses 8, 9(2), 14, 17, 19, 21 and 24

Clauses 8, 9(2), 14, 17, 19, 21 and 24 contain retrospective provisions which are to operate from various dates, the earliest of which is 1 November 1989. However, as the retrospectivity is beneficial to individuals in each case, the Committee makes no further comment.

**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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**SUPERANNUATION BENEFITS (SUPERVISORY MECHANISMS) BILL 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Minister for Finance.

The Bill proposes to make provision for supervisory mechanisms to apply to the provision of superannuation benefits to Commonwealth sector employees. The Bill would re-enact Part XA of the Superannuation Act 1976 in a separate Act. The Minister would have power to approve the provision of benefits and to issue guidelines to employers where appropriate. Employers would have complete freedom to operate within guidelines and only proposals outside the guidelines would require the Minister's approval.

**GENERAL COMMENT**

Clause 6 contains provisions for the issue of Ministerial guidelines. However, the Committee notes with approval that clause 68)(b) provides that such guidelines are disallowable instruments.

Similarly, clause 7 contains provisions for the issue of Ministerial determinations. However, clause 7(6)-(10) provides for tabling within 5 sitting days and disallowance within a further 5 sitting days. Accordingly, the Committee has no further comment on 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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#### **SUPERANNUATION BILL 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Minister for Finance.

The purpose of this Bill is to establish a new superannuation scheme for Commonwealth employees, to be implemented from 1 July 1990. The Bill proposes to adopt the approach used for private sector superannuation schemes which use a Trust Deed administered by Trustees to set up the scheme. Regulations under the Superannuation Act 1976 will give members of the current Commonwealth superannuation scheme 12 months from 1 July 1990 in which to decide whether to join the new scheme.

#### **GENERAL COMMENT**

Various provisions of this Bill are 'Henry VIII' clauses: in particular, subclause 5(1) and paragraphs 6(1)(j) and 6(2)(c). However, by virtue of clause 44, the Ministerial instruments or declarations are not only disallowable instruments but are also Statutory Rules. Consequently, they will have to be published and numbered and will, therefore, be both subject to parliamentary scrutiny and reasonably accessible to the public.

The Committee has no further comment on the Bill.

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## **SUPERANNUATION LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Minister for Finance.

The Bill proposes a number of amendments to the Superannuation Act 1922, the Superannuation Act 1976, the Superannuation Benefit (Interim Arrangement) Act 1988 and the Papua New Guinea (Staffing Assistance) Act 1973. The main purpose of the amendments is to bring the superannuation provisions in these Acts into line with the new Commonwealth superannuation scheme.

### **RETROSPECTIVITY Clause 2(2)**

Clause 2(2) provides that clause 48, which deals with lump sums payable on commutation, is to be retrospective to 1 May 1987. The Committee draws Senators' attention to the provision as it may breach principle 1(a)(i) and unduly trespass on personal rights and liberties.

### **'HENRY VIII' CLAUSES Clauses 9, 64, 104**

Clauses 9 (in relation to declarations of an 'approved authority'), 64 (in relation to Ministerial declarations of variation of a Table in the Bill and exclusion or inclusion of classes of persons) and 104 (in relation to Ministerial declarations of variation of a Table in the Bill, interest factors, qualified employees, arrangements for certain employees and interest) are 'Henry VIII' provisions. However, they are all disallowable instruments and also

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statutory instruments and will therefore be numbered and published. They will also be subject to the scrutiny of the Standing Committee on Regulations and Ordinances.

Accordingly, the Committee makes no further comment on the provision.

#### RETROSPECTIVITY

##### Clause 90

Clause 90 extends the regulation-making power by providing that regulations made under a substantial number of provisions may be made within 12 months and may be made retrospective to a date no earlier than 1 July 1990. The Committee draws the provision to Senators' attention as it may breach principle 1(a)(i) and trespass unduly on personal rights and liberties.

#### GENERAL COMMENT

The Committee notes that clause 39 contains numerous examples of sexist language. In the Committee's view, this is inappropriate and, accordingly, the provisions should be re-drafted.

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

**SUPPLY BILL (NO 1) 1990-91**

This Bill was introduced into the House of Representatives on 8 May 1990 by the Minister for Finance.

The Bill proposes to make interim provision for the appropriation of money out of the Consolidated Revenue Fund for the service of the year ending 30 June 1991.

The Committee has no comment on this Bill.

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**SUPPLY BILL (NO 2) 1990-91**

This Bill was introduced into the House of Representatives on 8 May 1990 by the Minister for Finance.

The Bill proposes to make interim provision for the appropriation of money out of the Consolidated Revenue Fund for certain expenditure in respect of the year ending 30 June 1991.

The Committee has no comment on this Bill.

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

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**SUPPLY (PARLIAMENTARY DEPARTMENTS) BILL 1990-91**

This Bill was introduced into the House of Representatives on 8 May 1990 by the Minister for Finance.

The Bill proposes to make interim provision for the appropriation of money out of the Consolidated Revenue Fund for certain expenditure in relation to the Parliamentary Departments in respect of the year ending 30 June 1991.

The Committee has no comment on this Bill.

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



**TAXATION LAWS AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Minister Assisting the Treasurer.

The Bill is substantially the same as a Bill that was introduced in November 1989, but which lapsed when the previous Parliament ended. It proposes a series of amendments to the capital gains tax provisions. These amendments include the application of capital gains tax to deemed disposals of certain created assets, the allowance of the market value of an asset being used in determining either its cost base or the consideration in respect of its disposal in certain circumstances, and the prevention of the indexation of amounts incurred on the acquisition of an asset where the amount remains unpaid and the acquisition of the asset did not involve its disposal by another person. The Bill also includes several other amendments.

**RETROSPECTIVITY  
Clause 38**

By virtue of clause 38, various provisions of this Bill would take effect retrospectively. However, in each case the retrospectivity is technical, or is beneficial to taxpayers, or gives effect to a measure announced in the Budget. Accordingly, the Committee makes no further comment on 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.

**TAXATION LAWS AMENDMENT BILL (NO. 2) 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend the Income Tax Assessment Act 1986 to authorise the making of certain regulations, to make changes to the Medicare levy provisions, to provide that certain eligible capital expenditures incurred by a taxpayer engaged in quarrying operations are deductible on a similar basis to those involved in mining operations, to provide for certain non-profit bodies to be eligible for income tax exemption, to repeal the exemption from income tax of the Australian Wool Testing Authority Ltd, to provide that companies in certain circumstances will incur franking debits in respect of dividends paid under dividend streaming arrangements after 30 June 1990, to amend eligible securities lending arrangements, to change the arrangements regarding deductions for profits derived from the disposal of contaminated live stock, and various other taxation changes.

**GENERAL COMMENT**

There are a number of provisions in the Bill with retrospective effect. Most relate to Budget matters, but clauses 61(4)-(6) make those relating to disposal of contaminated stock (clauses 8 and 9 - retrospective to 1 July 1987), for films (clause 38 - retrospective to 1 July 1987) and certain gifts (clause 10 - retrospective to 10 November 1989) were announced subsequently. However, as all of these provisions have a beneficial effect, the Committee makes no further comment on 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.

**TAXATION LAWS AMENDMENT BILL (NO. 3) 1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Minister Assisting the Treasurer.

The Bill proposes a series of amendments to the Income Tax Assessment Act 1936, the Fringe Benefits Tax Assessment Act 1986 and the Sales Tax (Exemptions and Classifications) Act 1935. The amendments deal with buy-backs of shares, thin capitalisation of Australian owned non-resident companies, shipping depreciation, actuary certificates, tax file number provisions, notification of instalments of provisional tax, offset of provisional tax credit, gift provisions, remote area housing, ACT self-government and 1990-91 provisional tax payment by instalments.

**GENERAL COMMENT**

There are a number of provisions with retrospective effect. Most relate to Budget matters, but clauses 2, 29(2)-(6) and 30 make those for certain gifts (clauses 11 and 31(2) - retrospective to 10 November 1989, 5 February 1990, 12 March 1990 and 1 April 1990), buy-backs of shares (clauses 15 and 17 - retrospective to 1 November 1989), and release from actuary certificates (clauses 24-28 and 33 - retrospective to 1 July 1988) were announced subsequently. However, as these provisions have a beneficial effect, the Committee makes no further comment on 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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**TRADE PRACTICES (MISUSE OF TRANS-TASMAN MARKET POWER) BILL  
1990**

This Bill was introduced into the House of Representatives on 9 May 1990 by the Attorney-General.

The Bill proposes to implement Australia's obligations under Article 4 of the Protocol to the Australia New Zealand Close Economic Relations - Trade Agreement on Acceleration of Free Trade in Goods. Article 4 of the Protocol recognises that the maintenance of Australian and New Zealand anti-dumping provisions in respect of goods originating in the other country will be inappropriate upon the achievement of full free trade in goods on 1 July 1990. It provides that from that date the competition laws of both countries should be applied to relevant anti-competitive conduct affecting trans-Tasman trade in goods.

**ABROGATION OF PROTECTION AGAINST SELF-INCRIMINATION  
Clause 12**

Clause 12 of the Bill inserts new subsection 155B(4) which would, if enacted, abrogate the protection against self-incrimination. However, the provision would still grant protection against the use of information obtained both directly and indirectly from the information or document required to be disclosed. While the provision is of a type which the Committee has previously regarded as acceptable, the Committee seeks the Minister's explanation of the need for the provision to be drafted in this way.

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

**GENERAL COMMENT**

Clause 25 inserts a number of provisions relating to evidence of official signatures, seals, stamps, processes, regulations and documents. Clause 28, which inserts new section 32ZD dealing with non-compliance with a New Zealand subpoena, also contains an evidentiary provision in subsection 32ZD(4). However, the Committee suggests that the provisions are acceptable, as the provisions are drafted to ensure that the matters are only to be prima facie evidence and not conclusive evidence.

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

**TRAINING GUARANTEE BILL 1990**

This Bill was introduced into the House of Representatives on 10 May 1990 by the Minister for Employment, Education and Training.

The Bill proposes to impose a requirement on employers resident in Australia to spend a minimum amount on structured training every financial year, starting on 1 July 1990.

The Committee has no comment on this Bill.

**TRAINING GUARANTEE (ADMINISTRATION) BILL 1990**

This Bill was introduced into the House of Representatives on 10 May 1990 by the Minister for Employment, Education and Training.

The Bill proposes to provide for the administration of the scheme set up by the Training Guarantee Bill 1990.

**GENERAL COMMENT**

Clause 85 provides that if an employer other than a government body makes false or misleading statements, the employer has to pay by way of penalty an additional training guarantee charge. While the Committee notes that this is not a criminal liability, it means that a government body is immune from penalty in respect of such statements. The Committee seeks the Minister's explanation as to why this apparent immunity is necessary.

The Committee notes that the Bill contains a number of taxation legislation look-alike provisions. Provided that the Bill is meant to be seen in that light, most of them may be acceptable. Nevertheless, the Committee makes the following observations:

- (a) Clause 60 provides that on review or appeal the burden of proving that an assessment is excessive lies on the employer;
- (b) Clause 70 provides that the fact that a review or appeal is pending does not affect the effect of the

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assessment or prevent the recovery of the charges or additional charges;

- (c) Clause 77 provides for substituted service of documents in relation to recovery of charges and service can be effected on an absentee or someone who cannot be found by posting to the last known address, without leave of the court;
- (d) Clause 83 provides for service on the public officer of a trust estate and clause 83(2) provides that, if there is no public officer, service on a person acting or appearing to act in the business of the trust estate is sufficient;
- (e) Clause 97 provides that the production of a notice of assessment or a copy thereof is conclusive evidence of its making and that the particulars are correct, except for the purposes of review or appeal. The clause also provides that the production of certain documents, certificates or training guarantee statements are prima facie evidence. Clauses 97(2), (4) and (5) use the phrase 'prima facie evidence', whereas clause 97(3) merely uses 'evidence'; and
- (f) Clause 98 provides for access to premises and documents and permits an authorised officer to inspect and copy documents. The authorised officer can do so upon the production of a written authority from the Commissioner of Taxation and does not require a search warrant issued by a judicial officer.



DL/90

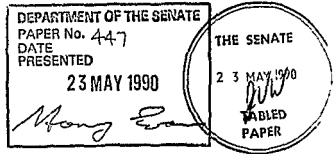
WOOL TAX (NO. 1) AMENDMENT BILL 1990  
WOOL TAX (NO. 2) AMENDMENT BILL 1990  
WOOL TAX (NO. 3) AMENDMENT BILL 1990  
WOOL TAX (NO. 4) AMENDMENT BILL 1990  
WOOL TAX (NO. 5) AMENDMENT BILL 1990

These Bills were introduced into the House of Representatives on 9 May 1990 by the Minister Assisting the Treasurer.

The Bills propose to amend the Wool Tax Acts (Nos. 1 - 5) 1964 to increase the level of the maximum rate of wool tax able to be imposed on shorn wool by each Act, from 10 per cent to 20 per cent.

The Committee has no comment on these Bills.

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. 2 OF 1990**

**23 MAY 1990**

**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 2 OF 1990**

**23 MAY 1990**

**ISSN 0729-6851**

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)  
Senator R. Crowley  
Senator J. Faulkner  
Senator J. McGauran  
Senator J.F. Powell  
Senator A. Vanstone

TERMS OF REFERENCE

Extract

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

- Administrative Services Legislation Amendment Bill 1990
- Airlines Agreement (Termination) Bill 1990
- \* Australian Maritime Safety Authority Bill 1990
- \* Bounty Legislation Amendment Bill 1990
- Broadcasting Amendment Bill 1990
- Broadcasting Amendment Bill (No.2) 1990
- Commonwealth Electoral Amendment Bill 1990
- \* Commonwealth Employees' Rehabilitation and Compensation Amendment Bill 1990
- \* Commonwealth Serum Laboratories (Conversion into Public Company) Bill 1990
- \* Customs (Detention and Search) Bill 1990
- \* Defence Legislation Amendment Bill 1990
- Dried Fruits Levy Amendment Bill 1990
- \* Environmental Protection of Coastal Waters (State and Northern Territory Powers) Amendment Bill 1990
- \* Family Law Amendment Bill 1990
- \* Higher Education Funding Bill 1990
- \* Petroleum Excise (Prices) Amendment Bill 1990

\*The Committee has commented on these Bills.

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.

**ADMINISTRATIVE SERVICES LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister Representing the Minister for Administrative Services.

The Bill would amend the Archives Act 1983 to allow the Australian Archives to levy charges on Commonwealth agencies for discretionary services. It would also repeal the Naval Properties Transfer Act 1925 and the Procurement of Goods, Works and Services Act 1981. The Parliamentary Allowances Act 1952 would be amended to ensure that allowances paid to office holders of the Parliament are paid during the period from dissolution until polling day. Other minor amendments are also proposed.

The Committee has no comment on this Bill.

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

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**AIRLINES AGREEMENT (TERMINATION) BILL 1990**

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Transport and Communications.

The Bill proposes to make certain legislative changes to effect the deregulation of the domestic aviation industry from 31 October 1990. The Bill would repeal the Airlines Agreement Act 1981, the Airlines Equipment Act 1958 and the Independent Air Fares Committee Act 1981 and amend the Australian Airlines (Conversion to Public Company) Act 1988, the Federal Airports Corporation Act 1988 and the Inter-State Commission Act 1975.

The Committee has no comment on this Bill.

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

**AUSTRALIAN MARITIME SAFETY AUTHORITY BILL 1990**

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Transport and Communications.

The Bill proposes to establish the Australian Maritime Safety Authority as a statutory body. The functions which would be conferred on the Authority under this Bill include search and rescue and control of ship-sourced marine pollution. The Bill would amend other Acts to confer on the Authority other functions, including the safety regulation of maritime operations in Australia and Australian ships operating overseas and also the provision of marine navigational aids in Australian waters.

**TERMINATION OF APPOINTMENT**  
Clause 21

Clause 21 of the Bill provides for the circumstances in which the Minister can terminate the appointment of a member of the Authority. Subclauses 21(1) and (2) provide that the Minister can terminate an appointment in the case of misbehaviour, physical or mental incapacity, bankruptcy, etc.

Paragraph 21(2)(e) provides that, in addition, the Minister may terminate the appointment of a member if 'the Minister is of the opinion that the performance of the member has been unsatisfactory for a significant period of time'. Indeed, subclause 21(3) provides that the Minister can terminate the appointment of any or all members of the Authority (with the exception of the Chief Executive

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



D2/90

Officer) if the performance of the Authority has been, in the Minister's opinion, unsatisfactory for a significant period of time.

The Committee notes that there appears to be no appeal against such a removal. Such provisions might also operate to militate against the Authority making independent judgments and giving independent advice. They might also undermine the impact of the specific reasons for removal set out in subclauses 21(1) and (2).

The Committee draws Senators' attention to the provision as it may breach principle 1(a)(i) and unduly trespass on personal rights and liberties.

**APPOINTMENT OF CHIEF EXECUTIVE OFFICER**  
**Clauses 49, 53**

Clause 49 of the Bill provides for the appointment by the Minister of a Chief Executive Officer of the Authority. This appointment is to be made after the Minister has received a recommendation from the Authority. Pursuant to subclause 49(2), the appointment is to be for a period not exceeding 5 years.

Clause 53 of the Bill states that the Chief Executive Officer holds office 'during the Authority's pleasure'. This would appear to be at odds with clause 49, as there would appear to be scope for the Authority to terminate, at any time, the appointment of a Chief Executive Officer duly appointed by the Minister for a term of up to 5 years. Accordingly, the Committee seeks from the Minister an explanation of the relationship between the two clauses.

**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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**DELEGATION OF POWER  
Clause 58**

Clause 58 provides that the Authority may delegate to 'a person' any or all of its powers under the Act. Unlike clause 57, which provides for the persons or classes of persons to whom the Minister can delegate various of his or her powers under the Act, there is no limitation as to the persons or classes of persons to whom powers can be delegated. There is nothing in either the Bill or the Explanatory Memorandum to explain the need for a power to delegate of this width.

The Committee has on numerous occasions pointed out that delegations to 'a person' are inappropriate. Accordingly, the Committee draws the provision to Senators' attention as it may breach principle 1(a)(iv) and 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.**

D2/90

## BOUNTY LEGISLATION AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 15 May 1990 by the Minister Representing the Minister for Industry, Technology and Commerce.

This is an omnibus Bill proposing a series of amendments to various Bounty Acts. The Bill's major purpose is to implement certain initiatives arising from the Australia/New Zealand Closer Economic Relations Trade Agreement. As part of this agreement, Australia and New Zealand each have decided not to pay production bounties or like measures on goods which are exported to the other country. The Bill also proposes other minor technical amendments to several Bounty Acts.

### RETROSPECTIVITY

Subclauses 2(2) and (3)

Subclauses 2(2) and (3) provide that the amendments to the Bounty (Ships) Act 1989 and Bounty and Subsidy Legislation Amendment Act (No. 2) 1989 are to be retrospective to 1 July 1989 and 26 December 1988 retrospectively. However, as the provisions are beneficial to persons other than the Commonwealth, the Committee makes no further comment.

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

D2/90

**BROADCASTING AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Transport and Communications.

The Bill proposes to amend the Broadcasting Act 1942 to give the Australian Broadcasting Tribunal a range of remedies as an alternative to licence suspension or revocation where an adverse finding has been made against the suitability of a commercial radio or television licensee. These proposed measures would enable the Tribunal to revoke, vary or impose licence conditions, issue directions and, if necessary, direct interests to be divested within six months. Other amendments involve a clarification of ministerial power regarding licence applications and other minor changes.

The Committee has no comment on this Bill.

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

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**BROADCASTING AMENDMENT BILL (NO.2) 1990**

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Transport and Communications.

The Bill proposes to amend the Broadcasting Act 1942 to amend ownership and control and licensing administration provisions. The Bill would change the prescribed interest definition for commercial television licences to exclude loan interests and increase the threshold for shareholding interests. The transaction approval process would be changed and a requirement that licensees notify the Tribunal of persons who secure control of the licensee would be introduced. The maximum licence renewal period for certain licences would be extended. The Bill would also include remedial provisions to ensure that certain networking arrangements with licensees do not breach relevant ownership and control limits or require prior Tribunal approval.

The Committee has no comment on this Bill.

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

D2/90

**COMMONWEALTH ELECTORAL AMENDMENT BILL 1990**

This Bill was introduced into the Senate on 14 May 1990 by Senator Dunn as a Private Senator's Bill.

The Bill proposes a series of amendments to the Commonwealth Electoral Act 1918 which would have the effect of changing the method of election for the House of Representatives from the present system to the Tasmanian Hare-Clark system. Other associated changes would include the rotation of candidates' names on the ballot paper for House of Representatives elections.

The Committee has no comment on this Bill.

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

D2/90

**COMMONWEALTH EMPLOYEES' REHABILITATION AND COMPENSATION  
AMENDMENT BILL 1990**

This Bill was introduced into the Senate on 17 May 1990 by the Minister for Industrial Relations.

The Bill proposes amendments to the Commonwealth Employees' Rehabilitation and Compensation Act 1988. The amendments would ensure that the Act applies to non-police staff members of the Australian Federal Police appointed since 1 January 1990. Other amendments would allow the Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees to have regard to the amount that former employees receiving compensation are able to earn in suitable employment.

**RETROSPECTIVITY  
Subclause 2(2)**

Clause 3 would amend section 5 of the Commonwealth Employees' Rehabilitation and Compensation Act 1988 to ensure that certain employees are covered by that Act. Subclause 2(2) provides that the effect of clause 3 is to be retrospective to 1 January 1990. However, as the provision is beneficial to persons other than the Commonwealth, the Committee makes no further comment.

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

**COMMONWEALTH SERUM LABORATORIES (CONVERSION INTO PUBLIC COMPANY) BILL 1990**

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Community Services and Health.

The Bill proposes to establish the Commonwealth Serum Laboratories (CSL) as a company and to provide for CSL to be registered as a company incorporated under the Companies Act 1981. The Bill would provide that, on transition, each staff member of CSL would become an employee of the company on the same terms and conditions as applied to his or her employment by the statutory authority.

**GENERAL COMMENT**

**Annual Report**

This Bill is substantially similar to the Commonwealth Serum Laboratories (Conversion into Public Company) Bill 1989, which the Committee commented on in Alert Digest No. 17 of 1989 (29 November 1989). In that Alert Digest, the Committee observed that CSL is required, under the existing legislation, to make an annual report to the Parliament. However, under the proposed legislation there is no such requirement. An annual report will, of course, have to be made and lodged with the appropriate Corporate Affairs Commission in order to comply with the Companies Act 1981.

In Alert Digest No. 17, the Committee recognised that once lodged with the Corporate Affairs Commission the annual report of CSL would be a public document but nevertheless requested that the Minister take appropriate steps to ensure that it is tabled in the Parliament. On 19 April 1990, the then Minister for Housing and Aged Care, Mr Staples, wrote

**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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to the Committee to advise that, if the Government was re-elected, it was intended that the annual reports of CSL would be tabled in the Parliament. The Committee notes that, like its predecessor, the current Bill contains no formal requirement to do so.

While the Committee thanks the Minister for the assurance that the annual report of CSL will be tabled in the Parliament, it would be preferable if a formal requirement to do so was contained in the legislation. Given the introduction of the new procedures for regular and enhanced scrutiny by the Senate's legislative and general purpose standing committees of annual reports tabled in the Senate (pursuant to the Senate's resolution of 14 December 1989), it is preferable that a formal requirement to table such annual reports is contained in legislation, so as to guarantee that this regular and enhanced scrutiny will continue to take place.

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

D2/90

#### CUSTOMS (DETENTION AND SEARCH) BILL 1990

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Bill proposes to amend the Customs Act 1901 to repeal the current power to detain and search persons suspected of unlawfully carrying prohibited goods and insert in its place a new division containing a more detailed range of customs detention and search powers.

#### GENERAL COMMENT

This Bill is substantially similar to the Customs (Detention and Search) Bill 1989, which the Committee dealt with in Alert Digest No. 18 of 1989 (6 December 1989). In that Alert Digest, the Committee commented that the Bill would grant extensive powers to police and customs officers to detain and search persons reasonably suspected of bringing prohibited substances into Australia. However, the Committee also observed that appropriate efforts had been made to protect persons against abuses of power by police and customs officers.

The current Bill actually improves on the protections contained in the 1989 Bill, by inserting provisions requiring that assistance be provided to detainees not fluent in English (proposed section 219 ZD). The Committee welcomes the insertion of this additional safeguard against abuse of the powers contained in 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.

.D2/90

## DEFENCE LEGISLATION AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Defence.

The Bill is an omnibus Bill proposing a series of amendments to the Defence Act 1903, the Naval Defence Act 1910, the Defence Force Discipline Act 1982 and the Statute Law (Miscellaneous Provisions) Act (No. 1) 1985. Amendments include the removal of the restrictions on the Chief of the Defence Force's power to make single service command appointments and organisational arrangements, the removal of certain seniority provisions, the modification of enlistment provisions, an increase in the orphan's benefit and various other changes.

### RETROSPECTIVITY Subclause 2(4)

This Bill is substantially similar to the Defence Legislation Amendment Bill (No. 2) 1989, which the Committee dealt with in Alert Digest No. 18 of 1989 (6 December 1989). In that Alert Digest, the Committee commented that, by virtue of subclause 2(4), the amendments made by Schedule 2 of the Bill would have retrospective effect to 30 June 1989. Subclause 2(4) of the current Bill is in identical terms.

In Alert Digest No. 18, the Committee noted that the amendments in question were beneficial to orphaned dependents of members of the defence forces and, accordingly, made no further comment. Similarly, the Committee has no further comment on this Bill.

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

**DRIED FRUITS LEVY AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the Dried Fruits Levy Act 1971 to increase the maximum rate of levy for dried vine fruits from \$5.00 to \$10.00 per tonne.

The Committee has no comment on this Bill.

D2/90

ENVIRONMENTAL PROTECTION OF COASTAL WATERS (STATE AND  
NORTHERN TERRITORY POWERS) AMENDMENT BILL 1990

This Bill was introduced into the Senate on 16 May 1990 by Senator Dunn as a Private Senator's Bill.

The Bill proposes to amend the Coastal Waters (State Powers) Act 1980 to give the Commonwealth express powers to formulate codes of practice for the conduct of environmentally sensitive operations within the coastal sea and, in the event that a State does not comply with and apply such codes, to make regulations for their enforcement.

GENERAL COMMENT

The Committee notes that there is an apparent drafting error in the first lines of proposed new subsections 6D(4), which appear on pages 8 and 20 of the Bill respectively. The word 'make' should probably be 'made' in each case, as in subsections (5) and (6) on the same pages.

The Committee has no further comment on this Bill.

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

D2/90

**FAMILY LAW AMENDMENT BILL, 1990**

This Bill was introduced into the House of Representatives on 16 May 1990 by the Attorney-General.

The Bill proposes to implement recommendations of the Family Law Council for improvements in the handling of child abuse allegations in child custody and access proceedings, to clarify the effect which a step-parent adoption of a child has on the custody, guardianship or access rights of the child's natural parents under the Family Law Act 1975 and to limit the conferral of child custody or guardianship rights on a person who is not a parent of the child. Other amendments would allow police to enter premises and search for a person when they are authorised under the Family Law Act to arrest that person and extend the protection given by the Family Law Act from State or Territory stamp duties to child maintenance agreements and certain other instruments. Other technical amendments are also proposed.

**POWER TO ARREST WITHOUT WARRANT**  
Proposed new section 122A

Clause 19 would insert new section 122A into the Family Law Act 1975. The proposed new section would allow the Family Court to authorise persons to enter and search premises, without warrant, for the purposes of arresting a person whom the arresting person is authorised (under the Act) to arrest. While the Committee notes that powers to arrest without warrant already exist in section 114AA of the Act, this provision would extend those powers.

Accordingly, the Committee draws the clause to Senators' attention as it may breach principle 1(a)(i) and unduly trespass 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.

D2/90

## HIGHER EDUCATION FUNDING BILL 1990

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the Higher Education Funding Act 1988 to provide as a condition of payments under the Act that States will not take any action to prevent or hinder the imposition or collection of fees by higher education institutions for organisations representing the interests of students generally.

### DETERMINATION BY THE MINISTER Clause 3

This Bill is substantially similar to the Higher Education Funding Amendment Bill (No. 3) 1989, which the Committee dealt with in Alert Digest No. 16 of 1989 (22 November 1989). In that Alert Digest, the Committee noted that clause 3 of the Bill proposed to insert new section 107A, which would prohibit a State either directly or indirectly preventing or hindering the imposition or collection of fees for student organisations by the governing body of an educational institution. In the event of a State failing to comply with these requirements, proposed subsection 107A(2) would allow the Minister to require that the State pay an amount of money to the Commonwealth. Further, the Minister could then determine that an amount was payable by the Commonwealth to an organisation representing the interests generally of students at the institution in question.

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

D2/90

In Alert Digest No. 16, the Committee commented that the Minister's determinations would not be subject to tabling or disallowance. The present Bill makes no such provision. Accordingly, the Committee re-states its view that determinations made by the Minister should be tabled in the Parliament and, in addition, be subject to disallowance.

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



D2/90

**PETROLEUM EXCISE (PRICES) AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 16 May 1990 by the Minister for Primary Industries and Energy.

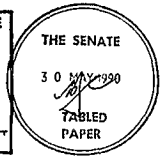
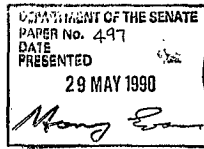
The Bill proposes to amend the Petroleum Excise (Prices) Act 1987 to widen the definition of oil producer to include onshore producers. The Bill would also amend the Principal Act to enable the calculation of separate volume weighted average realised prices for excise purposes for the Bass Strait oil producing region and for the Jackson producing region. The Bill also provides for the description of each producing region to be prescribed in the Regulations to the Act. Other minor technical changes are also proposed.

**RETROSPECTIVITY**  
**Clause 2**

Clause 2 of the Bill provides that the amendments proposed by the Bill are to be retrospective to 26 December 1987, the date of commencement of the Principal Act, the Petroleum Excise (Prices) Act 1987. The Explanatory Memorandum explains that this is to correct certain inequities in excise liabilities between offshore and onshore oil producers. Nevertheless, in addressing this imbalance, the provisions would appear to retrospectively impose on those oil producers who have been subject to excise at the lower rate an additional burden which they probably had not contemplated.

Accordingly, the clause is drawn to Senators' attention as it may breach principle 1(a)(i) of the terms of reference and unduly trespass 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. 3 OF 1990**

**30 MAY 1990**

**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 3 OF 1990**

**30 MAY 1990**

**ISSN 0729-6851**

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)  
Senator R. Crowley  
Senator J. Faulkner  
Senator J. McGauran  
Senator J.F. Powell  
Senator A. Vanstone

TERMS OF REFERENCE

Extract

- (1) (a) At the commencement of each Parliament, a Standing Committee of the Senate, to be known as the Standing Committee for the Scrutiny of Bills, shall be appointed to report, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise -
- (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative power; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

D3/90

The Committee has considered the following Bill:

Broadcasting Amendment (Foreign Shareholdings)  
Bill 1990

The Committee has not commented on this Bill.

Bills restored to the Notice Paper

On 9, 17 and 21 May 1990, a total of 26 Bills which had been introduced into the Senate in previous sessions were restored to the Notice Paper pursuant to Resolutions of the Senate on each of those dates. The effect of the Resolutions was to allow consideration of the Bill in each case to resume at the stage reached in the previous session of Parliament.

The Committee made comments on the following Bills in previous Alert Digests and Reports:

Australian Heritage Commission (National Estate  
Protection) Amendment Bill 1989 [1990]

Geneva Conventions Amendment Bill 1989 [1990]

For the information of Senators, the Committee has reproduced those comments and the relevant response in its Second Report of 1990.

The Committee made no comment on the following Bills:

Acts Interpretation (Ministerial Undertakings)  
Amendment Bill 1989 [1990]

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.

D3/90

Australian National Maritime Museum Bill 1989  
[1990]

Broadcasting (Prohibition of Violent Programs  
for Children) Bill 1988 [1990]

Child Care (National Children's Services  
Program) Amendment Bill 1989 [1990]

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

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

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

Constitution Alteration (Parliament) Bill 1987  
[1990]

Defence Amendment Bill 1988 [1990]

Delegated Legislation Review Bill 1988 [1990]

Federal Court (Grouped Proceedings) Bill 1989  
[1990]

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

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

Industrial Relations (Right to Strike)  
Amendment Bill 1989 [1990]

Koongara Project Area Repeal Bill 1988 [1990]

Legislative Initiative Bill 1989 [1990]

National Health (Pharmaceutical Benefits  
Determinations) Amendment Bill 1989 [1990]

National Identification System (Reference to  
the People) Bill 1987 [1990]

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Committee under its Terms of Reference is invited to do so.

D3/90

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

Ozone Depleting Substances Regulation Bill 1988  
(No. 2) [1990]

Peace Trust Fund Bill 1989 [1990]

Petroleum Retail Marketing Sites Amendment  
(Divorcement of Ownership) Bill 1987 [1990]

Sales Tax (Exemptions and Classifications)  
Amendment Bill (No. 3) 1989 [1990]

Senate (Quorum) Bill 1989 [1990]

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Committee under its Terms of Reference is invited to do so.

D3/90

**BROADCASTING AMENDMENT (FOREIGN SHAREHOLDINGS) BILL 1990**

This Bill was introduced into the Senate on 22 May 1990 by Senator Powell as a Private Senator's Bill.

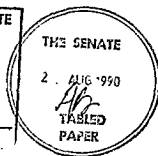
The Bill proposes to amend the Broadcasting Act 1942 to reduce the maximum allowable foreign financial interest in Australian television networks from 50% to 20%.

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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PAPER No. 700  
DATE  
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22 AUG 1990  
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**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 4 of 1990**

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**ISSN 0729-6851**

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Senator V. Bourne  
Senator R. Crowley  
Senator J. Faulkner  
Senator A. Vanstone

### TERMS OF REFERENCE

#### Extract

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

The Committee has considered the following Bills:

- \* Australian Centennial National Rail Transport Development Bill 1990  
Commonwealth Electoral (Printing, Publishing and Distribution of Electoral Matters) Amendment Bill 1990
- \* Foreign Acquisitions and Takeovers Amendment (Registration of Interests) Bill 1990  
Legislation (Non-Sexist Language) Bill 1990
- \* Patents Bill 1990

**Bill restored to the Notice Paper**

On 1 June 1990, the Privacy Amendment Bill 1989, which was originally introduced into the Senate on 16 June 1989, was restored to the Notice Paper pursuant to a resolution of the Senate of that date. The effect of the resolution was to allow consideration of the Bill to resume at the stage reached in the previous Parliament.

The Committee made comments on the Bill in previous Alert Digests and Reports. For the information of Senators, those comments and the relevant responses are reproduced in the Committee's Third Report of 1990.

- \* The Committee has commented on these Bills.

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 CENTENNIAL NATIONAL RAIL TRANSPORT DEVELOPMENT BILL  
1990**

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

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

**DECLARATIONS BY THE MINISTER  
Clauses 4 and 5**

Clause 4 of the Bill allows the Minister to declare, by instrument in writing, that a railway or a proposed railway is a 'national railway' for the purposes of the Bill. Similarly, clause 5 allows the Minister to declare, by instrument in writing, an authority that provides or proposes to provide railway services over a national railway to be an 'approved railway authority' for the purposes of the Bill.

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

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

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.

**COMMONWEALTH ELECTORAL (PRINTING, PUBLISHING AND DISTRIBUTION  
OF ELECTORAL MATTERS) AMENDMENT BILL 1990**

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

The Bill proposes to amend the Commonwealth Electoral Act to prohibit false and misleading political advertising by inserting a provision similar to section 52 of the Trade Practices Act 1974.

The Committee has no comments on this Bill.

**FOREIGN ACQUISITIONS AND TAKEOVERS AMENDMENT (REGISTRATION OF INTERESTS) BILL 1990**

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

The Bill proposes to establish a register of foreign ownership of Australian land, property, business and resources.

**REVERSAL OF THE ONUS OF PROOF**  
**Clause 4**

Clause 4 contains proposed new section 38L, which would insert various new offence provisions into the Foreign Acquisitions and Takeovers Act 1975. Proposed subsection 38L(1) makes it an offence for a foreign corporation to fail to comply with various notice and reporting requirements set out in the Bill. Further, proposed subsection 38L(3) provides that where a corporation has committed an offence against subsection (1), an officer or agent of the corporation will be deemed to be knowingly concerned in and party to the commission of the offence, 'unless the contrary is proved'.

This reverses the onus of proof, as it is normally incumbent upon the prosecution to prove all elements of an offence. While the Committee has previously accepted the inclusion of such provisions, mainly in circumstances where the matters requiring proof are peculiarly within the knowledge of the alleged offender, there is no explanation of the need to reverse the onus in this case. Accordingly, the provision is drawn to Senators' attention as it may trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

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**LEGISLATION (NON-SEXIST LANGUAGE) BILL 1990**

This Bill was introduced into the Senate on 30 May 1990 by Senator Dunn as a Private Senator's Bill.

The Bill proposes to include gender-neutral terms in all Commonwealth legislation. The Bill would cause the Attorney-General to introduce amendment bills for each Act which required the incorporation of gender-neutral terms.

The Committee has no comments on this Bill.

## PATENTS BILL 1990

This Bill was introduced into the Senate on 29 May 1990 by the Minister for Industry, Technology and Commerce. According to the Minister's Second Reading Speech, the Bill is a 'reincarnation' of the Patents Bill 1989, which the Committee dealt with in Alert Digest No. 8 of 1989.

The Bill proposes to implement the Government's response to the 1984 report of the Industrial Property Advisory Committee entitled 'Patents, Innovation and Competition in Australia'. The Bill proposes a number of amendments to the Patents Act 1952 which would result in a thorough redrafting and re-arrangement of the original Act with the intention of modernising language and avoiding unnecessary complexity. The Bill would also incorporate amendments to the Patents Act relating to extensions of patent term.

### 'HENRY VIII' CLAUSE Clause 228(2)(f)

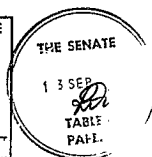
Clause 228 of the Bill sets out the matters in relation to which the Governor-General may make regulations under the Bill. Paragraph 228(2)(f) authorises regulations 'modifying the operation of [the Bill] in relation to [Patent Cooperation Treaty] applications ... by excluding, varying or substituting different provisions for specified provisions of [the Bill]'. This is what the Committee would generally classify as a 'Henry VIII' clause, as it would allow the Principal Act to be amended by regulation.

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

**General comment**

The Committee notes with approval that some of the changes made to the 1989 version of the Bill decrease the amount of detail to be filled in by regulations. In this regard, the Committee draws attention to clauses 43 (priority dates), 48 (modified examination) and 65 (determination of date of patent) of the current Bill.

DEPARTMENT OF THE SENATE  
PAPER No. 845  
DATE  
PRESENTED  
13 SEP 1990  
*Mary P.*



**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 5 OF 1990**

**12 SEPTEMBER 1990**

**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 5 of 1990**

**12 SEPTEMBER 1990**

**ISSN 0729-6851**

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)  
Senator A. Vanstone (Deputy Chairman)  
Senator V. Bourne  
Senator R. Crowley  
Senator I. Macdonald  
Senator N. Sherry

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The Committee has considered the following Bills:

- Australian Heritage Commission Amendment Bill 1990
- \* Bounty Legislation Amendment Bill (No. 2) 1990
- \* Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1990
- Extradition Amendment Bill 1990
- First Home Owners Amendment Bill 1990
- Flags Amendment Bill 1990
- Geneva Conventions Amendment Bill 1990
- \* Governments and Government Instrumentalities (Application of Laws) Bill 1990
- ICSID Implementation Bill 1990
- Industrial Relations Legislation Amendment Bill 1990
- Medicare Levy Amendment Bill 1990
- Pay-Television Transmission Bill 1990
- Sales Tax (Exemptions and Classifications) Amendment Bill 1990
- Sales Tax Laws Amendment Bill (No. 2) 1990
- \* Social Security and Veterans' Affairs Legislation Amendment Bill (No. 2) 1990
- Social Welfare Legislation (Pharmaceutical Benefits) Amendment Bill 1990
- Taxation Laws Amendment (Rates and Provisional Tax) Bill 1990
- \* Telecommunications Reform Bill 1990
- Wildlife Protection (Regulation of Exports and Imports) Amendment Bill 1990

\* The Committee has commented on these Bills.

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 HERITAGE COMMISSION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 22 August 1990 by the Minister for the Arts, Sport, the Environment, Tourism and Territories.

The Bill proposes to:

- . clarify and improve the Commission's operations;
- . include powers to allow the Commission to administer the National Estate Grants Program;
- . omit a subsection which discriminates against Aboriginal sites;
- . exempt authorities of the self-governing territories and Australian Airlines Limited from requirements of the Act; and
- . make changes of an administrative nature.

The Committee has no comment on this Bill.



**BOUNTY LEGISLATION AMENDMENT BILL (NO. 2) 1990**

This Bill was introduced into the House of Representatives on 22 August 1990 by the Minister for Small Business and Customs.

The Bill proposes amendments to various bounty Acts. Primarily it intends to amend the Bounty (Computers) Act 1984 to extend the operation of the computer bounty scheme for a further five years, while phasing down the rate payable from the current 20% to 9% in 1995.

**Retrospectivity**  
**Subclauses 2(2), (3) and (4)**

Subclause 2(2) of the Bill proposes to make the intended amendment to subsection 5(8) of the Bounty (Computers) Act 1984 retrospective to 9 March 1990. The proposed amendment changes the reference in that Act to subsection 23(3) of the Industries Assistance Commission Act 1973 to subsection 10(1) of the Industry Commission Act 1990. The proposed commencement date reflects the commencement date of the latter Act.

Subclause 2(3) of the Bill proposes to make the intended amendment to section 3AA of the Bounty and Capitalisation Grants (Textile Yarns) Act 1981 retrospective to 1 July 1990. The proposed amendment corrects an omission from the Bounty Legislation Amendment Act 1990. The proposed commencement date reflects the date of the Australia-New Zealand Closer Economic Relations Trade Agreement coming into effect, which is also reflected in the amendments contained in the latter Act.

Subclause 2(4) of the Bill proposes to make the intended amendment to section 12 of the Bounty (Textile Yarns) Amendment Act 1990 retrospective to 16 June 1990. The proposed amendment corrects an incorrect reference to the short title of the textile yarns legislation (substituting 'Bounty and Capitalisation Grants (Textile Yarns) Act 1981' for 'Bounty (Textile Yarns) Act 1981'). The proposed commencement date reflects the commencement date of the Bounty (Textile Yarns) Amendment Act 1990.

The amendments proposed by subclauses 2(2), (3) and (4) of this Bill, while retrospective in operation, are all technical in nature. In each case, it appears that no person or body other than the Commonwealth would be prejudicially affected by the retrospectivity. Accordingly, the Committee makes no further comment on the Bill.

**CRIMES (TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES)  
BILL 1990**

This Bill was introduced into the House of Representatives on 22 August 1990 by the Attorney-General. It is identical in substance to a Bill of the same name which was originally introduced on 2 November 1989 and which the Committee dealt with in Alert Digest No. 16 of 1989.

The Bill proposes to meet Government obligations under the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as part of the process of ratifying the Convention. Most provisions of the Convention falling within Commonwealth responsibility are covered by existing legislation, with this Bill's main purpose being to extend Australia's extra-territorial jurisdiction in accordance with Article 4 of the Convention.

**What is 'a reasonable time'?**  
**Clause 16**

In Alert Digest No. 16 of 1989, the Committee noted that subclause 16(2) of the Bill provides that prosecutions under the Bill are only to be instituted with the consent of the Attorney-General. However, a person may still be charged, arrested, remanded in custody or on bail where the consent has not been given. The Committee noted that a similar provision exists in the Crimes (Hostages) Act 1988 and that the Explanatory Memorandum states that the subclause is intended to allow 'preliminary steps' to be taken prior to the Attorney-General giving consent.

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Subclause 16(3) of the Bill states that subclause 16(2) does not prevent the discharge of the accused if proceedings are not continued within 'a reasonable time'. However, as the Committee noted in Alert Digest No. 16, what constitutes a reasonable time is not disclosed in the Bill. The Committee requested that the Bill be amended to provide some guidance on what constitutes 'a reasonable time'. The Bill which is currently before the Parliament contains no such guidance.

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

**Reversal of onus of proof  
Clause 17**

As the Committee noted in Alert Digest No. 16, clause 17 contains a reversal of the onus of proof. The clause provides that a person who possesses or imports a trafficable quantity of drugs is presumed to have the drugs for 'the purpose of sale or supply'. Though the presumption is explicitly rebuttable, the clause reverses the onus of proof, as it would normally be incumbent on the prosecuting party to prove such a matter.

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

**EXTRADITION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 22 August 1990 by the Attorney-General.

The Bill proposes to amend the Extradition Act 1988 to:

- . clarify regulation-making with respect to multi-lateral treaties, bi-lateral treaties and reciprocal arrangements;
- . provide a scheme for consent surrender to New Zealand;
- . increase police powers in situations where a person does not comply with bail conditions;
- . permit Australian magistrates to take evidence overseas; and
- . make minor technical changes.

The Committee has no comment on this Bill.

**FIRST HOME OWNERS AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 21 August 1990 by the Minister for Community Services and Health.

The Bill's main purpose is to preclude payment of assistance to sole or joint applicants who contract to purchase or build, or who commence construction of a dwelling on or after 22 August 1990. The Bill also fixes 30 June 1991 as the cut-off date by which applications under the First Home Owners Act 1983 must be received by the Secretary to the Department of Community Services and Health.

The Committee has no comment on this Bill.

**FLAGS AMENDMENT BILL 1990**

This Bill was introduced into the Senate on 23 August 1990 by Senator Parer as a Private Senator's Bill. The Bill is identical in substance to a Bill of the same name which was introduced into the House of Representatives on 31 August 1989 as a Private Member's Bill by Mr Fife. It was dealt with by the Committee, without comment, in Alert Digest No. 11 of 1989.

The Bill proposes to amend the Flags Act 1953 to ensure that the Australian national flag is not altered except with the approval of the Australian people voting in a referendum, that the flag is not supplanted by use of powers under the Act, and that the appointment of other flags and ensigns is subject to disallowance by either House of the Parliament.

The Committee has no comment on this Bill.

**GENEVA CONVENTIONS AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 22 August 1990 by the Attorney-General.

The Bill proposes to enable ratification of Protocol I, additional to the Geneva Conventions of 12 August 1949, concerning the Protection of Victims of International Armed Conflicts.

The Committee has no comment on this Bill.



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**GOVERNMENTS AND GOVERNMENT INSTRUMENTALITIES (APPLICATION OF LAWS) BILL 1990**

This Bill was introduced into the House of Representatives on 22 August 1990 by the Attorney-General. It is identical in substance to the Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1989, which was introduced into the House of Representatives on 31 May 1989 and which was commented on by the Committee in Alert Digest No. 8 of 1989.

The Bill proposes to clarify what kind of State and Territory laws apply to the Commonwealth and Commonwealth instrumentalities and State governments. Further, it addresses problems created by long-standing uncertainties as to the extent of the Commonwealth's implied constitutional immunities from State law, as well as problems arising from section 64 of the Judiciary Act 1903, in light of the High Court's decision in The Commonwealth v Evans Deakin Industries Ltd ((1986) 161 CLR 254).

**Commencement  
Subclause 2(2)**

In Alert Digest No. 8 of 1989, the Committee noted that subclause 2(2) of the Bill provides that clause 9 is not to commence until a year after the Bill receives the Royal Assent. The Committee noted that this is longer than the 6 month period now accepted as appropriate, referring to Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. That drafting instruction states, in part, that if a commencement date is nominated which is in excess of 6 months from Royal Assent, then the Explanatory Memorandum to the Bill should explain the reason for this. In this case, the Explanatory Memorandum states:

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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This deferral is needed in order to give time to decide what regulations should be made for the purposes of subsection 9(2), and to give time to make the regulations.

The Committee notes that the remaining provisions of the Bill are expressed to commence 3 months after the date of Royal Assent. According to the Explanatory Memorandum, this is necessary 'in order to give time for the making of regulations' (other than those for the purposes of subsection 9(2)). It would appear, therefore, that the length of the deferral required in relation to the making of regulations for the purposes of subsection 9(2) is connected to the need to decide what regulations need to be made.

The Committee does not believe that the Explanatory Memorandum to the Bill sufficiently explains why a deferral in excess of 6 months is required for the commencement of clause 9. Accordingly, the Committee draws the provision to Senators' attention as it may constitute an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

**Modification of State laws by regulation - 'Henry VIII' provisions**  
Paragraphs 5(2)(b) and (d) and 3(a) and (c), clause 6, subclauses 7(3), (4) and (5) and subclause 9(2)

The Committee noted in Alert Digest No. 16 that these provisions allow the Governor-General to make regulations to determine which State and Territory laws apply to the Commonwealth and in what form. The Attorney-General gave the following explanation for the use of this mechanism in his Second Reading speech (page 4):

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 Government believes that the only feasible approach is to specify in an Act some classes of State and self-governing Territory legislation (defined to include any relevant continuing Imperial legislation) that should apply to the Commonwealth and its instrumentalities, and to have regulation-making powers to deal with other classes of laws and with any special problems - the regulations being subject, of course, to Parliamentary scrutiny and disallowance. This provides the necessary flexibility to respond quickly to new State or self-governing Territory legislation. The Bill follows this course.

The Committee notes that subclauses 14(2) and (3) provide that any regulations that apply, or cease to apply, State legislation to the Commonwealth cannot have retrospective operation, but can have effect only from the time of the making of the regulations.

In view of the explanation given by the Attorney-General in the Second Reading speech and the effect of subclauses 14(2) and (3), the Committee has no further comment on the provisions.

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**ICSID IMPLEMENTATION BILL 1990**

This Bill was introduced into the House of Representatives on 22 August 1990 by the Attorney-General.

The Bill proposes to ratify the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The Convention establishes the International Centre for Settlement of Investment Disputes providing facilities for arbitration or conciliation of disputes between States and nationals of other States under the auspices of the Centre.

The Committee has no comment on this Bill.

**INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the Senate on 23 August 1990 by the Minister for Industrial Relations.

The Bill proposes to amend the Industrial Relations Act 1988 to implement changes to provisions concerning the registration, size, coverage and amalgamation of organisations governed by that Act. The Bill also proposes to provide legislative guidance to the Australian Industrial Relations Commission in the exercise of its powers in these areas.

The Committee has no comment on this Bill.

D5/90

**MEDICARE LEVY AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 21 August 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend the Medicare Levy Act 1986 to:

- . impose a basic rate of 1.25% of taxable income for 1990-91; and
- . increase the level of low income thresholds below which people are not required to pay any levy.

The Committee has no comment on this Bill.

D5/90

**PAY-TELEVISION TRANSMISSION BILL 1990**

This Bill was introduced into the House of Representatives on 31 May 1990 by Mr N.A. Brown as a Private Member's Bill.

The Bill proposes to repeal section 24A of the Radiocommunications Act 1983, which imposes an embargo on the introduction of pay-television services until at least September 1990.

The Committee has no comment on this Bill.

D5/90

**SALES TAX (EXEMPTIONS AND CLASSIFICATIONS) AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 21 August 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend the Sales Tax (Exemptions and Classifications) Act 1935 to ensure that printed matter inserted into a publication exempt from tax is only exempt if it is specifically covered by an exemption item in the First Schedule to that Act.

The Committee has no comment on this Bill.



D5/90

**SALES TAX LAWS AMENDMENT BILL (NO. 2) 1990**

This Bill was introduced into the House of Representatives on 21 August 1990 by the Minister Assisting the Treasurer.

The Bill proposes to:

- . introduce a progressively increasing average rate of tax for motor vehicles in the wholesale value range of \$30,234 to \$54,418; and
- . ensure that taxable printed matter is not exempt from tax simply because it is inserted into an exempt publication (eg a newspaper or magazine).

The Committee has no comment on this Bill.

D5/90

**SOCIAL SECURITY AND VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL  
(NO. 2) 1990**

This Bill was introduced into the House of Representatives on 23 August 1990 by the Minister for Community Services and Health.

The Bill proposes to amend five Acts:

- . Social Security Act 1947;
- . Veterans' Entitlements Act 1986;
- . Seamen's War Pensions and Allowances Act 1940;
- . Income Tax Assessment Act 1936; and
- . Taxation Administration Act 1953.

It will give effect to some measures announced in the Budget and the February 1990 Economic Statement, including extending the requirement to provide a tax file number to most recipients of welfare benefit payments and to provide for the assessment of income on loans made by pensioners and beneficiaries, assuming a minimum rate of interest.

**Requirement to provide tax file number  
Clauses 9, 10, 11, 24, 31, 37-42**

Clauses 9, 10 and 11 of the Bill would insert into the Social Security Act 1947 new sections 52A and 52B, 77 and 77A and 91A and 91B. These new sections would, if enacted, require that a person's tax file number be provided in relation to the payment of sole parent's pensions, family allowance supplements and family allowances respectively.

Clause 24 would insert into the Veterans' Entitlements Act 1986 new sections 128A and 128B, which would require that a person's

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tax file number be provided in relation to various 'income payments', as defined by section 128A.

Clause 31 would insert into the Seamen's War Pensions and Allowances Act 1940 new sections 32AA and 32AB, which would require the provision of a person's tax file number in relation to the payment of a pension under that Act.

Clauses 37-42 would make consequential amendments to the Income Tax Assessment Act 1936 and the Taxation Administration Act 1953.

The Committee notes that these provisions are similar in substance to sections 125A and 138A of the Social Security Act 1947, (inserted by the Social Security and Veterans' Affairs Amendment Act (No. 3) 1989), which require the provision of tax file numbers in relation to applications for sickness or unemployment benefits. The Committee commented on these provisions in Alert Digest No. 14 of 1989.

As the Committee observed in Alert Digest No. 14 in relation to the earlier provisions, while such provisions may be considered necessary to prevent persons defrauding the social security system, they may also be considered to be unduly intrusive into a person's private life. Accordingly, the Committee draws the provisions to Senators' attention as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

D5/90

**SOCIAL WELFARE LEGISLATION (PHARMACEUTICAL BENEFITS)  
AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 23 August 1990 by the Minister for Aged, Family and Health Services.

The Bill proposes to amend the following Acts:

- . National Health Act 1953;
- . Social Security Act 1947; and
- . Veterans' Entitlements Act 1986

to give effect to the structural reform of the Pharmaceutical Benefits Scheme.

The Committee has no comment on this Bill.

**TAXATION LAWS AMENDMENT (RATES AND PROVISIONAL TAX) BILL 1990**

This Bill was introduced into the House of Representatives on 21 August 1990 by the Minister Assisting the Treasurer.

The Bill proposes to:

- . give effect to reductions in personal tax rates announced in the February 1990 Economic Statement;
- . declare the general rates of income tax payable by individuals and trustees generally for 1990-91, 1991-92 and subsequent financial years;
- . reduce the level of rebate of tax available for payments of net medical expenses exceeding \$1,000; and
- . provide a method of calculating provisional tax for 1990-91 and require the payment of this tax on certain salary or wages.

The Committee has no comment on this Bill.

D5/90

**TELECOMMUNICATIONS REFORM BILL 1990**

This Bill was introduced into the House of Representatives on 23 August 1990 by Mr N.A. Brown as a Private Member's Bill.

The Bill proposes to:

- . encourage the expansion of the telecommunications industry;
- . provide for competition in telecommunications;
- . provide for increased investment in employment in telecommunications; and
- . modernise telecommunications by the introduction of new and diverse services.

**Decisions not subject to review**  
**Clauses 29 and 30**

Clause 29 of the Bill would, if enacted, insert into the Telecommunications Act 1989 various new provisions concerning the issue, variation and cancellation of telecommunications service licenses by AUSTEL. Clause 30 of the Bill would, in effect, make a decision by AUSTEL to refuse an application for a license (pursuant to proposed sections 146B or 146C) subject to review by the Administrative Appeals Tribunal. However, the Bill makes no provision for the review of decisions by AUSTEL to vary or cancel a license, pursuant to proposed sections 146D-146F and 146H respectively.

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

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

**WILDLIFE PROTECTION (REGULATION OF EXPORTS AND IMPORTS)  
AMENDMENT BILL 1990**

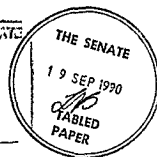
This Bill was introduced into the House of Representatives on 22 August 1990 by the Minister for the Arts, Sport, the Environment, Tourism and Territories.

The Bill proposes to:

- . raise the maximum penalty for an offence under the Wildlife Protection (Regulation of Exports and Imports) Act 1982 from 5 to 10 years, with the option of imposing both a monetary and custodial penalty;
- . provide a more flexible approach to the requirements for management programs governing the export and import of wildlife;
- . provide an upper limit on the number of birds that may be exported by a person taking up permanent residence overseas; and
- . simplify some administrative procedures.

The Committee has no comment on this Bill.

DEPARTMENT OF THE CLERK  
PAPER No. 952  
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*M. Long P.*



**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 6 OF 1990**

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

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The Committee has considered the following Bills:

Australia Council Amendment Bill 1990

\* Carriage of Goods by Sea Bill 1990

\* Customs Tariff Amendment Bill 1990

End of War List Bill 1990

European Bank for Reconstruction and Development  
Bill 1990

\* Sex Discrimination Amendment Bill 1990

Stevedoring Industry Legislation Amendment Bill  
1990

Stevedoring Industry Levy Amendment Bill 1990

Taxation (Interest on Non-resident Trust Distributions)  
Bill 1990

\* Taxation Laws Amendment Bill (No. 4) 1990

\* Taxation Laws Amendment (Foreign Income) Bill 1990

\* The Committee has commented on these Bills

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.

**AUSTRALIA COUNCIL AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 12 September 1990 by the Minister for the Arts, Tourism and Territories.

The Bill proposes to amend the Australia Council Act 1975 to give effect to the Government's response to the report of the House of Representatives Standing Committee on Expenditure's inquiry into Commonwealth assistance to the arts (the McLeay Report). Primarily, the Bill will streamline the Council's administrative structure and clarify the relationship between the Council and the Government.

The Committee has no comment on this Bill.

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## CARRIAGE OF GOODS BY SEA BILL 1990

This Bill was introduced into the House of Representatives on 12 September 1990 by the Minister for Land Transport.

The Bill proposes to replace the Sea-Carriage of Goods Act 1924, which regulates Australia's marine cargo liability regime, based on the Hague Rules agreed to in 1924. The Bill will give effect to the amended Hague Rules, which increase liability limits, replace the gold standard with the IMF currency unit and clarify the meaning of 'package or unit' to take account of containerisation.

### Commencement by proclamation Clause 2(2)

Clause 2(2) of the Bill provides that Part 3 and Schedule 2 of the Bill are to commence on a date 'to be fixed by Proclamation'. Though the commencement by proclamation is explicitly tied to the coming into force of the Hamburg Convention of 1978, the provision breaches the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, which states that a restriction should be placed on the time within which an Act (or particular provisions of an Act) should be proclaimed. The drafting instruction states that a commencement clause should fix either a period or a date after Royal Assent for commencement. It also requires that an explanation be given in the Explanatory Memorandum if a date or period in excess of 6 months from Royal Assent is nominated. The Bill contains no such restrictions.

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The provisions contained in Part 3 and Schedule 2 of the Bill give effect to the so-called 'Hamburg Rules', which originate from the Hamburg Convention. The Explanatory Memorandum to the Bill states:

The Hamburg Rules will be proclaimed at some future unspecified time to be fixed by the Government of the day. The delay in implementation of the Hamburg Rules is necessary as they have not yet received sufficient international support to make them a viable alternative marine cargo liability regime for Australia at this stage. Not only have the Hamburg Rules not yet entered into force internationally, with only 17 of the required 20 contracting States having ratified or acceded to them, none of Australia's major trading partners have become contracting States.

The Explanatory Memorandum goes on to say:

Delaying proclamation to a date to be fixed ensures that a future Government retains discretion to examine and to decide upon the appropriateness of implementing the Hamburg Rules, taking into account international acceptance of the Rules and domestic interests. This approach gives a signal to our major trading partners, some of which are considering the application of the Hamburg Rules, of Australia's support for the Hamburg Rules as the appropriate international marine cargo liability regime.

In the light of this explanation, the Committee makes no further comment on the Bill.

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**CUSTOMS TARIFF AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 12 September 1990 by the Minister for Small Business and Customs.

The Bill proposes numerous changes to the Customs Tariff Act 1987. Notably, Schedule 1 proposes to amend the Act to comply with the international Harmonized System Convention and inserts a free rate of duty for certain apparel made of vulcanised rubber. Schedule 2 proposes to amend the Act to include the carriage of lightweight wool fabrics. The six remaining schedules contain various other proposed amendments to the Act.

**Retrospectivity**

**Subclauses 2(2) - (7) and (10)**

Subclauses 2(2) - (7) and (10) of the Bill would make the amendments proposed by clauses 3 - 8 and 11 of the Bill respectively, retrospective to various nominated dates. The changes proposed are mostly either administrative or effect the removal of redundant provisions. Of the substantive changes to be effected by the Bill, the most substantial are beneficial to individuals. Accordingly, the Committee makes no further comment the Bill.

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**END OF WAR LIST BILL 1990**

This Bill was introduced into the Senate on 18 September 1990 as a Private Senator's Bill by Senator Boswell. It is identical in substance to a Bill of the same name which was introduced into the Senate on 7 September 1989 by Senator McGauran and which was passed by the Senate on 2 November 1989. It was dealt with by the Committee, without comment, in Alert Digest No. 12 of 1989.

The Bill proposes to establish an End of War List Tribunal. The Tribunal would be responsible for preparing an End of War List for Australian Defence Forces personnel who served in Vietnam from 1962 to 1973.

The Committee has no comment on this Bill.



**EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT BILL 1990**

This Bill was introduced into the House of Representatives on 12 September 1990 by the Minister Assisting the Treasurer.

The Bill proposes to appropriate monies for making any payment that Australia is required to make under the agreement establishing the European Bank for Reconstruction and Development. Under the agreement, Australia has been allocated 10,000 shares, representing one percent of the initial authorised capital stock of the Bank.

The Committee has no comment on this Bill.

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**SEX DISCRIMINATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 12 September 1990 by the Attorney-General. The Bill is similar in substance to a Bill of the same title which was introduced in the House of Representatives on 11 May 1989 and considered by the Committee in Alert Digest No. 6 of 1989.

The Bill proposes to repeal section 41 of the Sex Discrimination Act 1984 (which currently exempts various superannuation practices from the operation of the Act), making most forms of direct discrimination on the grounds of sex and marital status in superannuation practices unlawful in respect of new superannuation schemes. Where superannuation funds are unable to comply with the new obligations the reasonable expectations of members will be maintained by allowing the discriminatory funds to continue. However, these funds will not be entitled to admit new members.

**Postponed commencement**  
**Subclause 2(2)**

Subclause 2(2) of the Bill provides that the Bill would come into effect 2 years after having received Royal Assent. This is contrary to the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, which states that a restriction should be placed on the time within which an Act (or particular provisions of an Act) should be proclaimed. The drafting instruction states that

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a commencement clause should fix either a period or a date after Royal Assent for commencement. It also requires that an explanation be given in the Explanatory Memorandum if a date or period in excess of 6 months from Royal Assent is nominated. This Bill clearly contravenes the restriction. The Explanatory Memorandum simply notes that this is the case, without giving any explanation.

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

#### General comment

In Alert Digest No. 6 of 1989, the Committee commented on proposed sections 41A, 41B and 41C, which were contained in clause 4 of the Bill then before the Committee. In particular, the Committee drew attention to the fact that proposed section 41C would have allowed the repeal of proposed sections 41A and 41B by regulation. The Committee notes with approval that the proposed section 41C has been deleted from the current Bill.

**STEVEDORING INDUSTRY LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 12 September 1990 by the Minister Representing the Minister for Industrial Relations.

The Bill, together with the Stevedoring Industry Levy Amendment Bill 1990, will give effect to waterfront reforms arising out of negotiations between the Government, stevedoring employers, waterfront unions and the ACTU. The reform process will involve new employment arrangements and a rejuvenation of the workforce, through a one-off early retirement/redundancy package for older employees.

The Committee has no comment on this Bill.

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**STEVEDORING INDUSTRY LEVY AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 12 September 1990 by the Minister Representing the Minister for Industrial Relations.

The Bill is introduced in conjunction with the Stevedoring Industry Legislation Amendment Bill 1990. In particular, this Bill proposes to:

- . ensure that the general levy imposed on stevedoring employers is imposed at prescribed rates per labour-hour of employment with respect to Division A and Division B employees,
- . ensure that special levies relating to bulk loading and unloading of cargo are such amount per worker-hour as are prescribed; and
- . phase out part of the general levy (relating to Division B workers).

The Committee has no comment on this Bill.

**TAXATION (INTEREST ON NON-RESIDENT TRUST DISTRIBUTIONS)  
BILL 1990**

This Bill was introduced into the House of Representatives on 13 September 1990 by the Minister Assisting the Treasurer.

The Bill proposes to impose an interest charge on non-resident trust distributions, as calculated under the new provisions of the Income Tax Assessment Act 1936 which are to be inserted by the Taxation Laws Amendment (Foreign Income) Bill 1990.

The Committee has no comment on this Bill.

**TAXATION LAWS AMENDMENT BILL (NO. 4) 1990**

This Bill was introduced into the House of Representatives on 12 September 1990 by the Minister Assisting the Treasurer.

The Bill proposes to:

- . amend the existing thin capitalisation rules;;
- . modify some transitional arrangements accorded to gold miners relating to the removal of the income tax exemption for their industry from 1 January 1991;
- . ensure that any unrecouped excess exploration and prospecting expenditure incurred on quarrying operations can be carried forward once the mining right to which the expenditure relates is sold;
- . amend the dividend imputation rules;
- . modify the existing zone rebate arrangements;
- . make a minor technical amendment to provisions dealing with the disposal of contaminated livestock; and
- . amend the income tax gift provisions to reflect changes in the names of the Australian College of General Practitioners and the Australian Sports Aid Foundation.

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**Retrospectivity**  
**Subclause 2(2), clause 31**

Subclause 2(2) of the Bill would make the operation of Part 3 of the Bill, which proposes to amend the Taxation Laws Amendment Act (No. 2) 1990, retrospective to the commencement of section 4 of that Act (ie 16 June 1990). The proposed amendment corrects a drafting error contained in that Act.

Clause 31 would make various specified amendments to the Income Tax Assessment Act 1936 retrospective to various specified dates, some as far back as 23 June 1970. However, though it is not stated in the Explanatory Memorandum to the Bill, the provisions appear to operate beneficially on taxpayers.

The Committee has no further comment on the Bill.



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**TAXATION LAWS AMENDMENT (FOREIGN INCOME) BILL 1990**

This Bill was introduced into the House of Representatives on 13 September 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend the Income Tax Assessment Act 1936 to introduce an accruals system of taxing certain foreign source income derived in low-tax countries by Australian-controlled entities and accumulated off-shore, effective from the beginning of the 1990-91 income year.

**Reversal of the onus of proof  
Clauses 18 and 49**

Clause 18 of the Bill would insert into the Income Tax Assessment Act 1936 a new division 6AAA, with special provisions relating to non-resident trust estates. Proposed new section 102AAZG sets out certain requirements concerning the keeping of records in relation to trust estates. Proposed subsection 102AAZG(2) makes it an offence not to keep such records.

Proposed new subsection 102AAZG(4) provides a series of defences to the offence provision, based on the taxpayer having no reasonable grounds to suspect that the requirements of the section were applicable, not knowing that they were applicable (having made all reasonable efforts to ascertain whether they applied) or having made reasonable efforts to obtain the information required. However, the Explanatory Memorandum states that a person

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attempting to rely on the defences contained in subsection (4) will carry the onus of proving that reasonable grounds existed or that reasonable efforts had been made.

Clause 49 would insert a new Part X into the Income Tax Assessment Act 1936, to make certain amounts part of a taxpayer's assessable income. Proposed new section 464 requires that certain records be kept. Failure to keep such records is an offence pursuant to proposed new section 465. Proposed new section 467 contains some 'reasonable excuse' defences but, as with clause 18, the Explanatory Memorandum states that the onus of proving such reasonable excuse lies with the taxpayer.

Clauses 18 and 49 contain similar provisions in relation to the keeping of records by partnerships. A defence to the relevant offence provision is provided in each case if the partner does not aid, abet, counsel or procure the act or omission constituting the offence and was not knowingly concerned in or party to the commission of the offence. However, the Explanatory Memorandum puts the onus of proof on the taxpayer in each case.

All of the provisions referred to effectively reverse the onus of proof, requiring the taxpayer to prove matters which would normally be considered to be matters for the prosecuting party to prove. Accordingly, the Committee draws Senators' attention to the provisions as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

**Retrospectivity**

**Clauses 51, 52 - 59, 60 and 61**

Clause 51 of the Bill contains a series of provisions which give various proposed amendments a retrospective effect. Clauses 52-59 also involve retrospectivity. The retrospectivity involved, in each case, appears to have the potential to operate prejudicially on taxpayers.

Clause 60 of the Bill provides that the first regulations made for the purposes of a provision inserted into the Income Tax Assessment Act 1936 by the Bill may be expressed:

- (a) to have been in effect at all relevant times before the date of notification of the regulations; or
- (b) to apply in relation to a period any part of which occurred before the date of notification of the regulations; or
- (c) to take effect from:
  - (i) a specified date; or
  - (ii) a specified time on a specified date;before the date of notification of the regulations.

The power is expressly limited to the first regulations made for the purposes of a provision inserted into the Principal Act by the Bill. However, it should be noted that this power to make such regulations could be exercised to make regulations going back for an unspecified period of time.

The Explanatory Memorandum to the Bill (at page 414) states that clause 60 is inserted to negate the effect of the operation of section 48 of the Acts Interpretation Act 1901,

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which provides that regulations take effect from the date of their notification in the Gazette or from a specified date. However, subsection 48(2) goes on to state that regulations expressed to take effect prior to notification and which (a) prejudicially affect or (b) impose liabilities on persons other than the Commonwealth or its agencies shall be void and of no effect. The Explanatory Memorandum acknowledges the content and effect of subsection 48(2) in asserting that the effect of clause 60 is to ensure that any regulations made may operate prior to the date of notification in the Gazette.

Clause 61 of the Bill provides that nothing contained in section 170 of the Income Tax Assessment Act 1936 (which sets out the conditions governing the amendment of assessments), will prevent the amendment of an assessment made before the commencement of the Bill, if made for the purpose of giving effect to the Bill. Inter alia (and subject to specified exceptions), section 170 limits the time within which the Commissioner of Taxation can issue an amended assessment.

The retrospective provisions referred to above all involve the possibility of taxpayers' rights being prejudicially affected. In addition, the explicit over-riding of section 48 of the Acts Interpretation Act 1901 is a matter which causes the Committee some concern. Accordingly, the Committee draws Senators' attention to the provisions as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

DEPARTMENT OF THE SENATE
PAPER No. 1046
DATE PRESENTED
10 OCT 1990
<i>Mong Ean</i>



**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 7 OF 1990**

**10 OCTOBER 1990**

**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 7 OF 1990**

**10 OCTOBER 1990**

**ISSN 0729-6851**

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)  
Senator A. Vanstone (Deputy Chairman)  
Senator V. Bourne  
Senator R. Crowley  
Senator I. Macdonald  
Senator N. Sherry

### TERMS OF REFERENCE

#### Extract

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

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The Committee has considered the following Bills:

- \* Arts, Environment, Tourism and Territories  
Legislation Amendment Bill 1990
- \* Community Services and Health Legislation  
Amendment Bill 1990
- \* Crimes Legislation Amendment Bill 1990
- \* Law and Justice Legislation Amendment Bill 1990

- \* The Committee has commented on these Bills

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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**ARTS, ENVIRONMENT, TOURISM AND TERRITORIES LEGISLATION  
AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 10 September 1990 by the Minister for the Arts, Sport, the Environment, Tourism and Territories.

This portfolio legislation proposes to amend the following 8 Acts:

- . Arts, Territories and Environment Legislation Amendment Act 1989,
- . Australian Capital Territory (Planning and Land Management) Act 1988,
- . Australian Tourist Commission Act 1987,
- . National Gallery Act 1975,
- . National Parks and Wildlife Conservation Act 1975,
- . Protection of Movable Cultural Heritage Act 1986,
- . Public Lending Right Act 1985, and
- . Seat of Government (Administration) Act 1910.

**Retrospectivity**

Clauses 2(2), (3), (4) and (5)

Clauses 2(2) and (3) provide for the retrospective operation of the amendments to the Arts, Territories and Environment Legislation Amendment Act 1989 and the Australian Capital Territory (Planning and Land Management) Act 1988 which are proposed by Parts 2 and 3 of the Bill respectively. However, as these Parts merely correct minor technical errors, the Committee makes no further comment.

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

Clauses 2(4) and (5) provide for the retrospective operation of the amendments to the Seat of Government (Administration) Act 1910 proposed by Part 9 and paragraph 17(a) of the Bill respectively. Clause 2(4) provides that the amendments proposed by Part 9 (other than paragraph 27(a)) are to be taken to have commenced immediately after the commencement of section 32 of the A.C.T. Self-Government (Consequential Provisions) Act 1988 (ie 11 May 1989). Clause 2(5) provides that the amendment proposed by paragraph 27(a) is to be taken to have commenced on 1 July 1990.

Under the Seat of Government (Administration) Act as it presently stands, the Governor-General has power to make Ordinances for the Australian Capital Territory on matters over which the Commonwealth retained authority when granting self-government. In relation to some of these retained powers, a timetable is set out in the legislation which granted self-government to govern their eventual transfer to the Territory government. For other powers there is no such timetable. The Minister's Second Reading speech explains that the amendment to the Seat of Government (Administration) Act is intended to

correct an error which appears to have caused the Ordinance-making power on some matters still retained, to expire on 1 July 1990.

In other words, neither the Commonwealth nor the Territory government can presently make changes to the law in certain areas of power retained by the Commonwealth. The proposed amendments would end this state of limbo by restoring the Commonwealth's power. Accordingly, the Committee makes no further comment.

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**COMMUNITY SERVICES AND HEALTH LEGISLATION AMENDMENT  
BILL 1990**

This Bill was introduced into the House of Representatives on 20 September 1990 by the Minister for Aged, Family and Health Services.

Primarily, this portfolio Bill proposes to amend the:

- . Child Care Act 1972 to allow for fee relief to be paid to child care centres previously ineligible for relief;
- . Health Insurance Act 1973 to increase the maximum patient contribution from \$20 to \$26 from 1 January 1991;
- . National Health Act 1953 to give effect to structural reform to the Pharmaceutical Benefits Scheme, including the establishment of the Pharmacy Restructuring Authority; and the
- . National Health Act 1953 and Health Insurance Act 1973 to extend the scope of secrecy provisions.

The Bill also makes other minor amendments to the three Acts mentioned above.

**General comment  
Clauses 4, 8, 29, 31**

Clauses 4 and 8 of the Bill would respectively insert new section 43 and amend section 12A of the Child Care Act 1972. These provisions allow for ministerial guidelines to be issued on certain matters. Similarly clause 29 would insert a new section 99L into the National Health Act 1953, requiring the Minister to determine certain guidelines. The

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Committee notes with approval that, in each case, the guidelines concerned are disallowable instruments, within the terms of section 46A of the Acts Interpretation Act 1901.

Clause 31 would insert proposed new subsection 135A(5A) into the National Health Act 1953. This provision would permit the publication of certain statistics in relation to the supply of pharmaceutical benefits, despite the fact that such release might mean that the manufacturer of the pharmaceuticals could be identified. The Committee notes with approval, however, that the protection of the privacy of the patient, pharmacist or medical practitioner in relation to these statistics is maintained.

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**CRIMES LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 19 September 1990 by the Attorney-General.

This omnibus Bill proposes to amend 25 various Acts concerned with crime, law enforcement and criminal justice. The amendments are minor in nature.

**Postponed commencement  
Subclauses 2(4) and (5)**

Subclause 2(4) of the Bill provides that the amendments to the Proceeds of Crime Act 1987 which are proposed by clause 58 are to commence on a day to be fixed by Proclamation. However, subclause 2(5) provides that if such a Proclamation has not been made within 12 months of Royal Assent then the amendments are to commence automatically.

By way of explanation for the delayed commencement of the provisions, the Explanatory Memorandum to the Bill states that the amendments are made in anticipation of the ACT legislature enacting its own legislation to deal with the confiscation of the proceeds of crime. It is asserted that this legislation will be enacted 'within the next 12 months'.

The Committee notes with approval the fact that the commencement provision is not open-ended and that the Explanatory Memorandum sets out the need for a commencement

period in excess of 6 months from Royal Assent. Accordingly, the Committee makes no further comment on the provision.

**Retrospective effect  
Subclauses 2(6) and (7)**

Subclause 2(6) of the Bill provides that the amendment to the Crimes Legislation Amendment Act 1989 proposed by clause 74(2) and Part 2 of Schedule 2 are to be taken to have commenced immediately after the commencement of section 15 of that Act (ie 30 June 1989). Subclause 2(7) provides that the amendment to the Intelligence and Security (Consequential Amendments) Act 1986 proposed by clause 74(3) and Part 3 of Schedule 2 are to be taken to have commenced immediately after the commencement of section 25 of that Act (ie 1 February 1987). In each case, the amendments are of a technical nature, correcting drafting errors. Accordingly, the Committee makes no further comment.

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**LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 20 September 1990 by the Attorney-General.

This omnibus Bill proposes to amend 14 various Acts concerning legislation within the Attorney-General's portfolio. The amendments are minor in nature.

**General comment**

The Committee notes with approval that clause 19 of the Bill proposes to amend section 130 of the Bankruptcy Act 1966 to provide that warrants for the seizure of property connected with a bankrupt can only be issued by a judge. In its present form, the Act also allows magistrates to issue such warrants. The Explanatory Memorandum to the Bill states:

The serious nature of search and seizure warrants makes it preferable for judges of a court exercising jurisdiction in bankruptcy to scrutinise the actions of bankruptcy trustees in applying for warrants of this kind.

The Committee endorses this statement and commends the Attorney-General for proposing the amendment.

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  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make such rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
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The Committee has considered the following Bills:

- Beef Production Levy Bill 1990
- \* Cattle and Beef Levy Collection Bill 1990
- Cattle Export Charge Bill 1990
- Cattle Industry Legislation (Consequential Provisions) Bill 1990
- Cattle Transaction Levy Bill 1990
- \* Child Support Legislation Amendment Bill 1990
- \* Constitution Alteration (Alterations of the Constitution on the Initiative of the Electors) 1990
- \* Excise Tariff Amendment Bill 1990
- Higher Education Funding Amendment Bill (No.2) 1990
- \* Industrial Relations Legislation Amendment Bill (No.2) 1990
- \* Live-stock Export Charge Amendment Bill 1990
- \* Live-stock Slaughter Levy Amendment Bill 1990
- Overseas Students Charge Amendment Bill 1990
- States Grants (General Purposes) Bill 1990
- States Grants (TAFE Assistance) Amendment Bill 1990
  
- \* The Committee has commented on these Bills

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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**BEEF PRODUCTION LEVY BILL 1990**

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to impose a levy on the production of beef on a cents per kilogram basis, calculated on carcase weight. The levy contains components for the funding of the Australian Meat and Live-stock Corporation and the Australian Meat and Live-stock Research and Development Corporation.

The rate of the levy may be altered by regulation (to a maximum of 5 cents) on recommendation of the appropriate Corporation and following approval of the recommendation by an annual general meeting of the beef industry.

The Committee has no comment on this Bill.

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## **CATTLE AND BEEF LEVY COLLECTION BILL 1990**

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to provide collection mechanisms for levies and charges imposed under the Cattle Transaction Levy Bill 1990, the Beef Production Levy Bill 1990 and Cattle Export Charge Bill 1990, effective from 1 January 1991.

### **Issue of search warrants by non-judicial officers Subclause 13(1)**

Clause 13(1) of the Bill, if enacted, would allow magistrates to issue search warrants in certain circumstances. 'Magistrate' is defined in clause 3(1) of the Bill to include a Justice of the Peace. The Committee has consistently drawn attention to provisions which allow for the issue of search warrants by non-judicial officers. Accordingly, the Committee draws Senators' attention to clause 13(1), as it may trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

### **Power to enter and search premises Clause 12**

Clause 12 of the Bill, if enacted, would allow an 'authorised person' to enter and search premises and to

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seize material either (a) with the consent of the occupier or (b) in accordance with a warrant issued pursuant to clause 13. The Committee notes that the consent provision in this case is somewhat crude, providing no protection to a person giving such a consent.

An example of the kind of consent provision which the Committee suggests might be more appropriate is that contained in the CT Credit Act 1985. As in this case, section 234 of that Act allows an investigating officer to enter, seize and search premises with the consent of the occupier. However, section 236 contains detailed provisions relating to the consent:

236 (1) Before obtaining the consent of a person for the purposes of section 234, the Director or an investigating officer shall inform the person that he [or she] may refuse to give his [or her] consent.

(2) Where the Director or an investigating officer obtains the consent of a person for the purposes of section 234, he [or she] shall ask the person to sign a written acknowledgement -

(a) of the fact that he [or she] has been informed that he [or she] may refuse to give his consent;

(b) of the fact that he [or she] has voluntarily given his [or her] consent; and

(c) of the day on which, and the time at which, he [or she] gave his [or her] consent.

(3) An entry by the Director or an investigating officer by virtue of the consent of a person is not lawful unless the person voluntarily consented to the entry.

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(4) Where it is material, in any proceeding, for a court to be satisfied of the voluntary consent of a person for the purposes of section 234 and an acknowledgement, in accordance with sub-section (2), signed by the person is not produced in evidence, the court shall assume, unless the contrary is proved, that the person did not voluntarily give such a consent.

This provision ensures that consent is properly obtained and also protects the person giving the consent. It is, therefore, preferable to the provision contained in the Bill before the Committee.

The Committee draws Senators' attention to clause 12 of the Bill as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

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**CATTLE EXPORT CHARGE BILL 1990**

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to impose a levy on the export of cattle based on the weight of cattle at the time of export, as opposed to the current per head charge, which is imposed. Moneys raised by the charge will be used to fund the Australian Meat and Live-stock Corporation and the Australian Meat and Live-stock Research and Development Corporation. The rate may be altered by regulation (to a maximum of 2.5 cents per kilo) on recommendation of the appropriate Corporation and following approval by an annual general meeting of the cattle industry.

The Committee has no comment on this Bill.



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**CATTLE INDUSTRY LEGISLATION (CONSEQUENTIAL PROVISIONS) BILL  
1990**

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to amend several Acts as a consequence of revised levy and export charge arrangements for the cattle and beef industry. Primarily the Bill will allow:

- . payment of monies under the new arrangements to the Australian Meat and Live-stock Corporation, the Australian Meat and Live-stock Research and Development Corporation and the National Cattle Disease Eradication Trust Account;
- . the Corporations to make recommendations to the Minister on the rates of levy and charges, and
- . the register of livestock producers to be restructured.

The Committee has no comment on this Bill.

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**CATTLE TRANSACTION LEVY BILL 1990**

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to impose a fiat rate per head levy on the sale of cattle and the transfer of cattle from the production to the processing stage, payable by the vendor or owner at the time of transfer.

The Committee has no comment on this Bill.

**CHILD SUPPORT LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 11 October 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend the:

- . Child Support (Registration and Collection) Act 1988;
- . Child Support (Assessment) Act 1989; and
- . Family Law Act 1975

to allow the relaxation of certain restrictions included in the original legislation.

**General comment**  
**Clause 12**

Clause 12 of the Bill proposes to amend section 113 of the Child Support (Registration and Collection) Act 1988 (which deals with the recovery of debts pursuant to that Act) to allow the Child Support Registrar to take such steps as are necessary to inform a custodial parent of the progress made in recovering amounts due to them. While this might be considered to involve at least the possibility of the non-custodial parent's privacy being breached, the Committee notes that, according to the Explanatory Memorandum to the Bill, '[t]he Privacy Commissioner has approved of the change'. Accordingly, the Committee makes no further comment.

**CONSTITUTION ALTERATION (ALTERATIONS OF THE CONSTITUTION  
ON THE INITIATIVE OF THE ELECTORS) 1990**

This Bill was introduced into the House of Representatives on 11 October 1990 by Mr Mack as a Private Member's Bill.

The Bill proposes to alter the Constitution by allowing electors to propose an alteration and have that proposal decided at the time of a general election. Further, the Bill intends to minimise costs to the taxpayer:

- . by presenting the proposal only at a general election;
- . providing checks and balances to ensure that the procedure is not hindered; and
- . giving electors options on how to proceed when presenting a proposal.

**General comment**

The Committee notes that the Bill contains several (apparent) errors. First, the Committee notes that the word 'Act' is omitted from clause 1 of the Bill and, consequently, from the short title. Second, the Committee notes that the headings on pages 3, 5, 7, 9, 11 and 13 refer to '1980' instead of '1990'. Finally, the Committee notes that, as the relevant provisions in the Constitution are presently set out, there might be some difficulty in identifying paragraphs 3, 4, 5 and 6 of section 128 in

proposed new section 129(24). Similarly, difficulties might be encountered in identifying paragraphs 5 and 6 of section 128 in proposed new section 130.

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**EXCISE TARIFF AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Small Business and Customs.

The Bill proposes to:

- . provide the facility for the determination of different VOLWARE prices for different oil producing regions;
- . alter the duty on naturally occurring liquefied petroleum gas, effective from 1 April 1990; and
- . effect a technical correction to the definition of 'new oil', to ensure that oil produced from two reservoirs in Bass Strait since 1 July 1980 and excisable at the 'old' oil rate, does not inadvertently become 'new oil' and subject to a free rate of duty.

**Retrospectivity**  
Subclauses 2(2) - (5)

Subclauses 2(2) - (5) of the Bill would make the amendments proposed by various clauses retrospective to various specified dates, some as far back as 1 July 1984. The Explanatory Memorandum to the Bill and the Minister's Second Reading speech acknowledge that the provisions are prejudicial to persons other than the Commonwealth. However,

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the Second Reading speech also states that the effect of the retrospective application of the amendments will be that

[in effect, what has been paid will ... be the correct amount of duty payable.

All producers had accepted the pre July 1983 classification arrangements and associated decisions and paid excise at the appropriate rate without protest from that time up until 1 March of this year. For that reason, the Government considers any changes made now to the 'new' oil definition that have the effect of ensuring that the oil classifications made prior to 1 July 1983 remain binding should be seen as 'declaratory' in nature - that is, the changes will only ratify what the industry and Government had always expected to have been the legal position.

The Committee makes no further comment on the Bill.

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**HIGHER EDUCATION FUNDING AMENDMENT BILL (NO.2) 1990**

This Bill was introduced into the House of Representatives on 11 October 1990 by the Minister for Higher Education and Employment Services.

The Bill proposes to provide funding for higher education institutions for the 1990-92 triennium amounting to \$3204 million. This amount includes \$29.6 million for additional intakes in 1993 and \$212.5 million for major capital projects.

The Committee has no comment on this Bill.



**INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL (NO.2) 1990**

This Bill was introduced into the House of Representatives on 11 October 1990 by the Minister Representing the Minister for Industrial Relations.

This portfolio Bill proposes to amend several Acts within the Industrial Relations portfolio, as well as the Defence Act 1903. Those amendments are as follows:

- . Defence Act 1903 - to vary the arrangements relating to appointments to the Defence Force Remuneration Tribunal;
- . Industrial Relations Act 1988 - to improve the operation of that Act, particularly with regard to award observance;
- . Industrial Relations (Consequential Provisions) Act 1988 - to allow the application of the Judges' Pensions Act 1968 to a Presidential member of the Australian Industrial Relations Commission;
- . Long Service Leave (Commonwealth Employees) Act 1976 - to enable that Act to cover Australian Federal Police staff members;
- . National Occupational Health and Safety Commission Act 1985 - to reflect ACT self-government and change arrangements for persons acting as Chief Executive Officer;

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- . Remuneration and Allowances Act 1990 - places the responsibility for funding the salaries of ACT magistrates with the ACT Administration; and
- . States Grants (Coal Mining Industry Long Service Leave) Act 1949 - to allow the Commonwealth to make certain advances to the States.

**Retrospectivity**  
Clauses 2(2) and (3)

Clause 2(2) of the Bill provides that clauses 22, 23 and 24 are to be taken to have commenced on 1 March 1989. Clause 2(3) provides that clause 26 is to be taken to have commenced on 1 January 1990. Clauses 22, 23 and 24 remove a superannuation anomaly and clause 26 ensures that staff members of the Australian Federal Police will have the same long service leave entitlements as police members. Since, in each case, the retrospectivity appears to be beneficial to persons or bodies other than the Commonwealth, the Committee has no objection to the clauses.

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**LIVE-STOCK EXPORT CHARGE AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to set the rate of charge for cattle under the Live-stock Export Charge Act 1977 to zero, to facilitate the introduction of revised levy and charge arrangements. The Bill also provides that if the new arrangements do not work satisfactorily the Minister may make a declaration to reinstate the rates operative at 31 December 1990. This declaration power is valid until 30 June 1994.

**Ministerial declaration - 'Henry VIII' clause  
Clause 4**

Clause 4 of the Bill proposes to insert a new section 7A into the Live-stock Export Charge Act. If enacted, this provision would allow the Minister, within a specified period and after consultation with the relevant industry body, to decide that the new scheme of charges proposed by this Bill is not operating 'in a satisfactory manner'. Having done so, the Minister can make a declaration to this effect. The declaration would also have the effect of restoring the existing arrangements, as if these amendments had not been made. In so doing, the Minister would also, in effect, repeal the provisions of this Bill, making the provision what the Committee would ordinarily regard as a 'Henry VIII' clause.

The Committee is also concerned that neither the Explanatory Memorandum nor the Second Reading speech offer any guidance as to the nature and the timing of the consultation procedures provided for by the Bill. Similarly, the Committee notes that the Bill gives no indication as to whether or not the people who will be affected by such a declaration will have any notice of a proposed declaration.

In this vein, the Committee notes that proposed new subsection 7A(2) would require the Minister to publish a copy of the declaration in the Gazette. However, there is no requirement to table such a declaration in the Parliament. Consequently, there is no scope for parliamentary scrutiny of the declaration. The Committee considers that these declarations should, at the very least, be tabled in the Parliament. Given the effect of the declarations, the Committee suggests that it may also be appropriate for them to be subject to disallowance.

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

**LIVE-STOCK SLAUGHTER LEVY AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to set the rate of levy on the slaughter of cattle, calves and bobby calves under the Live-stock Slaughter Levy Act 1964 to zero, to facilitate the introduction of revised levy and charge arrangements. The Bill also provides that if the new arrangements do not work satisfactorily the Minister may make a declaration to reinstate the rates operative at 31 December 1990. This declaration power is valid until 30 June 1994.

**Ministerial declaration - 'Henry VIII' clause  
Clause 6**

Clause 6 of the Bill proposes to insert a new section 6G into the Live-stock Slaughter Levy Act. If enacted, this provision would allow the Minister, within a specified period and after consultation with the relevant industry body, to decide that the new scheme of charges proposed by this Bill is not operating 'in a satisfactory manner'. Having done so, the Minister can make a declaration to this effect. The declaration would also have the effect of restoring the existing arrangements, as if these amendments had not been made. In so doing, the Minister would also, in effect, repeal the provisions of this Bill, making the provision what the Committee would ordinarily regard as a 'Henry VIII' clause.

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The Committee is also concerned that neither the Explanatory Memorandum nor the Second Reading speech offer any guidance as to the nature and the timing of the consultation procedures provided for by the Bill. Similarly, the Committee notes that the Bill gives no indication as to whether or not the people who will be affected by such a declaration will have any notice of a proposed declaration.

In this vein, the Committee notes that proposed new subsection 6G(2) would require the Minister to publish a copy of the declaration in the Gazette. However, there is no requirement to table such a declaration in the Parliament. Consequently, there is no scope for parliamentary scrutiny of the declaration. The Committee considers that these declarations should, at the very least, be tabled in the Parliament. Given the effect of the declarations, the Committee suggests that it may also be appropriate for them to be subject to disallowance.

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

**OVERSEAS STUDENTS CHARGE AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Employment, Education and Training.

The Bill proposes to amend the Overseas Students Charge Act 1979 to fix the amounts of the charges payable for the 1991 academic year.

The Committee has no comment on this Bill.

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**STATES GRANTS (GENERAL PURPOSES) BILL 1990**

This Bill was introduced into the House of Representatives on 11 October 1990 by the Minister Assisting the Treasurer.

The Bill proposes to provide general purpose assistance to the States and the Northern Territory amounting to \$13.5 billion, or approximately 15 per cent of estimated Commonwealth Budget outlays in 1990-91.

The Committee has no comment on this Bill.



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**STATES GRANTS (TAPE ASSISTANCE) AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 10 October 1990 by the Minister for Employment, Education and Training.

The Bill proposes to make available funds of \$358.587m for technical and further education in 1991 and an additional \$14.581m for 1990 (bringing the total 1990 program to \$343.477m).

The Committee has no comment on this Bill.

DEPARTMENT OF THE SENATE  
PAPER No. 1388  
DATE  
PRESENTED  
7 NOV 1990  
*Mary Egan*

**SCRUTINY OF BILLS ALERT DIGEST**



**NO. 9 OF 1990**

**7 NOVEMBER 1990**

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## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)  
Senator A. Vanstone (Deputy Chairman)  
Senator V. Bourne  
Senator R. Crowley  
Senator I. Macdonald .  
Senator N. Sherry

### TERMS OF REFERENCE

#### Extract

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

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The Committee has considered the following Bills:

- \* Broadcasting (Foreign Ownership) Amendment Bill 1990
- \* Commonwealth Funds Management Limited Bill 1990
- Copyright Amendment Bill 1990
- Debits Tax Termination Bill 1990
- \* Financial Information (Privacy) Bill 1990
- International Development Association (Further Payment) Bill 1990
- Motor Vehicle Standards (Emission Quotas) Amendment Bill 1990
- \* Occupational Health and Safety (Commonwealth Employment) Bill 1990
- \* Overseas Students (Refunds) Bill 1990
- \* Primary Industries and Energy Legislation Amendment Bill 1990
- \* Sales Tax Laws Amendment Bill (No. 3) 1990
- \* Social Security Legislation Amendment Bill 1990

\* The Committee has commented on these Bills

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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**BROADCASTING (FOREIGN OWNERSHIP) AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 17 October 1990 by the Minister for Transport and Communications.

The Bill proposes to:

- . limit the aggregate foreign ownership of Australian commercial radio and television licensees to an absolute maximum of 50 per cent; and
- . require that at least 80 per cent of the directors of a commercial licensee be Australian citizens.

**Prospective commencement  
Clause 2(2)**

Clauses 3, 4, 5, 6 and 9 of the Bill propose various amendments to the Broadcasting Act 1942, to give effect to the new rule that at least 80 per cent of the directors of a commercial licensee must be Australian citizens. By clause 2(2) of the Bill, these clauses all commence on 22 May 1991.

Depending on if and when the Bill is actually passed by the Parliament and receives Royal Assent, there is a possibility that the Bill will infringe the so-called '6 month rule', which is set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, a copy of which appears at the

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end of this Alert Digest. This drafting instruction states that, preferably, Acts or parts of Acts should not be expressed to commence more than 6 months from Royal Assent.

The drafting instruction also states that if a period in excess of 6 months is specified, then the reason for the longer period should be set out in the Explanatory Memorandum to the Bill. In the present case, the Explanatory Memorandum states:

This date [ie 22 May 1991] gives licensees 12 months from the date of the Government's announcement of the new rule [22 May 1990] ... to comply with the rule.

The Committee makes no further comment on the clause.

#### Retrospectivity Clause 12

Clause 12 of the Bill gives licensees a period of time in which to comply with the new foreign ownership rules which are to be effected by clauses 7, 8, 10 and 11 which, inter alia, propose to provide a 'more effective' method of calculating the aggregate foreign shareholding of a company. It provides that, if a licensee was complying with the aggregate foreign ownership limit existing at 22 May 1990 but would not be complying if the amendments proposed by clauses 7, 8, 10 and 11 had been in force on that day, then those interests in excess of the allowable limit are to be disregarded until 22 May 1993. In effect, it gives those licensees a period of grace, within which they can put their ownership in order. Subclause 12(2) allows the Australian Broadcasting Tribunal to extend this transitional period.

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While this clause would appear to operate to the benefit of those persons affected by it, the Committee is unclear about how the amendments would affect a licensee who was not complying with the foreign ownership limit existing at 22 May 1990. In particular, the Committee is anxious to know whether any period of grace applies to such licensees. Accordingly, the Committee seeks the Minister's advice on the way the proposed amendments will operate in relation to such licensees.



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**COMMONWEALTH FUNDS MANAGEMENT LIMITED BILL 1990**

This Bill was introduced into the House of Representatives on 17 October 1990 by the Minister for Finance.

The Bill proposes to:

- . provide for the conversion of the Superannuation Fund Investment Trust (SFIT) into a wholly Commonwealth-owned public company; and
- . transfer SFIT's trustee function to a joint employer/employee board of trustees, to be known as the Commonwealth Superannuation Board of Trustees No. 2.

**Commencement by Proclamation  
Subclause 2(4)**

Parts 3, 6, 7, 8 and 9 of the Bill deal with, respectively, the conversion of the SFIT into a public company, staffing matters, the transfer of assets and liabilities, miscellaneous transitional matters and consequential amendments to the Superannuation Act 1976. Subclause 2(4) of the Bill provides that, with 2 specified exceptions, the provisions contained in these parts are to commence on a date to be fixed by Proclamation. However, subclause 2(5) provides that if these provisions have not commenced by 1 July 1991 then they are to commence on that date.

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The Committee notes that Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 states that, as a general rule, commencement clauses involving commencement by Proclamation should operate on either a fixed date or a fixed period after Royal Assent. It also states that, if a period after Royal Assent is nominated, that period preferably should not exceed 6 months. The drafting instruction goes on to state that if a period greater than 6 months is required, then the Explanatory Memorandum to the Bill should explain why this is necessary.

In the present case, the period within which the provisions would commence is limited by the nomination of a date on which they will automatically come into force if no Proclamation has been made. If the Bill passes both Houses of the Parliament in the current session, it is at least possible that the provisions nominated could come into force more than 6 months after Royal Assent. However, as the possible breach is relatively slight, the Committee makes no further comment on the provision.

'Henry VIII' clause  
Clause 6

Clause 6 of the Bill, if enacted, would allow the legislation to be modified in so far as it refers to the Companies Act 1981 should that Act cease to operate. Pursuant to the clause, references to the Companies Act or its provisions could be omitted and substituted by regulation. This is what the Committee ordinarily regards as a 'Henry VIII' clause, as it would permit the amendment of primary legislation by delegated legislation.

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By way of explanation, paragraph 9 of the Explanatory Memorandum to the Bill states, in part:

This provision is necessary to provide a mechanism to complete the public company conversion in the event of the Companies Act 1981 being superseded before the transition takes place.

The Committee makes no further comment on the Bill.

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**COPYRIGHT AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 17 October 1990 by the Attorney-General.

The Bill proposes to:

- . enable unrestricted commercial importation of 'non-pirate' copies of all new books (other than those first published in Australia or those published simultaneously in Australia and overseas);
- . suspend a copyright owner's control over importation of non-pirate copies of books first published in Australia or published simultaneously in Australia and overseas when the owner cannot supply copies for more than 90 days; and
- . allow the importation of single copies of non-pirate copies of books at any time to fill documented orders from customers for their private use.

The Committee has no comment on this Bill.

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**DEBITS TAX TERMINATION BILL 1990**

This Bill was introduced into the House of Representatives on 17 October 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend the Debits Tax Act 1982 and the Taxation Administration Act 1953 to transfer the responsibility for debits tax from the Commonwealth to the States and Territories. While the States and Territories put the necessary mechanisms in place, the Commissioner of Taxation will have agency arrangements with the State and Territory Taxation Commissioners. The transfer is expected to occur on 1 December 1990.

The Committee has no comment on this Bill.

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**FINANCIAL INFORMATION (PRIVACY) BILL 1990**

This Bill was introduced into the House of Representatives on 18 October 1990 as a Private Member's Bill by Mr Costello.

The Bill proposes to regulate financial reporting while protecting the rights of consumers.

**Commencement by Proclamation  
Clause 2**

Clause 2 of the Bill provides for commencement on a date to be fixed by Proclamation. There are no limits placed on the time within which this Proclamation should be made. The Committee notes that Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 states that, as a general rule, commencement clauses of this type should fix either a period or a date after Royal Assent as the time by which an Act should be proclaimed.

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

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**Sexist language  
Clause 25**

Clause 25 of the Bill deals with the making of complaints to the Privacy Commissioner. In subclauses (2) and (3), the Commissioner is referred to as 'he'. Further, there is an apparent error in the first line of subclause (4), where 'consider' should, presumably, be 'considers'.

**General comment**

The Committee notes that there are some apparent errors in the Bill. In subclause 7(b), the reference to 'less' should, presumably, be 'loss'. In paragraph 37(3)(a), there is reference to 'the time within which an application may be made under section 36'. However, the Bill does not appear to give any indication of what this time period is.

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**INTERNATIONAL DEVELOPMENT ASSOCIATION (FURTHER PAYMENT) BILL  
1990**

This Bill was introduced into the House of Representatives on 18 October 1990 by the Minister Representing the Minister for Foreign Affairs and Trade.

The Bill proposes to authorise a contribution by Australia of \$382,500,000 towards the Ninth Replenishment of the International Development Association.

The Committee has no comment on this Bill.



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**MOTOR VEHICLE STANDARDS (EMISSION QUOTAS) AMENDMENT BILL  
1990**

This Bill was introduced into the Senate on 16 October 1990 by Senator Coulter as a Private Senator's Bill.

The Bill proposes to impose a limit on total CO<sub>2</sub> emissions from all motor vehicles sold by an importer or manufacturer in 1991. The Bill also proposes to reduce the total emission limit by 5 per cent each succeeding year.

The Committee has no comment on this Bill.

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**OCCUPATIONAL HEALTH AND SAFETY (COMMONWEALTH EMPLOYMENT)  
BILL 1990**

This Bill was introduced into the House of Representatives on 18 October 1990 by the Minister Representing the Minister for Industrial Relations.

The Bill proposes to provide for the protection of the health and safety of Commonwealth employees at work. In particular, the Bill imposes a general duty of care on employers, manufacturers and suppliers of plant and substances and installers of plant. A general duty of care is also imposed on employees.

**'Henry VIII' clauses  
Subclauses 6(2), 7(2) and paragraph 9(2)(c)**

Subclause 6(2) of the Bill would allow the Director-General of Security, after consulting the Minister, to declare that specified provisions of the Bill do not apply or that they apply subject to such modifications and adaptations as are set out. This is what the Committee would ordinarily regard as a 'Henry VIII' clause, as it allows the Director-General to amend a piece of primary legislation by means of a piece of delegated legislation.

Subclause 7(2) would allow the Chief of the Defence Force, after consulting the Minister, to declare that specified provisions of the Bill do not apply to the Defence Force (or specified members of it) or that they apply subject to such

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modifications or adaptations as are set out. For the same reason this is also a 'Henry VIII' clause.

Similarly, paragraph 9(2) would allow the Minister to declare that the Bill does not or does apply to the holder of a particular office (subparagraphs 9(2)(c)(i) and (ii), respectively).

In each case, declarations made under these provisions are, explicitly, disallowable instruments for the purposes of section 46A of the Acts Interpretation Act 1901.

The Committee draws attention to the provisions as they may be considered to constitute an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Codes of practice  
Clause 70

Clause 70 of the Bill would allow the Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees to prepare and also allow the Minister to approve, amend or revoke codes of practice '[f]or the purpose of providing practical guidance to employers'. Pursuant to subclause 70(5), where the Minister approves, amends or revokes a code of practice, the Minister must a) publish a notice to that effect in the Gazette and b) table in each House of the Parliament within 15 sitting days a document setting out the code of practice as approved, amended or revoked. However, there is no scope for the Parliament to disallow such codes of practice.

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Pursuant to clause 71, approved codes of practice are admissible in evidence in court proceedings where it is alleged that a person has contravened a provision in the Bill or in regulations issued pursuant to it, if the code of practice was in effect and is relevant to the alleged contravention. Clause 71 also contemplates action being taken for 'failure to observe' a provision of a code of practice. If this is the case, then the code of practice appears to have an effect which approaches that of a piece of legislation. It may be appropriate, therefore, for the codes of practice to be subject to disallowance.

The Committee draws attention to the clause as it may constitute an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

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**OVERSEAS STUDENTS (REFUNDS) BILL 1990**

This Bill was introduced into the House of Representatives on 17 October 1990 by the Minister for Employment, Education and Training.

The Bill proposes to facilitate the refunding of payments by the Commonwealth to overseas students unable to undertake or complete courses of study in Australia for which money has been paid in advance.

**Power to obtain information and documents  
Clause 5**

Clause 5 of the Bill empowers the Secretary (or an officer authorised in writing) to issue notices to an educational institution (or its agent) requiring them to supply 'particulars' of overseas students enrolled at the institution. This may be considered to involve a breach of students' privacy, as there is no indication of the kinds of information covered by 'particulars' or the uses to which such information could be put. Though there is no formal requirement to do so, the Committee also notes that neither the Explanatory Memorandum to the Bill nor the Minister's Second Reading speech refer to the Privacy Commissioner having been consulted on this matter.

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

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

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**PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL  
1990**

This Bill was introduced into the House of Representatives on 18 October 1990 by the Minister for Primary Industries and Energy.

The Bill is an omnibus Bill. It proposes to amend 12 statutes administered within the Primary Industries and Energy portfolio.

**Retrospectivity  
Subclause 2(2)**

Part 7 of the Bill proposes various amendments to the Primary Industries and Energy Research Development Act 1989. Pursuant to subclause 2(2), these amendments are to be retrospective to 1 October 1990. Neither the Explanatory Memorandum to the Bill nor the Second Reading speech provide any substantive justification for this retrospectivity.

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

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**SALES TAX LAWS AMENDMENT BILL (NO. 3) 1990**

This Bill was introduced into the House of Representatives on 18 October 1990 by the Minister Assisting the Treasurer.

The Bill proposes to exempt items of computer equipment from sales tax if they are used for:

- . engineering or technical design of goods for manufacture;
- . production-related activities, eg purchasing of materials;
- . finalising text or artwork to be printed; or
- . combinations of the above usages with use as aids to manufacture.

Exemptions will apply where 50 per cent or more of the computer use is for these activities.

**Retrospectivity  
Subclause 2(1)**

Subclause 2(1) of the Bill provides that, except for paragraph 7(a) (which substitutes 'or' for 'and' in one of the Sales Tax Regulations), the provisions in the Bill are to be retrospective to 19 October 1990. The Committee draws Senators' attention to the provision as it may trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

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## SOCIAL SECURITY LEGISLATION AMENDMENT BILL, 1990

This Bill was introduced into the House of Representatives on 18 October 1990 by the Minister Representing the Minister for Social Security.

The Bill proposes to amend the following Acts:

- . Social Security Act 1947;
- . Social Security and Veterans' Entitlements (Maintenance Income Test) Amendment Act 1988;
- . First Home Owners Act 1983;
- . Health Insurance Act 1973;
- . National Health Act 1953;
- . Income Tax Assessment Act 1936; and
- . Taxation Administration Act 1953

to effect measures announced in the February 1990 Economic Statement and the 1990-91 Budget.

### Retrospectivity

Clauses 4(4), (8), (9) and (12), 5(b), (d), (m), (r) and (s), 7(a), 8, 10, 12, 14(k), 21, 22, 47, 50, 56, 62-69, 70(1)(d) and (e), 72(a) and (b) and 87-91

The Bill contains numerous clauses which are (or which will be, if and when they become law) retrospective in effect. Those clauses and the relevant dates are as follows:

- . Subclause 4(4) proposes to make the amendments set out in clause 10 (which relate to section 6 of the Social Security Act 1947) retrospective to 22 August 1990;



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- . Subclause 4(8) proposes to make the amendments set out in clauses 37 and 55 (which relate to sections 82 and 129 of the Social Security Act, respectively) retrospective to 1 August 1990;
- . Subclause 4(9) proposes to make the amendments set out in clause 47 (which relate to section 118 of the Social Security Act) retrospective to 20 September 1990;
- . Subclause 4(12) proposes to make the amendments set out in paragraph `70(d)' (presumably the subclause actually refers to subparagraph 70(1)(d)), which relates to section 159 of the Social Security Act retrospective to 29 December 1988;
- . Clause 5 proposes to make various amendments to section 3 of the Social Security Act. The retrospective effect of the relevant subclauses are:
  - (b) to 22 August 1990;
  - (d) to 22 August 1990;
  - (m) to 19 December 1989;
  - (r) to 22 August 1990; and
  - (s) to 1 June 1990.
- . Subclause 7(a) proposes to amend section 4 of the Social Security Act. It is expressed to be retrospective to 22 August 1990;
- . Clause 8 proposes to amend section 4C of the Social Security Act. It is expressed to commence on 22 August 1990;

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- . Clause 10 proposes to amend section 6 of the Social Security Act. It is expressed to commence on 22 August 1990;
- . Clause 12 proposes to amend section 12A of the Social Security Act. It is expressed to commence on 1 October 1990;
- . Clause 14 proposes to make various amendments to section 12C of the Social Security Act. The amendment proposed by subclause (k) is expressed to commence on 19 December 1989;
- . Clause 21 proposes to amend section 20 of the Social Security Act. It is expressed to commence on 1 January 1990;
- . Clause 22 proposes to amend section 33 of the Social Security Act. It is expressed to commence on 20 September 1990;
- . Clause 47 proposes to amend section 119 of the Social Security Act. It is expressed to commence on 10 September 1990;
- . Clause 50 proposes to repeal section 122BA of the Social Security Act. It is expressed to commence on 22 August 1990;
- . Clause 56 proposes to amend section 130 of the Social Security Act. It is expressed to commence on 22 August 1990;

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- . Clause 62 proposes to amend section 151A of the Social Security Act. It is expressed to commence on 1 November 1990;
- . Clause 63 proposes to insert a new section 151AB into the Social Security Act. It is expressed to commence on 1 November 1990;
- . Clause 64-67 propose to amend sections 151J, 151K, 151L and 151N of the Social Security Act respectively. They are expressed to commence on 1 November 1990;
- . Clause 68 proposes to insert a new Part XVIIIA into the Social Security Act. It is expressed to commence on 22 August 1990;
- . Clause 69 proposes various amendments to section 158 of the Social Security Act. The amendments proposed by subclauses a) and b) are expressed to commence on 22 August 1990;
- . Clause 70 proposes various amendments to section 159 of the Social Security Act. The amendment proposed by paragraph (1)(d) is expressed to commence on 22 December 1988. The amendment proposed by paragraph (1)(e) is expressed to commence on 22 August 1990;
- . Clause 72 proposes various amendments to section 178 of the Social Security Act. The amendment proposed by subclause (a) is expressed to commence on 28 December 1989. The amendment proposed by subclause (b) is expressed to commence on 22 August 1990;

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- . Clauses 87 and 88 propose to amend section 4D of the Health Insurance Act 1973. The amendments are expressed to commence on 1 June 1990;
- . Clauses 89 and 90 propose to amend section 4 of the National Health Act 1953. They are expressed to commence on 1 June 1990; and
- . Clause 91 proposes to insert a new section 4AAA into the National Health Act. It is expressed to commence on 1 June 1990.

In addition to these examples of actual retrospectivity, several amendments are expressed to commence on 1 December 1990 which, depending on the progress of the Bill, may or may not involve retrospective operation. In this regard, the Committee notes the effect of clauses of 45, 46 and 51, subclause 69(c) and paragraph 10(1)(a).

The Minister's Second Reading speech indicates that the Bill 'would amend [the] social security legislation to implement some of the measures announced in the Treasurer's February Statement and in the 1990 Budget'. This, presumably, explains those amendments which are expressed to commence on 22 August 1990 (ie the day after the Budget).

The Committee has previously indicated that, in relation to retrospectivity, budgetary measures are something of a special case. In a paper entitled The Operation of the Senate Standing Committee for the Scrutiny of Bills, 1981-1985, the then Chairman of the Committee, Senator Tate, said:

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

In the present case, while the Budget explanation appears to cover many of the proposed amendments, the Minister's Second Reading speech and the Explanatory Memorandum to the Bill offer little guidance as to the need for retrospectivity in the remaining cases. Given the Committee's objection in principle to retrospective legislation, the Committee and, indeed, the Senate would be greatly assisted if some explanation could be provided for the need for retrospectivity in each case. In making this request, the Committee notes that this is already a complicated piece of legislation, amending various Acts. The Committee would, therefore, be grateful for any assistance that can be provided to simplify the Bill and its operation in relation to the various Acts affected.

The Committee draws Senators' attention to the clauses referred to above as they may unduly trespass on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Provision of tax file numbers  
Clauses 26, 29, 52, 53, 59, 60, 61, 81, 86

Clauses 26, 29, 52, 53, 59, 60, 61 and 81 propose to amend, repeal and insert various provisions in the Social Security Act involving the requirement to provide tax file numbers in relation to the provision of various benefits. Clause 86 proposes to amend the First Home Owners Act 1983 to require

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persons to provide tax file numbers in relation to certain payments of assistance under that Act.

The provisions are similar to provisions to which the Committee has previously drawn attention, most recently in Alert Digest No. 5 of 1990 in relation to provisions in the Social Security and Veterans' Affairs Legislation Amendment Bill (No. 2) 1990. As the Committee observed at that time, while such provisions may be considered necessary to prevent persons defrauding the social security system, they may also be considered to be unduly intrusive into a person's privacy. Accordingly, the Committee draws the provisions to Senators' attention as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

OFFICE OF PARLIAMENTARY COUNSEL

DRAFTING INSTRUCTION

NO. 2 OF 1989

Commencement of Legislation by Proclamation

Last year, Senators expressed strong disapproval of the fact that many pieces of legislation had been unproclaimed, in some cases for many years (eg Hansard 24 November 2772ff.).

2. In response to this criticism, the Department of the Prime Minister and Cabinet (PM&C) has instructed that a new policy should be adopted when providing for commencement of Acts by Proclamation. PM&C has issued a Legislation Circular and new paragraphs to be inserted in the Legislation Handbook, copies of which are attached. I have discussed the matter with PM&C, and what follows is my understanding of the new policy.

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

- (a) a provision that the Act commences at the fixed time if it has not already commenced by Proclamation; or
- (b) a provision that the Act shall be taken to be repealed at the fixed time if the Proclamation has not been made by that time.

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

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

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

7. In future therefore, commencement clauses providing for restricted Proclamation dates should be along the following lines, depending on which options are chosen.

1. "FORCED COMMENCEMENT"

A. Where only one day may be proclaimed

(X) Subject to subsection (Y), this Act commences on a day to be fixed by Proclamation.

AND EITHER

(Y) If this Act does not commence under subsection (X) before [specified day], it commences on that day.

OR

(Y) If this Act does not commence under subsection (X) within the period of [6 months] beginning on the day on which it receives the Royal Assent, it commences on the first day after the end of that period.

[Note: This form can be adapted for the commencement of a single provision, 2 or more provisions or 'the remaining provisions'.]



B. Where different days may be proclaimed

(X) Subject to subsection (Y), sections x, y and z/the remaining provisions of this Act/commence on a day or days to be fixed by Proclamation.

AND EITHER

(Y) If a provision referred to in subsection (X) does not commence under that subsection before [specified day], it commences on that day.

OR

(Y) If a provision referred to in subsection (X) does not commence under that subsection within the period of [6 months] beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

2. "FORCED REPEAL"

A. Where only one day may be proclaimed

(X) Subject to subsection (Y), this Act commences on a day to be fixed by Proclamation.

AND EITHER

(Y) If the commencement of this Act is not fixed by a Proclamation published in the Gazette before [specified day], this Act is repealed on that day.

OR

(Y) If the commencement of this Act is not fixed by a Proclamation published in the Gazette within the period of [6 months] beginning on the day on which this Act receives the Royal Assent, this Act is repealed on the first day after the end of that period.

[Note: This form can be adapted for the commencement of a single provision, 2 or more provisions or 'the remaining provisions'.]

B. Where different days may be proclaimed

(X) Subject to subsection (Y), sections x, y and z/the remaining provisions of this Act/commence on a day or days to be fixed by Proclamation.

AND EITHER

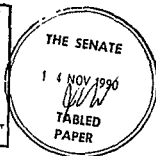
(Y) If the commencement of a provision referred to in subsection (X) is not fixed by a Proclamation published in the Gazette before [specified day], the provision is repealed on that day.

OR

(Y) If the commencement of a provision referred to in subsection (X) is not fixed by a Proclamation published in the Gazette within the period of [6 months] beginning on the day on which this Act receives the Royal Assent, the provision is repealed on the first day after the end of that period.

*I M L Turnbull*  
(I M L Turnbull)  
First Parliamentary Counsel  
10 February 1989

DEPARTMENT OF THE SENATE  
PAPER No. 1409  
DATE  
PRESENTED  
14 NOV 1990  
*Mary Egan*



**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 10 OF 1990**

**14 NOVEMBER 1990**

**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 10 of 1990**

**14 NOVEMBER 1990**

**ISSN 0729-6851**

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)  
Senator A. Vanstone (Deputy Chairman)  
Senator V. Bourne  
Senator R. Crowley  
Senator I. Macdonald  
Senator N. Sherry

### TERMS OF REFERENCE

#### Extract

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

The Committee has considered the following Bills:

- AUSSAT Amendment Bill 1990
- Australian Centennial Roads Development Amendment Bill 1990
- \* Australian Citizenship Amendment Bill 1990
- \* Australian Meat and Live-stock Corporation Amendment Bill 1990
- Australian Meat and Live-stock (Quotas) Bill 1990
- \* Builders Labourers' Federation Legislation Amendment Bill 1990
- Commonwealth and State Housing Agreement (Service Personnel) Bill 1990
- \* Commonwealth Banks Restructuring Bill 1990
- \* Community Services and Health Legislation Amendment Bill (No. 2) 1990
- Constitution Alteration (Making of Laws on the Initiative of Electors) Bill 1990
- \* Corporations Legislation Amendment Bill 1990
- Customs (Rainforest Timber) Amendment Bill 1990
- Defence (Conscientious Objection) Bill 1990
- Defence Force (Home Loans Assistance) Bill 1990
- Disability Services Amendment Bill 1990
- Education Services (Export Regulation) Bill 1990
- \* Export Market Development Grants Amendment Bill (No. 2) 1990
- Housing Loans Insurance Corporation (Sale of Assets and Abolition) Bill 1990

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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Income Tax Assessment (Substantiation Requirements) Amendment Bill 1990

Industrial Relations Amendment Bill 1990

Ministers of State Amendment Bill 1990

National Crime Authority (Powers of Parliamentary Joint Committee) Amendment Bill 1990

Northern Prawn Fishery Voluntary Adjustment Scheme Loan Guarantee Amendment Bill 1990

- \* Pipeline Authority (Charges) Bill 1990
- States Grants (Schools Assistance) Amendment Bill 1990
- \* Taxation Laws Amendment Bill (No. 5) 1990
- \* Taxation Laws Amendment (International Agreements) Bill 1990
- \* Transport and Communications Legislation Amendment Bill 1990
- \* Veterans' Affairs Legislation Amendment Bill 1990
- \* Wool Legislation Amendment Bill 1990
- \* Wool Tax (Nos. 1 - 5) Further Amendment Bills 1990

\* The Committee has commented on these Bills

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.

**AUSSAT AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Transport and Communications.

The Bill proposes to facilitate the sale of AUSSAT, allowing it to compete with OTC and Telecom in both the domestic and international telecommunications markets.

The Committee has no comment on this Bill.



**AUSTRALIAN CENTENNIAL ROADS DEVELOPMENT AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 7 November 1990 by the Minister for Transport and Communications.

The Bill proposes to:

- . amend the Australian Centennial Roads Development Act 1988 so that a separate appropriation from the Consolidated Revenue Fund can be paid into the trust fund in addition to customs and excise duty already paid into the trust fund; and
- . provide three new categories of assistance:
  - (i) provincial cities and rural highways projects;
  - (ii) black spots projects and road safety measures;
  - and
  - (iii) urban public transport projects.

The Committee has no comment on this Bill.

**AUSTRALIAN CITIZENSHIP AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 12 November 1990 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to allow children born outside Australia and New Guinea prior to 26 January 1949 to acquire citizenship by descent, through their mother, in certain circumstances. Three minor administrative amendments are also proposed within the Bill.

**Delayed commencement  
Clause 2**

Clause 2 of the Bill provides for the Bill to commence on a day to be fixed by Proclamation. However, the Committee notes with approval that, in accordance with Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, subclause 2(2) limits the time between passage of the Bill and commencement. It provides that if the legislation has not been proclaimed within 6 months of Royal Assent then it is to commence on the day following the expiry of that period.

**AUSTRALIAN MEAT AND LIVE-STOCK CORPORATION AMENDMENT  
BILL 1990**

This Bill was introduced into the House of Representatives on 7 November 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to facilitate the operation of quotas as set out in the Australian Meat and Live-stock (Quotas) Bill 1990. The legislation requires that full quota arrangements are set out in the Australian Meat and Live-stock Corporate Plan and that details of quota allocation are published in the Australian Meat and Live-stock Corporation's annual report.

**Delayed commencement  
Subclause 2(2)**

Clause 8 of the Bill proposes to repeal section 16J of the Australian Meat and Live-stock Corporation Act 1977, which currently governs the Australian Meat and Live-stock Corporation's power in relation to the operation of meat quotas. Pursuant to subclause 2(2), this repeal is to take place on 1 January 1992. This exceeds the 6 month delay in commencement which, in the light of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, the Committee would ordinarily regard as acceptable.

By way of explanation, the Explanatory Memorandum to the Bill states that

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the delay in repealing the section allows the completion of any quota schemes implemented under that section prior to the commencement of the Australian Meat and Live-stock (Quotas) Bill 1990 and this Act.

The Committee makes no further comment on the Bill.

**AUSTRALIAN MEAT AND LIVE-STOCK (QUOTAS) BILL 1990**

This Bill was introduced into the House of Representatives on 7 November 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to:

- . provide the Australian Meat and Live-stock Corporation (AMLC) with the power to implement and administer schemes to control the level of Australian meat and livestock exports to particular markets; and
  
- . allow the AMLC to allocate quota entitlements amongst licensed exporters by auction, sale by tender, private sale or by allocation free of charge.

The Committee has no comment on this Bill.

**BUILDERS LABOURERS' FEDERATION LEGISLATION AMENDMENT  
BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister Representing the Minister for Industrial Relations.

The Bill proposes to exclude the Builders Labourers' Federation (BLF), State registered branches of the BLF or any equivalent association of its members, from applying for registration under the Industrial Relations Act 1988 until 14 April 1996. Further, it will allow, in limited circumstances, the Australian Industrial Relations Commission to hear matters in which the State registered branches may have an interest.

**Retrospectivity  
Clause 6**

Clause 6 of the Bill provides that the provisions of the Bill, with the exception of subclause 4(b) (which would, in certain circumstances, allow a State registered association to intervene in proceedings before the Australian Industrial Relations Commission), have effect in relation to any application or proceedings under the Industrial Relations Act 1988 made or commenced before the commencement of the provisions of the Bill. These provisions could, therefore, operate retrospectively, in relation to proceedings already commenced. Indeed, the Committee understands that there are current proceedings to which this amendment would apply if enacted.

The Committee is concerned that the proposed amendment could operate in this way, as it may have the effect of determining issues in and, consequently, the outcome of proceedings already before the Australian Industrial Relations Commission. In the light of this concern, the Committee would appreciate some assistance from the Minister as to the effect of the proposed amendments on any current proceedings and, if relevant, the rationale behind such an application of the proposed law.

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

**COMMONWEALTH AND STATE HOUSING AGREEMENT (SERVICE PERSONNEL)  
BILL 1990**

This Bill was introduced into the House of Representatives on 7 November 1990 by the Minister for Defence Science and Personnel.

The Bill proposes to enable the Commonwealth to enter into necessary agreements with the States for the provision of housing for Defence personnel. The existing agreements have become unsatisfactory to both the Commonwealth and the States and have been re-negotiated. With the establishment of the Defence Housing Authority, total responsibility for Defence public housing is intended to rest with the Commonwealth.

The Committee has no comment on this Bill.



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**COMMONWEALTH BANKS RESTRUCTURING BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Treasurer.

The Bill proposes to:

- . provide for the Commonwealth Bank to acquire the rights, property, staff and liabilities of the State Bank of Victoria;
- . restructure the statutory entities in the Bank's group and convert it to a public company; and
- . establish special restrictions on foreign subscriptions to the Bank's first issue of shares to the public.

**Delayed commencement/commencement by Proclamation  
Subclauses 2(2) and (3)**

Pursuant to subclause 2(1), clauses 1 - 6 of the Bill are to commence on Royal Assent. The remaining provisions of the Bill all commence at some later date.

Subclause 2(2) provides that the amendments proposed by paragraphs 48(b) and (c) are to commence when the first guidelines issued pursuant to section 6 of the Superannuation Benefits (Supervisory Mechanisms) Act 1990 come into force. The effect of these paragraphs is to remove

references to approval by the Minister for Finance in the amendments to section 110 of the Commonwealth Banks Act 1959 which are proposed by paragraph 48(a), presumably on the basis that when these 'Supervisory Mechanisms Guidelines' are in force, such approval will no longer be necessary.

There is no limit on the time within which this proposed amendment will come into force, as there appears to be no requirement for the Supervisory Mechanisms Guidelines to be issued within a certain time. In the absence of any explanation, this would appear to be contrary to the intentions of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Committee would appreciate some guidance from the Treasurer as to the likely promulgation of the Supervisory Mechanisms Guidelines.

Subclause 2(3) of the Bill provides that the remaining provisions of the Bill are to commence 'on a day, or at a time, fixed by Proclamation'. Drafting Instruction No. 2 of 1989 states that, as a general rule, a restriction should be placed on the time within which such Proclamations can be made. The Drafting Instruction suggests that either a date or a fixed period after Royal Assent should be used. If a period after Royal Assent is nominated, this should preferably not be in excess of 6 months. In the absence of such a restriction, an explanation should be given in the Explanatory Memorandum.

In the present case, the Explanatory Memorandum states that the provision for commencement by Proclamation

is so that [commencement] can be made to coincide with other events, in particular the settlement of the

agreement for the succession of the Commonwealth Bank to [the State Bank of Victoria].

While this explanation appears perfectly reasonable, the Committee is unaware of the other 'events' to which the Explanatory Memorandum refers and the parts of the Bill to which they relate. The Committee would appreciate some further information from the Treasurer on these events and their relevance to the Bill.

**Reversal of the onus of proof/strict liability provision  
Clause 22**

Clause 22 of the Bill proposes to insert 2 new divisions into the Commonwealth Banks Act 1959, dealing with the conversion of the Commonwealth Bank into a public company and restrictions on the issue of shares in the Commonwealth Bank, respectively. In the latter division, proposed new section 27K would prohibit foreign persons from applying for the issue of shares in the Bank. Pursuant to proposed subsection 27K(5) it would be an offence for a foreign person to apply, punishable on conviction by a fine not exceeding \$50,000.

Proposed subsection 27K(8) provides that in proceedings for an offence against subsection (5)

it is a defence if the defendant proves that, at all relevant times, the defendant was not aware, and could not have been reasonably expected to be aware, of a fact the existence of which was necessary to constitute the offence.

Though this subclause effectively reverses the onus of proof, it could be argued that the facts necessary to prove the defence are peculiarly within the knowledge of the defendant. However, subclause (9) goes on to provide:

For the purposes of subsection (8), a person is to be conclusively presumed to have been aware at a particular time of a fact of which a servant or agent of the person (being a servant or agent having duties or acting on behalf of the master or principal in relation to any matter relevant to this section) was aware at that time.

The practical effect of this 'conclusive presumption' is to hold a person strictly liable in relation to facts known by their servants and agents which are constituent elements of an offence against the proposed section.

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

**COMMUNITY SERVICES AND HEALTH LEGISLATION AMENDMENT BILL  
(NO. 2) 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Aged, Family and Health Services.

The Bill proposes to amend six Acts to give effect to several initiatives, including care for the aged, Medicare benefits for diagnostic imaging services and pathology, and nurse education as well as effecting technical amendments to the Therapeutic Goods Act 1989.

**Delayed commencement  
Subclause 2(6)**

Subclause 2(6) of the Bill provides that the amendments proposed by Part 7 of the Bill, which relates to the Therapeutic Goods Act 1989, are to commence immediately after the commencement of that Act. Pursuant to section 2 of the Therapeutic Goods Act, that Act does not commence until such time as both Houses of the Parliament have approved regulations issued under it. It is possible, therefore, that the commencement of the Part will be in breach of the '6 month rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

The Committee makes no further comment on the Bill.

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**CONSTITUTION ALTERATION (MAKING OF LAWS ON THE INITIATIVE OF THE ELECTORS) 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by Mr Mack as a Private Member's Bill.

The Bill proposes to allow public initiation of a proposal to enact a Commonwealth law, generally known as the 'direct legislative initiative'.

The Committee has no comment on this Bill.

**CORPORATIONS LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Attorney-General.

The Bill proposes to give effect to the Heads of Agreement between Commonwealth, State and Northern Territory Ministers on future corporate regulation in Australia. Inter alia, the Bill converts the Corporations Act 1989 into a law (under section 122 of the Constitution) of the Australian Capital Territory, to be known as 'the Corporations Law of the Australian Capital Territory'.

The Committee initially dealt with the 16 bills making up what was described as the 'Corporations legislation' in Alert Digest No. 10 of 1988. In that Alert Digest, the Committee identified various and numerous concerns with the bills in the package. The (then) Acting Attorney-General responded to those concerns by letter dated 20 January 1989. In that letter, the Acting Attorney-General also indicated that various amendments would be moved in response to the Committee's concerns. The Acting Attorney-General's response and the foreshadowed amendments were duly noted in the Committee's Third Report of 1989.

However, in its Fourteenth Report of 1989, the Committee noted that a number of the foreshadowed amendments were not, in fact, passed. Those amendments do not appear to have been taken up by this Bill either. While the Committee does not wish to, in effect, re-argue its concerns with the original package of legislation, the Committee refers Senators to

what it has previously said in the earlier Alert Digest and Reports. For the information of Senators, relevant extracts of those earlier documents and a copy of the Acting Attorney-General's response are attached to this Alert Digest.

The Committee makes the following additional points:

**Commencement by Proclamation  
Subclause 2(2)**

Subclause 2(1) of the Bill provides that Parts 1 and 2 of the Bill (the 'Preliminary' part and the part converting the Corporations Act 1989 into a law for the government of the Australian Capital Territory, respectively) are to commence on Royal Assent. Subclause 2(2) provides that the remaining provisions of the Bill are to commence on a day or days to be fixed by Proclamation. Contrary to the 'general rule' set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, there is no limit on the time within which this Proclamation must be made. The Explanatory Memorandum to the Bill offers no explanation for the provision.

The Committee draws Senators' attention to the provision as possibly involving an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.



**Reversal of the onus of proof  
Schedule 5 - Amendments relating to buy-backs - proposed new  
section 206BG**

Schedule 5 of the Bill proposes various amendments to the corporations law relating to share buy-backs. It proposes to insert a new section 206BG into the Corporations Act 1989. This new section would create a presumption that the directors were aware of a proposed or actual takeover bid in certain circumstances, with the result, according to the Explanatory Memorandum, 'that directors will not be able to avoid the notice requirements of proposed s.260BF and related provisions'. As such, the provision reverses the onus of proof. However, as the matters requiring proof are (presumably) peculiarly within the knowledge of the defendant, the Committee makes no further comment.

**Reversal of the onus of proof  
Schedule 5 - Amendments relating to buy-backs - proposed new  
section 206SE**

Schedule 5 of the Bill proposes to insert new section 206SE, which deals with offences relating to compliance certificates, into the Corporations Act 1989. Pursuant to proposed subsection 206SE(1), a person is taken to have contravened the subsection either by signing such a certificate or by passing it on. Proposed subsection (2) provides a defence to the offence provision if the defendant can prove that they believed, on reasonable grounds, that the proposed buy-back would not contravene the Act. Since the onus is placed on the defendant, the provision effectively reverses the onus of proof. However, as the Committee noted above, these are matters which are

(presumably) peculiarly within the knowledge of the defendant. Accordingly, the Committee makes no further comment.

#### **General comment**

In Alert Digest No. 10 of 1988, the Committee drew attention to subclause 112(3) of the (then) Corporations Bill 1988. The Committee noted that the provision was what it would ordinarily consider to be a 'Henry VIII' clause. However, the clause subsequently passed into law.

The Committee notes with approval that this Bill seeks to repeal and replace the provision complained of with a provision of which the Committee would approve. The Committee also notes that this not one of the provisions referred to above to which the (then) Acting Attorney-General foreshadowed amendment.

**CUSTOMS (RAINFOREST TIMBER) AMENDMENT BILL 1990**

This Bill was introduced into the Senate on 6 November 1990 by Senator Coulter as a Private Senator's Bill.

The Bill proposes to insert a new section 50A into the Customs Act 1901 to ban the importation of certain tropical rainforest timbers into Australia.

The Committee has no comment on this Bill.

**DEFENCE (CONSCIENTIOUS OBJECTION) BILL 1990**

This Bill was introduced into the Senate on 7 November 1990 by Senator Vallentine as a Private Senator's Bill.

The Bill proposes to ensure that military personnel (both volunteers and conscripts) have the right to object to serving at a particular overseas operation.

The Committee has no comment on this Bill.

**DEFENCE FORCE (HOME LOANS ASSISTANCE) BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Defence Science and Personnel.

The Bill proposes to introduce a new scheme for providing home loan assistance to members of the Defence Force who enlisted on or after 15 May 1985 and gives the National Australia Bank the exclusive right to participate as the lender under the scheme.

The Committee has no comment on this Bill.

**DISABILITY SERVICES AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by Mr Braithwaite as a Private Member's Bill.

The Bill proposes to amend the Disability Services Act 1986 to provide for the tabling in Parliament of principles, objectives and guidelines made under the Act. Further, this Bill proposes that three new services be approved for funding under the Act, namely, attendant care services, staff training services and vocational training services.

The Committee has no comment on this Bill.

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**EDUCATION SERVICES (EXPORT REGULATION) BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Employment, Education and Training.

The Bill proposes to regulate the marketing and provision of education services to overseas markets. To this end, a Commonwealth Register of Institutions and Courses for Overseas Students will be established under this legislation. Visas for study purposes will only be issued to students if they are accepted into registered courses at registered institutions.

The Committee has no comment on this Bill.

**EXPORT MARKET DEVELOPMENT GRANTS AMENDMENT BILL  
(NO. 2) 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Science and Technology.

The Bill proposes to implement decisions on the recommendations of the Report of the Hughes Committee for Review of Export Market Development Assistance. Included in the major amendments (retrospective to 1 July 1990):

- . extension of the Export Market Development Grants Scheme for 5 years to 30 June 1995;
- . raising the minimum expenditure threshold from \$10,000 to \$30,000 for grant eligibility, with expenditure after the first \$15,000 being eligible for grants;
- . reduction of the grant rate from 70% to 50%;
- . increasing the maximum grant in any year from \$200,000 to \$250,000 and the export earning ceiling beyond which grants are no longer payable from \$20 to \$25 million;
- . an allowance for hotel, meals and accommodation expenditure of \$200 per day, for a maximum of 21 days; and



- . limitation of the number of grants to eight per claimant.

**Retrospectivity**  
**Clause 2**

Clause 2 of the Bill provides that the Bill is to be retrospective to 1 July 1990. However, as the previous grants scheme was to cease on 30 June 1990, it seems unlikely that the retrospectivity will be prejudicial to persons or bodies other than the Commonwealth. Accordingly, the Committee makes no further comment on the Bill.

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**HOUSING LOANS INSURANCE CORPORATION (SALE OF ASSETS AND ABOLITION) BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister Assisting the Treasurer.

The Bill proposes to provide the Commonwealth with the authority to sell the Housing Loans Insurance Corporation (HLIC) to the CIC Insurance Group, subject to certain contractual arrangements. Provision is also made for the HLIC to be abolished after the sale is effected and residual assets and liabilities have been transferred to the Commonwealth.

The Committee has no comment on this Bill.

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**INCOME TAX ASSESSMENT (SUBSTANTIATION REQUIREMENTS)  
AMENDMENT BILL 1990**

This Bill was introduced into the Senate on 7 November 1990 by Senator Watson as a Private Senator's Bill.

The Bill proposes to amend the substantiation provisions of the Income Tax Assessment Act 1936 by providing the Commissioner of Taxation a discretion to apply the provisions with fairness and commonsense.

The Committee has no comment on this Bill.

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**INDUSTRIAL RELATIONS AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by Mr Charles as a Private Member's Bill.

The Bill proposes to remove section 229 of the Industrial Relations Act 1988, which states that a person shall not, by writing or speech, use words to bring the Commission or a member of the Commission into disrepute.

The Committee has no comment on this Bill.

**MINISTERS OF STATE AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 7 November 1990 by the Minister Representing the Minister for Administrative Services.

The Bill proposes to increase the limit on the annual sum appropriated from Consolidated Revenue in respect of Ministers' salaries, consequent upon the Remuneration and Allowances Act 1990, effective 1 July 1990, 1 January 1991 and 1 July 1991.

The Committee has no comment on this Bill.

**NATIONAL CRIME AUTHORITY (POWERS OF PARLIAMENTARY JOINT COMMITTEE) AMENDMENT BILL 1990**

This Bill was introduced into the Senate on 8 November 1990 by Senator Crichton-Browne as a Private Senator's Bill.

This Bill proposes to repudiate certain opinions claiming that the secrecy provisions of section 51 of the National Crime Authority Act 1984 inhibit the National Crime Authority in providing information to the Parliamentary Joint Committee on the National Crime Authority.

The Committee has no comment on this Bill.

**NORTHERN PRAWN FISHERY VOLUNTARY ADJUSTMENT SCHEME LOAN  
GUARANTEE AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to alter the operation of the existing Voluntary Adjustment Scheme to facilitate the implementation of an enhanced buy back scheme as the first stage of a restructuring package.

The Committee has no comment on this Bill.

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**PIPELINE AUTHORITY (CHARGES) BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Finance.

The Bill proposes to increase the existing haulage tariff arrangements in place for the Pipeline Authority by 25 percent from 1 January 1991 and by a further 25 percent from 1 January 1992. This will constitute the first step in commercialising and, eventually, selling the Moomba-Sydney gas pipeline system.

**'Henry VIII' clause  
Subclause 13(3)**

Subclause 13(3) of the Bill provides that if the Companies Act 1981 ceases to operate as a result of the coming into force of another law which contains provisions similar to that Act, then subclause 13(2) (which deals with determination of compensation for subsidiary corporations) can be amended by regulation to substitute the reference in that clause to the Companies Act with a reference to the legislation subsequently in force.

This is what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow primary legislation to be amended by delegated legislation. However, as the clause is presumably drafted in expectation of the imminent



replacement of the Companies Act (see reference to Corporations Legislation Amendment Bill 1990 earlier in this Alert Digest), the Committee makes no further comment on the Bill.

#### General comment

The Committee understands that a legal challenge is currently on foot in relation to the increased haulage charges and the process of privatisation of the pipeline which this Bill seeks to implement. It would be a matter of concern to the Committee if a prime purpose of this legislation was to frustrate legal processes which are in train. Indeed, if such a purpose was evident on the face of the Bill, it would be a matter which the Committee would bring to Senators' attention as possibly trespassing on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

**STATES GRANTS (SCHOOLS ASSISTANCE) AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister for Employment, Education and Training.

The Bill proposes to supplement existing financial provisions to account for increased price levels and extend financial allocations to the 1991 program year. It also proposes to alter or make new arrangements to the:

- . Special Education Program;
- . Literacy and Learning Program;
- . Disadvantaged Schools Program;
- . Capital Grants Program;
- . Award Restructuring Assistance Program.

The Committee has no comment on this Bill.

**TAXATION LAWS AMENDMENT BILL (NO. 5) 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend 5 Acts to:

- . increase the level of tax deductions for personal superannuation contributions for people not receiving any superannuation support;
- . introduce a tax rebate for certain superannuation payments;
- . tax exempt the pay and allowances of Defence Force personnel on operational service in Kuwait;
- . make amendments in relation to the gift provisions of income tax law, taxation of eligible termination payments and capital gains;
- . apply a new penalty where a taxpayer overestimates the amount of tax deductions from salary or wages in a provisional tax variation application;
- . to exempt payments made by employers to commercial child care centres from fringe benefit tax;
- . modify a number of tax laws to comply with the Sex Discrimination Act 1984; and

- . correct a technical deficiency in the Occupational Superannuation Standards Act 1987 in respect of tax file numbers.

**Prospective commencement  
Subclause 2(3)**

Subclause 2(3) of the Bill provides that the amendments proposed by subclauses 38(3) and 39(2) and by Part 3 of the Schedule to the Bill are to commence on 1 July 1993. These proposed amendments all relate to the Bill's intention to modify the operation of a number of taxation laws in accordance with the policy of the Sex Discrimination Act.

The delayed commencement of these provisions is clearly in excess of the 6 months which would be regarded as the acceptable maximum pursuant to Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. In making this observation, the Committee accepts that the Drafting Instruction explicitly addresses commencement by Proclamation only. However, the Committee believes that the general principles are equally applicable to instances such as this.

Drafting Instruction No. 2 of 1989 states that provisions involving prospective commencement in excess of 6 months from Royal Assent should be explained in the Explanatory Memorandum. In relation to the amendments proposed by Part 3, the Explanatory Memorandum to the Bill states:

To ensure an equitable result, the removal of the marital status limitations in sections 102 and 102AC of

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To ensure an equitable result, the removal of the marital status limitations in sections 102 and 102AC of the Assessment Act will not take effect for two years after the commencement of the amendment reducing the age limit (refer to Part 1 of the Schedule). Married women under 18 years of age would otherwise be disadvantaged by this amendment because the Marriage Act 1961 allows women to marry at age 16 while men cannot marry until they are 18 years of age. Accordingly, by subclause 38(3) of this Bill the amendments made by Part 3 of the Schedule apply to assessments in respect of the 1993-94 and subsequent income years.

The Committee has some difficulty in understanding how this amendment would apply and why it needs to be retrospective. The Committee would appreciate some further clarification from the Treasurer on the need for retrospectivity in this case.

The Committee also notes that, while subclause 39(2) is not expressed to commence until 1 July 1993, the subclause itself would operate to negate the effect of section 170 of the Income Tax Assessment Act 1936 (which limits the Taxation Commissioner's power to issue amended assessments) to prevent the amendment of an assessment made before the commencement of the provision. In other words, while the provision is expressed to commence prospectively it can operate retrospective to its commencement. Though it is not the Committee's principal concern in relation to the provision, the Committee would appreciate some guidance from the Treasurer on the rationale behind the provision.

**Retrospectivity**

**Clauses 7, 8, 9, 10(a) and (b), 11, 12, 13, 14, 16, 17-20, 21, 22(1), 23, 25, 27, 28(2), (3), (4), (5), (6), (7) and (8)**

Clauses 7, 11 and 28(2) of the Bill propose to amend section 23AC of the Income Tax Assessment Act 1936 and to backdate to 2 August 1990 certain exemptions from taxation of income and allowances applicable to persons serving in the Middle East operational area (as defined).

Clauses 8, 9 and 28(3) propose to amend sections 27A and 27AA of the Income Tax Assessment Act in relation to eligible termination payments insofar as they affect superannuation payouts. Their operation is expressed to be retrospective to 1 July 1990.

Subclauses 10(a) and 28(4) propose to confer retrospectively tax deductibility on gifts to 'The Friends of the Duke of Edinburgh's Award in Australia Incorporated'. The amendments are to operate from 20 September 1990.

Subclause 10(b) proposes to confer tax deductibility on gifts to 'Australian Vietnam Forces Welcome Home '87 Pty Limited' where those gifts are made on or after 1 July 1989 and on or before 31 December 1990.

Clauses 12, 13 and 14 propose to make various amendments (including the insertion of a new Subdivision AAC into Division 17 of Part III) to the Income Tax Assessment Act in order to provide rebates for certain personal superannuation contributions. Clause 27 proposes various consequential amendments. Pursuant to subclause 28(5), the proposed amendments are to apply from 1 July 1990.

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Clause 16 proposes to make certain amendments to the Income Tax Assessment Act in relation to a person's principal residence where that person has been temporarily absent. Pursuant to subclause 28(6), these amendments are to operate from and including the income tax year which includes 20 September 1985.

Clauses 17-20 relate to Part IVA of the Income Tax Assessment Act, which contains the general anti-avoidance provisions of the income tax law. The amendments proposed would extend the meaning of a 'tax benefit' for the purposes of section 177C of that Act. Pursuant to subclause 28(7), the amendments would apply to any tax schemes entered into after the Bill was introduced (ie 8 November 1990).

Clauses 21, 22(1), 23 and 25 propose to make various amendments to the Income Tax Assessment Act in relation to payment of provisional tax on salary and wages. Pursuant to subclause 28(8), the amendments are to apply in relation to provisional tax payable for 1990-91 and all subsequent years of income.

All of the provisions referred to above are retrospective in operation. With the exception of those relating to anti-avoidance and provisional tax, all appear to operate beneficially on persons or bodies other than the Commonwealth. The Committee would, however, appreciate confirmation from the Treasurer that the amendments proposed by clause 16 in relation to principal residence have a beneficial effect on taxpayers. In particular, the Committee would like to know whether persons who have, since 20 September 1985, been denied an exemption from the Capital Gains Tax provisions as a result of a temporary absence from

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their principal residence will be entitled (as a result of the proposed amendment) to a refund of any tax paid.

The Committee draws the provisions of subclauses 28(7) and (8), together with the substantive amendments to which they relate, to the attention of Senators as possibly trespassing unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.



**TAXATION LAWS AMENDMENT (INTERNATIONAL AGREEMENTS) BILL 1990**

This Bill was introduced into the House of Representatives on 8 November 1990 by the Minister Assisting the Treasurer.

The Bill proposes to give legislative force to three comprehensive double taxation agreements - between Australia and China, Sri Lanka and Fiji, respectively. The agreements are designed to avoid double taxation of income flowing between Australia and these countries and to prevent fiscal evasion of taxes.

**Retrospectivity  
Subclause 2(2)**

Clause 8 of the Bill provides for the rectification of the text of a taxation agreement between Australia and Papua New Guinea, to omit 'a superfluous and unnecessary word'. According to subclause 8(3) of the Bill, the Governments of Australia and the Independent State of Papua New Guinea have, 'in an exchange of Notes', agreed to rectify the text of the agreement ab initio (ie from the outset).

Part 3 of the Bill proposes various 'technical' amendments to the Income Tax (International Agreements) Amendment Act (No. 2) 1989. It corrects an incorrect reference to the 'Principal Act', repeals a provision that is now redundant and deletes some amendments that are no longer necessary. Pursuant to subclause 2(2) of the Bill, the amendments proposed by clause 8 and Part 3 are to be taken to have

commenced on the day on which the Income Tax (International Agreements) Act (No. 2) 1989 received the Royal Assent (ie 19 December 1989).

In the light of the explanation discussed above, the Committee makes no further comment.

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## TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 7 November 1990 by the Minister for Transport and Communications.

This omnibus Bill proposes to amend 15 Acts administered within the Transport and Communications portfolio. The amendments are primarily technical in nature.

### Retrospectivity

Subclauses 292), (3), (4), (7), (11) and (12)

Subclause 4(1) proposes to amend the Air Navigation Act 1920 in relation to the power to make regulations. Pursuant to subclause 2(2), it is taken to have commenced at the same time as Part IX of the Civil Aviation Act 1988 (ie 1 July 1988). The Explanatory Memorandum to the Bill states that the retrospective operation of the amendment

will ensure that regulations previously made under the Principal Act, which relate to air accident investigation, are valid and that there exists a valid statutory basis under the Principal Act to conduct inquiries into air accidents which occurred prior to the proposed Act receiving the Royal Assent and after the insertion of subsection 26(1AA) into the Principal Act.

Clause 12 of the Bill proposes to amend a definition contained in section 3 of the Civil Aviation Act. Pursuant

to subclause 2(3) it is to be taken to have commenced immediately after that section commenced (ie 15 June 1988). The Explanatory Memorandum states:

This will have the effect of validating determinations by the CAA setting fees and charges for purposes of Division 2 of Part VI of the Principal Act and validating subsequent action taken with respect to statutory liens. While this amendment will have a retrospective effect, it will not impose new liabilities retrospectively. All persons affected by the amendment have already ordered their affairs on the basis that the charging and recovery powers of the CAA have been validly authorised by law.

Clause 16 proposes to repeal and replace section 23A of the Civil Aviation Act, which relates to statements of the contents of cargo. The proposed amendment provides that regulations made pursuant to the Civil Aviation Act may require that a person who consigns any cargo for carriage on an aircraft to make a statement concerning the contents of that cargo. Pursuant to subclause 2(4), the provision commences or is to be taken to have commenced, as the case may be, immediately after section 10 of the Civil Aviation Amendment Act 1990 (ie 24 November 1990), which inserted the existing section 23A.

Clause 18 of the Bill proposes to amend section 66 of the Civil Aviation Act to replace references to 'Authority' with 'Board'. The Explanatory Memorandum explains that these references were missed when the Civil Aviation Act was amended in relation to the change of name by the Civil Aviation Amendment Act 1990. Accordingly, subclause 2(7) ties the commencement of the proposed amendments to the

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commencement of the amending act (ie 20 June 1990).

Clause 23 of the Bill proposes to correct a typographical error contained in section 27A of the Civil Aviation Act. Pursuant to subclause 2(8), it is to be taken to have commenced on 1 July 1990.

Clause 44 of the Bill proposes to insert a new section 18A into the Civil Aviation Act. The effect of the amendment would be to allow AUSTEL to be exempted from Commonwealth, State and Territory taxation. The Explanatory Memorandum states:

AUSTEL is a regulatory body on which the imposition of taxation and sales tax would be inappropriate. Accordingly the exemption contained in clause 44 from laws imposing taxation and sales tax is to commence retrospectively from the date on which AUSTEL was established.

Clause 45 of the Bill provides that certain Acts specified in the Schedule to the Bill are to be amended as specified in the Schedule. Pursuant to subclause 2(12), these amendments are to be taken to have commenced immediately after the commencement of various specified provisions in other Acts. According to the Explanatory Memorandum to the Bill, these proposed amendments correct 'minor drafting errors'.

This Bill, clearly, contains numerous retrospective provisions. However, in each case, the retrospectivity has been referenced to a particular event (ie the commencement of a relevant Act or provision) and adequately explained in the Explanatory Memorandum. The Committee commends this

approach, which the Committee found both useful and easy to follow.

**General comment**

Clauses 5 and 9 of the Bill provide that the amendments proposed by clauses 17 and 24, respectively, are to commence 'on a day to be fixed by Proclamation'. However, the Committee notes with approval that if such commencement has not been fixed within 6 months of the Bill receiving Royal Assent, the provisions are to be taken to have been repealed at the beginning of the period. This accords with the approach recommended by Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 and is to be commended.

**VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL 1990**

This Bill proposes amendments to the following Acts:

- . Veterans' Entitlements Act 1986;
- . Defence Service Homes Act 1918;
- . Seamen's War Pensions and Allowances Act 1940;
- . Social Security and Veterans' Affairs Legislation Amendment Act (No. 4) 1989; and
- . Public Service Act 1922.

The amendments proposed implement Government election promises, give effect to Budget decisions and make a range of other amendments to improve the provision of benefits to veterans.

**Retrospectivity  
Various clauses**

The Bill contains a substantial number of proposed amendments with a retrospective operation. These amendments are to operate either from a nominated date or from the commencement of a specified Act or provision. In each case, the relevant commencement date appears in italics in the text of the Bill. Given the number of provisions, the Committee simply notes the existence of retrospectivity in relation to the following provisions of the Bill:

- . clauses 3(1), 25 and 34 (20 September 1990);
- . clause 3(2) (28 December 1989);

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- . clauses 3(3), 40, 63, 64 and 66 (20 September 1990);
- . clause 7(b) (immediately after the commencement of the Veterans' Entitlements (Transitional provisions and Consequential Amendments) Amendment Act 1986, ie 22 May 1986);
- . clause 7(c) (18 February 1989);
- . clause 7(d) (2 August 1990, although the Committee notes that the Explanatory Memorandum fails to identify this as being a retrospective provision);
- . clause 7(j) (immediately after the commencement of the Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Amendment Act 1986, ie 22 May 1986);
- . clause 22(a) (immediately after the commencement of the Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Amendment Act 1986, ie 22 May 1986);
- . clause 22(b) (18 February 1989);
- . clause 22(c) (2 August 1990);
- . clause 24 (22 December 1988);
- . clauses 26 and 33 (20 September 1990);
- . clause 35 (immediately after the commence of s.81 of the Social Security and Veterans' Affairs Legislation Amendment Act (No. 4) 1989, ie 28 December 1989);
- . clause 37(a) and (b) (immediately after the commencement of the Veterans' Entitlements Act 1986, ie 22 May 1986);
- . clause 37(c) (18 February 1989);
- . clause 37(d) (2 August 1990);
- . clause 37(e) (immediately after the commencement of s.90(c) of the Social Security and Veterans' Affairs Legislation Amendment Act (No. 4) 1989, ie 28 December 1989);



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- . clause 38(a) (immediately after the commencement of s.5 of the Veterans' Affairs Legislation Amendment Act 1987, ie 22 May 1986);
- . clause 38(b) and (c) (immediately after the commencement of the Veterans' Entitlements Act 1986, ie 22 May 1986);
- . clause 39 (22 December 1988);
- . clause 41(a) and (c) (22 August 1990);
- . clause 42(a) (immediately after the commencement of the Veterans' Entitlements Act 1986, ie 22 May 1986);
- . clause 42(b) and (d) (18 February 1989);
- . clause 42(c) (2 August 1990);
- . 44(k) (19 December 1989 - clauses 44-48 are retrospective in effect to ensure that profits or bonuses from returns on investments are assessable only when the investment is withdrawn);
- . clause 53 (22 August 1990);
- . clause 60 (22 December 1988);
- . clause 61 (immediately after the commencement of the Veterans' Entitlements Act 1986, ie 22 May 1986);
- . clause 62 and 67 (22 December 1988);
- . clauses 68-79 (immediately after the commencement of section 18 of the Social Welfare Legislation (Pharmaceutical Benefits) Amendment Act 1990, ie 1 November 1990);
- . clause 80 (immediately after the commencement of s.120 of the Social Security and Veterans' Affairs Legislation Amendment Act (No. 4) 1989, ie 28 December 1989);

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- . clause 92(a) and (b) (immediately after the commencement of the Veterans' Entitlements Act 1986, ie 22 May 1986);
- . clause 92(c) (10 April 1990);
- . clause 92(d) (2 August 1990).

**Ministerial guidelines**  
**Clauses 9(q)**

Clause 9 of the Bill proposes to amend section 18 of the Defence Service Homes Act 1918. Subclause 9(q) would require the Secretary of the Department of Veterans' Affairs, in deciding whether or not a person is suffering 'serious financial hardship' for the purposes of certain provisions of the Act, to have regard to any guidelines issued by the Minister pursuant to proposed new subsection 18(5c).

Clause 11 of the Bill proposes a similar amendment in relation to decisions under section 20 of the Defence Service Homes Act. Clauses 12 and 14 propose similar amendments in relation to sections 21 and 23 of the Act, respectively.

In each case, guidelines approved by the Minister must be laid before each House of the Parliament within 15 sitting days of that House after the guidelines have been approved. The Committee notes that there is no provision for the guidelines to be disallowed by either House. However, the Committee also notes that the guidelines are not formally binding on either the decision-maker or any person or body which subsequently reviews the original decision. In view of this and bearing in mind the nature of these guidelines, the Committee makes no further comment.

**WOOL LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 7 November 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to give effect to the recommendations of the Australian Wool Corporation's (AWC) business plan 1990-91 to:

- . reduce the rate of wool tax on carpet wool from 18 percent to 3.85 percent;
- . exempt carpet wool from the Reserve Price Scheme for wool;
- . allow the AWC to use its market support fund for sheep disposal schemes;
- . allow a special payment to producers affected by the floods in NSW and Queensland in early 1990;
- . allow the AWC Board to meet other than in-person, eg by telephone hook-up or with the aid of closed circuit television.

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**Retrospectivity  
Subclause 2(2)**

Subclause 2(2) provides that the amendments proposed by clauses 4, 7, 8, 9, 13 and 15-18 are to operate retrospectively, from 4 October 1990 which, according to the Explanatory Memorandum to the Bill,

is to be the date of effect of the increase in the operative rate of wool tax from 18% to 25%.

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

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**WOOL TAX (NOS. 1 - 5) FURTHER AMENDMENT BILLS 1990**

These Bills were introduced into the House of Representatives on 7 November 1990 by the Minister for Primary Industries and Energy.

The Bills propose to:

- . increase the maximum rate of wool tax from 20 to 30 percent;
- . allow the operational rate to be set by regulation (increased from 18 to 25 percent by these Bills);
- . reduce the rate of tax on carpet wool; and
- . allow for a wool tax surcharge up to a maximum rate of 20 percent.

All these amendments are expressed to be effective from 4 October 1990.

**Retrospectivity  
Clause 2**

Clause 2 of each of these Bills provides that the Bill is to be taken to have commenced on 4 October 1990. The Committee draws Senators' attention to each of the clauses as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

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. 10 OF 1988**

**31 AUGUST 1988**

**ISSN 0729-6851**

**CORPORATIONS LEGISLATION**

The corporations legislation is a package of 16 bills directed at replacing the existing National Uniform Companies and Securities Scheme under which the Commonwealth and the States and the Northern Territory share the regulatory responsibilities for companies, and the securities and futures industries in Australia. All bills in the package were introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

The Corporations Bill 1988 is the principal bill of the package and contains the substantive provisions necessary for the regulation of the industries it covers. The corporations legislation package also comprises the following bills:

Australian Securities Commission Bill 1988

Close Corporations Bill 1988

Close Corporations (Additional Liquidator's Recovery Trust Fund Contribution) Bill 1988

Close Corporations (Liquidator's Recovery Trust Fund Contribution) Bill 1988

Close Corporations (Fees) Bill 1988

Corporations (Fees) Bill 1988

Futures Organisations (Application for Membership) Fidelity Funds Contribution Bill 1988

Futures Organisations (Membership) Fidelity Funds Contribution Bill 1988

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

Futures Organisations Fidelity Funds Contribution Bill 1988

National Guarantee Fund (Members of Participating Exchanges) Levy Bill 1988

National Guarantee Fund (Participating Exchanges) Levy Bill 1988

National Guarantee Fund (Reportable Transactions) Levy Bill 1988

Securities Exchanges (Application for Membership) Fidelity Funds Contribution Bill 1988

Securities Exchanges (Membership) Fidelity Funds Contribution Bill 1988

Securities Exchanges Fidelity Funds Levy Bill 1988

In its Annual Report for 1985-86 the Committee commented on the National Uniform Companies and Securities Scheme and, in particular, on the powers of the Commonwealth Parliament in relation to legislation making up the scheme (see Parliamentary Paper 447/1986, chapter 5, pp. 31-36).

The Committee drew the Senate's attention to provisions in several enactments making up the scheme, which could be regarded as coming within its terms of reference, as they might be considered to trespass unduly on personal rights and liberties. These included provisions which imposed a persuasive onus of proof on defendants in criminal proceedings; provisions abrogating the privilege against self incrimination; and provisions creating offences of strict liability in respect of furnishing of false or misleading information.

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



The nature of the scheme put it beyond the power of the Commonwealth Parliament to give proper consideration to concerns which may have been raised by the Committee.

The comment made by the Committee in its comment on the nature of the Scheme (a point raised several times during debates on Scheme legislation enacted by the Commonwealth Parliament in 1979) was that there was little to be gained by the Committee drawing the Senate's attention to provisions in bills introduced under the Uniform Scheme as the scheme effectively delegated the Parliament's legislative power to the Ministerial Council established to administer the scheme.

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

**AUSTRALIAN SECURITIES COMMISSION BILL 1988**

The Bill will establish an Australian Securities Commission to administer and regulate the laws governing companies, securities and the futures industry in Australia. It confers broad investigative, hearing and informative powers on the new Commission.

The Bill will also establish a number of new statutory consultative bodies. A Companies and Securities Advisory Committee is to be established, which will advise the Minister on the legislation and administration of the national scheme. A Corporations and Securities Panel will also be established to perform adjudication functions in relation to market place malpractices. It is intended that the Panel will be established on the recommendation of the consultative group.

A Companies Auditors and Liquidator's Disciplinary Board, and an Accounting Standards Review Board will also be established by the Bill.

The Committee draws the Senate's attention to the following clauses of the Bill:

**Clauses 64, 67 and 196 - Reversal of the onus of proof**

Subclause 64(3) would reverse the normal onus of proof in criminal proceedings. Under subclauses 64(1) and (2) it is an offence to either give information or make a statement to the Commissioner, or give evidence at a hearing by the Commission that is false or misleading in material particular. Under subclause 64(3) it is a defence, the onus of proof of which will be placed on the defendant, to a charge under either subclause 64(1) or (2) that the defendant, when making the statement, or giving evidence believed on reasonable grounds that it was true and not misleading.

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

Subclause 67(2) would reverse the normal onus of proof in criminal proceedings. Under subclause 67(1) it will be an offence to conceal, destroy, mutilate or alter a book relating to a matter, or take or steal a book relating to a matter out of a State or Territory of Australia. Under subclause 67(2) it is a defence, the onus of proof of which will be placed on the defendant, to a charge under the subclause 67(1) that the defendant intended neither to defeat the purpose of a national scheme law, nor to delay or obstruct an investigation or proposed investigation by the Commission.

Subclause 196(2) would reverse the normal onus of proof in criminal proceedings. Under subclause 196(1) it will be an offence to give evidence that is false or misleading at a hearing of the Corporations and Securities Panel. Pursuant to subclause 196(2) it will be a defence, the onus of proof of which will be placed on the defendant, to a charge under subclause 196(1) if, when giving evidence, the defendant believed on reasonable grounds that it was true and not misleading.

As these clauses would reverse the normal onus of proof in criminal proceedings, they are drawn to Senator's attention as they may be considered to be in breach of principle 1(a) (i) of the terms of reference and may trespass unduly on personal rights and liberties.

#### Clause 126 - Reversal of the onus of proof

Clause 126 will provide that is a defence to a prosecution under clause 125 (where persons fail to give notice to the Commission of a possible conflict of interest in a matter before the Commission) if it is established by that person, that when he or she was required to consider the matter, he or she was not aware of a fact or thing whose existence obliged the person to comply with clause 125.

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

Whilst the Committee draws the Senate's attention to the clause, it observes that the Committee regards the imposition of a persuasive onus of proof on an accused person in relation to a statutory defence under certain circumstances as acceptable.

Where the defence available is in practical effect the same as the common law defence of mistake of fact, proof of which is placed on the defendant under the general criminal law the Committee will not automatically object to the reversal of the onus of proof.

However, the Committee observes that it will continue to carefully scrutinise and report such provisions, as the reversal of the onus of proof in criminal proceedings by statute must always be an issue of concern to be drawn to legislators' attention.

#### Clause 215 - Creation of an offence of strict liability

Subclause 215 (3) will make it an offence to give evidence which is false or misleading at a hearing conducted by the Companies Auditors and Liquidator's Disciplinary Board. Whilst the subclause is of similar wording to other provisions of the Bill (see subclauses 64(2) and 196(1)) those provisions provided a form of statutory defence to such a charge (albeit, form which would reverse the onus of proof).

Under subclause 215(3), a person subject to prosecution would be guilty of the offence created, even though he or she had no reasonable means of knowing that the evidence given was false, and had no intention to mislead the Board.

As the clause would create an offence of strict liability, the clause may be considered to be in breach of principle 1 (a) of the terms of reference, and 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.

**Clauses 23 and 48 - Non-reviewable decisions**

Subclause 23 (1) will allow an examinee's lawyer to be present at the examination by an inspector appointed pursuant to clause 19 of the Bill. The examinee's lawyer will be empowered by clause 23 to advise the inspector, and examine the examinee, about matters on which the inspector has examined the examinee.

Subclause 23(2) will give to an inspector the discretion to stop the lawyer in either of those activities if, in the inspector's opinion, a person is trying to obstruct the examination. There is no means provided in the Bill for review of the exercise of this discretion and, furthermore, the discretion will be exercisable so as to prevent a person from exercising rights under the provision.

Subclause 48(1) will allow a person making a disclosure to the Commission, to have his or her lawyer present during the disclosure. The person's lawyer may, subject to the determination of the representative of the Commission, address the representatives of the Commission on the matters raised by a person's disclosure.

Under subclause 48(2) the representative of the Commission hearing the disclosure may stop the lawyer addressing the Commission's representatives if, in the presiding representative's opinion, the lawyer is trying to obstruct the disclosure.

There is no means provided in the Bill for the review of the exercise of this discretion and, as is the case with subclause 23(2), the discretion may be exercisable so as to prevent a person from exercising their rights under the provision.

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

The provisions of subclauses 23(2) and 48(2) of the Bill are accordingly drawn to the Senate's attention as they might be considered to breach principle 1(a) (iii) of the terms of reference and make rights liberties and/or obligations unduly dependent upon non-reviewable decisions.

**Clause 102 - Delegation of administrative power**

Subclause 102(1) will permit the Commission to delegate to ' a person' all or any of its functions and powers. Under subclause 102(3) the term 'person' includes a body.

The Commission will be restricted in its power to delegate to the extent that the Commission, under subclause 102(2), may not delegate a function or power to persons other those enumerated in the subclause without the Minister's approval.

The Committee has consistently drawn attention to and criticised such provisions on the grounds that they impose no limitation on, and give no guidance as to, the attributes of the person to whom a delegation may be made. (see Annual Report 1985-86, Chapter 4; Annual Report 1986-87).

The Committee has also commented that, in particular cases, certain powers should not be delegated at all and that others should only be capable of delegation to specified senior officers. (see, for example, Alert Digest No. 5 of 1986 - Australian Sports Commission Bill 1986).

In this regard the Committee draws to Senators' attention that this clause would enable the Commission to delegate the powers given to the Commission including wide general power of investigation and inspection; the disclosure of information about securities and futures dealings; to hold hearings; and to make orders of profound financial consequence upon a decision by the Commission that a person or company has not co-operated in the Commission's inquiries.

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 notes that members of the Commission itself must be people with knowledge of, or experience in, fields such as business, company administration, financial markets, law, economics and accounting (Clause 9).

The Committee believes that the class of persons who come within the scope of potential delegation should desirably have the same or similar qualifications to those that must be possessed by Commission members. By adding appropriate restrictions, to which they may be delegated, the Parliament can ensure that the wide and important powers conferred on the Commission by this Bill will be subject to acceptable though practical restriction.

Clause 102 of the Bill is accordingly drawn to Senator's attention under principle 1(a) (ii) in that it may be considered to make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers.

#### Clause 138 - Annual Report

Clause 138 of the Bill states that the Commission is a public authority to which Division 3 of Part XI of the Audit Act applies.

Part XI of The Audit Act sets out financial provisions relating to public authorities. Division 3 of Part XI, containing sections 63J to 63M, sets out the audit and reporting requirements for certain public authorities. Section 63M of the Audit Act sets out the annual reporting requirements placed on authorities to which Division 3 of Part XI of the Act applies.

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

Section 63M(1) of the Audit Act reads:-

The authority shall, as soon as practicable after 30 June in each year, prepare and submit to the appropriate Minister a report of its operations during the year ended on that date, together with financial statements in respect of that year in such form as the Minister administering this Act [i.e. the Minister for Finance] approves.

The term 'as soon as practicable' in subsection 63M(1) in turn must be read subject to subsection 34C(2) of the Acts Interpretation Act 1901. Subsection 34C(2) of the Acts Interpretation Act requires an authority to furnish a periodic report to the relevant Minister after the end of the period to which the report relates but, in any event, no later than six (6) months after the end of that period.

The Committee observes, by way of comparison with clause 138, that Section 52 of the National Companies and Securities Commission Act 1979 obliges that authority to prepare and forward an annual report to the Attorney-General, and hence to the Parliament within 6 months of the end of each financial year.

It appears to the Committee undesirable that a person unfamiliar with legislation imposing reporting requirements on Commonwealth Authorities, particularly in the Audit Act, look in vain in this Bill for a requirement that an important Commonwealth Authority is obliged to provide an annual report to the Minister and, more importantly, to the Parliament.

The Committee believes that statutory provisions which impose reporting requirements upon Commonwealth bodies should be clearly spelt out in the legislation establishing that body.

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



CLOSE CORPORATIONS BILL 1988

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

The Bill will provide a new simplified corporate structure for small business by reducing financial and other reporting requirements and by abandoning the company law distinctions between directors and shareholders in favour of simple principles based on partnership laws. It will also introduce a new corporate entity to be known as the Close Corporation.

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

Clause 15 - 'Henry VIII' Clause

Clause 15 is directed at ensuring that, where applicable, the provisions of the Corporations Bill will apply to close corporations.

Subclause 15(3) of the Bill is a 'Henry VIII' clause which, on the face of it, appears to be unique.

The subclause provides that a Court, (defined in the Bill as the Federal Court of Australia or the Supreme Court of a State or Territory) for the purpose of achieving the object of any provision of the Corporations Bill in relation to a close Corporation, may make such order as is necessary which may arise in connection with the application of that provision of the Corporations Bill including an order modifying the terms of the relevant provision of the Corporations Bill.

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

Clauses in an enabling Bill which permit the making of regulations modifying the effect of the provisions of the enabling Bill are traditionally known as 'Henry VIII' clauses.

It appears to the Committee that subclause 15(3) of the Bill would, if enacted, allow a Court to decide that a provision of the Corporations Bill was not operating so as to give a reasonable result and, consequent upon such a finding, may make an order modifying the terms of the provision, (presumably to the extent that a provision will not apply at all).

The Committee draws attention to the clause as it may breach principle 1(a) (iv) of the terms of reference and constitute an inappropriate delegation of legislative authority.

Clauses 153, 154, 155 and 159 - Reversal of the onus of proof

Subclause 153(1) of the Bill lists a number of offences which could be committed by officers of close corporations relating to the disclosure of the existence of corporation property, the books of the corporation, and matters relating to the corporation's affairs.

Pursuant to subclauses 153(2), (3) and (4) it is a defence to prosecutions instituted under provisions in subclauses 153(1) that the defendant had no intention to defraud or; intention to conceal the state of affairs of the corporation. The onus of disproving guilty intent is cast on the defendant, whereas the criminal law requires the prosecution to prove the defendant's guilty intent.

The clause is drawn to the Senate's attention as it may breach principle 1(a) (i) of the terms of reference and 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.

Subclause 154(1) of the Bill makes it an offence not to comply with provisions of the Bill requiring the keeping of proper books of account. Under subclause 154(2) it is a defence to a prosecution under subclause 154(1) that the defendant had reasonable grounds to believe, and did believe, that a competent and reliable person was charged with ensuring that requirement was complied with, and was in a position to discharge such a duty. The onus of proving the elements of the defence are placed on the defendant.

The clause is drawn to the Senate's attention as it may breach principle 1(a) (i) of the terms of reference and trespass unduly on personal rights and liberties.

Subclause 155(1) of the Bill will make it an offence, for which a corporation and members managing its affairs may be jointly and severally liable, to incur debts when there are reasonable grounds for expecting that the corporation could not pay such debts.

Pursuant to subclause 155(2) a defence to a prosecution under subclause 155(1) is that the defendant(s) prove that the debt was incurred without the defendant's express or implied authority or consent or that, the corporation was not able to pay its debts at the time debts were incurred.

As the subclause will reverse the normal onus of proof in criminal proceedings it is drawn to the Senate's attention as it may breach principle 1(a) (i) of the terms of reference and trespass unduly on personal rights and liberties.

Subclause 159(1) and (2) make it an offence to destroy, mutilate or falsify securities or books relating to a corporation's affairs and to interfere with so as to destroy, alter or falsify records maintained on various storage systems.

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

Pursuant to subclause 159(3) it is a defence to a prosecution under subclauses 159(1) or (2) if the defendant can prove that he or she acted honestly. The onus of proving the elements of the defence are placed on the defendant.

The subclause, is drawn to the Senate's attention, as it may breach principle 1(a) (i) of the terms of reference and 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.

**CLOSE CORPORATIONS (ADDITIONAL LIQUIDATOR'S RECOVERY TRUST FUND CONTRIBUTION) BILL 1988**

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

The Bill will impose a tax upon close corporations where the Australian Securities Commission has determined that additional Liquidator's recovery trust fund contributions are required. The Commission will determine the amount of the tax but it will not exceed \$50.00

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.

**CLOSE CORPORATIONS (LIQUIDATOR'S RECOVERY TRUST FUND CONTRIBUTION) BILL 1988**

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General

The Bill will impose a tax upon the subscribers to a pouncing statement of a proposed close corporation. The tax will be known as the Liquidator's recovery trust fund contribution. The amount of the tax will be prescribed by regulation but will not exceed \$50.00

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.

CLOSE CORPORATIONS (FEES) BILL 1988

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

The fees that will be charged in connection with the proposed close corporations Bill 1988 will be set out in regulations to be made under the terms of this bill. The maximum fee that can be prescribed by regulation is \$2,500.00.

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.

**CORPORATIONS BILL 1988**

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

The Bill is an omnibus Bill that draws together the present provisions found in the Companies Act 1981, the Securities Industry Act 1980, the Companies (Acquisition of Shares) Act 1980, the Futures Industry Act 1986 and in State and Northern Territory Legislation applying those acts. The scope of the legislative provisions of the Bill is along the lines of the existing law. However, some reforms have been made to remove unnecessary regulation and to overcome specific inefficiencies or burdens in the existing legislation.

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

**Clause 43 - 'Henry VIII' clause**

Clause 43 of the Bill provides that specified relevant interests in shares shall be subject to a number of conditions, which may be disregarded for the purposes of provisions in a number of sections and parts of the Bill.

In allowing for possible modification by regulation of a number provisions of the Bill, the clause is an example of a 'Henry VIII' clause.

The clause is drawn to the Senate's attention as it may be in breach of principle 1(a) (iv) of the terms of reference and 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.



**Clause 112 - 'Henry VIII' clause**

Subclause 112 (3) will provide that the Minister may give notice in the Gazette that an unincorporated partnership or association consisting of not more than a specified number of persons may carry on a profession or calling.

The Committee has consistently objected to clause in Bills which have the effect of allowing a Minister to specify matters to be covered by statute, by Gazette notice, rather than by regulations which would be subject to Parliamentary consideration.

The clause is drawn to the Senate's attention in that it may breach principle 1(a) (4) of the terms of reference and constitute an inappropriate delegation of legislative power.

**Clause 348 - Reversal of the onus of proof**

Clause 348 would make a local agent of a registered foreign company answerable for all acts, matters and things which a foreign company is required to do under the Bill, and would also make the local agent personally liable to a penalty imposed on the foreign company for contravention of a provision of the legislation, unless the local agent satisfies the Court or Tribunal hearing the matter that he or she should not be so liable.

In so far as the onus of proof of the matters contained in the clause are placed on the local agent, the normal onus of proof in criminal proceedings has been reversed.

A further matter which is of concern to the Committee, and which is not apparently dealt with in the Bill, is that a Court or Tribunal hearing the matter under the section is given no assistance in determining the circumstances in which liability may or may not, be imposed upon the local agent.

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

The clause is drawn to the Senate's attention in that it may be in breach of principle 1(a) (i) of the terms of reference and trespass unduly upon personal rights and liberties.

Clause 590 and 591 - Reversal of the onus of proof

Under subclause 590(1) a number of offences are created which may subject officers of a company to prosecution.

Subclause 590(2) provides that it is a defence to a charge arising under a number of the provisions of subclause 590(1) if the defendant proves that he or she had no intent to defraud or to conceal the state of affairs described by the section.

The provisions accordingly constitute a reversal of the normal onus of proof in criminal proceedings, in that they would cast on the defendant the onus of disproving guilty intent.

The clause is drawn to the attention of the Senate in that it may breach principle 1(a) (i) and trespass unduly on personal rights and liberties.

Subclause 591(1) makes it an offence not to comply with a number of provisions in clause 289 of the Bill relating to the keeping of proper books of account and other accounting records by a corporation.

Pursuant to subclause 591(2), it is a defence to a prosecution under subclause 591(1) that the defendant can prove that he or she had reasonable grounds to believe, and did believe, that a competent and reliable person was charged with the duty of ensuring that the requirements imposed by the Bill were complied with, and was in a position to discharge that duty.

The provision amounts to a reversal of the normal onus of proof in criminal proceedings and places on the defendant the onus of proving the matters set out in subclause 591(2).

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

The clause is drawn to the Senate's attention in that it may be a breach of principle 1(a) (i) of the terms of reference and unduly trespass on personal rights and liberties.

Clause 618 - 'Henry VIII' clause

Clause 618 of the Bill will provide a formula for calculating the number of voting shares acquired during a 6 month period. The formula is important in calculating percentages of shareholding during takeovers.

Pursuant to paragraph 618(3) (b) it would be possible to alter the base percentage of the share-holding in a company, to which a person or other company could add 3% of a company's voting shares every 6 months.

The alteration may be effected by regulation. The Committee believes that this is a matter that should not be dealt with by delegated legislation, but should be altered by appropriate amendment of the legislation, so as to subject the change to proper scrutiny and debate.

Accordingly the clause is drawn to the Senate's attention in that it may be a breach of principle 1(a) (iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

Clause 704 and 705 - Reversal of the onus of proof

Clause 704 of the Bill will provide a number of offences for mis-statements etc.

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

Pursuant to subclause 704(6), it is a defence to a prosecution of a person for contravention of subclause 704(1), (3) or (5) if it can be proved that a statement was served or given or an offer was sent when the person charged with an offence under the subclauses believed a number of matters to be true and not misleading.

In addition, the subclause provides that the defendant has to prove that he or she had a state of belief in the matters referred to in paragraph 704(6)(4) (a), which prevailed at the date of the information alleging the matters constituting the offence.

The clause reverses the onus of proof in criminal proceedings, and would place the onus of disproving guilty intent on the defendant in criminal proceedings.

Clause 705 proposes a range of offences relating to mistatements and public statements and advertisements produced at the time of takeover announcements.

Pursuant to subclause 705(6) similar matters will have to be proved by the defendant in a prosecution to those dealt within paragraph 704(4) (6).

The subclause constitutes an apparent reversal of the onus of proof in criminal proceedings and is drawn to attention on the same basis as the provisions in 704(6).

Accordingly the clauses are drawn to the Senate's attention in that they may breach principle 1(a) (i) of the terms of reference and unduly trespass 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 707 - 'Henry VIII' Clause

Clause 707 provides in paragraph 707(1) (b), that the Minister may by notice published in the Gazette, specify that a company is one in relation to which relevant provisions of part 6.7, of the Bill apply.

The Committee has consistently drawn attention to such provisions, as notices published in the Gazette do not allow for proper Parliamentary consideration. The Committee believes that such matters should be specified by regulation so that the matter may be properly considered by the Parliament.

Accordingly the clause is drawn to the Senate's attention in that it may be a breach of principle 1(a) (iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

Clause 708 - 'Henry VIII' clause

Clause 708 governs substantial shareholdings in corporations. Pursuant to paragraph 708(5) (b) the Minister may specify in regulations a percentage of shareholdings which is relevant to the provision, other than the percentage of 5%.

Such a clause would permit the prescription of a shareholding percentage which was substantially different to 5% and accordingly could effect persons to whom Part 6.7 of the Bill would apply.

Accordingly, the clause is drawn to the Senate's attention in that it may be a breach of principle 1(a) (iv) of the terms of reference and 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.

The provision of the clause is similar to the provisions of clause 728 and accordingly is drawn to the Senate's attention as it may be in breach of 1(a) (4) of the terms of reference and constitute an inappropriate delegation of legislative power

**Clause 748 - 'Henry VIII' clause**

Clause 748 of the Bill will provide that regulations may vary the requirements of any statement which is required by Part 6.12 of the Bill, either by amending or altering such requirements, or by adding additional requirements.

The clause is clearly a 'Henry VIII' clause in that, if enacted it would permit later amendment of a section of a statute by regulation.

Accordingly, the clause is drawn to the Senate's attention as it may be in breach of the principle 1 (a) (iv) of the terms of reference and constitute an inappropriate delegation of legislative power.

**Clause 996 - Reversal of the onus of proof**

Subclause 996(1) of the Bill will make it an offence for a person to issue in prospectus in which there is a false or misleading statement or omission .

Pursuant to subclause 996(2) it is a defence to a prosecution under subclause 996(1) if a defendant can establish a number of matters, including that he or she had reasonable grounds to believe that the statements in the prospectus were true and not misleading or the omission was not material, or inadvertent.

The subclause would apparently reverse the onus of proof in criminal proceedings and would apparently oblige the defendant to disprove both negligence and intention, whereas under criminal and the common law it is incumbent upon the prosecution normally to prove both.

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 clause is drawn to the Senate's attention as it may be a breach of principle 1(a) (i) of the terms of reference trespass unduly on personal rights and liberties

**Clause 998 - Reversal of the onus of proof**

Clause 998 of the Bill, and particularly in 998(3) and (4), makes it an offence to trade in a false manner and engage in transactions which may effect market rigging.

Pursuant to subclause 998 (8) it is a defence to a prosecution under either to the above subclauses if it is proved that the purposes for which securities in question were brought or sold, were not bought for the purpose of creating a misleading appearance with respect to a market for, or the price of, certain securities.

The Committee has examined this clause and believes that it appears to require the defendant to disprove guilty intent, and, accordingly, amounts to the reversal of the normal onus of proof in criminal proceedings.

The clause is drawn to the Senate's attention as it may be in breach of the principle 1(a) (i) of the terms of reference and, trespass unduly on personal rights or liberties.

**Clause 1127 - Non-reviewable decision**

Clause 1127 of the Bill would grant to the Minister in subclause 1127 (1) an apparently unfettered discretion to declare specified futures markets to be exempt future markets under the Bill. There appears no process whereby a market, or markets, might challenge the exercise of this discretion.

The decision may only be challenged as to its legality under the Administrative Decisions Judicial Review Act 1977 in a Court.

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

The likely effect of any decision by the Minister under the clause would be financially profound, and may involve considerable long-term damage to a futures market.

The clause is drawn to the Senate's attention in that it may be of breach to principle 1 (a) (iii) of the terms of reference in that it would make rights liberties and /or obligations unduly dependent upon a non-reviewable decision.

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



**CORPORATIONS (FEES) BILL 1988**

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

The Bill details the matters in respect of which fees are payable for the purposes of the Corporations Bill 1988 and authorises the making of the regulations for the fees.

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.

FUTURES ORGANISATIONS (APPLICATION FOR MEMBERSHIP) FIDELITY FUNDS  
CONTRIBUTION BILL 1988

Any fidelity fund contribution payable by a person wishing to be admitted to membership of a futures exchange or futures association will be imposed by this Bill. The amount of the contribution will be determined by the futures exchange or futures association and will be at least \$500.00 and not more than such amount as is prescribed by the Regulations. The Regulations will be able to prescribe different constitution amounts for different futures exchanges or associations.

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

Clause 5 - Inappropriate delegation of legislative power.

Under clause 5, there is no upper limit on the tax to be imposed under the Bill. Under clause 6, that upper limit is to be set by regulations.

The Committee has consistently taken the view that it is an inappropriate delegation of legislative power. The maximum rate of a tax is to be determined by regulation, rather than by Act of the Parliament.

The Committee draws the Senate's attention to the clause under principle 1(a) (iv) in that it may be considered to be 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.

FUTURES ORGANISATIONS (MEMBERSHIP) FIDELITY FUNDS CONTRIBUTION  
BILL 1988

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

Any fidelity fund contribution payable by a contributing member of a futures exchange or futures association who wishes to continue his/her membership of that exchange or association will be imposed by this Bill. The amounts of the contribution will be determined by the futures exchange or association and will be at least \$100.00 and not more than such amount as is prescribed by the Regulations. The Regulations will be able to prescribe different contribution amounts for different future exchanges or associations.

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

Clause 5 - Inappropriate delegation of legislative power.

Under clause 5, there is no upper limit on the tax to be imposed under the Bill. Under clause 6, that upper limit is to be set by regulations.

The Committee has consistently taken the view that it is an inappropriate delegation of legislative power. The maximum rate of a tax is to be determined by regulation, rather than by Act of the Parliament.

The Committee draws the Senate's attention to the clause under principle 1(a) (iv) in that it may be considered to be 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.

**FUTURES ORGANISATION FIDELITY FUNDS LEVY BILL 1988**

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

Any fidelity fund levy payable by a person in addition to the person's annual contribution to the fund will be imposed by this Bill. The amounts of the levy will be determined by the futures exchange or association and will not exceed the amount prescribed by the Regulations. The Regulations will be able to prescribe different levies for different exchanges and associations.

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

Clause 5 - Inappropriate delegation of legislative power.

Under clause 5, there is no upper limit on the tax to be imposed under the Bill. Under clause 6, that upper limit is to be set by regulations.

The Committee has consistently taken the view that it is an inappropriate delegation of legislative power. The maximum rate of a tax is to be determined by regulation, rather than by Act of the Parliament.

The Committee draws the Senate's attention to the clause under principle 1(a) (iv) in that it may be considered to be 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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**NATIONAL GUARANTEE FUND (MEMBERS OF PARTICIPATING EXCHANGES) LEVY  
BILL 1988**

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

The Bill will impose a levy that is payable by members of participating exchanges for the purposes of the Corporations Bill 1988. The amount of the levy is to be determined by the participating exchange. The participating exchanges can set different rates for different classes of members or member organisations of the exchange. Regulations may be made prescribing the maximum rate of the levy and different maximum levels.

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

**Clause 5 - Inappropriate delegation of legislative power.**

Under clause 5, there is no upper limit on the tax to be imposed under the Bill. Under clause 6, that upper limit is to be set by regulations.

The Committee has consistently taken the view that it is an inappropriate delegation of legislative power. The maximum rate of a tax is to be determined by regulation, rather than by Act of the Parliament.

The Committee draws the Senate's attention to the clause under principle 1(a) (iv) in that it may be considered to be 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.

NATIONAL GUARANTEE FUND (PARTICIPATING EXCHANGES) LEVY BILL 1988

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General

The Bill will impose a levy that is payable by participating exchanges for the purposes of the Corporates Bill 1988. The amount of the levy is to be set by the Securities Exchange Guarantee Corporation Regulations may be made prescribing the maximum rate of the levy and different rates can be set for different participating exchanges.

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

Clause 5 - Inappropriate delegation of legislative power.

Under clause 5, there is no upper limit on the tax to be imposed under the Bill. Under clause 6, that upper limit is to be set by regulations.

The Committee has consistently taken the view that it is an inappropriate delegation of legislative power. The maximum rate of a tax is to be determined by regulation, rather than by Act of the Parliament.

The Committee draws the Senate's attention to the clause under principle 1(a) (iv) in that it may be considered to be 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.

NATIONAL GUARANTEE FUND (PARTICIPATING EXCHANGES) LEVY BILL 1988

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General

The Bill will impose a levy that is payable for the purposes of the Corporations Bill 1988, in relation to reportable transactions. The levy is payable at a rate determined by the Securities Guarantee Corporation and Regulations prescribing the maximum rate of the levy may be made. Regulations can set different maximum rates for transaction by different classes of dealers.

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

Clause 5 - Inappropriate delegation of legislative power.

Under clause 5, there is no upper limit on the tax to be imposed under the Bill. Under clause 6, that upper limit is to be set by regulations.

The Committee has consistently taken the view that it is an inappropriate delegation of legislative power. The maximum rate of a tax is to be determined by regulation, rather than by Act of the Parliament.

The Committee draws the Senate's attention to the clause under principle 1(a) (iv) in that it may be considered to be 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.

SECURITIES EXCHANGES (APPLICATION FOR MEMBERSHIP) FIDELITY FUNDS  
CONTRIBUTION BILL 1988

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

The Bill will impose the tax that is payable for the purposes of the Corporations Bill 1988 by a person seeking membership of a securities exchange. The amounts of the tax will be determined by the securities exchange and the maximum amount may be set by regulations. Regulations can set different amounts for different securities exchanges.

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

Clause 5 - Inappropriate delegation of legislative power.

Under clause 5, there is no upper limit on the tax to be imposed under the Bill. Under clause 6, that upper limit is to be set by regulations.

The Committee has consistently taken the view that it is an inappropriate delegation of legislative power. The maximum rate of a tax is to be determined by regulation, rather than by Act of the Parliament.

The Committee draws the Senate's attention to the clause under principle 1(a) (iv) in that it may be considered to be 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.



**SECURITIES EXCHANGES (MEMBERSHIP) FIDELITY FUNDS CONTRIBUTION  
BILL 1988**

This Bill was introduced into the House of Representatives on 25 May 1988 by the Attorney-General.

The Bill will impose the tax that is payable for the purposes of the Corporations Bill 1988 by a member of a securities exchange. The amounts of the tax will be determined by the securities exchange and the maximum amount may be set by regulations. Regulations can set different amounts for different securities exchanges.

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

**Clause 5 - Inappropriate delegation of legislative power.**

Under clause 5, there is no upper limit on the tax to be imposed under the Bill. Under clause 6, that upper limit is to be set by regulations.

The Committee has consistently taken the view that it is an inappropriate delegation of legislative power. The maximum rate of a tax is to be determined by regulation, rather than by Act of the Parliament.

The Committee draws the Senate's attention to the clause under principle 1(a) (iv) in that it may be considered to be 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.



ACTING ATTORNEY-GENERAL  
PARLIAMENT HOUSE  
CANBERRA A.C.T. 2600

20 JAN 1989

BAD88/12543  
55586

Dear Senator Cooney

I am replying on the Attorney-General's behalf to the letter of 2 September 1988 from the Secretary to your Committee enclosing the extract from the Scrutiny of Bills Alert Digest No. 10 of 1988 about the Australian Securities Commission Bill 1988 and related Bills.

The issues the Committee has raised have been carefully considered. The response to each of the specific matters together with some general introductory comments about the Bills are set out in the attached paper.

The Bills were prepared in their present form as part of an overall policy to retain existing co-operative scheme provisions except in a small number of areas where the business community called for reforms. However the paper indicates that, in response to comments by your Committee, the Government would be prepared to introduce further amendments to meet a number of the Committee's concerns. As the Bills are now being examined in detail by the Joint Select Committee on Corporations Legislation I have sent a copy of this letter to the Chairman of that Committee. I envisage that the amendments would be moved at the same time as the Government introduces any amendments which it considers appropriate following receipt of the report of the Joint Committee.

Yours sincerely

(MICHAEL TATE)

Senator B.C. Cooney  
Chairman  
Senate Standing Committee for  
the Scrutiny of Bills  
Parliament House  
CANBERRA ACT 2600



General introductory comments

Most of the clauses of the Bills on which the Committee has commented are in substantially the same terms as existing provisions of the co-operative companies and securities legislation.

2. The Bills continue to provide wide discretions to the Australian Securities Commission to ensure that it can be a strong and effective regulatory body and that it can be flexible and responsive to developments in a quickly changing market place. As with the existing legislation, the Bills draw a balance between the specific and detailed rules governing the majority of cases and the need to alter those rules quickly where a strict application of the black letter law may cause hardship or may be inappropriate. The effectiveness of the regulatory regime would be seriously compromised if it were necessary to seek Parliamentary approval for every minor modification of the black letter law.

3. The Committee has made many comments about reversals of the onus of proof. Again, in most cases the provisions in question are based on provisions in the existing co-operative companies and securities legislation. Nevertheless, the Government would be prepared to introduce further amendments to some of the reverse onus provisions. Others, it is submitted, satisfy the Committee's usual tests of acceptability or are justifiable on other grounds.

Abbreviations

4. The following abbreviations are used below:

ASC	-	Australian Securities Commission
CA	-	<u>Companies Act 1981</u> and Codes
CASA	-	<u>Companies (Acquisition of Shares) Act 1980</u> and Codes
FIA	-	<u>Futures Industry Act 1986</u> and Codes
NCSC Act	-	<u>National Companies and Securities Commission Act 1979</u>
SIA	-	<u>Securities Industry Act 1980</u> and Codes.

AUSTRALIAN SECURITIES COMMISSION BILL 1988

Subclauses 64(3), 67(2) and 196(2)

5. Subclause 64(3) is based on CA subsection 14(3), SIA subsection 12(6) and FIA subsection 15(3). Subclause 67(2) is based on CA subsection 310(2), SIA subsection 34(2) and FIA subsection 40(2). Subclause 196(2) is a new provision in similar terms to subclause 64(3).

6. It is submitted that the defences in subclauses 64(3) and 196(2) are analogous to the defence of 'honest and reasonable mistake of fact', the onus of establishing which lies with the defence at common law. It is submitted that these defences should be retained.

7. It is submitted that subclause 67(2) is acceptable from a criminal law policy point of view in that the defence which it provides is easy for the defendant to prove and difficult for the prosecution to disprove. The matters to be raised by way of defence under subclause 67(2) are also likely to be peculiarly within the knowledge of the defendant.

#### Clause 126

8. This clause is based on subsection 49(3) of the NCSC Act. Clause 126 provides a defence of ignorance to an ASC staff member or delegate who is prosecuted for failure to notify pecuniary or other interests under clause 125. The ASC staff member or delegate is in the best position to establish his or her lack of knowledge of the notification requirements. The reversal of onus in this case is acceptable because the matters to be raised by way of defence are peculiarly within the knowledge of the accused, and it would be extremely difficult for the prosecution to negative the defence.

#### Subclause 215(3)

9. This provision is based of CA subsection 30H(3). There is a corresponding provision in NCSC Act, subsection 39(3). The Committee has criticised this provision insofar as it appears to create a strict liability offence. Subsequent to the Committee making its comment, the House of Representatives has passed an amendment to clause 215 to provide a defence to a prosecution for the giving of materially false or misleading evidence. The defence will allow the defendant to prove that when giving the evidence he or she believed on reasonable grounds that it was true and not misleading. This defence will mitigate the strict liability. At common law there are only limited defences to strict liability offences and the onus of proving the defence is place on the defendant. Thus in circumstances of a strict liability offence which has an attendant defence which places an onus on the defendant it is not correct to say that the defendant has to disprove guilty intent. There is no intent '(mens rea)' in a strict liability offence. What the defendant is required to do is to establish the defence on the balance of probabilities.

10. The defence is analogous to the defence of 'honest and reasonable mistake of fact', the onus of establishing which lies with the defence at common law. It is submitted that the defence should be retained.

#### Subclauses 23(2) and 48(2)

11. These subclauses are based on CA subsection 296(12), SIA subsection 19(2A) and FIA subsection 25(14).

12. As a result of the High Court's decision in NCSC v News Corporation Ltd (1984) 8 ACLR 84, it would appear that the rules of natural justice will apply to investigations conducted by the ASC. On the basis of the rules of natural justice a person will be entitled to a fair opportunity to answer allegations made against him or her. A person who is denied natural justice at an ASC examination will, of course, have a right to appeal to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 for a review of the ASC's decision.

#### Clause 102

13. This clause is based on NCSC Act sections 45 and 46. It is noted that the Committee accepts the importance of this clause to the effective operation of the legislation. To satisfy the Committee's concerns, however, consideration will be given to specifically requiring the ASC's delegates to be people with knowledge of, or experience in, the fields of business, company administration, financial markets, law or accounting. In practice the ASC's delegates would possess one or more of these attributes. The Committee's attention is also drawn to s.34AB of the Acts Interpretation Act 1901 which expressly provides that where an Act confers a power of delegation, that delegation may be made generally.

#### Clause 138

14. By virtue of this new provision, the ASC will be a public authority to which Division 3 of Part XI of the Audit Act 1901 applies. That Division requires, among other things, that an authority submit an annual report and financial statement to the responsible Minister. The effect of the Division is explained in the explanatory memorandum on the ASC Bill.

15. The drafting device employed in cl.138 obviates the need to repeat the terms of Division 3 of Part XI of the Audit Act. It is a well-known device which has been used extensively in Commonwealth legislation since 1980.

16. Examples of comparable provisions are the Australian War Memorial Act 1980, s.36; the National Museum of Australia Act 1980, s.38; the National Occupational Health and Safety Commission Act 1985, s.60; the Australian Nuclear Science and Technology Organisation Act 1987, s.29; and the Australian Institute of Health Act 1987, s.24.

17. Accordingly, it is submitted that clause 138 should be retained in its present form.

### CLOSE CORPORATIONS BILL 1988

#### Clause 15

18. This is a new provision. Although it has no exact precedent in the existing co-operative scheme legislation, there are many provisions in that legislation permitting the modification of the black letter law. As noted above, such provisions are necessary to enable quick solutions to be found where a strict application of the black letter law may cause hardship or may be inappropriate.

19. The complexity of companies and securities legislation and the difficulty in legislating for all possible contingencies, many of which cannot be reasonably foreseen, mean that provisions such as subclause 15(3) must be included in the legislation.

20. Subclause 15(3) will give the Court a free hand in resolving difficulties arising from the application of a provision of the Corporations Bill to a close corporation. One would expect the Courts to be reluctant to modify the black letter law unless it was necessary to do so to provide a just result. Furthermore, it is submitted that courts are not appropriately described as delegates of legislative authority. Courts exercise judicial functions, which require them to examine particular cases and specific problems. Thus they have different responsibilities to those of the Executive or the Parliament. The fact that courts ultimately make orders that are binding only on the parties before them would seem to preclude any conclusion that they are delegates of legislative authority.

Clauses 153, 154, 155 and 159

21. It is recognised that subclauses 153(2), (3) and (4) are not in accordance with provisions usually contained in Commonwealth legislation because they remove the normal mens rea element for offences of this kind. The Government is prepared to introduce amendments so that the elements of intent to defraud or to conceal the state of affairs of the company are included as elements of the offence. These amendments would:

- (a) omit subclauses 153(2), (3) and (4);
- (b) add 'fraudulently' before 'concealed' in subparagraph 153(1)(c)(i) and before 'makes' in paragraph 153(1)(d);
- (c) add 'fraudulently' before 'pawned' in subparagraph 153(1)(c)(v) and omit 'otherwise than in the ordinary course of business of the corporation' in that subparagraph; and
- (d) add 'with intent to conceal the state of affairs of the corporation' after 'corporation' in paragraph 153(1)(f).

22. It is submitted that subclauses 154(2) and 155(2) are acceptable in that they deal with circumstances peculiarly within the defendant's knowledge which it would be difficult for the prosecution to disprove and relatively easy for the defendant to prove.

23. It is submitted that the defence in subclause 159(3) is analogous to the defence of 'honest and reasonable mistake of fact', the onus of establishing which lies with the defendant at common law. It is therefore submitted that this defence should be retained.

CORPORATIONS BILLClause 43

24. The effect of clause 43 is that regulations may be made to enable specified relevant interests in specified shares to be disregarded in specified circumstances for the purposes of:

- (a) clause 234 (dealing with company loans to directors);
- (b) clause 235 (dealing with the register of directors' shareholdings which a company is required to keep);
- (c) clause 236 (dealing with the general duty of a director to make disclosure to his or her company);
- (d) Part 6.7 (dealing with the reporting of substantial (5%) shareholdings in a company);
- (e) Part 6.8 (dealing with the power of the ASC to obtain information as to the beneficial ownership of shares); and
- (f) Chapter 7 (dealing with the regulation of the securities industry).

25. Clause 43 is based on CA subsection 8(11) and SIA subsection 5(11). No regulations have been made under the existing relevant interest provisions.

26. The relevant interest provisions are complicated and involve difficult decisions on matters such as who controls particular shares and whether a shareholder is associated with another person.

27. Clause 43 is necessary to enable the above provisions to be modified quickly should it ever be necessary to do so to prevent an inappropriate application of them. Any regulations made to modify the application of clause 43 will of course be subject to Parliamentary disallowance. It is submitted that this level of parliamentary scrutiny is appropriate for the type of modification power that is being proposed.

Subclause 112(3)

28. This provision is based on CA subsection 33(4).

29. The Gazettal procedure provided for enables the Minister to increase the maximum membership of unincorporated partnerships and associations (such as firms of solicitors or accountants) at very short notice should the need arise. It is desirable that the Minister should have this power to prevent outside partnerships and associations being in breach of the law. If, however, in exercising this power the Minister failed to take a relevant consideration into account or took an irrelevant consideration into account, an appeal would lie to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. The exercise of this power does not warrant parliamentary scrutiny. The power is appropriate in the circumstances.

Clause 348

30. This provision is based on CA subsection 514(2). The Government accepts the force of the Committee's arguments and is prepared to introduce an amendment to clause 348 which would omit the words following 'Act' in paragraph 348(b) (i.e. 'unless the local agent satisfies the court or tribunal hearing the matter that the local agent should not be so liable'). This will result in liability being imposed on the local agent in circumstances where the foreign company is liable.

Subclauses 590(2) and 591(2)

31. These subclauses are based on CA subsection 554(2) and 555(2).

32. The Government accepts the force of the Committee's arguments and is prepared to introduce further amendments to clause 590 which would:

- (a) add the word 'fraudulently' in sub-paragraphs (1)(c)(i) and (v) and in paragraph (1)(d);
- (b) omit subclauses (2) and (3);
- (c) add the element of intention to conceal the state of affairs of the company in paragraph (1)(f) (e.g. by the addition of the words 'without reasonable excuse'); and
- (d) omit subclause (4).

33. Consideration within the Department of the terms of clause 591 has led to the conclusion that it may create the potential for double jeopardy with clause 289. Clause 289 requires a company to keep proper accounting records. Subclause 289(11) requires a director to take reasonable steps to ensure that the company complies with clause 289. Subclause 289(12) provides a defence along the same lines as subclause 591(2), which the Committee has criticised as being an undesirable reversal of the normal onus of proof in criminal proceedings. Clause 591 creates an offence of failing to keep proper accounting records in contravention of clause 289 in the case of a company that is in financial difficulty or the affairs of which are or have been under investigation.

34. Consideration within the Department of the terms of subclause 289(11) has led to the conclusion that it may be too uncertain to be of any use as an offence. Subclauses 289(12) and 591(2) reverse the onus of proof and seem unnecessary as the matters itemized would negative taking the 'reasonable steps' referred to in subclauses 289(11) and 591(1). To overcome the problems inherent in clauses 289 and 591 the Government proposes to introduce further amendments that would omit subclauses 289(11), 289(12) and 591(2) and recast the terms of subclause 591(1) to make clear that if a person has been convicted of an offence against clause 289 the person is not liable to be convicted of an offence against clause 591.



Paragraph 618(3)(b)

35. This provision is the same as CASA para.15(2)(b). There is a similar provision in para.615(7)(b) of the bill, which is the same as CASA subsection 11(7). No regulations have been made under the existing provisions. These provisions set the thresholds beyond which the acquisition controls imposed by Chapter 6 of the Bill will apply. They remain appropriate and no regulations are contemplated to alter the thresholds. In most cases the thresholds fall short of a controlling interest. If, however, it ever emerged that the thresholds were inappropriate and were being abused it would be necessary to act quickly to stem the abuse. For this reason it is preferable to allow the thresholds to be altered by regulation.

Subclauses 704(6) and 705(6)

36. These provisions are based on CASA subsections 44(16) and (17). The prosecution must prove that there are materially false or misleading statements in, or omission of material from, the takeover documents or publicity. The subclauses to which the Committee has drawn attention enable the defendant to present evidence of his or her knowledge or belief not known to the prosecution. These defences are broadly equivalent to a defence of 'honest and reasonable mistake of fact', the onus of establishing which rests with the defendant at common law.

Clause 707

37. This clause is based on CA s.134. No bodies corporate have been declared by Gazette notice for the purposes of this provision and it is not contemplated that any will be declared. If, however, it became apparent to the Minister that it was necessary to declare an unlisted company as being a company which should comply with the substantial shareholdings requirements, the Minister would need to act quickly. (The substantial shareholdings requirements provide shareholders with an early warning of persons who might be planning to move towards control of a company.) The Gazette procedure will enable the Minister to act quickly should the need ever arise. It is desirable that this procedure should be available to the Minister to prevent the substantial shareholdings requirements being circumvented. If, however, in making a declaration, the Minister failed to take a relevant consideration into account or took an irrelevant consideration into account, an appeal would lie to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. The making of such declarations does not warrant Parliamentary scrutiny. The power conferred on the Minister under clause 707 is appropriate in the circumstances.

Paragraph 708(5)(b)

38. Paragraph 708(5)(b) is based on CA subsection 136(9) except that the substantial shareholdings reporting threshold is set at 5% instead of 10%. The proposed 5% threshold is to ensure that appropriate levels of public disclosure are maintained following the proposed abolition of the capacity of

a company and shareholders to issue notices to trace beneficial ownership of shares. The ability of the Minister to make regulations quickly to alter the threshold is, however, desirable, should the need for finetuning arise. The specification of a particular percentage is appropriately done in regulations because it does not involve any change in the general policy or principles underlying the relevant provisions in the Act but provides for the appropriate parliamentary scrutiny through tabling and disallowance.

Clause 728

39. This clause is based on CASA s.57 but extends the exemption powers available under that provision. Clause 728, like CASA s.57, will be of crucial importance to the effective operation of the takeover provisions. The importance and usefulness of CASA s.57 is generally recognised in the business community. CASA s.57 has worked satisfactorily to date. It is essential that the ASC, like the NCSC, should be able to act very quickly in a takeover matter (where time is of the essence) to alter the black letter law where its strict application would cause hardship or would be inappropriate. The Gazette notice procedure is the appropriate one in the circumstances. If, however, in exercising this power, the ASC failed to take a relevant consideration into account, or took an irrelevant consideration into account, an appeal would lie to the Federal court under the Administrative Decisions (Judicial Review) Act 1977.

Clause 730

40. This clause is based on CASA s.58 but extends the modification powers available under that provision. The comments in paragraph 39 above are equally applicable to this provision.

Clause 748

41. This clause is based on CASA subsections 62(3) and (4). No regulations have been made in reliance on these provisions. All amendments made to the Schedule of CASA have been made by Act of Parliament. The Government accepts the force of the Committee's objection to clause 748 and proposes to introduce an amendment to omit clause 748. It is recognised that amendments to the requirements of statements set out in Part 6.12 and to the provisions detailing the types of documents to be served or lodged under Chapter 6 should be effected by way of legislation. These amendments may raise important policy issues warranting full Parliamentary scrutiny.

Subclause 996(2)

42. This subclause is based on CA subsection 108(1). The Government accepts the need to introduce amendments to include the element of materiality in subclause (1) and to omit paragraph 2(a). Like the defences in subclauses 704(6) and 705(6), the defences in paragraphs 996(2)(b) and (c) are

analogous to the defence of 'honest and reasonable mistake of fact', the onus of establishing which lies with the defendant at common law. It is submitted that these defences should be retained.

Subclause 998(8)

43. This subclause is based on SIA subsection 124(6). The prosecution must prove the elements of subclauses 998(3) or (4). Subclause 998(8) will enable the defendant to present evidence about his or her purpose for buying or selling securities. Subclauses 998(3) and (4) create strict liability offences which do not have a mens rea element and the prosecution is thus not required to establish 'guilty minds'. The defence provided by subclause 998(8) mitigates the strict liability. At common law there are only limited defences to strict liability offences and the onus of proving the defence is on the defendant. Thus, in circumstances where a strict liability offence provides a defence which places the onus on the defendant, it is not correct to say that the defendant has to 'disprove guilty intent'. There is no 'guilty intent' element in the offence. Instead, as at common law, the defendant has to establish a defence (in this case, the purpose for engaging in the conduct) on the balance of probabilities. It is therefore submitted that subclause 998(8) should be retained.

Clause 1127

44. This provision is based on FIA subsections 45(2) and (3). Any person aggrieved by the Minister's decision to declare a specified futures market to be an exempt futures market would, as the Committee has noted, have a right to appeal to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. The grounds of review are set out in s.5 of that Act. One ground is that the making of a decision was an improper exercise of power. This includes taking irrelevant considerations into account, failing to take relevant considerations into account and the exercise of a power in bad faith. Another important ground of review is that there has been a breach of the rules of natural justice. These appeal grounds would appear to be adequate in the circumstances.

FUTURES ORGANISATIONS (APPLICATION FOR MEMBERSHIP) FIDELITY FUNDS CONTRIBUTION BILL 1988

FUTURES ORGANISATIONS (MEMBERSHIP) FIDELITY FUNDS CONTRIBUTION BILL 1988

FUTURES ORGANISATIONS FIDELITY FUNDS LEVY BILL 1988

NATIONAL GUARANTEE FUND (MEMBERS OF PARTICIPATING EXCHANGES) LEVY BILL 1988

NATIONAL GUARANTEE FUND (PARTICIPATING EXCHANGES) LEVY BILL 1988

NATIONAL GUARANTEE FUND (REPORTABLE TRANSACTIONS) LEVY BILL 1988

SECURITIES EXCHANGES (APPLICATION FOR MEMBERSHIP) FIDELITY FUNDS CONTRIBUTION BILL 1988

SECURITIES EXCHANGES (MEMBERSHIP) FIDELITY FUNDS CONTRIBUTION BILL 1988

SECURITIES EXCHANGES FIDELITY FUNDS LEVY BILL 1988

45. These Bills deal with levies payable by members of stock exchanges and futures exchanges to the guarantee funds or fidelity funds established by those exchanges. These matters are dealt with in separate Bills as, from a constitutional point of view, they are in the nature of taxing measures. They do not, however, involve departures from the existing co-operative scheme arrangements. The Bills make it clear that the levies are to be determined by the exchanges. Any regulations prescribing a maximum rate of levy would in practice give effect to determinations of the exchanges as to what that maximum rate should be. The Committee's concerns do not appear to be justified.

46. Furthermore, since the Committee made its comments the House of Representatives has passed amendments to cls.1235 and 1236 (Amendments (207) and (208) to the Corporations Bill).

47. The effect of the clauses as amended is that the Sydney Futures Exchange and other approved futures organisations will be able to determine that the fidelity fund levy regime set out in the Corporations Bill and the separate Levy Bills does not apply to specified persons.

48. It will permit the Sydney Futures Exchange to continue its existing practices whereby:

- (a) its local members (ie those who trade only on their own account) are not required to contribute to the fidelity fund (because they are never in a position where they can misappropriate clients' funds); and
- 9b) the Exchange levies transaction fees by its business rules instead of imposing an application for membership fee or an annual membership fee.

49. Clauses 1235 and 1236 as amended will permit the Exchange to impose application for membership fees or annual membership fees should the transaction fees which it presently levies be insufficient. Should the Exchange choose to do so then the Futures Levy Bills will apply.

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

**THIRD REPORT  
OF 1989**

**5 APRIL 1989**

## CORPORATIONS LEGISLATION PACKAGE

The Committee commented on the Corporations legislation package in the Tenth Scrutiny of Bills Digest of 1988, and a response dated 29 January 1989 to the Committee's comments was received from the Acting Attorney-General.

In his introductory comments to his response the Minister makes the following points:

1. That most of the clauses of the Bills on which the Committee has commented are in substantially the same terms as existing provisions of the co-operative companies and securities legislation.
2. The Bills continue to provide wide discretions to the Australian Securities Commission. The Minister stated in his response that,

"As with existing legislation, the Bills draw a balance between the specific and detailed rules governing the majority of cases and the need to alter those rules quickly when a strict application of the black letter law may cause hardship or may be inappropriate. The effectiveness of the regulatory regime would be seriously compromised if it were necessary to seek Parliamentary approval for every minor modification of the black letter law."

3. In response to the Committee's comments on reversals of the onus of proof the Minister states, "Again, in most cases the provisions in question are based on provisions in the existing co-operative companies and securities legislation."

The Committee thanks the Minister for his response but stresses that the fact that a provision in a Bill is similar to a provision in existing legislation is not itself a reason for supporting that provision. In any event a provision that breaches any of principles (i)(a) to (v) of the Committee's terms of reference is a matter of concern to the Committee. The existing legislation was in many cases passed before the Committee was formed, or was the result of a Ministerial Council agreement and for all practical purposes not able to be amended by Parliament.

The Committee is concerned to preserve the rights of the Parliament to oversight legislation. Whilst there may be a need for the Commission to be flexible in its regulatory regime it should not operate in a manner that reduces Parliament's role in the review of legislation.

**AUSTRALIAN SECURITIES COMMISSION BILL 1989**

**Sub-clause 64(3) and 196(2) - Reversal of onus of proof.**

The Committee accepts the Minister's view that the defences in these sub-clauses are analogous to the defence of "honest and reasonable mistake of fact."

**Sub-clause 67(2)**

The Minister states the defence provided by this sub-clause is "easy for the defendant to prove and difficult for the prosecution to disprove and that the matters raised by the defence are also likely to be particularly within the knowledge of the defendants". The Committee is of the view that this clause should be amended to include the intent of the accused as an element of the offence, similar to clause 153 of the Close Corporation Bill.

The sub-clause is brought to Senators attention as it may be in breach of principle 1(a)(i) of the terms of reference and may trespass unduly on personal rights and liberties by reversing the normal onus of proof.

**Clause 68 - Self-incrimination**

In examining clause 68 the Committee noted that this clause requires persons to give evidence against themselves under oath. Sub-clause 68(4) provides that information so obtained cannot be used against the provider of that information except in certain limited circumstances. Moreover, it is an investigative tool which is exceptional and not known to the common law. The Committee is concerned at the further growth of the use of this investigatory procedure which the Committee regards as a possible breach of principle (1)(a)(i) that may trespass unduly on individual rights and liberties.



**Clause 126 - Reversal of onus of proof**

This clause provides a defence to clause 125, which creates an offence of, failure to give notice to the Commission of a possible conflict of interest in a matter before the Commission. The Committee accepts the Minister's view that this clause provides a defence analogous to that of mistake and has no further comments.

Sub-clause 215(3) - In view of the House of Representatives amendment to this clause which mitigates strict liability and gives the defendant an opportunity to establish that in giving evidence there was a belief on reasonable grounds, that the evidence was true and was not misleading. The Committee has no further comments on the sub-clause.

Sub-clauses 23(2) and 48(2) - The Committee accepts the Ministers response and has no further comments on the sub-clauses.

**Clause 102 - Delegation of Administrative power**

The Committee notes the Minister's statement with the respect to the persons to be appointed to the Commission. The Committee has no further comments on the clause.

**Clause 138 - Annual Report**

The Committee accepts the Minister's explanation that the Annual Report and Financial Statement are to be submitted to Parliament. The Committee has no further comment on the clause.

**CLOSE CORPORATIONS BILL 1988**

**Clause 15 - 'Henry VIII' Clause**

Sub-clause 15(3) enables the Court to achieve the object of any particular provision of a Corporations Bill in relation to the Close Corporation to "make such order as is necessary which may arise in connection with the application of that provision of the Corporations Bill including an order modifying the terms of the relevant provision of the Corporations Bill."

The Committee accepts the Minister's statement that such orders will be binding only on the parties and that Courts will not be enabled to act as delegates of legislative authority.

**Clauses 154, 155, and 159**

The Committee accepts the Minister's statement that "The Government is prepared to introduce amendments so that the elements of intent to be defined or to conceal the state of affairs of the company are included as elements of the offence."

With respect to the Minister's statement that the defence in sub-clause 159 (3) is "analogous to the defence of honest and reasonable mistakes of fact, the onus of establishing which lies with the defendant at common law". The Committee would prefer to see the sub-clause amended in the same terms as clause 153.

CORPORATIONS BILL 1988

Clause 43 - 'Henry VIII' Clause

The Committee was concerned that this clause which allows the modification of a number of provisions of the Bill by regulation may constitute a Henry VIII clause; in that specified relevant interests in shares are subject to a number of conditions which can be disregarded for the purposes of provisions in a number of sections and parts of the Bill.

The Committee notes the Minister's comment that "the relevant interest provisions are complicated and involve difficult decisions on matters such as who controls particular shares and whether a shareholder is associated with another person".

Further the Minister states, any regulations made are subject to Parliamentary disallowance and submits that "this level of parliamentary scrutiny is appropriate for the type of modification power that is being proposed."

The Committee is always concerned at the use of King Henry VIII Clauses, but in this instance notes that the relevant interest provisions are complex and the clause in its present form is reasonable in the circumstances.

**Subclause 112(3) - 'Henry VIII' Clause**

The Committee notes the Minister's response but sees no reason why the Minister cannot increase the size of maximum membership of unincorporated associations by the use of regulations rather than gazettal.

Senators' attention is drawn to the clause as it may breach principle 1(a)(iv) of the terms of reference and be considered to constitute an inappropriate delegation of legislative power.

**Subclause 590(2) and 591(2) - Reversal of onus of proof.**

The Committee notes the Minister's statement that clause 590(2) is to be amended and clause 591(2) is to be omitted. The Committee has no further comments on these clauses.

**Paragraph 618(3) (b) - Henry VIII Clause**

The paragraph is part of the provisions which set the thresholds beyond which the acquisition controls imposed by Part VI of the Bill apply. The paragraph allows the thresholds to be altered quickly if they were to be abused. The Committee accepts the Minister's explanation and has no further comments on the paragraph.

**Sub-clauses 704(6) and 705(6) - Reversal of onus of proof.**

The Committee accepts the Minister's view that the sub-clauses which were subject of the Committee's concern "enable the defendant to present evidence of his or her knowledge of belief not known to the prosecution", and as such do not require the further attention of the Committee.

#### Clause 707 - Gazette Notice

The Committee accepts the Minister's view that the Clause allows the Minister to act via Gazette notice to "declare an unlisted company as being a company which should comply with the substantial shareholdings requirements "and the Gazettal procedure enables the Minister to act quickly to prevent the substantial shareholdings requirements being circumvented to the detriment of shareholders".

#### Paragraph 708(5)(b)

The clause governs substantial shareholdings in corporations and paragraph 708(5)(b) allows the Minister to specify in regulations a percentage of shareholdings which is relevant to the provisions other than five per cent. The Committee accepts the Minister's views that the "specification of a particular percentage is appropriately done in regulations because it does not involve any change in the general policy or principles involving the relevant provisions."

#### Clause 728 and 730

This clause allows gazettal of a notice determining exemptions from compliance with Chapter Six of the Bill.

Whilst the Committee does not favour the use of gazettal in place of Regulations, it accepts that the Gazette procedure is appropriate to allow the Commission to act quickly in a takeover matter to prevent hardship.

Clause 748 - The Committee notes the Minister's comment that "The Government accepts the force of the Committee's objection to clause 748 and proposes to introduce an amendment to omit clause 748."

**Clause 996 - Reversal of onus of proof.**

The Committee is pleased to note that the Government is prepared to omit paragraph 2(a). The Committee still sees it as appropriate to omit paragraph 2(c) and redraft sub-clause (1). It is the view of the Committee that the notion of inadvertence should be an element of the offence and not a matter for a defendant to establish.

The Committee draws the Senate's attention to sub-clause (1) and paragraph 2(1) as possibly being in breach of principle (1)(a)(i) of the terms of reference and may unduly trespass on personal rights and liberties.

**Sub-clause 998(8) - Reversal of onus of proof**

Sub-clause 998(3) of the Bill establishes offences of trading in a false manner or engaging in transaction which may affect market rigging.

Sub-clause 998(8) proposes a defence of proving that the purposes for which securities in question were bought or sold was not for the purpose of creating a misleading appearance with respect to a market for, or the price of certain securities.

The Committee accepts that for policy reasons the offences should be strict liability offences and if the prosecution were required to prove guilty intent the offences would become unworkable.

Accordingly the Committee is of the view that although the clause is a reversal of the onus of proof it is acceptable within the Committee's guidelines.

**Clause 1127 - Non-reviewable decision**

The Committee repeats its view expressed in Scrutiny of Bills Digest No. 10 of 1988 that sub-clause 1127 (1) appears to give the Minister an unfettered discretion to exempt futures markets pursuant to the provisions of the Bill.

The Committee thanks the Minister for his response but seeks a detailed explanation from the Minister of the need for this provision.

The clause is drawn to the Senators' attention in that it may be in breach of principle 1(a)(iii) of the Committee's terms of reference that it would make rights, liberties and/or obligations unduly dependant upon a non-reviewable decision.

#### STOCK EXCHANGE AND FUTURES EXCHANGES LEVY BILLS

The Committee notes the Minister's response and accepts his statement that regulations setting a maximum rate of levy are designed to give effect to the Futures and Stock Exchanges prescribing the level of the maximum rate.

The committee has no further comments on this clause.

#### CRIMES (HOSTAGES) ACT 1988

The Committee commented on this Act in the Scrutiny of Bills Eighteenth Report of 1988. A response has been received from the Attorney-General.

#### Clause 10 - Consent of Attorney-General

The Committee expressed concern as to the provisions of Section 8 of the Act which allows for the arrest and detention of alleged offenders prior to the granting of the Attorney-General's consent to prosecution. The Committee commented on a similar provision in the Crimes (Torture) Act 1988 in its First Report of 1988. The Committee noted the Minister's response which emphasised the serious nature of hostage-taking and that sub-clause 10(2) is required to implement Australia's obligations under the International Convention Against the Taking of Hostages.

The Committee thanks the Minister for his response and trusts that it will be of assistance to Senators in debating the Bill.



**Clause 11 - Reversal of Onus of Proof**

The Committee notes the Minister's response and is prepared to accept the reasons advanced by the Attorney-General with respect to the reasons for the clause. The Committee is concerned that the provision should be used solely for the technical jurisdictional reasons outlined by the Minister.

The Committee thanks the Minister for his response and trusts that it will be of assistance to Senators when debating the Bill.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FOURTEENTH REPORT

OF 1989

27 SEPTEMBER 1989

ISSN 0729-6258

## **CORPORATIONS ACT 1989**

This Act was reported by the Committee in its Third Report of 1989 (5 April 1989) and received the Royal Assent on 14 July 1989.

In the Third Report the Committee noted certain clauses which the Acting Attorney-General undertook to amend in his response to the Committee dated 20 January 1989. The printed Act is now available and the Committee draws the following matters to the attention of the Senate.

### **Section 348 - Liability of local agent**

The Committee was concerned that this provision would reverse the normal onus of proof. The provision makes a local agent of a registered foreign company

'answerable for the doing of all acts, matters and things that the foreign company is required by or under this Act to do;'.

The local agent is personally liable for a penalty imposed on a foreign company for contravening a provision of the legislation unless the local agent is able to satisfy the Court or Tribunal hearing the matter that the local agent should not be so liable.

In his response to the Committee dated 20 January 1989 the Minister stated that the provisions would be amended to omit the words in paragraph 348(b) 'unless the local agent satisfies the court or tribunal hearing the matter that the local agent should not be so liable'.

The Committee did not comment further on the section in the Third Report of 1989.

The Committee notes, however, that the amendment outlined in the Minister's letter has not been made in the printed Act.

**Offences by Officers of Companies - Reversal of onus of proof  
Subsections 590(2) and 591(2)**

The provisions of subsection 590(2) provide a defence to a charge that may arise under a number of provisions of subclause 590(1), if a defendant proves that there was no intent to defraud or conceal the state of affairs described by the section. This casts on the defendant the onus of disproving guilty intent.

The provision was commented upon by the Committee in Alert Digest No.10 of 1988 (31 August 1988), and in the Third Report of 1989 the Committee noted the undertaking by the Minister to omit subsection 590(2).

Subsection 591(1) makes it an offence not to comply with certain provisions of Section 289 of the Act, relating to the keeping of books of account and other accounting records by a corporation.

Subsection 591(2) provides a defence if a defendant can prove that he or she had reasonable grounds to believe, and did believe, that a competent and reliable person was responsible for meeting the requirements of the Act and was in a position to discharge that duty.

The Committee commented in Alert Digest No.10 of 1988 that the defendant was thereby required to bear the onus of proving the matters set out in subsection 591(2).

The Committee noted in Report No.3 of 1989 the undertaking of the Minister to omit subsection 591(2).

The amendments to subsections 590(2) and 591(2) outlined by the Minister have not been incorporated in the Printed Act.

#### Altering the Act by Regulation Section 748

In Alert Digest No.10 of 1988 the Committee noted that the provision allowed the requirements of any statement set out in Part 6.12 of the Act to be amended, altered or the requirements added to by regulation. The Committee regarded the provision as an inappropriate delegation of legislative power.

In the Third Report of 1989 the Minister commented that the Government accepted the force of the Committee's objections to section 748 and proposed to introduce an amendment to omit the provision.

The Committee notes that the provision remains unchanged in the printed Act thereby allowing important policy issues not to be subject to full Parliamentary scrutiny.

Defence to a charge of issuing a prospectus that contains a false or misleading statement or from which there is an omission  
Section 996

Subsection 996(1) establishes an offence where a person causes the issue of a prospectus relating to the securities of a corporation in which there is a false or misleading statement or an omission.

Subsection 996(2) provides a defence that includes a number of matters, including a defendant establishing that he or she believed on reasonable grounds that the statements in the prospectus were true and not misleading and the omission was not material or inadvertent.

The Committee brought the provision to the attention of the Senate in Alert Digest No.10 of 1988 as reversing the onus of proof in obliging the defendant to disprove both negligence and intention, when in the criminal law the prosecution is required to prove both matters.

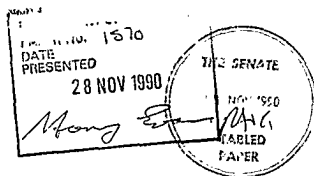
In its Third Report of 1989 the Committee noted the undertaking by the Minister to omit paragraph 996 (2)(a) requiring the defence to prove that the statement or omission was not material. Paragraph 996 (2)(a) remains in the printed Act.

The Committee asks the Minister to inform it why the amendments noted have not been made.

The full response of the Minister in respect of matters raised by the Committee is attached to this Report.

Barney Cooney  
(Chairman)

27 September 1989



**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 11 OF 1990**

**28 NOVEMBER 1990**



**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 11 OF 1990**

**28 NOVEMBER 1990**

**ISSN 0729-6851**

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)  
Senator A. Vanstone (Deputy Chairman)  
Senator V. Bourne  
Senator R. Crowley  
Senator I. Macdonald  
Senator N. Sherry

### TERMS OF REFERENCE

#### Extract

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

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The Committee has considered the following Bills:

- Australian Bureau of Statistics (Parliamentary Supervision of Proposals) Amendment Bill 1990
- \* Australian Capital Territory (Planning and Land Management) Amendment Bill 1990
- Australian Sports Drug Agency Bill 1990
- \* Crimes (Investigation of Commonwealth Offences) Amendment Bill 1990
- \* Customs and Excise Legislation Amendment Bill 1990
- \* Data-matching (Assistance and Tax) Bill 1990
- Financial Corporations (Prudential Standards) Amendment Bill 1990
- National Cattle Disease Eradication Trust Account Bill 1990
- \* Primary Industries Levies and Charges Collection Bill 1990
- Primary Industries Levies and Charges Collection (Consequential Provisions) Bill 1990

- \* The Committee has commented on these Bills

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.

D11/90

AUSTRALIAN BUREAU OF STATISTICS (PARLIAMENTARY SUPERVISION  
OF PROPOSALS) AMENDMENT BILL 1990

This Bill was introduced into the Senate on 15 November 1990  
by Senator Walters as a Private Senator's Bill.

The Bill proposes to amend the Australian Bureau of  
Statistics Act 1975 to provide that the Bureau, before  
conducting a survey, must prepare a proposal which may be  
accepted or rejected by either House of the Parliament  
within five sitting days of the proposal being tabled in  
both Houses.

The Committee has no comment on this Bill.

D11/90

**AUSTRALIAN CAPITAL TERRITORY (PLANNING AND LAND MANAGEMENT)  
AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 13 November 1990 by the Minister for the Arts, Tourism and Territories.

The Bill proposes to amend the Australian Capital Territory (Planning and Land Management) Act 1988 to extend from one year to two years the period within which the National Capital Plan is to cover the ACT. The Principal Act allowed for a 'transition period' of not more than one year, within which time the National Capital Plan was to come into force. The Plan has been submitted recently to the Minister, but the one year period has expired.

**Retrospectivity  
Clause 2**

This Bill proposes to amend section 57 of the Australian Capital Territory (Planning and Land Management) Act 1988 to increase from one year to two years the transitional period within which the National Capital Plan will apply to the ACT. A transitional period of one year was initially set to allow the first ACT government time to draft and, following consultation, put in place such a plan. In the interim, the pre-self-government planning regime was to apply.

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The one year transitional period has now expired and there is not a National Capital Plan in place. This Bill proposes to extend the transitional period in order to avoid the possibility that the ACT is found to have no valid planning system in place.

Clause 2 of the Bill proposes to have the Bill commence immediately after the commencement of section 57 of the Australian Capital Territory (Planning and Land Management) Act, ie 11 May 1989. In that sense, the Bill operates retrospectively. However, in the light of what is set out above, the Committee makes no further comment on the Bill.

D11/90

**AUSTRALIAN SPORTS DRUG AGENCY BILL 1990**

This Bill was introduced into the House of Representatives on 15 November 1990 by the Minister for the Arts, Sport, the Environment, Tourism and Territories.

The Bill proposes to establish a statutory authority to be called the Australian Sports Drug Agency. This independent body will be responsible for conducting drug testing and educational programs for Australian sport.

The Committee has no comment on this Bill.

D11/90

**CRIMES (INVESTIGATION OF COMMONWEALTH OFFENCES) AMENDMENT  
BILL 1990**

This Bill was introduced into the House of Representatives on 15 November 1990 by the Attorney-General.

The Bill proposes to provide for a maximum period during which an arrested person may be held for questioning or investigation before being taken before a magistrate. It also proposes to introduce the mandatory tape-recording of confessional material. This Bill is in response to the High Court's decision in Williams v The Queen.

**Postponed commencement  
Subclause 2(3)**

Subclause 2(3) provides that the amendments proposed by the Bill are to commence 'on a day or days to be fixed by Proclamation'. However, subclause 2(4) provides that any provision of the Bill which has not commenced within 12 months of Royal Assent, automatically commences the first day after the end of that 12 month period.

Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 states that, as a general rule, commencement by Proclamation should be limited by either a date or a period from Royal Assent. It also states that, preferably, a date or period no greater than 6 months from Royal Assent should be specified.



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If a longer period is nominated, as here, the Drafting Instruction states that the reason for this should be set out in the Explanatory Memorandum. In this case, the Explanatory Memorandum states:

The period of up to 12 months prior to commencement is required in order that the equipment and building alterations, made necessary by the Bill, can be in place before commencement.

The Committee makes no further comment on the provision.

#### General comment

Clause 3 of the Bill proposes to insert a new Part 1B into the Crimes Act 1914 to provide for a pre-charge custodial period in relation to Commonwealth offences. The Explanatory Memorandum states that the purpose of the proposed amendment is

to provide a necessary and reasonable pre-charge investigation period before a suspect must be released, either unconditionally or on bail, or brought before a magistrate.

According to the Second Reading speech, the new part aims to remedy a 'serious dilemma' which was created by the High Court's decision in Williams v The Queen, ((1986) 161 CLR 278).

In the proposed new part, proposed new subsections 23B(3), 23C(3)(b) and (7)(a), 23D(2) and 23E(7) refer to the role of magistrates in relation to certain Commonwealth offences,

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including giving magistrates certain powers in relation to persons brought before them as required by the provisions of the Bill.

'Magistrate' is defined in proposed subsection 23B(1) as including a justice of the peace. However, proposed subsection 23D(2) provides for an application to extend an investigation period to be made to:

- (a) a magistrate; or
- (b) if it cannot be made at a time when a magistrate is available - a justice of the peace.

In the light of the earlier definition of magistrate to include a justice of the peace, the Committee is curious as to the intent and effect of this provision. In particular, the Committee would like to know whether the framing of paragraph (b) is simply intended to make the situation abundantly clear or whether some other meaning is intended. Accordingly, the Committee would appreciate some assistance from the Attorney-General in this regard.

The Committee has a long-standing interest in provisions involving arrest and detention, as the deprivation of liberty is a serious matter and one which is patently within the Committee's terms of reference. People should not be denied their liberty without serious cause. In relation to the present Bill, the Committee notes in particular the concluding statement on page 4 of the Explanatory Memorandum:

Nothing in the Bill confers a power to detain a person who is not under arrest as defined, or to

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detain a person solely for the purpose of questioning or investigation, nor affects the right to refuse to answer questions (when not required to do so by statute). In other words, the provisions apply only to those situations where a police officer, having the requisite suspicion, would be entitled, at common law or by statute, to effect an arrest in respect of a Commonwealth offence. Nor does the Bill affect the burden on the prosecution to prove the voluntariness of a confession or admission or the discretion of a court to exclude unfairly, illegally or improperly obtained evidence.

The Committee makes no further comment on the Bill.

D11/90

**CUSTOMS AND EXCISE LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 13 November 1990 by the Minister for Small Business and Customs.

This omnibus Bill proposes to amend the Customs Act 1901 and Excise Act 1901 to:

- . introduce an electronic entry and cargo reporting system for exports (and to consequentially repeal the existing export return scheme);
- . provide for advance reporting of ships and aircraft and their cargo and crew, including the electronic reporting of this information;
- . validate past seizures of dangerous goods, following a Federal Court decision which found a provision of the Customs legislation to be invalid; and
- . correct technical deficiencies in Customs provisions concerned with offences and the control of narcotic goods.

Retrospectivity  
Subclause 2(4), clause 49

Clause 33 of the Bill proposes to amend section 269T of the Customs Act 1901 to change certain definitions in relation to 'countervailing duty'. Subclause 2(4) would, if enacted,

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make those amendments retrospective to 21 December 1989. The Explanatory Memorandum to the Bill states:

[T]he corrections to various anti-dumping provision references in section 269T of the Customs Act, effected by Clause 33, are taken to have commenced on 21 December 1989, the date the Customs Tariff (Anti-Dumping) Amendment Act 1989 (Act No. 173 of 1989) commenced. The latter Act made several amendments to the principal Customs Tariff (Anti-Dumping) Act 1975, effectively transferring sections of that Act to the Customs Act. The amendments to section 269T are necessary to remove the references to sections of the Customs Tariff (Anti-Dumping) Act 1975 which were omitted by Act 173 of 1989.

The Committee makes no further comment on the provision.

Clause 49 of the Bill deals with 'purported exercise[s]' of the Minister's power under item 18 of the Second Schedule to the Customs (Prohibited Imports) Regulations in relation to dangerous goods. The clause, if enacted, would retrospectively validate certain decisions made between 13 December 1956 and 11 October in relation to such goods.

The Explanatory Memorandum acknowledges the provision is intended to validate past seizures under this particular item of the Customs (Prohibited Imports) Regulations which, as a result of a decision of the Federal Court of Australia, could be ruled to be invalid. The decision in question, in the case of Owen v Turner and Jones, was made by a single judge on 21 December 1989 and upheld by the Full Court on 14 September 1990. In the light of the decision, an amendment was made to the Regulations on 11 October 1990. Clause 49 of the Bill therefore seeks to validate any decisions made prior to the amendment.

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By way of explanation for the retrospectivity, the Explanatory Memorandum states:

Whilst recognizing that retrospective provisions are open to criticism in that they operate to prejudice persons' legal rights, it is felt in the present situation that the dangers posed to the community should any Item 18 goods (which include machine guns, bombs, flick knives, land mines, etc.) be required to be released into home consumption is a circumstance where a retrospective provision validating otherwise invalid, although bona fide, seizures is both legitimate and justified.

In his Second Reading speech, the Minister said:

This House has long been careful when faced with provisions which are retrospective in effect and operate to remove citizens rights, and properly so. In this circumstance, however, the Government is of the view that the amendment is both justified and necessary. The alternative would be the possibility that customs could be required to release into the general community the bombs, guns, unsafe toys, flick knives etc., that had been seized, in good faith in the belief that item 18 was valid.

As a matter of principle, the Committee is concerned that the decision of a court can be, in effect, over-ruled by the subsequent passage of a piece of legislation. Such a course of action would tend to detract from the role of courts in the legal system (of which the Parliament is, of course, also a part) and the certainty of their decisions. However, in making this statement, the Committee notes the circumstances of this case and the particular dangers to the community which the Minister says the amendment is trying to contain. Ultimately, the principles have to be balanced against the realities.

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The case to which this proposed amendment is a response involved machine guns. The Explanatory Memorandum and the Second Reading speech also refer to bombs, flick knives and land mines as goods which, as a result of the case, could be released. However, reference is also made to 'unsafe toys'. The Committee would be interested to examine a more exhaustive list of the kinds of goods to which this proposed amendment relates.

The Committee is also interested in the effect of the amendment on the importer of the goods in the particular case, who was the successful party in the Full Federal Court appeal. In particular, the Committee would like to know whether the goods in question were returned to the person as a result of the Federal Court decision and, if so, whether the effect of the proposed amendment will be to require the person to return them. In relation to the effect of the decision on the importer, the Committee notes that while costs were awarded to the importer of the goods in the proceedings before the single judge, the Full Federal Court ordered that both parties pay their own costs of the appeal.

The Committee would appreciate the Minister's assistance with the matters referred to above.

**DATA-MATCHING (ASSISTANCE AND TAX) BILL 1990**

This Bill was introduced into the Senate on 15 November 1990 by the Minister for Social Security.

The Bill proposes to make it possible to detect where a person has provided inconsistent information to one or more of the various specified agencies and is, as a result, receiving incorrect payment. The relevant agencies are:

- . Department of Social Security;
- . Department of Veterans' Affairs;
- . Department of Community Services and Health;
- . Department of Employment, Education and Training; and
- . Australian Taxation Office.

**General comment**

There are provisions in the Bill that authorise the matching of data bases that would not have been attempted before the computer age because of the labour involved. The records will include a number of items of personal information. Some people will find the very holding of this information by agencies intrusive. As always in this area, a balance must be reached between protecting the rights and privacy of individuals and ensuring that falsely based claims and payments are not made. The Committee notes that, according to the Second Reading speech, the Privacy Commissioner, whose responsibility it is to protect rights of privacy, has



been involved in the process and that the 'guidelines have been prepared in consultation with, and have been approved by, the Privacy Commissioner'.

The Committee makes no further comment on the Bill.

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**FINANCIAL CORPORATIONS (PRUDENTIAL STANDARDS) AMENDMENT BILL  
1990**

This Bill was introduced into the Senate on 15 November 1990 by Senator Spindler as a Private Senator's Bill.

The Bill proposes to transfer to the Reserve Bank the supervisory power for asset ratios, lending policies, interest rates and other matters for non-bank financial institutions as well as banks.

The Committee has no comment on this Bill.

**NATIONAL CATTLE DISEASE ERADICATION TRUST ACCOUNT BILL 1990**

This Bill was introduced into the House of Representatives on 15 November 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to provide for the continuation of the National Cattle Disease Eradication Trust Account. The Account is established under the Live-stock Slaughter levy Collection Act 1964, to be repealed by the Primary Industries Levies and Charges Collection (Consequential Provisions) Bill 1990.

The Committee has no comment on this Bill.

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**PRIMARY INDUSTRIES LEVIES AND CHARGES COLLECTION BILL 1990**

This Bill was introduced into the House of Representatives on 15 November 1990 by the Minister for Resources.

The Bill proposes to rationalise primary industries levy and charge collection. It will enable a uniformity of collection methods and allow a consistent approach to procedural matters previously embodied in more than 30 Acts.

**Issue of search warrants by non-judicial officers  
Clause 20**

Clause 20 of the Bill provides for the issue of search warrants to enter premises in certain circumstances. The provision would allow a magistrate to issue such a warrant. However, pursuant to subclause 4(1) of the Bill, magistrate 'includes a justice of the peace'. The Committee has consistently drawn attention to provisions which would allow non-judicial officers to issue search warrants. As the Committee stated in its 1987-88 Annual Report (pp 14-15),

search warrants should usually be issued only by judicial officers (judges and magistrates) and not justices of the peace. The Committee regards justices of the peace as lay persons whose role in contemporary Australia should not encompass the issuing of warrants to officials of the State to search private property. Generally, a justice of the peace cannot, as a matter of definition, exhibit the characteristics of legal training, independence, security of tenure and familiarity with the law ... that are inherent features of judicial office.

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

**Entering premises with consent  
Clause 19**

Clause 19 of the Bill would allow an authorised person (as defined in subclause 4(1)) to enter premises either in accordance with a warrant, as discussed above, or with the consent of the occupier of the premises. However, as the Committee noted in Alert Digest No. 8 of 1990, in relation to a similar provision contained in the Cattle and Beef Levy Collection Bill 1990, the provision provides no protection to the occupant to ensure that the consent is really true consent.

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

**General comment**

Subclause 4(1) contains a definition of 'order' for the purposes of the Bill. The subclause also defines 'prescribed' to include 'prescribed by Order'. 'Regulations' are defined as including 'orders'. The Committee assumes that 'Order', in the definition of 'prescribed', should be 'order'.

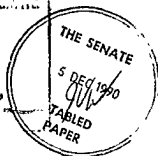
**PRIMARY INDUSTRIES LEVIES AND CHARGES COLLECTION  
(CONSEQUENTIAL PROVISIONS) BILL 1990**

This Bill was introduced into the House of Representatives on 15 November 1990 by the Minister for Resources.

The Bill proposes to make the consequential amendments to each of the levy and export charge imposition Acts, following on from the Primary Industries Levies and Charges Collection Bill 1990. It repeals 27 collection Acts whose principal parts have been incorporated into the main Bill.

The Committee has no comment on this Bill.

DEPARTMENT OF THE SENATE  
Bill No. 1645  
DATE  
PRESENTED  
5 DEC 1990  
*Murray*



**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 12 OF 1990**

**5 DECEMBER 1990**

**SCRUTINY OF BILLS ALERT DIGEST**

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**5 DECEMBER 1990**

**ISSN 0729-6851**



## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)  
Senator A. Vanstone (Deputy Chairman)  
Senator V. Bourne  
Senator R. Crowley  
Senator I. Macdonald  
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### TERMS OF REFERENCE

#### Extract

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

The Committee has considered the following Bill:

- \* Defence Legislation Amendment Bill (No. 2) 1990

- \* The Committee has commented on this Bill

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**DEFENCE LEGISLATION AMENDMENT BILL (NO. 2) 1990**

This Bill was introduced into the Senate on 28 November 1990 by the Minister for Justice and Consumer Affairs.

The Bill proposes to amend 6 defence-related Acts to:

- . entitle spouses of deceased members of the Defence Force to commute a portion of their pension and to index children's pensions to CPI movements;
- . exempt Commonwealth-owned defence companies from capital gains tax on assets acquired by the Commonwealth before the imposition of that tax and make associated depreciation adjustments;
- . remove provisions requiring authorisation of the Governor-General in Council for certain procurement activities; and
- . make technical amendments to the Defence Act 1983, the Control of Naval Waters Act 1918 and the Defence Housing Authority Act 1987.

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

Clauses 10, 11, 12, 13, 16, 17 and 18 of the Bill relate to the indexation of children's pensions. Pursuant to subclause 2(2), if enacted, the amendments would commence on 1 July 1990. As the amendments proposed are beneficial to the children concerned, the Committee makes no further comment.

DEPARTMENT OF INDUSTRY
PAPER No.
DATE PRESENTED
12 DEC 1990
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**SCRUTINY OF BILLS ALERT DIGEST**

**NO. 13 OF 1990**

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**12 DECEMBER 1990**

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**13 DECEMBER 1990**

**ISSN 0729-6851**

## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

Senator B. Cooney (Chairman)  
Senator A. Vanstone (Deputy Chairman)  
Senator V. Bourne  
Senator R. Crowley  
Senator I. Macdonald  
Senator N. Sherry

### TERMS OF REFERENCE

#### Extract

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise -
- (i) trespass unduly on personal rights and liberties;
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The Committee has considered the following Bills:

- Abortion Funding Abolition Bill 1990
- Australian Horticultural Corporation Amendment Bill 1990
- \* Australian National Maritime Museum (Elimination of Age Discrimination) Amendment Bill 1990
- Companies (Insolvency Assistance) Amendment Bill 1990
- \* Crimes (Bribery and Corruption) Amendment Bill 1990
- \* Data-matching Program (Assistance and Tax) Bill 1990
- Dried Vine Fruits Legislation Amendment Bill 1990
- Fisheries Administration Bill 1990
- \* Industrial Relations (Membership of Associations) Bill 1990
- Insurance Amendment Bill 1990
- Pig Slaughter Levy Amendment Bill 1990
- Primary Industries and Energy Legislation Amendment Bill (No. 2) 1990
- \* Social Security Bill 1990
- \* Taxation Laws Amendment Bill (No. 6) 1990

- \* The Committee has commented on these Bills

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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**ABORTION FUNDING ABOLITION BILL 1990**

This Bill was introduced into the House of Representatives on 6 December 1990 by Mr Webster as a Private Member's Bill.

The Bill proposes to amend the Health Insurance Act 1973 to prevent payment of medicare benefits for medical services related to abortions, unless the abortion was performed to avert the death of the mother or when another procedure is performed and the doctor is unaware that an abortion would occur.

The Committee has no comment on this Bill.



AUSTRALIAN HORTICULTURAL CORPORATION AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 4 December 1990 by the Minister for Aged, Family and Health Services.

The Bill proposes to, through the establishment of Product Boards, set up an Australian Dried Fruits Board within the Australian Horticultural Corporation.

The Committee has no comment on this Bill.

**AUSTRALIAN NATIONAL MARITIME MUSEUM (ELIMINATION OF AGE DISCRIMINATION) AMENDMENT BILL 1990**

This Bill was introduced into the Senate on 10 December 1990 by Senator Michael Baume as a Private Senator's Bill.

The Bill proposes to omit subsections 17(4) and 30(2) from the Australian National Maritime Museum Act 1990 in order to remove the prohibition against people 65 years of age and over from becoming a member of the Board or a Director of the National Maritime Museum.

**General comment**

The Committee notes that this Bill would, if enacted, remove provisions from the Australian Maritime Museum Act 1990 which discriminate against people on the basis of their age.

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**COMPANIES (INSOLVENCY ASSISTANCE) AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 5 December 1990 by the Attorney-General.

The Bill proposes to enable a court to order a meeting or meetings, on a consolidated basis, of the creditors or a class of creditors of a holding company and its subsidiaries.

The Committee has no comment on this Bill.

**CRIMES (BRIBERY AND CORRUPTION) AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 6 December 1990 by Mr Peacock as a Private Member's Bill.

The Bill proposes to implement recommendations made by the Committee for the Review of Commonwealth Criminal Law in its November 1990 report. Its provisions include the modernising of Commonwealth criminal law relating to bribery and corruption of judicial officers, parliamentarians and public servants.

**Reversal of the onus of proof**

Proposed new subsections 43(2), 44(2), 55(4) and 59(3)

Proposed new subsection 43(1) would, if enacted, make it an offence for a person who knows an offence has been committed to impede intentionally the apprehension, prosecution or conviction of the person who committed the offence. In particular, it would be an offence for a person to make a threat or give a benefit to another person in order to induce them to either withhold information or provide information which the person giving the information knows to be false. Similarly, it would be an offence to receive or agree to receive a benefit in return for either withholding information or giving information known to be false.

Pursuant to proposed new subsection 43(2), if a person is charged with an offence under subsection (1) which involves the receipt of a benefit, it is a defence if the defendant proves that the benefit amounted only to the making good of

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any loss or injury caused by the original offence (ie the offence to which the 'inducement' relates). Similarly, it is a defence if the person proves that the benefit was only reasonable compensation for any loss or injury caused by the offence.

By requiring the person charged, in effect, to prove that a benefit is not an inducement but compensation for loss or injury suffered, the proposed new subsection 43(2) reverses the onus of proof. It is ordinarily incumbent on the prosecution to prove the elements of an offence. In this case, the proposed new subsection would appear to excuse the prosecution, in certain circumstances, from proving that a payment was, in fact, an inducement.

Proposed new subsection 44(1), if enacted, would make it an offence to ask for, receive or obtain or to agree to receive or obtain a benefit in return for concealing the commission of an offence, frustrating the prosecution of an offence (by withholding information or otherwise) or providing false information about an offence. Pursuant to proposed new subsection 44(2), it is a defence to an offence under subsection (1) if a person can prove that a benefit was the making good of a loss or injury or reasonable compensation for a loss or injury caused by the original offence. The onus is on the defendant to provide this, however.

Proposed new subsection 55(1) would, if enacted, make it an offence for a current or former Commonwealth officer to ask for, receive or obtain or to agree to receive or obtain a benefit as a reward or inducement for any act performed in their capacity as an officer. Pursuant to proposed new subsection 55(4), if in a prosecution for an offence under subsection (1) 'it appears that the receipt of the benefit

... would be likely to have influenced the officer to act contrary to his or her duty', then, 'in the absence of evidence to the contrary', the benefit is to be taken to be an inducement for performing the act to which the offence relates. It would be incumbent on the defendant to adduce evidence to the contrary. In that sense, there appears to be a reversal of the onus of proof.

Proposed new subsection 59(1) would, if enacted, make it an offence for a member or a former member of the Parliament to ask for, receive or obtain a benefit as a reward or inducement for any act performed in their capacity as a member. Similarly, pursuant to proposed subsection 59(4), the receipt of a benefit is assumed, in the absence of evidence to the contrary, to be an inducement for performing the act to which the offence relates. As above, there would appear to be a reversal of the onus of proof.

Each of the proposed new subsections referred to appear to involve a reversal of the onus of proof. Accordingly, they are drawn to Senators' attention as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

**DATA-MATCHING PROGRAM (ASSISTANCE AND TAX) BILL 1990**

This Bill was introduced into the Senate on 6 December 1990 by the Minister for Social Security.

The Bill proposes to allow data-matching between the Departments of Community Services and Health, Employment, Education and Training, Social Security, Veterans' Affairs and the Australian Taxation Office.

**General comment**

Though neither the Bill nor the Explanatory Memorandum or the Second Reading speech to the Bill say so, this Bill is similar in substance to the Data-matching (Assistance and Tax) Bill 1990, which the Committee considered in relation to Alert Digest No. 11 of 1990. Indeed, this Bill is effectively a consolidation of the previous Bill and the proposed amendments to that Bill which the Government circulated after its introduction. The Committee was aware of those amendments when they were circulated and, in fact, considered them at the time without making any comment on them.

In relation to this Bill, the Committee notes what it said in relation to the previous Bill:

There are provisions in the Bill that authorise the matching of data bases that would not have been attempted before the computer age because of the labour involved. The records will include a number of items of personal information. Some people will find the very holding of this information by agencies intrusive. As always in

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this area, a balance must be reached between protecting the rights and privacy of individuals and ensuring that falsely based claims and payments are not made. The Committee notes that, according to the Second Reading speech, the Privacy Commissioner, whose responsibility it is to protect rights of privacy, has been involved in the process and that the 'guidelines have been prepared in consultation with, and have been approved by, the Privacy Commissioner'.

The Committee made no further comment on that Bill.

Some of the provisions of this Bill (eg subclauses 13(7) and (8)) appear to be a little more protective of privacy than the earlier Bill. Some other provisions appear to be less protective. In this regard, the Committee notes that

- . more information is referred to in some of the definitions (eg the definitions of 'income data' and 'personal identity data');
- . subclause 5(2) over-rides guidelines in force under the Privacy Act 1988;
- . pursuant to paragraph 15 of Step 6 of the earlier Bill, results of a data-matching would have had to show that personal assistance might have been got by a person or tax might be being evaded, whereas in the new Bill it is sufficient for the results to suggest these things;
- . subclauses 11(4), (5) and the new (6) appear to lessen the provisions relating to notice of proposed action.

However, in the light of the Committee's comments on the earlier Bill (ie the Data-matching (Assistance and Tax) Bill 1990), which the Committee has quoted above, the Committee makes no further comment on this Bill.



**DRIED VINE FRUITS LEGISLATION AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 4 December 1990 by the Minister for Aged, Family and Health Services.

The Bill proposes to:

- . extend the sultana underwriting scheme by 3 years;  
and
- . remove statutory backing for domestic consumer transfers on the sale of dried vine fruit through the removal of the domestic component of statutory equalisation.

The Committee has no comment on this Bill.

**FISHERIES ADMINISTRATION BILL 1990**

This Bill was introduced into the House of Representatives on 6 December 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to establish new arrangements for the administration of Commonwealth fisheries management activities. To this end, the legislation established the:

- . Australian Fisheries Management Authority;
- . Australian Fisheries Management Authority Selection Committee; and
- . Fishing Industry Policy Council.

The Committee has no comment on this Bill.

**INDUSTRIAL RELATIONS (MEMBERSHIP OF ASSOCIATIONS) BILL 1990**

This Bill was introduced into the House of Representatives on 6 December 1990 by Mr Charles as a Private Member's Bill.

The Bill proposes to put into effect the concept of voluntary union membership and voluntary membership of associations.

**Strict liability/reversal of the onus of proof**  
Subclauses 11(1) and (2)

Clause 11 relates to prosecutions for offences against proposed subsection 5(1), sections 6, 7 and 8, subsections 9(1) and (2) and subsection 10(2) which, respectively, prohibit the following activities:

- . discrimination on the basis of membership of an industrial relations organisation;
- . refusing to employ someone on the basis of such membership;
- . threatening to dismiss a person on that basis;
- . employees ceasing to work on the basis of certain actions of their employer;
- . threatening to take industrial action against an employer on the basis of such membership;
- . advising, encouraging or inciting an employer to act against an employee; and
- . organisations advising, encouraging, inciting or threatening action against a person or employer on the basis of such membership.

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Subclause 11(1) provides that, in a prosecution pursuant to any of the clauses referred to above, it is not necessary to prove the reason, purpose or intent of the person in relation to the offence. This is contrary to the situation which generally exists in relation to offences, as the prosecution ordinarily has to prove that the person had the necessary intent (mens rea) to commit the offence.

Subclause 11(2) provides that, in relation to an offence to which subclause (1) applies, where a reason, purpose or intent is specified in the charge, it is a defence if the defendant proves that the relevant action was not motivated (either in whole or in part) by the reason, purpose or intent alleged. In effect, this reverses the onus of proof, as it is ordinarily incumbent on the prosecution to prove all of the constituent elements of an offence. In the present case, this means that the prosecution would ordinarily be required to prove that the action was, in fact, motivated by the alleged reason, purpose or intent.

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

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**INSURANCE AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 5 December 1990 by the Minister Assisting the Treasurer.

The Bill proposes to amend section 37 of the Insurance Act 1973 to increase from \$500,000 to \$750,000 the annual premium limit applied to some insurers and to exempt them from certain statutory provisions (primarily concerned with reporting requirements). The Bill also proposes to provide that any future increases in the limit on annual premiums can be effected by regulation.

The Committee has no comment on this Bill.

**FIG SLAUGHTER LEVY AMENDMENT BILL 1990**

This Bill was introduced into the House of Representatives on 4 December 1990 by the Minister for Primary Industries and Energy.

The Bill proposes to increase the maximum rates of levies which can be applied for pig research and development purposes (to \$1.00 per pig slaughtered) and for financing the operations of the Australian Pork Corporation (to \$2.50 per pig slaughtered).

The Committee has no comment on this Bill.

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**PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL  
(NO. 2) 1990**

This Bill was introduced into the House of Representatives on 6 December 1990 by the Minister for Primary Industries and Energy.

This omnibus legislation proposes to amend the following Acts:

- . Grape Research Levy Act 1986;
- . Primary Industries and Energy Research and Development Act 1989.

The amendments are intended to correct minor drafting inconsistencies.

The Committee has no comment on this Bill.

' SOCIAL SECURITY BILL 1990

This Bill was introduced into the House of Representatives on 6 December 1990 by the Minister Representing the Minister for Social Security.

The Bill proposes to effect a re-draft of the Social Security Act 1947 prepared in the light of a review of the Act by the Department of Social Security and representatives of the welfare sector. The Bill uses a 'clear English' drafting style, intended to make it more accessible to Australian citizens. It also attempts to re-organise the Bill to take into account the numerous changes made to the current Act since 1947. This Bill does not include any amendments to the Act introduced during the current sittings.

**Discrimination**

Clauses 23, 43, 1133(2)(c), 1139(2)(b)(iv) and 1221-B1

Clause 23 of the Bill defines 'pension age' as:

- (a) if the person is a woman - the age of 60 years; or
- (b) if the person is a man - the age of 65 years.

A similar definition of 'pension age' is either used or relied upon in clauses 43, 1133(2)(c), 1139(1)(b)(iv) and 1221-B1. The Committee notes that this is age discrimination on the grounds of gender.



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**Self-incrimination**

Clauses 70, 123, 174, 224, 286, 343, 391, 437, 489, 574, 646, 715, 761, 810, 875, 932, 980, 1025, 1056 and 1309

The clauses set out above all provide that a person is not excused from giving information or producing a document pursuant to various specified clauses, divisions or parts of the Bill on the ground that the information may tend to incriminate the person. This is an abrogation of the common law privilege against self-incrimination. However, the Committee notes that in each of the clauses identified above, there is a use indemnity proviso, that is, the information or document produced can only be used in relation to a prosecution pursuant to the particular provision. In that sense, the clauses are in a form which the Committee has previously found to be acceptable.

The Committee makes no further comment on the clauses.

**Non-reviewable decisions**

**Clause 1250**

Chapter 6 of the Bill sets out the system pursuant to which decisions made under the Bill are to be subject to review. This review is either by way of internal review or review by the Social Security Appeals Tribunal (SSAT) or the Administrative Appeals Tribunal.

Clause 1250 of the Bill proposes to exempt certain decisions from review by the SSAT. It provides that the SSAT cannot review a decision:

- (a) under section 36 (major disaster declaration);
- or

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) under section 27 (approval of vocational courses - UB work test); or
- (c) under section 28 (approval of voluntary organisations - UB and JSA work test); or
- (d) under a provision dealing with the form and place of lodgment of a claim; or
- (e) under a provision dealing with the manner of payment of a pension, benefit or allowance; or
- (f) under a provision dealing with debts owed to the Commonwealth by a recipient of a pension, benefit or allowance; or
- (g) under a provision dealing with the giving of a notice requiring information from a recipient of a pension, benefit or allowance; of
- (h) under section 1241 or 1251 (continuation of payment pending review of adverse decision); or
- (j) under section 1231 (deduction of amounts from pension, benefit or allowance payments for tax purposes); or
- (k) under section 1100 (application of Division 2 of Part 3.10 to a foreign currency); or
- (l) under section 1104 (date of applicability of re-assessed exchange rate).

Subclause 1250(2) also provides that the SSAT

cannot review a rate of return decision in relation to an investment product where a person applies for review of the decision more than 3 months after the decision came into force.

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Principle 1(a)(iii) of the Committee's terms of reference requires it to draw the attention of the Senate to provisions which

make [personal] rights, liberties or obligations unduly dependent upon non-reviewable decisions.

Accordingly, pursuant to principle 1(a)(iii) of its terms of reference, the Committee draws Senators' attention to the clauses identified.

#### General comments

The Committee notes that clause 1253(4) of the Bill provides as follows:

The reference in subsection (4) to powers and discretions conferred by this Act does not include a reference to powers and discretions conferred by [several specified clauses].

The Committee suggests that the reference to subsection (4) should be a reference to subsection (3).

The Committee commends this attempt to make the Social Security legislation more accessible, which has also afforded the opportunity to examine and consider the legislation as a whole.

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**TAXATION LAWS AMENDMENT BILL (NO. 6) 1990**

This Bill was introduced into the House of Representatives on 6 December 1990 by the Minister Assisting the Treasurer.

The Bill proposes to:

- . amend the Income Tax Rates Act 1986 to reduce the lowest marginal rate of tax from 21 to 20 per cent;
- . reduce the level of the tax rebate for net medical expenses exceeding \$1,000 to 20 per cent;
- . amend the Income Tax Assessment Act 1936 with regard to certain technical aspects of capital gains tax;
- . modify the application of dividend imputation arrangements for life assurance companies;
- . provide for the taxation treatment of various bereavement payments that have replaced the special temporary allowance and funeral benefit;
- . amend certain provisions regarding foreign source income measures.

**Retrospectivity**  
Subclauses 2(2) and (3)

Subclause 2(2) of the Bill provides that clauses 9, 15, 33, 65, 76, 77 and 78 and Part 6 of the Bill are to be taken to have commenced immediately after the commencement of the Taxation Laws Amendment (Foreign Income) Act 1990. The Bill for that Act is currently before the Senate. If both Bills

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are actually passed then this clause would, if enacted, probably make the provisions referred to operate retrospectively. Depending on when each Bill is passed, this retrospectivity may be slight or it may be significant.

The Explanatory Memorandum to the Bill expressly acknowledges

Several of the amendments proposed in this Bill are consequent upon the measures proposed in the Taxation Laws Amendment (Foreign Income) Bill 1990 ('the Foreign Income Bill'). These amendments may be divided into two categories - those amendments that have application dates prescribed in this Bill and those amendments that do not. The amendments that fall into the second category rely on the application provisions in the Foreign Income Act. Therefore, to make it clear that these amendments are to apply as if, in effect, they were included in the original Foreign Income Act, they have been expressed to commence at the time that Act commences. At the time of preparation of this Bill the Foreign Income Bill was still being considered by the Parliament. Therefore, these amendments are linked to the commencement of that Act by prescribing that they commence at the time that the Royal Assent is granted to that Act.

The Committee makes no further comment on this subclause.

Subclause 2(4) of the Bill provides that the amendments proposed by paragraph 34(6) and clauses 36, 40 and 82 are to be taken to have commenced on 21 August 1990. The provisions would, therefore, operate retrospectively. However, the Committee notes that the date nominated relates to the Budget date. The Committee makes no further comment on the subclause.

**Prospective commencement  
Subclause 2(4)**

Subclause 2(4) of the Bill provides that the amendments proposed by clauses 32, 79(9), 88(2), 91 and 92(3) are to commence on 1 July 1991. Depending on if and when this Bill receives the Royal Assent, this proposed commencement could be in excess of 6 months from Royal Assent and, therefore, contrary to the spirit of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1990. However, as the discrepancy is likely to be slight, if at all, the Committee makes no further comment.