SCRUTINY OF BILLS ALERT DIGEST

NO. 1 OF 1991

13 FEBRUARY 1991

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:

Broadcasting (Prohibition of Broadcasting of Tobacco Advertising) Amendment Bill 1990

Defence (Middle East Anti-conscription) Amendment Bill 1991

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

* Trade Practices Amendment Bill 1990

War Crimes (Crimes Against Humanity) Amendment Bill 1990

* The Committee has commented on this Bill

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.

BROADCASTING (PROHIBITION OF BROADCASTING OF TOBACCO ADVERTISING) AMENDMENT BILL 1990

This Bill was introduced into the Senate on 21 December 1990 by Senator Powell as a Private Senator's Bill.

The Bill proposes to amend the Broadcasting Act 1942 to prohibit the 'accidental or incidental' broadcasting of advertising relating to tobacco products.

The Committee has no comment on this Bill.

DEFENCE (MIDDLE EAST ANTI-CONSCRIPTION) AMENDMENT BILL 1991

This Bill was introduced into the Senate on 22 January 1991 by Senator Powell as a Private Senator's Bill.

The Bill proposes to insert a new section 60A into the Defence Act 1903 to disapply those sections of that Act which authorise the Government to call on Australian men to serve in the Australian defence forces for the duration of war insofar as they would be applicable to the Gulf conflict.

The Committee has no comment on this Bill.

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

This Bill was introduced into the Senate on 21 December 1990 by Senator Spindler as a Private Senator's Bill.

The Bill proposes to amend certain provisions currently considered to prevent the Parliamentary Joint Committee on the National Crime Authority from carrying out its statutory duty 'to monitor and review the performance by the [National Crime] Authority of its functions'.

The Committee has no comment on this Bill.

TRADE PRACTICES AMENDMENT BILL 1990

This Bill was introduced into the House of Representatives on 21 December 1990 by the Attorney-General.

The Bill proposes to amend section 50 of the Trade Practices Act 1974 which relates to mergers and acquisitions and positions of dominance in a substantial market.

Retrospectivity
Clause 2

Clause 2 of the Bill, if enacted, would make the Bill operate from the date of its introduction: 21 December 1990. By way of explanation, in his Second Reading speech on the Bill, the Attorney-General advised that a purpose of the Bill was to overcome an omission which had become apparent in the operation of section 50 of the Trade Practices Act (which deals with mergers and acquisitions). He went on to say:

> The Government believes these amendments are desirable to ensure that Australian competition law as embodied in the Trade Practices Act continues to be effective, and that any window of opportunity available to exploit any weakness in the Act is firmly closed. The Bill is expressed to come into operation from today [ie 21 December 1990]. I consider it appropriate that some retrospective effect be given to the measure, to ensure that advantage is not taken of the gap before the Bill becomes law.

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

WAR CRIMES (CRIMES AGAINST HUMANITY) AMENDMENT BILL 1990

This Bill was introduced into the Senate on 19 December 1990 by Senator Peter Baume as a Private Senator's Bill.

The Bill proposes to amend the War Crimes Amendment Act 1988 to widen the scope of that legislation so as to make it applicable to any war crime committed by any person in any theatre of war at any time.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 2 OF 1991

20 FEBRUARY 1991

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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(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:

Arts, Sport, Environment, Tourism and Territories Legislation Amendment Bill 1991

* Industry, Technology and Commerce Legislation Amendment Bill 1991

Meat Chicken Levy Amendment Bill 1991

* Wool Marketing (Temporary Provisions) Amendment Bill 1991

* The Committee has commented on these Bills

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ARTS, SPORT, ENVIRONMENT, TOURISM AND TERRITORIES LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 14 February 1991 by the Minister for the Arts, Sport, the Environment, Tourism and Territories.

The Bill proposes to repeal the Darwin Lands Acquisition Act 1945 and amend the following Acts:

- Australian Capital Territory (Self-Government) Act 1988;
- Australian Sports Commission Act 1989;
- Australian Sports Drug Agency Act 1990;
- National Library Act 1960;
- National Parks and Wildlife Conservation Act 1975; and
- Northern Territory (Self-Government) Act 1978.

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.

INDUSTRY, TECHNOLOGY AND COMMERCE LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the Senate on 13 February 1991 by the Minister for Industry, Technology and Commerce.

This omnibus Bill proposes to amend the following Acts:

- Industry Research and Development Act 1986;
- National Measurement Act 1960;
- Science and Industry Research Act 1949;
- Export Market Development Grants Act 1974;
- Industry, Technology and Commerce Legislation Amendment Act 1989; and
- Patents Act 1990.

Retrospectivity
Subclauses 2(3) and (4)

The Schedule to this Bill contains a proposed amendment to the Industry, Technology and Commerce Legislation Amendment Act 1989. Pursuant to subclause 2(3) of the Bill, this amendment is to be retrospective to 27 June 1989.

The Schedule also contains several proposed amendments to the Patents Act 1990. Pursuant to subclause 2(4) of the Bill, these amendments are to be taken to have commenced immediately after the commencement of the Patents Act 1990. The Patents Act is yet to be proclaimed but, of course, the proclamation could occur at a time which would make these amendments retrospective also.

The Explanatory Memorandum to the Bill notes that the proposed amendments referred to above 'correct minor drafting errors'. In the light of this information, the Committee makes no further comment on the Bill.

'Henry VIII' clause
Clause 4

Clause 4 of the Bill proposes various amendments to the Industry Research and Development Act 1986. Included in those proposed amendments is a definition of 'designated activity' for the purposes of the legislation. Pursuant to paragraph (f) of the definition, one of the meanings of 'designated activity' is

> an activity in respect of which a declaration under section 34B is in force ...

Proposed new section 34B is to be inserted pursuant to clause 9 of the Bill. That proposed new section provides:

> The Minister may, by notice published in the Gazette, declare an activity to be a designated activity for the purposes of the definition of 'designated activity' in subsection 4(1).

The effect of paragraph (f) of the proposed definition is, therefore, to allow the Minister to vary the definition of 'designated activity' as set out in (what would be) a piece of primary legislation by declaring that another 'activity' is a 'designated activity' for the purposes of the legislation. In that sense, it is what the Committee would regard as a 'Henry VIII' clause.

The Committee notes that there is no requirement for such a declaration to be tabled in the Parliament. Further, there is no suggestion of the declaration being a 'disallowable instrument' for the purposes of section 46A of the Acts Interpretation Act 1901. Given the effect of such declarations, these mechanisms for Parliamentary scrutiny of the declarations may be appropriate.

The Committee draws the provision to Senators' attention 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.

'Henry VIII' clause
Clause 25

Clause 25 of the Bill proposes to amend section 9A of the Science and Industry Research Act 1949. The clause proposes to insert a new subsection 9A(1), which would allow the Commonwealth Scientific and Industrial Research Organisation, subject to the approval of the Minister and any applicable regulations, to accept money or other property given, devised, bequeathed, assigned or otherwise made available to it, on trust or otherwise. However, pursuant to proposed new subsection (1A), the Minister's approval is not necessary in relation to amounts less than $1 million 'or such other amount as is prescribed for the purpose of this subsection'.

The latter part of the clause would allow the amount below which the Minister's approval is not required, which is set out in what would be the primary legislation, to be varied by the Minister. In that sense, the clause is, strictly

speaking, what the Committee would consider to be a *'Henry VIII' clause. However, since the higher threshold* would have to be prescribed by regulation and would, therefore, be subject to Parliamentary scrutiny, the Committee makes no further comment on the clause.

MEAT CHICKEN LEVY AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 13 February 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to increase the maximum rate of levy collected from the meat chicken industry from 0.005 cent per head to 0.05 cent per head. The increase is intended to correct a drafting error contained in section 7 of the Meat Chicken Levy Act 1969. The funds raised are for research and for exotic disease purposes.

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.

WOOL MARKETING (TEMPORARY PROVISIONS) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 14 February 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the Wool Marketing Act 1987 to:

- suspend the operation of the reserve price scheme for wool (expected to have effect from 25 February 1991);
- provide for the Australian Wool Corporation to repay borrowed funds under a debt reduction program;
- implement the Wool Industry Supplementary Payments Scheme and appropriate moneys for the Scheme; and
- provide ministerial power to appoint an Administrator or Interim Board for the Corporation, should this be required.

Inappropriate delegation of legislative power
Clause 4 - Proposed new sections 140, 141, 143, 144

Clause 4 of the Bill proposes to insert a new Part X into the Wool Marketing Act 1987. Pursuant to proposed new section 140, the Minister would be empowered to issue guidelines for and in relation to the making of supplementary payments to wool producers. Pursuant to proposed new subsection 141(1), from the date that the legislation commences to a date to be fixed by Proclamation, the Australian Wool Corporation is required to make payments

in accordance with any guidelines issued pursuant to proposed new section 140.

Similarly, pursuant to proposed new section 143, from the date that the legislation commences to a date to be fixed by Proclamation, the Corporation is prohibited from operating the reserve price scheme for wool which is provided for under the Wool Marketing Act. In both cases, there is no limit on the period of time within which such a Proclamation should be made, meaning the operation of the restrictions imposed on the Corporation is open-ended.

Two aspects of these provisions are worthy of comment. First, the Committee has previously indicated its concern about Proclamation provisions that are left open-ended. While this concern has principally been expressed in relation to provisions which commence by Proclamation, provisions such as the ones identified above involve similar problems, as they involve a devolution of power by the Parliament to the Minister until such time as the Governor-General (on the advice of the Minister) makes the Proclamation.

In this regard, the Committee notes that proposed new section 147 would give the Minister various 'special' powers for the purposes of the amendments proposed by the Bill. However, the operation of that proposed new section (and those powers) is limited, as the section would cease to have effect on 1 July 1992, or sooner by Proclamation. Such a limit could equally be employed in relation to the powers conferred on the Minister as a result of proposed new sections 141 and 143.

Second, there is the question of the guidelines themselves. In the case of the guidelines to be issued pursuant to proposed new section 140 there is simply a requirement that they be published in the Gazette. There is no requirement that they be tabled in the Parliament and, consequently, no question of their being subject to disallowance.

The Committee acknowledges that the guidelines will be used in relation to the payment of what will be, in effect, a benefit to wool growers affected by the proposed new Part. However, there is no indication of what sort of matters the guidelines might address. It should also be remembered that they will also be used to determine how up to $300 million from Consolidated Revenue is to be disbursed. In these circumstances, it may be appropriate that the guidelines be subject to tabling in the Parliament and, perhaps, disallowance.

Similarly, there is provision in proposed new section 144 for the Minister to issue guidelines to the Corporation as to how the Corporation is to reduce its indebtedness. There is no requirement for such guidelines to be even published in the Gazette. While this may be regarded as being something more clearly within the responsiblilty of the Minister and a matter less deserving of scrutiny by the Parliament, the Committee would appreciate the Minister's assistance on the need for such guidelines, the types of matters likely to be covered by such guidelines and the rationale behind the omission of a requirement to have them published.

The Committee draws the provisions referred to above to Senators' attention as they may constitute an inappropriate

delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

'Henry VIII' clause
Proposed paragraph 148(2)(b)

Proposed new section 148 sets out the regulation-making power attached to the legislation. Proposed paragraph 148(2)(b) would, if enacted, allow the making of regulations to

> amend any provision of this Act other than this Part.

This is clearly a 'Henry VIII' clause, as it would allow a piece of primary legislation (the Act) to be amended by subordinate legislation (by regulations).

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.

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 1991

6 MARCH 1991

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

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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.

The Committee has considered the following Bills:

Employment, Education and Training Amendment Bill 1991

Immigration (Education) Amendment Bill 1991

* Industrial Relations Legislation Amendment Bill 1991

* Marine Navigation (Regulatory Functions) Levy Bill 1991

* Marine Navigation (Regulatory Functions) Levy Collection Bill 1991

Primary Industries Legislation Amendment Bill 1991

* Trusts (Hague Convention) Bill 1991

* 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.

EMPLOYMENT, EDUCATION AND TRAINING AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 20 February 1991 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the Employment, Education and Training Act 1988 to:

- change the reporting requirements of the Higher Education Council (to once a year, in March); and
- empower the Minister to appoint a member or acting member of the National Board of Employment, Education and Training to act as a member of a constituent council for a period up to 12 months.

The Committee has no comment on this Bill.

IMMIGRATION (EDUCATION) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 20 February 1991 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to amend the Immigration (Education) Act 1971 to broaden the categories of persons eligible for citizenship courses and English language training under the Adult Migrant Education Program.

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.

INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 20 February 1991 by the Minister Representing the Minister for Industrial Relations.

This omnibus Bill proposes to amend the Commonwealth Employees' Rehabilitation and Compensation Act 1988, the Remuneration Tribunal Act 1973 and 58 other Acts. The amendments to the other Acts are mainly consequential upon proposed amendments to the Commonwealth Employees' Rehabilitation and Compensation Act and the Remuneration Tribunal Act. They provide for such matters as the recreation leave entitlements of certain public officers, which would in future be determined by the Remuneration Tribunal.

Retrospectivity
Subclause 2(2)

Subclause 4(1), clause 8, paragraph 9(b) and clauses 14-19 of the Bill propose various amendments to the Commonwealth Employees' Rehabilitation and Compensation Act 1988 (the CERC Act). Pursuant to subclause 2(2), these amendments would operate from 1 December 1988, the date that the CERC Act commenced.

The Committee notes with approval that in respect of each of the clauses which are expressed to operate retrospectively, the Explanatory Memorandum sets out the reasons for the retrospectivity. With the exception of clause 16 (which

corrects a typographical error in subsection 126(4) of the CERC Act), the proposed amendments are intended to clarify uncertainty which has arisen about the meaning of various provisions since the enactment of the legislation. None of these amendments would appear to adversely affect individuals. In the light of this, the Committee makes no further comment on the provision.

'Henry VIII' clause
Clause 11

Clause 11 of the Bill proposes to insert a new Division 4A into Part VII of the CERC Act. Included in that proposed new Division is proposed new section 95C, which would impose certain reporting conditions on Commonwealth Departments and authorities. Pursuant to proposed new subsection 96C(2), the Secretary or principal officer (respectively) of such bodies would be required to provide certain information to the Commission for the Safety, Rehabilitation and Compensation of Commonwealth Employees not later than 'the prescribed day' in 1991 and in each subsequent year.

Proposed new subclause 96C(5) states:

> 'prescribed day', in relation to a year, means 30 April in that year, or if the regulations specify another day for the purposes of this definition, the day so specified in that year.

This would mean that the reporting date nominated by the CERC Act, as amended (ie 30 April), could be altered by delegated legislation. As such, the subclause which would permit this is, strictly speaking, what the Committee would regard as a 'Henry VIII' clause.

However, the Committee notes that the alteration could only be made by regulation, making it open to Parliamentary scrutiny and, ultimately, disallowance. Further, any amendment to the reporting date would only affect Government Departments and authorities. In the light of this, the Committee makes no further comment on the provision.

MARINE NAVIGATION (REGULATORY FUNCTIONS) LEVY BILL 1991

This Bill was introduced into the House of Representatives on 21 February 1991 by the Minister for Land Transport.

The Bill proposes to impose a sliding scale of levy on sea-going ships, to recover the costs of maritime safety and regulatory functions from the commercial shipping industry. The levy will be phased in over three years.

Inappropriate delegation of legislative power
Subclause 7(2)

Subclause 7(2) of the Bill sets out the various rates of levy which would apply to ships if the Bill were enacted. In each case, an amount of levy per ton is specified but there is also the proviso 'or such other amount as is from time to time prescribed'. Such prescription must, of course, be by regulation.

The regulation-making power of the Bill is contained in clause 8, which explicitly empowers the Governor-General to make regulations for the purposes of subclause 7(2). Subclause 8(2) limits the extent to which the various rates of levy can be increased, providing that they cannot be increased by more than 15% in any 12 consecutive months. However, this prohibition does not come into force until after 30 June 1993. This means that up until this time, there is no limit on the amount that such a levy can be increased.

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

The Committee has consistently drawn attention to provisions which allow levies to be set in this way, without any upper limit on the levy or a formula by which the upper limit can be determined. While accepting the view that such levies are often described as being simply a means of recovering costs, they may also be regarded as a form of taxation. Indeed, if the levy were to be increased from 4 cents a ton to, say, $4 a ton, the levy would appear to be a tax rather than a levy. As such, it should be a matter for the Parliament.

In making this observation , the Committee acknowledges that the regulations by which such an increase would be made would, of course, be subject to Parliamentary scrutiny and, ultimately, disallowance. However, they would not be amenable to amendment, as this option is not open to either House of the Parliament when considering a regulation. If an impost such as this is more properly described as a tax then, in the Committee's view, it should be subject to debate in both Houses of the Parliament and amendment by either House.

The Committee also acknowledges that its concern is limited to the period up to 30 June 1993, as the provision proposes to put in place what the Committee would regard as an appropriate restriction on the increasing of the levy after that date.

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

MARINE NAVIGATION (REGULATORY FUNCTIONS) LEVY COLLECTION BILL 1991

This Bill was introduced into the House of Representatives on 21 February 1991 by the Minister for Land Transport.

The Bill proposes to provide the administration for the levy proposed to be imposed by the Marine Navigation (Regulatory Functions) Levy Bill 1991.

'Henry VIII' clauses
Paragraph 7(4)(c), clause 12

Clause 7 of the Bill provides for the ways in which the levy which would be imposed pursuant to the Marine Navigation (Regulatory Functions) Levy Bill 1991 is to be collected. Subclause (4) provides that the payment may be made:

a) personally; or
b) by post addressed to the Collector; or
c) as otherwise prescribed.

Paragraph c) is what the Committee would ordinarily regard as a 'Henry VIII' clause, as it would allow the amendment, by regulation, of the methods of payment as set out in the legislation.

Similarly, clause 12 of the Bill contains a proposed amendment to section 8 of the Marine Navigation Levy Collection Act 1989 which would allow payments required by

its relevant levy legislation to be made as set out above or 'as otherwise prescribed'.

While these provisions are technically 'Henry VIII' clauses, the prescription of alternative methods of payment would, presumably, be to the advantage of those paying the levy, or at least could be no disadvantage. Accordingly, the Committee makes no further comment on the provisions.

Inappropriate delegation of legislative power
Subclause 11(2)

Clause 11 of the Bill sets out the regulation-making power of the legislation. Subclause 11(1) provides:

> The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:
>
> (a) required or permitted by this Act to be prescribed; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Subclause (2) then goes on to provide:

> Without limiting subsection (1), the regulations may provide for the refund or remission (in whole or in part) of an amount of levy paid or payable in respect of a ship in such circumstances as are specified in the regulations.

There is no guidance as to the grounds on which a levy could be refunded or remitted. This would, therefore, be left up to the regulations. While such regulations would, of course, be disallowable, there would be no scope for the Parliament

to make any positive input into such regulations, as the normal scrutiny and disallowance process does not provide for such input. The Parliament simply would have the power to approve or disallow such regulations.

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

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

PRIMARY INDUSTRIES LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 20 February 1991 by the Minister for Primary Industries and Energy.

This omnibus Bill primarily proposes to amend the following legislation:

- Australian Meat and Live-stock Research and Development Corporation Act 1985;
- Dairy Produce Act 1986; and
- Horticultural Research and Development Corporation Act 1987.

The Bill makes consequential amendments to 14 other Acts.

The Committee has no comment on this Bill.

TRUSTS (HAGUE CONVENTION) BILL 1991

This Bill was introduced into the House of Representatives on 20 February 1991 by the Attorney-General.

The Bill proposes to implement and give effect in Australian law to the provisions of the *Hague Convention on the Law Applicable to Trusts and on their Recognition*. The *Convention* will come into force with Australia's ratification.

General comment
Clause 2

Clause 2 of the Bill provides for the commencement of the Bill. Subclause 2(1) provides that (subject to subclause (2)) the legislation is to commence on a date to be fixed by Proclamation, though this cannot be before the date on which the Hague Convention on the Law Applicable to Trusts and on their Recognition comes into force in Australia.

Subclause (2) provides that if such a Proclamation has not been made within 6 months of the Convention coming into force, then the legislation is to commence on the first day after the end of that period. This subclause, therefore, satisfies the requirements set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

The Committee notes that pursuant to Article 30 of the Convention, its entering into force in Australia is dependent on three countries ratifying, accepting or

approving the Convention. According to the Attorney-General's Second Reading speech, two countries (the United Kingdom and Italy) have already ratified the Convention. As the ratification of the Convention by Australia would appear to be within the discretion of the Attorney-General and since there does not appear to be any reason why the Attorney-General should not ratify the Convention, the Committee wonders why the Convention has not been ratified to date. Indeed, the Committee would appreciate the Attorney-General's advice as to when the Convention might be ratified by Australia.

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.

SCRUTINY OF BILLS ALERT DIGEST

NO. 4 OF 1991

13 MARCH 1991

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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(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:

Antarctic Mining Prohibition Bill 1991

* Australian Capital Territory (Electoral) Amendment Bill 1991

Commonwealth Banks Amendment Bill 1991

Higher Education Funding Amendment Bill 1991

Loan Bill 1991

* Occupational Superannuation Laws Amendment Bill 1991

* Sex Discrimination Amendment Bill 1991

States Grants (TAFE Assistance) Amendment Bill 1991

* Superannuation Supervisory Levy Bill 1991

* 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.

ANTARCTIC MINING PROHIBITION BILL 1991

This Bill was introduced into the House of Representatives on 6 March 1991 by the Minister for the Arts, Sport, the Environment, Tourism and Territories.

This Bill proposes to prohibit minerals activity in the Australian Antarctic Territory and prohibit Australian nationals and corporations from undertaking minerals activities in that region.

The Committee has no comment on this Bill.

AUSTRALIAN CAPITAL TERRITORY (ELECTORAL) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 March 1991 by the Minister for the Arts, Tourism and Territories.

The Bill proposes to amend the Australian Capital Territory (Electoral) Act 1988 to provide for a revised system to elect the Australian Capital Territory Legislative Assembly, to be known as the 'ACT Electoral System'.

General comment

The Committee notes that the Act which this Bill proposes to amend, the Australian Capital Territory (Electoral) Act 1988, contained, in a Schedule, a series of modifications to the Commonwealth Electoral Act 1918 in order to apply a large part of the Commonwealth Electoral Act to elections in the Australian Capital Territory, subject to the changes effected by the Schedule. This Bill contains three such Schedules. Schedule 1 proposes to amend the modifications which were made to the Commonwealth Electoral Act by the Schedule to the Australian Capital Territory (Electoral) Act. Schedule 2 proposes to substitute some of the modifications which were made by the Schedule with other modifications. Schedule 3 proposes to repeal some of the earlier modifications.

The Committee is of the view that this situation presents a person who wishes to look up the electoral law that applies

to the ACT with a very confusing task. A person would have to refer to three separate pieces of legislation, including cross-referencing four different Schedules, in order to establish what the electoral law is.

Among other things, this Committee is charged with the responsibility of scrutinising legislation to ensure that it does not trespass unduly on personal rights and liberties. The right to vote is a fundamental right. It also involves a right to be able to ascertain readily whether or not an individual has an entitlement to vote and, if so, how that vote fits in to the overall electoral system. This legislation and the way it would operate in conjunction with other relevant legislation makes that task difficult.

Given the importance of this legislation for the ACT, the Committee suggests that it would have been helpful if the electoral framework could be reflected by a single, free-standing piece of legislation. The Committee would appreciate the Minister's views on this suggestion.

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

COMMONWEALTH BANKS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 March 1991 by Mr Beale as a Private Member's Bill.

The Bill proposes full privatisation of the Commonwealth banks, with provision to:

- remove the 30 per cent limit on private shareholding in the Commonwealth Bank; and
- make the Commonwealth Bank's shareholdings subject to the Foreign Acquisitions and Takeovers Act 1975 and Banks (Shareholdings) Act 1972.

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.

HIGHER EDUCATION FUNDING AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 March 1991 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the Higher Education Funding Act 1988 to provide increased funding for higher education institutions, totalling $171 million for the 1991-1993 triennium.

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.

LOAN BILL 1991

This Bill was introduced into the House of Representatives on 7 March 1991 by the Minister Assisting the Treasurer.

The Bill proposes to enable certain defence expenditures to be met from the Loan Fund which would otherwise be met from the Consolidated Revenue Fund and to reimburse the Consolidated Revenue Fund from the Loan Fund for certain non-defence expenditures.

The Committee has no comment on this Bill.

OCCUPATIONAL SUPERANNUATION LAWS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 March 1991 by the Minister Assisting the Treasurer.

The Bill proposes to:

- provide for the collection of the superannuation supervisory levy proposed to be imposed by the Superannuation Supervisory Levy Bill 1991;
- make changes concerning the provision of information under sections 15F and 15G of the Occupational Superannuation Standards Act 1987;
- apply a fee to requests made to the Insurance and Superannuation Commissioner under section 15Q;
- allow the Commissioner some discretion in the collection of fees for late lodgement of returns;
- correct a technical oversight in the Insurance and Superannuation Commissioner Act 1987 relating to pooled superannuation trusts; and
- insert a provision in the Income Tax Assessment Act 1936 that the late lodgement amount of the levy is not tax deductible.

Inappropriate delegation of legislative power
Clause 25

Clause 25 of the Bill proposes to amend section 22 of the Occupational Superannuation Standards Act 1987, which sets out the regulation-making power of that Act. The clause proposes to add three further 'matters' in relation to which

regulations can be made pursuant to the Occupational Superannuation Standards Act. Proposed new paragraph 22(e) would allow the Governor-General to make regulations providing for exemptions and remissions of the levy which is to be paid pursuant to other amendments proposed by this Bill.

There is no suggestion of the grounds on which such exemptions or remissions might be made. This would be left up to the regulations. While the regulations would, of course, be disallowable, the Parliament would not be able to make any positive input into the content of such regulations.

The Committee draws attention to the clause 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.

SEX DISCRIMINATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 March 1991 by the Attorney-General.

The Bill proposes to amend:

- the Sex Discrimination Act 1984 to remove the exemption for superannuation and replace it with more limited exemptions and insert exemptions for certain Commonwealth and Territory legislation presently exempted by regulations; and
- the Marriage Act 1961 and War Gratuity Act 1945 to remove inconsistencies with the Sex Discrimination Act.

General comment

The Attorney-General's Second Reading speech on the Bill gives some historical background on the progress of the Bill. He notes that it was first introduced on 11 May 1989, but lapsed when the Federal election was called. It was re-introduced, with certain amendments, on 12 September 1990. At this stage, the Committee made certain comments on the Bill (see Alert Digest No. 6 of 1990). The Attorney-General responded to those comments in a letter dated 5 November 1990.

The 1990 version of the Bill was withdrawn from the House of Representatives Notice Paper on 6 March 1991. On that date, the current version of the Bill was introduced.

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

According to the Attorney-General's Second Reading speech, the 1990 version of the Bill was withdrawn 'in order to make several minor and technical drafting amendments'. One of those amendments is relevant to the concerns expressed by the Committee in relation to the 1990 version of the Bill.

In Alert Digest No. 6 of 1990, the Committee noted that that Bill was expressed to commence 2 years after receiving the Royal Assent. The Committee suggested that this was contrary to the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Committee observed that the Explanatory Memorandum to the Bill simply noted that this was the case, without offering any explanation for the need for a commencement in excess of 6 months from Royal Assent.

In his response to the Committee's concerns on the 1990 version of the Bill, the Attorney-General offered the following explanation for the postponement of the commencement of the Bill:

> The primary reason for postponing the commencement of the amendments to the Act for 2 years concerns the need to ensure that the superannuation industry has a reasonable amount of time in which to make the necessary changes to the design of their superannuation schemes. The Government decided that it was reasonable for the commencement period to start after the legislation has passed all stages of the legislation process. Consultations have been held with industry on the basis of this delayed commencement.

The Attorney-General goes on to say:

> Another reason is that the delay provides scheme operators with a period of time in which to provide an option to members under s41B(1), where

> this is necessary, of obtaining 'non-discriminatory superannuation benefits'.

The Committee takes this opportunity to thank the Attorney-General for providing this additional information, which appears to be equally relevant to the current Bill. Further, the Committee notes that the Explanatory Memorandum to the Bill currently before the Parliament offers the following explanation for the postponed commencement:

> The two year period before these provisions commence is to allow superannuation funds time to amend their conditions in order to comply with these provisions.

The Committee believes that this additional information assists the Parliament and commends its inclusion in the Explanatory Memorandum.

Two other matters raised by the Attorney-General's response in relation to the 1990 version of the Bill are also worthy of comment at this stage. In the final paragraph of his letter, the Attorney-General states:

> I should add that I am surprised that the Committee has raised this issue at this stage. First, an identical provision was not criticised when the Bill was considered by the Committee in May 1989. Second, I do not read the Drafting Instruction No [2] of 1989 as having any application to the commencement clause, as the clause does not commence by 'proclamation'. The date of commencement is fixed as two years after the date of Royal Assent.

In relation to the first matter, the Committee acknowledges that the comment was not made in relation to the similar provision in the first version of the Bill. However, the

Committee did not feel in any way constrained by the fact that the provision was not drawn attention to at that time. It is always possible that provisions which should be drawn to Senators' attention can escape the Committee's scrutiny. Equally, it is always possible that the Committee's views on certain types of provisions can develop and, indeed, change.

This latter point can be illustrated by the Committee's approach to Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. The Attorney-General has quite correctly pointed out that Drafting Instruction No. 2 applies to limit the use of provisions for legislation to commence by Proclamation. However, as the Committee has suggested in recent Alert Digests, the spirit of Drafting Instruction No. 2, that is, the desire to limit the extent to which Parliament delegates its legislative power to the Executive, leads the Committee to comment on any commencement-type provision which allows for a commencement in excess of 6 months from the Royal Assent.

Clearly, in cases such as the present one, the Parliament retains its power over the implementation of the legislation because, if it passes the Bill, the Parliament has explicitly provided for the delayed commencement. Nevertheless, the Committee is of the view that it would assist the Parliament in such cases if the Explanatory Memorandum contained an explanation of the need for a delayed commencement. The Committee is pleased to observe that in this case that assistance has now been provided.

The Committee thanks the Attorney-General for his response on the 1990 version of the Bill, which, in view of the withdrawal of that Bill and the Committee's inclination not to make a substantive comment on the current Bill, might

otherwise have gone unrecognised. For the information of Senators, a copy of the Attorney-General's response is attached to this Alert Digest.

The Committee makes no further comment on the Bill.

STATES GRANTS (TAFE ASSISTANCE) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 March 1991 by the Minister for Higher Education and Employment Services.

The Bill proposes to vary the existing grants made to the States for technical and further education, with a net effect of a reduction in funding levels of $0.386m.

The Committee has no comment on this Bill.

SUPERANNUATION SUPERVISORY LEVY BILL 1991

This Bill was introduced into the House of Representatives on 7 March 1991 by the Minister Assisting the Treasurer.

The Bill proposes to effect full cost recovery in relation to the superannuation aspects of the Insurance and Superannuation Commission operations by imposing a levy on superannuation funds, approved deposit funds and pooled superannuation trusts that lodge an annual return with the Insurance and Superannuation Commissioner.

Inappropriate delegation of legislative power
Paragraph 6(1)(a)

Clause 6 of the Bill provides for the amount of levy to be paid by superannuation funds, approved deposit funds and pooled superannuation trusts in conjunction with the annual return which they lodge with the Insurance and Superannuation Commissioner. Paragraph 6(1)(a) provides that the 'basic levy amount' is to be ascertained 'in accordance with the regulations'.

The provision raises two possible concerns. First, the Committee questions whether this is an appropriate matter to be left for the regulations. The only guidance on what the regulations might contain comes from subclause 6(5), which provides:

> The regulations may provide for different basic levy amounts for different classes of funds or unit trusts.

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

Second, there is the question of whether this `levy' is more appropriately categorised as a tax. If it is more properly categorised as a tax then, clearly, this is a matter which should be dealt with by primary legislation and not by regulation.

In making this comment, the Committee accepts that subclause 6(4) sets the maximum amount for the basic levy amount at $30,000. The specification in the legislation of a maximum levy or a formula for determining the maximum levy is a factor which generally tends to allay the Committee's concerns in this regard. However, the Committee notes that in the present case, in his Second Reading speech, the Minister states:

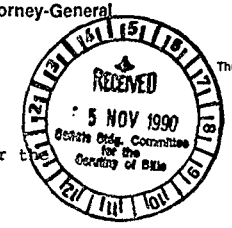
> I expect that the maximum levy imposed by regulation for the first year or so of operation would be of the order of $5,000.

If this is so, the maximum levy allowed under subclause 6(4) is significantly higher than the amount which (at least initially) is expected to be set, leaving a considerable scope for discretion in regulations subsequently made to alter the levy. In all the circumstances, the Committee would appreciate some guidance from the Minister on the reason that the clause has been drafted in this way.

The Committee draws Senators' attention to the clause 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.

Attorney-General

The Hon. Michael Duffy M.P.
Parliament House
Canberra ACT 2600



- 5 NOV 1990

Senator B C Cooney
Chairman
Senate Standing Committee for the
Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to a memorandum from the Secretary of the Committee of 20 September 1990, enclosing the extracts from the Scrutiny of Bills Alert Digest No. 6 of 1990 concerning the Sex Discrimination Amendment Bill 1990. The Committee has drawn attention to clause 2 of the Bill which provides as follows:

> "This Act commences 2 years after the day on which it receives the Royal Assent."

The primary reason for postponing the commencement of the amendments to the Act for 2 years concerns the need to ensure that the superannuation industry has a reasonable amount of time in which to make the necessary changes to the design of their superannuation schemes. The Government decided that it was reasonable for the commencement period to start after the legislation has passed all stages of the legislation process. Consultations have been held with industry on the basis of this delayed commencement. Another reason is that the delay provides scheme operators with a period of time in which to provide an option to members under s41B(1), where this is necessary, of obtaining "non-discriminatory superannuation benefits".

I should add that I am surprised that the Committee has raised this issue at this stage. First, an identical provision was not criticised when the Bill was considered by the Committee in May 1989. Second, I do not read the Drafting Instruction No 1 of 1989 as having any application to the commencement clause, as the clause does not commence by "proclamation". The date of commencement is fixed as two years after the date of Royal Assent.

Yours sincerely,

MICHAEL DUFFY

SCRUTINY OF BILLS ALERT DIGEST

NO. 5 OF 1991

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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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* Albury-Wodonga Development Amendment Bill 1991

Appropriation Bill (No. 4) 1990-91

Appropriation Bill (No. 5) 1990-91

Appropriation (Parliamentary Departments) Bill (No. 2) 1991

* Bounty (Citric Acid) Bill 1991

Bounty Legislation Amendment Bill 1991

Commonwealth Banks Amendment Bill 1991

Commonwealth Electoral Amendment Bill 1991

* Customs Tariff Amendment Bill 1991

* Customs Tariff (Uranium Concentrate Export Duty) Amendment Bill 1991

* Defence Force Superannuation Legislation Amendment Bill 1991

Flags Amendment Bill 1991

* Military Superannuation and Benefits Bill 1991

* Sales Tax Laws Amendment Bill (No. 1) 1991

Sales Tax Laws Amendment Bill (No. 2) 1991

* Social Security Legislation Amendment Bill 1991

Social Security (Rewrite) Transition Bill 1991

* Student Assistance Amendment Bill 1991

* 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.

ALBURY-WODONGA DEVELOPMENT AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Local Government.

The Bill proposes to amend the Albury-Wodonga Development Act 1973 to:

- alter the membership of the Albury-Wodonga Development Corporation;

- enable the Commonwealth, New South Wales and Victorian Corporations to produce one annual report on the Albury-Wodonga project, instead of three;

- provide Corporation staff with reciprocal mobility rights within the Australian Public Service and with other statutory authorities; and

- approve the Albury-Wodonga Area Development Agreement Amendment Agreement (No. 2).

Prospective commencement
Subclauses 2 (2), (3) and (4)

Subclause 2(1) provides that clauses 1, 2 and 5 of the Bill are to commence on Royal Assent. Subclause 2(2) of the Bill provides that clause 18 (which relates to

mobility of employment between the Albury-Wodonga Development Corporation and the Australian Public Service) is to commence on a day to be fixed by Proclamation. However, subclause (3) provides that if the commencement of clause 18 is not proclaimed within six months of Royal Assent, then it is to be repealed. This is in accordance with the requirements of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

Subclause 2(4) of the Bill provides that the remaining provisions are to commence on a day to be fixed by Proclamation. There is no limit on the time within which such a Proclamation must be made, though it cannot be made prior to the execution by all three governments of the Agreement which is to be approved by clause 5 of the Bill.

Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 provides that, as a general rule, the time within which Proclamation of an Act or parts of an Act should be made should be limited to six months from the Act receiving the Royal Assent. If this is not the case, the Drafting Instruction suggests that the Explanatory Memorandum should give reasons why a longer period is necessary.

In the present case, the Explanatory Memorandum gives no reason for the open-ended Proclamation provision in subclause 2(4). Though it is presumably a matter which is connected to the uncertainty as to when the Agreement referred to in clause 5 will be executed by the three governments involved, the Explanatory Memorandum does not say this. Some clarification on this point would be helpful.

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

APPROPRIATION BILL (NO. 4) 1990-91

This Bill was introduced into the House of Representatives on 14 March 1991 by the Minister for Finance.

The Bill proposes to appropriate an additional $723.8 million to meet payments for the ordinary annual services of the Government.

The Committee has no comment on this Bill.

APPROPRIATION BILL (NO. 5) 1990-91

This Bill was introduced into the House of Representatives on 14 March 1991 by the Minister for Finance.

The Bill proposes to appropriate an additional $274.4 million from the Consolidated Revenue fund, for capital works and services, payments to or for the States and Territories, advances and loans, and other services.

The Committee has no comment on this Bill.

APPROPRIATION (PARLIAMENTARY DEPARTMENTS) BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 14 March 1991 by the Minister for Finance.

The Bill proposes to appropriate an additional $1.9 million for recurrent expenditures of the Parliamentary departments.

The Committee has no comment on this Bill.

BOUNTY (CITRIC ACID) BILL 1991

This Bill was introduced into the House of Representatives on 14 March 1991 by the Minister for Science and Technology.

The Bill proposes to provide bounty assistance for the production of citric acid by fermentation. The bounty (to operate from 12 March 1991 to 31 December 1995) will be paid at $700 per tonne in the first year, reducing to $150 per tonne in the final year.

Retrospectivity
Clause 2

Clause 2 provides that the Bill is to be taken to have commenced on 12 March 1991. As a result, the Bill operates retrospectively. However, as the Bill may be regarded as being akin to a Budget measure, this is considered to be a case in which some degree of retrospectivity is acceptable. Accordingly, the Committee makes no further comment on the clause.

Inappropriate delegation of legislative power
Subclauses 15(5) and (7)

Clause 15 of the Bill provides for persons to be registered as producers of bountiable citric acid for the purposes of the legislation. Subclause 15(5) provides that regulations made under clause 31 may prescribe conditions to be met by

applicants for registration. Similarly, subclause 15(7) provides for regulations to be made which prescribe conditions on the production of bountiable citric acid. The Explanatory Memorandum states that it is 'proposed' that the regulations setting out registration criteria will 'give effect to the following policy conditions':

- that a registered person continue research, development and commercialisation of citric acid by the high technology production process the subject of the present bounty;
- that a registered person contribute to research in new product development arising from or associated with the fermentation process the subject of this bounty;
- that a registered person explore international market opportunities for the fermentation technology and the product (ie. citric acid); and
- that a registered person take all reasonable steps to ensure maximum advantage is taken from the expertise and know-how associated with the development and production of citric acid and other new products in Australia by suitable licensing, franchising or other arrangements.

This statement gives some guidance on what the regulations might contain. It should be remembered, however, that though the Parliament would have the opportunity to disallow such regulations, there is no scope for the Parliament to make any positive input as to their content.

In making this comment, the Committee notes that, pursuant to clause 28 of the Bill, various decisions made under the Bill would be open to review on the merits

by the Administrative Appeals Tribunal. In particular, the Committee notes that decisions to approve (paragraph 28(1(e)) or cancel (paragraph 28(1)(f)) a registration are open to such review. Nevertheless, the Committee is concerned that the Parliament would not appear to have any opportunity to influence either the content of the regulations setting out the criteria upon which registration will be decided or the 'policy conditions' on which those criteria will be based.

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

Abrogation of protection against self-incrimination
Subclause 21(5)

Clause 21 of the Bill proposes to give an 'authorised officer' (as defined by clause 4) various powers in relation to the investigation of possible offences against the provisions of the Bill. Subclause 21(5) provides that a person would not be excused from answering a question put by an authorised officer or from producing documents as required by an authorised officer on the grounds that such answer or production might tend to incriminate the person. This is an abrogation of the common law protection against self-incrimination.

In making this comment, the Committee notes, however, that the subclause goes on to state that any information or material obtained as a direct or indirect consequence of such answer or production is not admissible in evidence against the person in criminal proceedings, other than proceedings arising out of the provisions of clause 21. As such, there is a strict limit on the extent to which persons can

incriminate themselves and the clause is, therefore, in a form which the Committee regards as acceptable.

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

BOUNTY LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 14 March 1991 by the Minister for Small Business and Customs.

The Bill proposes to amend six bounty Acts. The amendments fall into four categories. The Bill proposes to amend:

(i) the textile, clothing and footwear bounties, to phase the rates down to zero by 30 June 1995;

(ii) the Bounty (Metal Working Machine Tools and Robots) Act 1985, to extend the bounty to 30 June 1997, broaden the scheme's coverage and introduce new eligibility criteria;

(iii) the Bounty (Computers) Act 1984, to widen the bounty to include printed circuit boards and phase down rates to eight per cent by 31 December 1995; and

(iv) five bounties to introduce minimum annual production threshold levels before bounty may be claimed and increase the minimum claim level on one bounty.

The Committee has no comment on this Bill.

COMMONWEALTH BANKS AMENDMENT BILL 1991

This Bill was introduced into the Senate on 13 March 1991 by Senator Short as a Private Senator's Bill.

The Bill proposes full privatisation of the Commonwealth banks, with provision to:

- remove the 30 per cent limit on private shareholding in the Commonwealth Bank; and

- make the Commonwealth Bank's shareholdings subject to the Foreign Acquisitions and Takeovers Act 1975 and the Banks (Shareholdings) Act 1972.

The Bill is identical to the legislation introduced in the House of Representatives on 7 March 1991 by Mr Beale (as a Private Member's Bill).

The Committee has no comment on this Bill.

COMMONWEALTH ELECTORAL AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 14 March 1991 by Mr Wilson as a Private Member's Bill.

The Bill proposes to ensure that, subject to the drawing of State boundaries for House of Representatives divisions, any political party obtaining more than 50 per cent of votes in that State will win the majority of seats in that State.

The Committee has no comment on this Bill.

CUSTOMS TARIFF AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Small Business and Customs.

The Bill proposes to amend the Customs Tariff Act 1987 to effect changes to general tariff rates, specific industry sectors of agriculture, passenger motor vehicles and textiles, clothing and footwear. The changes include those announced as part of the ministerial statement - Building a Competitive Australia.

Retrospectivity
Subclauses 2(2) - (9)

Subclause 2(1) of the Bill provides that clauses 1 and 2 are to commence on Royal Assent. Subclauses 2(2) - (9) provide for the various other clauses of the Bill to commence on certain specified dates, ranging from 17 August 1990 to 1 July 1991. Many of these clauses would, therefore, operate retrospectively. However, the Committee has indicated that there are certain circumstances in which it regards retrospectivity as being acceptable. In the present case, the Committee acknowledges that in the absence of retrospective operation there would be various opportunities for evasion of changed customs tariffs in the period prior to Royal Assent. Accordingly, the Committee makes no further comment on the clause.

CUSTOMS TARIFF (URANIUM CONCENTRATE EXPORT DUTY) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Small Business and Customs.

The Bill proposes to amend the Customs Tariff (Uranium Concentrate Export Duty) Act 1980 to increase the duty on exported uranium concentrate mined in the Alligator Rivers Region from $1.15 to $1.30 per kilogram, effective from 21 February 1990.

Retrospectivity
Clause 2

Clause 2 of the Bill provides that the Bill is to be taken to have commenced on 21 February 1990. The Explanatory Memorandum refers to this date as being the date of effect of the Customs Tariff (Uranium Concentrate Export Duty) Proposal, which was tabled in the Parliament on 10 May 1990 in accordance with section 273EA of the Customs Act 1901. That section provides:

> (1) The Minister may, at any time when the Parliament is prorogued or the House of Representatives has expired by effluxion of time, has been dissolved or is adjourned otherwise than for a period not exceeding 7 days, publish in the *Gazette* a notice that it is intended, within 7 sitting days of the House of Representatives after the date of the publication of the notice, to propose in the Parliament a Customs Tariff or Customs Tariff alteration in

accordance with particulars specified in the notice and operating as from such time as is specified in the notice, not being:

(a) in the case of a Customs Tariff or Customs Tariff alteration that could have the effect of making the duty payable by any person importing goods greater than the duty that would, but for that Customs Tariff or Customs Tariff alteration, by payable - a time earlier than the time of publication of the notice; or

(b) in any other case - a time earlier than 6 months before the time of publication of the notice.

(2) Where notice of intention to propose a Customs Tariff or a Customs Tariff alteration has been published in accordance with this section, the Customs Tariff or Customs Tariff alteration shall, for the purposes of this Act (other than section 226) and any other Act, be deemed to be a Customs Tariff or Customs Tariff alteration, as the case may be, proposed in the Parliament.

While the Committee acknowledges that the retrospectivity which is intended in the present case is explicitly authorised by section 273EA, the Committee is nevertheless concerned that it has taken over 12 months to commence the legislative action required to effect the change in tariff. The Committee would appreciate the Minister's advice on the reason for this delay.

DEFENCE FORCE SUPERANNUATION LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Defence Science and Personnel.

The Bill proposes to amend the Defence Force Retirement and Death Benefits Act 1973 to remove uncertainties about the operation of certain provisions and make minor improvements to the closed scheme operating under that Act. The proposed amendments are consequent upon the Military Superannuation and Benefits Bill 1991.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that the amendments proposed by subclause 4(1) (which amends certain definitions) and clauses 15 (dealing with invalidity benefits payable to certain superannuation contributors), 18 (proposing amendments to the Superannuation Act [1976] or the Superannuation Act 1990) or 22 (dealing with payment of refunds under the Superannuation Act 1990) are to be taken to have commenced on 1 July 1990. While the amendments all appear to operate beneficially on individuals, the Committee noted that neither the Explanatory Memorandum nor the Minister's Second Reading speech to the Bill offer any explanation of either the need for the retrospectivity or any indication that the proposed amendments are, in fact, beneficial to individuals. The Committee suggests that such an approach would be helpful.

FLAGS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 14 March 1991 by Mr Hawker as a Private Member's Bill.

The Bill proposes to amend the Flags Act 1953 to ensure that the Australian National Flag cannot be changed without 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.

MILITARY SUPERANNUATION AND BENEFITS BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Defence Science and Personnel.

The Bill proposes to establish a new superannuation scheme for members of the Defence Force, to be known as the Military Superannuation and Benefits Scheme (MSBS) and to be implemented from 1 October 1991.

General comment
Subclause 5(1)

Clause 4 of the Bill provides for the making of a 'Trust Deed' by the Minister, to govern the establishment and operation of the superannuation scheme with which the Bill deals. Subclause 5(1) provides that the Minister may 'by signed instrument' amend the Trust Deed. Pursuant to clause 49(1)(a), such an instrument would be a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901.

The Committee notes that clause 49(1)(b), similarly, designates a declaration, for the purposes of paragraph (f) of the definition of 'eligible member' in subclause 30(1) as a disallowable instrument. Such declarations are deemed to be Statutory Rules for the purposes of the Statutory Rules Publication Act 1903. This means that such declaration must be printed, published, numbered and made available for sale by the Government Printer. No such conditions apply to instruments for the

purposes of subclause 5(1), as paragraph 46A(1)(c) of the Acts Interpretation Act explicitly excludes 'disallowable instruments' from the printing and publication regime of the Statutory Rules Publication Act.

The Committee regards the availability of legislation and of legislative instruments to the public and, in particular, the individuals affected by them, as being of the utmost importance. In the present case, the Committee notes that, pursuant to subclause 3(3) of the Trust Deed, the Military Superannuation and Benefits Board of Trustees No. 1 (which is to administer the scheme set up by the Bill) is required to comply with the requirements of the Occupational Superannuation Standards Act 1987 and Regulations that are applicable to the scheme. Regulation 17(1)(h) of the Occupational Superannuation Standards Regulations provides that

> where the trust deed of a superannuation fund is altered, the trustee or trustees of the fund shall give to each of its members as soon as practicable thereafter a written statement explaining the nature and purpose of the alteration and the effect (if any) of the alteration on the entitlements of its members.

This requirement applies to the superannuation scheme to be established by the Bill. Any amendments to the Trust Deed are, therefore, required to be published to members of the superannuation fund. Accordingly, the Committee makes no further comment on the clause.

SALES TAX LAWS AMENDMENT BILL (NO. 1) 1991

This Bill was introduced into the House of Representatives on 12 March 1991 by the Minister Assisting the Treasurer.

The Bill proposes to reduce the rates of sales tax on 'luxury' vehicles to 30 per cent in the case of all dealings occurring on or after 13 March 1991. The sales tax currently ranges between 30 and 50 per cent.

Retrospectivity
Clause 2

Clause 2 of the Bill provides that it is to be taken to have commenced on 13 March 1991. The Bill is, therefore, to operate retrospectively. However, the Committee notes that the changes proposed by the Bill would appear to operate beneficially on individuals. Accordingly, the Committee makes no further comment on the Bill.

SALES TAX LAWS AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 14 March 1991 by the Minister Assisting the Treasurer.

The Bill proposes to allow certain sales taxpayers the option to lodge returns and pay sales tax on a quarterly basis rather than monthly.

The Committee has no comment on this Bill.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Aged, Family and Health Services.

This omnibus Bill primarily intends to address the following social security concerns:

- scholarship payments awarded from outside Australia;
- exemption of certain funeral bonds from the income and assets test;
- recovery by the Commonwealth of social security payments from compensation lump sums in spite of contrary State or Territory legislation; and
- a protocol between Australia and Canada concerning pensions payable to widows covered by the Agreement on Social Security.

The Bill also proposes to effect other minor technical amendments.

Retrospectivity
Clauses 4(b), (c), (d), 5(1), 5(2), 9, 10, 11, 12, 13, 21, 23, 25

The Bill contains various clauses which are expressed to operate retrospectively.

However, the Committee notes that, in each case, the commencement date appears with the clause and the relevant paragraph in the Explanatory Memorandum contains an explanation of the reason for the retrospectivity. In addition, the Committee notes that the amendments proposed by the clauses listed above are of a technical nature, correcting drafting errors or providing clarification. Accordingly, the Committee makes no further comment on the clauses.

'Legislation by press release'/Inappropriate delegation of legislative power
Subclause 4(b) and (d), clause 8

Clause 8 of the Bill proposes to insert a new section 12AAB into the Social Security Act 1947. If enacted, the clause would remove certain overseas scholarships from the definition of 'income' for the purposes of the Social Security Act. Subclauses 4(b) and (d) propose to make consequential amendments to the interpretation section of the Social Security Act. The proposed amendments are to take effect from 1 September 1990.

The Explanatory Memorandum to the Bill indicates that the retrospective commencement date 'reflects the Government's policy announcement of this initiative'. This is, therefore, an example of what the Committee regards as 'legislation by press release', whereby the Government announces a legislative initiative on a particular date, on the assumption that the legislation will be enacted, and then expresses the legislation to operate retrospectively, from the date of the announcement.

While the Committee disapproves in principle of this approach, it has, in the past, accepted this kind of exercise where the announcement and the legislation (or, at

least, the draft legislation) appear within a short period of time. Indeed, the Committee notes that, in relation to taxation bills, the Senate itself has adopted a policy that where a bill or draft bill has not been introduced within six months of an announcement it will amend the bill to provide for a commencement date no earlier the either the date of introduction of the bill into Parliament or the date of publication of the draft bill (see Journals of the Senate, No. 109, 8 November 1988, pp.1104-5).

Though this is clearly not a taxation bill, if the six month rule-of-thumb were applied to the present case, the Bill would appear to fall foul. The initiative was announced on 1 September 1990 but the Bill was not introduced until 13 March 1991. However, the Committee would not record any objection on this occasion for two reasons. First, the contravention of the rule-of-thumb is, in this case, relatively slight. Second, it appears that the retrospectivity is, in any event, beneficial to individuals.

Another aspect of proposed new section 12AAB should be noted, however. In conjunction with clauses 4(b) and (d), this clause would give the Minister the power to decide what were and what were not to be 'approved scholarships' for the purposes of the exemption from the income test which is proposed by new section 12AAB. This decision would not appear to be open to scrutiny by the Parliament. The Committee suggests that any document which approves such scholarships should, at least, be tabled in the Parliament.

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

Non-reviewable decision
Clause 19

Section 178 of the Social Security Act lists various decisions pursuant to the Act which are explicitly not open to review by the Social Security Appeals Tribunal. Clause 19 proposes to add to that list decisions pursuant to subsection 251(1B) of the Act. That subsection allows the Minister to give, vary or revoke directions to the Secretary of the Department of Social Security concerning the exercise of the Secretary's discretion to write-off or waive debts owed to the Commonwealth by welfare beneficiaries.

In 1988 the Committee drew attention to the provision which inserted the existing power of the Minister to give directions to the Secretary concerning the exercise of the discretion to write-off or waive debts (see Seventeenth Report of 1988 and Second Report of 1989). The Committee noted that these directions are required to be tabled in the Parliament but are not subject to disallowance. The Committee at that time was concerned that these directions were expressed to be binding, not only on the Secretary but also on the Social Security Appeals Tribunal or the Administrative Appeals Tribunal in reviewing relevant decisions of the Secretary. In view of this binding effect, the Committee suggested that the directions should be subject to disallowance. This suggestion was not taken up by the Senate. However, the Committee remains of the view that the directions should be tabled.

This amendment, if enacted, would further restrict the possibility of any review of the directions, as it would make the Minister's decision to issue, vary or revoke directions immune from review. The Committee draws attention to the clause as it may be considered to make personal rights, liberties or obligations unduly

dependent on non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.

SOCIAL SECURITY (REWRITE) TRANSITION BILL 1991

This Bill was introduced into the House of Representatives on 13 March 1991 by the Minister for Aged, Family and Health Services.

The Bill proposes to:

- repeal the Social Security Act 1947;
- provide for the transition from the 1947 Act to the Social Security Act 1991;
- consolidate applicable savings provisions; and
- make consequential amendments to other Acts.

The Committee has no comment on this Bill.

STUDENT ASSISTANCE AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 14 March 1991 by the Minister for Higher Education and Employment Services.

This omnibus Bill proposes to amend the Student Assistance Act 1973 to:

- delete references to competitive postgraduate awards;
- provide that students must give their tax file numbers to the Department before being paid assistance;
- change arrangements for late payment charges by debtors;
- protect student assistance files from subpoenas by courts and tribunals;
- change the annual reporting requirement on the operation of the Act;
- provide that decisions of the Student Assistance Review Tribunal be available within 10 working days of the Tribunal making its decision; and
- provide that Ministerial determinations made under the Act are to be tabled in the Parliament and 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.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill proposes to make the amendment contained in paragraph 16(b) retrospective to 2 January 1990. That paragraph proposes to correct a drafting error contained in section 43 of the Student Assistance Act 1973, which was inserted by the Student Assistance Amendment Act (No. 2) 1989. The latter Act commenced on 2 January 1990, the date from which the proposed correction is intended to operate. In the light of the explanation provided, the Committee makes no further comment on the clause.

Non-reviewable decision
Paragraph 14(a)

Paragraph 14(a) of the Bill proposes to replace the current subsection 14(1) of the Student Assistance Act with a new subsection 14(1). That new subsection 14(1) would, if enacted, allow '[t]he Minister or a prescribed officer' to determine whether or not to waive the payment of a late payment charge or interest on overpaid amounts. Any such decision by the Minister or a prescribed officer would appear to be immune from review. While the Student Assistance Review Tribunal has a general power, pursuant to Part 5 of the Act, to review decisions that are adverse to an applicant, the power to review is confined to decisions by an 'authorised officer'. Decisions by the Minister or a 'prescribed officer' under proposed new subsection 14(1) would, therefore, appear to be immune from review.

Accordingly, the Committee draws attention to the provision as it may make personal rights, liberties or obligations unduly dependent on non-reviewable decision, in breach of principle 1(a)(iii) of the Committee's terms of reference.

Provision of tax file numbers
Clause 17

Clause 17 of the Bill would, if enacted, require an applicant for AUSTUDY or for a special educational assistance scheme to supply their tax file number in relation to that application. The provision is similar in effect to provisions which the Committee has previously drawn attention to, most recently in Alert Digest No. 9 of 1990 in relation to provisions in the Social Security Legislation Amendment Bill 1990. As the Committee observed at that time, while such provisions may be seen as necessary to prevent persons defrauding the student assistance system, they may also be considered as unduly intrusive upon a person's privacy. Accordingly, the Committee draws the provision to Senators' attention 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

The Committee notes by way of a general comment that the legislation of which this amendment is to form a part is almost impossible to follow. The Student Assistance Act 1973 was re-numbered and re-lettered (with effect from 2 January 1990) as a result of section 17 of the Student Assistance Amendment Act (No. 2) 1989. The Act has not been reprinted to take account of the re-numbering. Since the latest reprint of the Act was published in 1986, in order to find the relevant section referred to by this amending Bill, it is necessary to take the 1986 reprint and manually re-number it, taking into account the several other amendments that have been enacted to date.

As the Committee observed recently in Alert Digest No. 4 of 1991 (in relation to the Australian Capital Territory (Electoral) Amendment Bill 1991), individuals have a right to be able to work out what the law is. The Committee notes that in 1947, Lord Justice Scott of the English Court of Appeal said:

> [T]here is one quite general question affecting all such sub-delegated legislation, and of supreme importance to the continuance of the rule of law under the British constitution, namely, the right of the public affected to know what that law is. (Blackpool Corporation v Locker [1948] 1 KB 349, at p361)

Though the comment was made in relation to sub-delegated legislation, the general proposition is, surely, of even greater importance in relation to primary legislation. In making the comment, Lord Justice Scott noted that, as a matter of law, ignorance of the law is no excuse. If the law is hard to understand (as it is here), it does nothing to assist the general public in knowing what the law is. The Committee, therefore, suggests that the reprinting of the Student Assistance Act 1973 be undertaken as a matter of urgency.

SCRUTINY OF BILLS ALERT DIGEST

NO. 6 OF 1991

17 APRIL 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

Acts Interpretation (Ministerial Undertakings) Amendment Bill 1991

* Export Control Amendment Bill 1991

* Health Insurance (Pathology Services) Amendment Bill 1991

* Training Guarantee (Administration) Amendment Bill 1991

Veterans' Entitlements Amendment Bill 1991

* **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.

ACTS INTERPRETATION (MINISTERIAL UNDERTAKINGS) AMENDMENT BILL 1991

This Bill was introduced into the Senate on 9 April 1991 by Senator Powell as a Private Senator's Bill.

The Bill proposes to ensure that if undertakings given to the Senate Standing Committee on Regulations and Ordinances to repeal or amend a piece of defective delegated legislation have not been acted upon, the particular instrument is deemed to be laid before each House of Parliament again, and is therefore able to be disallowed.

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.

EXPORT CONTROL AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 11 April 1991 by the Minister for Resources.

The Bill proposes to amend the Export Control Act 1982 to make several administrative changes. It also proposes to create two new offences:

(1) an offence of entering goods for export where export conditions have not been complied with; and

(2) an offence of authorised officers receiving goods or services from owners of registered export establishments without the written permission of the Secretary.

Strict liability offences
Clause 6

Clause 6 of the Bill proposes to insert a new section 7A into the Export Control Act 1982. That proposed new section would make it an offence (punishable by imprisonment for up to five years) for a person to enter goods for export and falsely represent that any conditions or restrictions applicable to the goods have been complied with.

Proposed new subsection 7A(1) deals with cases where the export of 'prescribed goods' is simply prohibited by the regulations, while proposed new subsection 7A(2) deals with prohibitions on the export of 'prescribed goods' to a 'specified' place. In each case, the offence created appears to be one of strict liability, as no proof is required that the person knowingly performed the acts constituting the offence. Indeed, the Explanatory Memorandum to the Bill states:

> It is not a necessary element of the offence that the person intends to export the goods.

The Committee notes that criminal offence provisions normally require proof that the person intended to commit the act or acts constituting the offence. By expressly deleting this mental element (commonly referred to as mens rea), the offences referred to above are what the Committee would generally regard as strict liability offences.

The Committee draws 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.

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

HEALTH INSURANCE (PATHOLOGY SERVICES) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 11 April 1991 by the Minister for Community Services and Health.

The Bill proposes to validate certain recommendations made by the Medicare Benefits Advisory Committee relating to the payment of Medicare Benefits. These recommendations were not given legal effect, as a result of a failure to make the necessary Ministerial determinations.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill, if enacted, would make the amendments proposed by subclauses 4(1) and 5(1) retrospective to the dates set out in the various paragraphs of those subclauses. Paragraph 4(1)(a) and (b), for example, are to operate retrospectively from 1 January 1980.

The Explanatory Memorandum to the Bill offers the following explanation for the retrospectivity:

> From time to time over a period of some years the Department issued Medical Benefits Assessment Advices based on determinations of the Medical Benefits Advisory Committee which purported to make amendments to Schedule 1 or Schedule 1A to the Health Insurance Act

> 1978. In fact they were ineffective for that purpose but were generally acted upon for some time by the Department, most relevant medical practitioners and the public in general. In particular payments were generally made in accordance with the Advices. They related to certain pathology tests not dealt with expressly in the Schedules.
>
> The purpose of this Bill is to validate the Advices so that claims and payments made in accordance with them will become valid and proper, to bring the legislation into line with the general practice in fact adopted at that time.

The Committee notes that the Explanatory Memorandum goes on to state:

> There will be transitional provisions to ensure that no-one will be required to make any refund of any payment already made as a result of this Bill, to preserve a right to additional payment in respect of anyone who, on the basis that the amendments contained in the Advices are valid, has been underpaid, and to exclude any liability for any additional windfall payments to pathologists for the procedures covered by the Advices in excess of the amounts specified in the Advices. The amount specified in the Advices for payment were fixed on the recommendation of the Medical Benefits Advisory Committee as proper remuneration for such procedures.

The Committee also notes that, according to the Minister's Second Reading speech, this is a matter which has been and still is the subject of litigation. The Committee has previously expressed concern that legislation can be used to determine the outcome of proceedings that are already before the courts. For this reason, the Committee would appreciate the Minister's advice on the nature and number of the '[f]urther litigation' referred to in his Second Reading speech and the likely effect of this Bill (if enacted) on that litigation.

TRAINING GUARANTEE (ADMINISTRATION) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 11 April 1991 by the Minister for Resources.

The Bill proposes to amend the Training Guarantee (Administration) Act 1990 to streamline the operation of that Act. In particular, the Bill proposes to introduce the concept of 'outstanding trainers' and to clarify the status and operation of Registered Industry Training Agents (RITAs).

Reversal of the onus of proof
Clauses 5 and 6

Clause 5 of the Bill proposes to insert new sections 11A and 11B into the Training Guarantee (Administration) Act 1990, to govern the treatment of partnerships and unincorporated associations, respectively, for the purposes of that Act. Proposed new subclause 11A(4), if enacted, would make an offence against the Act which is committed by a partnership an offence committed by each of the partners. Similarly, proposed new subclause 11B(5) would make an offence committed by an unincorporated association an offence committed by the controlling officer or officers of the association.

Proposed new subclauses 11A(5) and 11B(6), respectively, provide that a partner or a controlling officer (as the case may be) can raise by way of defence to such an alleged offence that they did not aid, abet, counsel or procure the act or omission

involved in the offence or that they were not in any way knowingly concerned in or party to that act or omission. However, this is a matter to be proved by the partner or controlling officer raising the defence. As such, it may be considered a reversal of the onus of proof, as it is ordinarily incumbent on the prosecution to prove all the elements of an offence.

Similarly, clause 6 proposes to amend section 12 of the Act, which relates to business groups. In particular, it proposes to replace paragraph 3(b) with a series of new paragraphs, which will have the effect of making an offence committed by a business group an offence by each of the individual members. As with the provisions to be inserted by clause 5, proposed new paragraph 12(3)(e) provides individual members with a defence to such an offence. However, as with those clauses, it is for the person raising the defence to prove it.

While accepting that there may be valid reasons for reversing the onus of proof, the Committee has consistently drawn attention to such provisions. Accordingly, the Committee draws attention to the provisions referred to above, 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.

General comment

The Committee raises two further matters by way of general comment. First, the Committee notes that the Bill explicitly makes individual members of partnerships or business groups or the controlling officers of unincorporated associations liable for breaches of the Training Guarantee (Administration) Act 1990. The Committee also notes that the Act imposes a range of penalties for the various offences set out in the Act.

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 the penalties imposed by the Act range from imprisonment (for up to 2 years), to fines (of up to $3,000), to the imposition of penalty charges. The Committee seeks advice from the Minister as to whether the imposition of, say, a fine on the members of a partnership individually would lead to the imposition, in effect, of a fine equivalent to the total of the fine which would be levied on a sole proprietor or a company but multiplied by the number of partners held liable, thereby subjecting the partnership to a greater penalty than that which would be levied on a sole proprietor or a company. In making this request, the Committee notes the effect of proposed new subsections 11A(3) and 11B(4), which would make partners or controlling officers 'jointly and severally' liable for any amount payable by the partnership or unincorporated association, as the case may be.

Finally, the Committee notes that this Bill proposes to make what appear to be substantial amendments to a piece of legislation, most of which only came into force on 1 July 1990. The Committee is concerned that persons upon whom this legislation imposes significant obligations will, already, have to refer to at least two separate pieces of legislation (if the Bill is enacted) in order to understand those obligations.

VETERANS' ENTITLEMENTS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 11 April 1991 by the Minister for Veterans' Affairs.

The Bill proposes to repeal Part III of the Veterans' Entitlements Act 1986 and replace it with a new Part III. Part III contains the provisions relating to the payment of service pensions and associated benefits for veterans, spouses and other dependants. The new Part III reflects the provisions contained in the old Part III, as amended, as at 1 July 1990.

The features of the new Part III are that the provisions are expressed in 'plain English', the sections are shorter and the layout and structure are more accessible.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 7 OF 1991

8 MAY 1991

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

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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

(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:

Income Tax (International Agreements) Amendment Bill 1991

Industrial Relations Legislation Amendment Bill (No. 2) 1991

* Migration Amendment Bill 1991

National Measurement (Standard Time) Amendment Bill 1991

* Social Security (Job Search and Newstart) Amendment Bill 1991

* Taxation Laws Amendment Bill (No. 2) 1991

Training Guarantee (Guidelines) Bill 1991

* **The Committee has commented on these Bills**

INCOME TAX (INTERNATIONAL AGREEMENTS) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 18 April 1991 by the Minister Assisting the Treasurer.

The Bill proposes to amend the Income Tax (International Agreements) Act 1953 to provide legislative authority to comprehensive double taxation agreements which have been concluded between Australia and Hungary and Australia and Kiribati.

The Committee has no comment on this Bill.

INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the Senate on 18 April 1991 by the Minister for Industrial Relations.

The Bill proposes to amend:

- the Defence Act 1903, to streamline the procedures of the Defence Force Remuneration Tribunal;

- the Industrial Chemicals (Notification and Assessment) Act 1989, to make minor drafting and technical changes;

- the Industrial Relations Act 1988, to give effect to certain recommendations contained in a report by a Committee of Review into the structure of the Industrial Relations Commission and the remuneration of its members; and

- the Trade Union Training Authority Act 1975, to give legislative effect to certain structural and administrative changes.

The Committee has no comment on this Bill.

MIGRATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 17 April 1991 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to amend the Migration Act 1958 to:

- introduce new arrangements for processing undocumented and unexpected arrivals;
- change merits review provisions; and
- make technical amendments to allow improved concessions and measures.

Delegation of power to 'an officer'
Paragraph 3(d)

Paragraph 3(c) and (d) of the Bill propose to amend section 4 of the Migration Act 1958 to add to the definition of 'officer' for the purposes of that Act. The Migration Act currently defines 'officer' as:

> (a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph;

(b) a person who is an officer for the purposes of the Customs Act 1901, other than such an officer specified by the Minister in writing for the purposes of this paragraph;

(c) a person who is a protective service officer for the purposes of the Australian Protective Service Act 1987, other than such a person specified by the Minister in writing for the purposes of this paragraph;

(d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or

(e) a member of the police force of an external Territory.

Paragraph 3(c) of the Bill proposes to add 'or' after paragraphs (a), (b) and (c) of the definition. Paragraph 3(d) then proposes to add the following as paragraph (f) of the definition:

> or ... any person authorised by the Minister in writing for the purposes of this paragraph.

The Committee generally does not approve of provisions which allow powers to be given to 'a person', as it is preferable that there are limits on the persons to whom such powers can be delegated. In the context of this Bill, the Committee notes that proposed new sections 54C and 54G (to be inserted by clause 12 of the Bill) would, if enacted, allow an 'officer' to, respectively, detain 'an unprocessed person' (as defined by the Bill) or arrest them without warrant. In the Committee's opinion, this is a significant power and one which should not be able to be delegated without any restriction as to the persons or classes of persons to whom it could be delegated.

The Committee draws Senators' attention to the clause 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.

Discretion to decide a person is an 'unprocessed person'
Clause 12 - proposed new section 54B

Proposed new section 54B, which is to be inserted by clause 12 of the Bill, introduces the concept of an 'unprocessed person'. An unprocessed person is someone who an authorised officer reasonably supposes would, if allowed to enter into Australia, become an illegal immigrant and in relation to whom it is impracticable or inconvenient to decide immediately whether or not an entry permit should be granted.

Classification as an 'unprocessed' person carries with it certain significant consequences including, as discussed above, the liability to be detained or arrested without warrant. However, there does not appear to be any provision within the legislation to allow a person to challenge their designation as an unprocessed person. If this is the case, it appears that the only recourse for a person who disputes their designation as such would be a writ of *habeas corpus* or an action in trespass.

Both courses of action would be neither easy to initiate nor of immediate assistance to a person in this situation. Further, in the case of an action in trespass, the person detained would have to show that the authorised officer had not properly formed the opinions required in order to designate the person as 'unprocessed'. In addition, the Committee notes that success in such an action would only entitle a person to damages, which does not necessarily make the action the most efficacious recourse to a person who has been incorrectly designated as an 'unprocessed person'.

The Committee draws Senators' attention to the clause 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.

NATIONAL MEASUREMENT (STANDARD TIME) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 18 April 1991 by Mr R F Edwards as a Private Member's Bill.

The Bill proposes to amend the National Measurement Act 1960, to provide for the specification of standard time zones for the States and Territories of Australia and to regulate summer time.

The Committee has no comment on this Bill.

SOCIAL SECURITY (JOB SEARCH AND NEWSTART) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 18 April 1991 by the Minister Representing the Minister for Social Security.

The Bill proposes to abolish the unemployment benefit and job search allowance and replace them with two new components:

(1) a short-term job search allowance, available to unemployed persons under 18 years of age and persons over 18 who have been registered as unemployed for less than 12 months; and

(2) a newstart allowance for persons 18 years of age and over who have been registered as unemployed for more than 12 months.

Provision of tax file numbers
Clause 7 - proposed new sections 527, 528, 609 and 610

Clause 7 of the Bill proposes to repeal and replace Parts 2.11 and 2.12 of the Social Security Act 1991. Included in those new Parts are requirements to provide tax file numbers in relation to job search allowances and newstart allowances. In addition, proposed new sections 528 and 610 would require an applicant for such an allowance to provide their partner's tax file number also.

The provisions are similar in effect to provisions which the Committee has previously drawn attention to, most recently in Alert Digest No. 5 of 1991 in relation to provisions in the Student Assistance Amendment Bill 1991. As the Committee observed at that time, while such provisions may be seen as necessary to prevent persons defrauding the social security system, they may also be considered as unduly intrusive upon 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.

Abrogation of privilege against self-incrimination
Clause 7 - proposed new sections 576 and 659

Proposed new sections 574 and 575, which are to be inserted by clause 7 of the Bill, would allow the Secretary of the Department of Social Security to require a person to whom a job search allowance is being paid to notify the Department of certain events and to give the Department particular information. Pursuant to proposed new subsection 576(1), a person would not be excused from providing information as required by those provisions on the ground that the information would tend to incriminate them.

Proposed new sections 657 and 658 would allow the Secretary to require that certain information be provided in relation to a newstart allowance. Similarly, proposed new subsection 659(1) would prevent a person from declining to provide such information on the grounds that it might tend to incriminate them.

These provisions are what the Committee would generally regard as an abrogation of the privilege against self-incrimination. However, in each case, information given by a person pursuant to those new sections is not admissible in evidence against a person in a criminal proceeding other than a proceeding under, or arising out of, those particular sections of the Social Security Act. As such, the provisions are in a form which the Committee has previously been prepared to accept. Accordingly, the Committee makes no further comment on the provisions.

Non-reviewable decisions
Clause 13

Clause 13 of the Bill proposes to amend section 1250 of the Social Security Act 1991. Section 1250 provides that certain decisions under the legislation are not subject to review by the Social Security Appeals Tribunal. Clause 13 proposes to add three further decisions to the list. They are:

a) a decision (pursuant to proposed new subsection 23(4A)) by the Employment Secretary to approve an 'allowance category';

b) a decision (pursuant to proposed new subsection 606(2)) by the Secretary to approve the terms of a Newstart Activity Agreement; and

c) a decision by the Employment Secretary under a provision dealing with the approval of a course or labour market program.

Principle 1(a)(iii) of the Committee's terms of reference require it to draw attention to provisions which make personal rights, liberties and/or obligations unduly dependent on non-reviewable decisions. With that in mind, the Committee would appreciate some assistance from the Minister on the need for these decisions to be immune from review and the likely impact of such immunity on would-be applicants for review.

In particular, the Committee would appreciate the Minister's advice as to the effect which the immunity from review would have in relation to Newstart Activity Agreements under proposed new section 606. The Committee notes that though the proposed new section refers to the arrangement between the Department and the applicant as an 'agreement', it appears that an applicant for a newstart allowance would have no opportunity to negotiate the terms of such an agreement. They could, of course, decline to sign the agreement. However, the Committee notes that this would, presumably, result in the allowance being denied. The Committee seeks the Minister's advice as to whether, in fact, an opportunity would exist for an applicant to question the terms of a Newstart Activity Agreement.

General comment

The Committee notes that this Bill seeks to amend a piece of legislation which only passed both Houses of the Parliament on 10 April 1991. The amendments proposed are both complicated and substantial. Given that a primary object of the Principal Act was to make the social security legislation easier to comprehend, it is unfortunate that this piece of amending legislation has been necessary so soon after the passage of the Principal Act.

TAXATION LAWS AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 18 April 1991 by the Minister Assisting the Treasurer.

The Bill proposes to amend various taxing Acts. The amendments relate to:

- taxation arrangements for genuine residents of the Territory of Cocos (Keeling) Islands;
- taxation of foreign source income;
- exemption from taxation for foreign employment income;
- the definition of 'thin capitalisation';
- arrangements for capital expenditures on land degradation measures;
- arrangements to allow deductions for current and capital expenditure incurred in rehabilitating mining and quarrying sites;
- tax file number rules;
- provisions dealing with the exemption of certain pensions, benefits and allowances;
- securities lending arrangements;
- provisions relating to company and superannuation fund self-assessment provisions;
- access arrangements for certain law enforcement agencies to taxation information; and

- gift provisions, reflecting a name change for the College of Nursing, Australia.

Retrospectivity
Subclauses 2(3)-(7), 83(5), (6), (7), (8), (10), (14), (15) and (16)

Clause 2 of the Bill deals with the commencement of various provisions of the Bill:

- subclause 2(3) proposes to make the amendments to be effected by clause 29 operate from immediately after the commencement of section 14 of the Taxation Laws Amendment Act 1991 (ie 24 April 1991);

- subclause 2(4) proposes to make the amendments to be effected by paragraph 33(a) operate from the commencement of section 31 of the Taxation Laws Amendment Act (No. 2) 1991 (ie 16 June 1990);

- subclause 2(5) proposes to make the amendments to be effected by paragraphs 33(c) and (d) operate from the commencement of section 31 of the Taxation laws Amendment Act (No. 3) 1989 (ie 30 June 1989);

- subclause 2(6) proposes to make the amendments to be effected by clause 77 operate from immediately after the commencement of section 76 of the Taxation Laws Amendment Act 1991 (ie 24 April 1991);

- subclause 2(7) proposes to make the amendments to be effected by clause 78 operate from immediately after the commencement of the Taxation Laws Amendment (Foreign Income) Act 1990 (ie 8 January 1991).

Clause 83 of the Bill deals with the application (as opposed to the commencement) of various amendments proposed by the Bill:

- subclause 83(5) proposes to apply the amendments to be effected by clause 28 to dividends paid after 18 April 1991;

- subclause 83(6) proposes to apply the amendments to be effected by clause 30 to expenditure incurred after 21 August 1990;

- Subclause 83(7) proposes to apply the amendments to be effected by subparagraph 78(1)(a)(xxiv) to gifts made on or after 13 July 1989;

- subclause 83(8) proposes to apply the amendments to be effected by paragraphs 33(b), (e) and (f) to assessments in respect of income of the 1985-86 year of income and all subsequent years of income;

- subclause 83(10) proposes to apply the amendments to be effected by paragraphs 41, 42, 43 and 44 to assessments in respect of income of the 1987-88 year of income and of all subsequent years of income;

- subclause 83(14) proposes to apply the amendments to be effected by clauses 56 and 65 to the year of income ending on 30 June 1990 and subsequent years of income;

- subclause 83(15) proposes to apply the amendments to be effected by proposed new subsections 202D(6) and (7), new section 202DDB and new subsection 202DG(4) to the quotation of tax file numbers on or after 1 July 1990; and

- subclause 83(16) proposes to apply the amendments to be effected by clause 76 to the calculation of attributable income of any eligible period beginning on or after 1 July 1990.

The various subclauses of clauses 2 and 83 referred to above all involve retrospective operation. However, in each case, the retrospectivity is noted and explained in the Explanatory Memorandum to the Bill. In addition, the amendments are either to correct drafting errors, beneficial to taxpayers or operate from the date on which the Bill was introduced. Accordingly, the Committee makes no further comment on the Bill.

General comment

The Committee notes that the Explanatory Memorandum to this Bill is an example of the so-called 'new style' of explanatory memorandum. There are aspects of the new style of which the Committee strongly approves. The Committee commends the new approach and the attempt to make what is, as a rule, very complicated legislation easier to understand.

TRAINING GUARANTEE (GUIDELINES) BILL 1991

This Bill was introduced into the Senate on 17 April 1991 by Senator Reid as a Private Senator's Bill.

The Bill proposes to amend the guidelines made pursuant to the Training Guarantee (Administration) Act 1990, to remove the arbitrary size limits of the prescribed categories under which an organisation can apply to become a Registered Industry Training Agent and replace them with 'general statement' criteria.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 8 OF 1991

15 MAY 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* *Australian and Overseas Telecommunications Corporation Bill 1991*

Customs Amendment Bill 1991

Departure Tax Amendment Bill 1991

Petroleum Resource Rent Legislation Amendment Bill 1991

* Petroleum (Submerged Lands) Amendment Bill 1991

Petroleum (Submerged Lands)(Royalty) Amendment Bill 1991

* Political Broadcasts and Political Disclosures Bill 1991

Telecommunications (Application Fees) Bill 1991

* Telecommunications Bill 1991

Telecommunications (Carrier Licence Fees) Bill 1991

* Telecommunications (Numbering Fees) Bill 1991

Telecommunications (Transitional Provisions and Consequential Amendments) Bill 1991

* Telecommunications (Universal Service Levy) Bill 1991

* **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 AND OVERSEAS TELECOMMUNICATIONS CORPORATION BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to amalgamate Telecom and OTC and to create a new fully public-owned corporation, the Australian and Overseas Telecommunications Corporation.

Prospective commencement
Subclause 2(1)

Subclause 2(1) of the Bill provides that, subject to clause 2, the Bill is to commence on a day to be fixed by Proclamation. Subclause 2(2) provides that Part 1 of the Bill is to commence on Royal Assent. Subclause 2(3) provides that Part 6 is to commence on 1 July 1991. This means that Parts 2, 3, 4, 5, 7 and 8 would commence on a date to be proclaimed.

Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 states that if a Bill or part of a Bill is to commence by Proclamation then, as a general rule, there should be a limit on the time within which such a Proclamation can be made. Failing this, the Drafting Instruction suggests that an explanation should be included in the Explanatory Memorandum to the Bill. In the present case, the Explanatory Memorandum states:

> The succession provisions of the Bill will commence on a day to be fixed by proclamation. This is so that proclamation can be made to coincide with the certification by AUSTEL that interconnection and equal access arrangements between the networks of Telecom and OTC and the second carrier are fully in place in all capital cities and an implementation timetable has been agreed by Telecom and OTC for provincial cities. This linkage has been made to provide an incentive for Telecom and OTC to move quickly on interconnection so that they can begin to derive the benefits of their merger. The standard provision, which provides for automatic commencement within 6 months if there has been no proclamation, has not been included because there can be no certainty that the AUSTEL certification can be provided within that timeframe.

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

Definition of 'authorised person'
Clause 3

Clause 3 of the Bill provides that an 'authorised person' is either the Minister or 'a person authorised by the Minister'. There is no limit as to the persons or classes of persons whom the Minister may so authorise. Given that an authorised person would be able, for example, to certify that a matter is an exempt matter for the purposes of Commonwealth, State or Territory taxation (clause 25), this might be considered to be a power which should involve limits as to the persons to whom it can be delegated.

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

'Henry VIII' provisions
Clauses 24 and 25

Clause 24 of the Bill provides that the Australian Overseas Telecommunication Corporation is not to be taken to be a public authority. This means, among other things, that the Corporation is not to be entitled to any immunity or privilege of the Commonwealth. However, the clause concludes by providing that this exclusion applies

> except so far as express provision is made by this Act or any other law of the Commonwealth, or by a law of a State or of a Territory, as the case may be, or the regulations otherwise provide.

The reference to regulations 'otherwise [providing]' is what the Committee would generally regard as a 'Henry VIII' clause, as the effect of such a provision would be to allow for the primary legislation to be amended by secondary legislation.

Similarly, clause 27 of the Bill provides that, subject to clause 24, the laws of the Commonwealth are to apply to the Corporation,

> except to the extent that [the Corporation] is exempted from the application of a particular law or class or laws by express provision of this Act or the regulations or of any other law of the Commonwealth.

This also means that the provisions of the primary Act can, in effect, be amended by regulation. The Explanatory Memorandum to the Bill offers no justification for the clauses being drafted in this way.

The Committee draws attention to the clauses as they 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.

Inappropriate delegation of legislative power
Clause 30

Clause 30 of the Bill provides:

> On and after a date to be fixed by the Minister by notice published in the *Gazette*, the Environment Protection (Impact of Proposals) Act 1974 ceases to apply to [the Corporation].

The clause therefore proposes to give the Minister an unfettered discretion to determine, at any time, that the Environment Protection (Impact of Proposals) Act 1974 ceases to apply to the Corporation. However, the Committee notes that the Explanatory Memorandum states:

> A special approach to environmental concerns has been adopted (the development of a national code detailed in the Telecommunications Bill 1991) to ensure that due consideration is given to them while at the same time ensuring that the second carrier is not unduly impeded from constructing and operating a competitive network infrastructure in the shortest possible time. To ensure proper consideration is taken of environmental issues, the [Environment Protection (Impact of Proposals) Act] will continue to apply to the telecommunications industry until an enforceable national planning code has been developed in consultation with relevant State and local authorities.

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

CUSTOMS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 9 May 1991 by the Minister for Small Business and Customs.

The Bill proposes to amend the Customs Act 1901 to:

(i) implement certain reforms to the anti-dumping subsidisation regime (expanding the definition of Australian industry in order to assist agricultural industries, simplifying the determination of provisional dumping measures and ensuring all anti-dumping and countervailing measures are applied for three years); and

(ii) effect technical changes relating to the conferral of power on judges to make detention and internal search orders.

The Committee has no comment on this Bill.

DEPARTURE TAX AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 8 May 1991 by the Minister for Land Transport.

The Bill proposes to increase the rate of departure tax from $10 to $20, effective from 1 August 1991.

The Committee has no comment on this Bill.

PETROLEUM RESOURCE RENT LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 9 May 1991 by the Treasurer.

The Bill proposes to give effect to certain measures announced in the Budget. Principally, this Bill will extend (from 1 July 1990) the resource rent tax to petroleum recovered from Bass Strait and allow a wider taxation deductibility of exploration expenditure.

The Committee has no comment on this Bill.

PETROLEUM (SUBMERGED LANDS) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 8 May 1991 by the Minister for Resources.

The Bill proposes to amend the Petroleum (Submerged Lands) Act 1967, to streamline the operation of the Act in relation to offshore petroleum.

Delegation of power to 'two persons'
Clause 3

Clause 3 of the Bill proposes to insert new section 8H into the Petroleum (Submerged Lands) Act 1967. Proposed new section 8H would allow a Joint Authority (which, in respect of each relevant State and Territory, consists of the Commonwealth Minister responsible for administering the legislation and the Minister's counterpart in the relevant State or Territory) to delegate its powers under the Act to 'two persons'.

Under the Act, a Joint Authority has wide-ranging powers, principally concerned with the granting of permits in relation to exploration of the continental shelf. In the light of this, it may be considered appropriate that the persons or classes of persons to whom the power can be delegated should be limited.

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

PETROLEUM (SUBMERGED LANDS) (ROYALTY) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 8 May 1991 by the Minister for Resources.

The Bill proposes to amend the Petroleum (Submerged Lands)(Royalty) Act 1967, to clarify a number of matters concerned with the collection and verification of royalties paid by petroleum producers.

The Committee has no comment on this Bill.

POLITICAL BROADCASTS AND POLITICAL DISCLOSURES BILL 1991

This Bill was introduced into the House of Representatives on 9 May 1991 by the Minister for Transport and Communications.

The Bill proposes to amend:

- the Broadcasting Act 1942, to prohibit the broadcasting of political advertisements at all times;

- the Commonwealth Electoral Act 1918, to require the full disclosure of all income, expenditure and debts of registered political parties;

- the Radiocommunications Act 1983, to ensure that licensees of multipoint distribution station licences comply with the broadcasting ban on political advertising; and

- the Referendum (Machinery Provisions) Act 1984, to ensure that the result of a referendum will not be overturned by the Court of Disputed Returns by reason of a breach of the Broadcasting Act 1942 or the Radiocommunications Act 1983.

Production of documents
Paragraph 17(b)

Paragraph 17(b) of the Bill proposes to insert a new subsection 316(2A) into the Commonwealth Electoral Act 1918. Section 316 of the Act deals with the investigation of alleged offences under that Act. Proposed new subsection would allow an 'authorised officer' (defined by subsection 316(2) as 'a person or a person included in a class of persons' authorised by the Electoral Commissioner to perform duties under the section) to require certain persons to appear before the officer or to produce documents. Failure to comply with such a requirement, 'without reasonable excuse', carries a penalty of up to $1000. In the light of the seriousness of the offence, the Committee suggests that it may be appropriate that the proposed new subsection also specify that the persons comply within a reasonable time. The possibility of a penalty of this magnitude being imposed without such a safeguard might be regarded as an unreasonable incursion into personal rights and liberties.

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

Prima facie, the limitations which are to be imposed by the Bill amount to an interference with the freedom of expression. Such an interference would be considered a trespass on personal rights and liberties, as contemplated by principle 1(a)(i) of the Committee's terms of reference. However, the principle requires the

Committee to examine legislation as to whether it trespasses unduly on personal rights and liberties.

The Committee acknowledges that the freedom of expression is not absolute. In this regard, the Committee notes that Article 19 of the International Convention on Civil and Political Rights (to which Australia is a signatory) provides:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

What is a 'necessary' restriction on the freedom of expression has to be decided on the basis of what is justifiable in the particular circumstances. Restrictions on the freedom of expression which are currently regarded as necessary relate to matters such as defamation, pornography and the incitement of racial hatred. Ultimately,

what is a necessary restriction is a matter of public policy. As such, it is a question which is appropriately a matter for decision by the Parliament.

In making this general comment, the Committee also acknowledges that it has been foreshadowed that there will be a legal challenge to this legislation. The legality of the legislation may then be decided by the High Court. In the light of all these factors, the Committee expresses no further views on the Bill.

TELECOMMUNICATIONS (APPLICATION FEES) BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to provide for application fees which will be payable in respect of certain applications to the Australian Telecommunications Authority (AUSTEL). The fees relate to general telecommunications licences and public mobile licences to be issued pursuant to the Telecommunications Bill 1991. In addition, application fees will apply for the use of certain line links and satellite facilities and for enrolment as a supplier of public access cordless telephone services.

The Committee has no comment on this Bill.

TELECOMMUNICATIONS BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to repeal and replace the Telecommunications Act 1989, to provide the general regulatory framework for the provision of telecommunications facilities and services in Australia.

Postponed commencement
Subclauses 2(3) and (4)

Clause 2 of the Bill deals with the commencement of the legislation. Subclause 2(3) provides that clauses 116 and 120 are to commence on a day to be fixed by Proclamation. The Explanatory Memorandum to the Bill states:

> The reason for the delayed commencement is that it is intended that these clauses will be proclaimed once the National Code in clause 120 has been proclaimed.

Subclause 2(4) provides that if clauses 116 and 120 have not commenced by 1 January 1991, they commence on that day. Depending on if and when the Bill is passed, this date may be slightly outside the six month limit set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. However, in the light of the explanation provided by the Explanatory Memorandum and the fact that any transgression is likely to be slight, the Committee makes no further comment on the clause.

'Henry VIII' provision
Clause 11

Division 2 of Part 2 of the Bill deals with the boundaries of telecommunications networks. Clause 11 provides:

> (1) The regulations may make provision for or in relation to:
>
> (a) defining the boundaries of a telecommunications network; or
>
> (b) determining the equipment, lines and other facilities that are to be taken to be beyond, or not beyond, the boundaries of a telecommunications network.
>
> (2) Regulations in force because of subsection (1) have effect despite anything in this Division.

The effect of subclause 11(2) is to allow the regulations to, in effect, amend the operation of provisions in Division 2. As such, it is what the Committee would generally regard as a 'Henry VIII' clause, because it would permit the primary legislation to be amended by subordinate legislation.

The Explanatory Memorandum offers two reasons for allowing this 'latitude' to the regulations:

> First, network interfaces can be technical complex [*sic*], involving rapidly changing technology. In such circumstances, it may become necessary to modify the application of the provisions, or to create new classes of end facilities.
>
> The second reason for the latitude in regulation making power is to enable effect to be given to the Government's decision announced by the Minister for Transport and Communications on 17 April 1991 that

> from 1 July 1993 the [network termination point] would be the property boundary.

The Committee is puzzled by the second limb of the justification. If the Committee has interpreted the statement correctly, it is suggested that it is necessary to provide a mechanism in the Bill to enable the amendment of the Bill in two years time, in order to give effect to an initiative which is to operate from that time. This being so, the Committee finds it difficult to understand why such an amendment cannot be effected by primary legislation rather than by regulation. The Committee would appreciate some clarification from the Minister on this matter.

Non-reviewable decisions
Clauses 57 and 60

Clause 56 of the Bill provides that an eligible corporation (as defined) may apply to the Minister for a general telecommunications licence or a public mobile licence. Clause 57 would allow the Minister to either grant a licence or to refuse or defer an application. Subclause 57(1)(b) would give the Minister an 'absolute discretion' to either grant a licence or refuse an application. Further, subclause 57(3) provides:

> Despite any other law, the Minister need not give reasons for a decision under this section.

The Explanatory Memorandum acknowledges that this clause excludes the operation of section 13 of the Administrative Decisions (Judicial Review) Act 1977, which, in certain circumstances, gives individuals a right to obtain reasons for decisions made that affect them.

Similarly, clause 60, which deals with applications to transfer a licence, would give the Minister an 'absolute discretion' to either grant or refuse such an application. Subclause 60(4) also provides that the Minister need not give reasons for such a decision.

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

'Henry VIII' clause
Clause 116

Clause 116 of the Bill provides, in part:

> (1) The regulations may provide that specified carriers may engage in specified exempt activities:
>
> (a) despite specified laws of a State or Territory; or
>
> (b) despite any law of a State or Territory.
>
> (2) A regulation in force because of subsection (1) has effect, according to its tenor, because of this subsection.

The effect of subclause 116(1) is analogous to a 'Henry VIII' clause, as it would permit the disapplication of primary State and Territory legislation by means of subordinate Commonwealth legislation. By way of explanation, the Explanatory Memorandum states:

> Telecom, historically, has had an immunity from State and Territory laws. Consequently, those laws have developed over time without consultation with Telecom or regard for the needs of the national telephone system. For example, State electricity laws create stringent standards in relation to power supply, which are designed for high voltage alternating current, not the low voltage direct current used in the telephone system. Application of those laws to Telecom could require a shutdown of the telephone service across the country until those laws were amended to take account of the special case of telecommunications services.

The Explanatory Memorandum goes on to state:

> However, it is recognised that the carriers should be subject, as far as practicable, to State and Territory laws. An immunity will only be needed in relation to specified telecommunications activities. For example, a carrier's administrative offices should comply with State and Territory planning requirements. However, those State laws may require a building of a certain size to have a certain number of car parking spaces or a percentage of window area. Such requirements may be inappropriate for an exchange building which houses equipment rather than staff.

Indeed, the Committee notes that the concluding subclauses of clause 116 provide:

> (3) It is the Parliament's intention that, where a regulation in force because of subsection (1) entitles a carrier to engage in specified exempt activities despite specified laws of a State or Territory, nothing in the regulation or in this section is to affect the operation of any other law or a State or Territory, so far as that other law is capable of operating concurrently with this Act.
>
> (4) Nothing in this section affects the liability of a carrier to taxation under a law of a State or Territory.

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

In the light of the explanation provided, and bearing in mind the effect of subclauses (3) and (4), the Committee makes no further comment on the clause.

Power to enter premises without warrant
Clause 362

Clause 362 of the Bill proposes to authorise an inspector to enter and search premises, without warrant and at any time during the day or night, for the purposes of ascertaining whether certain parts of the legislation have been complied with. The Committee has, as a rule, drawn attention to such provisions, on the basis that entry and search should only be permissible subject to a warrant issued by a judge or a magistrate.

However, several aspects of the current provision are worthy of note. First, unlike clause 363, which deals with searches and seizures in relation to suspected offences, clause 362 does not authorise the use of force in such entry and search. As a result, an inspector would not be able to enter and search unoccupied premises (unless, of course, they were open). Second, if the occupier of premises requires an inspector to produce his or her identity card, the inspector is not entitled to enter and search the premises unless they do so. Third, pursuant to subclause 362(2), if the premises are a residence, an inspector is not entitled to enter the premises unless the occupier of the premises consents to the entry.

With these factors in mind, the Committee makes no further comment on the clause.

TELECOMMUNICATIONS (CARRIER LICENCE FEES) BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to provide for the payment of fees for general telecommunications licences and public mobile licences issued pursuant to the Telecommunications Bill 1991.

The Committee has no comment on this Bill.

TELECOMMUNICATIONS (NUMBERING FEES) BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to provide for the payment of fees in relation to the allocation of numbers for public telecommunications services.

Fees for allocation of 'special numbers' - inappropriate delegation of legislative power
Clauses 5 and 7

Clause 5 of the Bill provides:

> There is payable to the Commonwealth, by a person to whom a number is to be allocated under section 242 of the Telecommunications Act 1991, in respect of the allocation of that number, the additional fee (if any) worked out as set out in the regulations.

The Committee notes that while the heading to the clause is 'Fees for allocation of "special" numbers', there does not appear to be anything in the body of the Bill to prevent the application of an additional fee to all subscribers. In this context, the Committee notes that, pursuant to subsection 13(3) of the Acts Interpretation Act 1991, a heading is not a part of an Act.

In relation to this clause, the Explanatory Memorandum states:

> This clause allows for the determination under the regulations of an additional fee for the allocation by AUSTEL of a number under section 242 of the Telecommunications Act 1991. Where an additional fee for a number is to be determined or worked out in accordance with the procedure set out in the regulations that additional fee is payable to the Commonwealth by a person to whom the number is allocated by AUSTEL under section 242 of the Telecommunications Act 1991.

The Minister's Second Reading speech on the Bill states:

> The bill provides for different levels of fees to be charged for ordinary and 'special' numbers.

While they are not part of the Bill, the heading, the Explanatory Memorandum and the Minister's Second Reading speech could, of course, be used as extrinsic aids to the interpretation of the provision pursuant to section 15AB of the Acts Interpretation Act. That section provides that if

(i) [a] provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of [a] provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable,

certain 'extrinsic material' can be used to help determine the meaning of the provision. The heading, the Explanatory Memorandum and the Second Reading speech are all explicitly contemplated as extrinsic aids to the interpretation of a provision (see subsection 15AB(2), especially paragraphs (a), (e) and (f)). However,

while this provision might assist a subscriber who attempted to challenge the imposition of an additional fee in respect of an 'ordinary' number, it seems preferable that the intent of the provision be manifested in the legislation itself.

In this regard, the Committee notes that clause 7 of the Bill would, if enacted, allow the Governor-General to make regulations for the purposes of clause 5. Among other things, these regulations can fix fees for the purposes of that clause. Unlike clause 6, which sets a limit of $2000 on fees to be fixed by regulation for allocation of 'ordinary' numbers pursuant to clause 4, there is no limit on the fee that can be set for a 'special' number. As such, this is what the Committee would generally regard as an inappropriate delegation of legislative power, as it would give an unfettered discretion to the Governor-General (acting with the advice of the Executive Council) as to the level of the fees to be set.

Given the uncertainty which the Committee has identified concerning the operation of clause 5, the Committee draws Senators' attention to the provisions, as they may involve an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

TELECOMMUNICATIONS (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to repeal the following Acts:

- Telecommunications Act 1989;
- Telecommunications (Application Fees) Act 1989;
- Australian Telecommunications Corporation Act 1989; and
- OTC Act 1946.

The Bill also proposes to make amendments consequential to the repeals.

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.

TELECOMMUNICATIONS (UNIVERSAL SERVICE LEVY) BILL 1991

This Bill was introduced into the House of Representatives on 7 May 1991 by the Minister for Transport and Communications.

The Bill proposes to impose a levy on certain telecommunications carriers as a contribution to the costs of fulfilling the universal service obligation (as provided in clause 288 of the Telecommunications Bill 1991).

Inappropriate delegation of legislative power
Subclause 4(1)

Subclause 4(1) of the Bill provides:

> The Minister may, by notice published in the *Gazette*, declare a specified carrier to be a participating carrier.

Designation as a 'participating carrier' involves the payment of the Universal Service Levy, which may be regarded as a form of taxation. If this is the case, the Committee suggests that designation as a 'participating carrier' might be a matter which is more appropriately the subject of scrutiny by the Parliament rather than something which should simply be notified in the *Gazette*. Notices designating a person as such might, therefore, properly be instruments that should be subject to tabling in and disallowance by the Parliament.

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

SCRUTINY OF BILLS ALERT DIGEST

NO. 9 OF 1991

29 MAY 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* Australian National University Bill 1991
* Crimes Legislation Amendment Bill (No. 2) 1991
* Great Barrier Reef Marine Park Amendment Bill 1991

  Industrial Relations Amendment Bill 1991
* National Food Authority Bill 1991
* National Health Amendment Bill 1991
* Service and Execution of Process Amendment Bill 1991
* Social Security (Rewrite) Amendment Bill 1991

  University of Canberra Amendment Bill 1991

  Veterans' Entitlements (Rewrite) Transition Bill 1991

*** 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.

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES PROVIDED

As Senators will be aware, comments on a Bill which are made by the Committee in an Alert Digest are also drawn to the attention of the Minister responsible for the Bill. The Minister is invited to respond to those comments. If a response is provided, the Committee is able to inform the Senate of the contents of that response in a subsequent Report.

The Committee's secretariat often receives queries from Senators, Members and others about whether or not responses have been received in relation to comments made about particular Bills. In response to such queries, the secretariat advises that all responses received are published once the relevant legislation is introduced in the Senate. Often it is the case that responses are not able to be reported because the relevant legislation has not yet been introduced in the Senate.

For the information of Senators, Members and others who follow its Alert Digests and Reports, the Committee has decided to prepare, maintain and publish an index of comments made on Bills and Ministerial responses received in relation to those comments. Such an index appears at the end of this Alert Digest. In future, an index will be appended to each Alert Digest. The Committee trusts that the index will be of assistance to those who follow the Committee's work.

AUSTRALIAN NATIONAL UNIVERSITY BILL 1991

This Bill was introduced into the House of Representatives on 15 May 1991 by the Minister for Higher Education and Employment Services.

The Bill proposes to repeal the Australian National University Act 1946 and the Canberra Institute of the Arts Ordinance 1988, to allow the amalgamation of the Australian National University and the Canberra Institute of the Arts with effect from 1 January 1992.

Abrogation of protection against self-incrimination
Subclause 47(10)

Clause 47 of the Bill sets out requirements for the audit of the accounts and records of the financial transactions of the Australian National University. Pursuant to subclause 47(6), the Auditor-General or an authorised person would be able to require a person to provide information or to produce documents in relation to that audit. Pursuant to subclause 47(10), a person would not be able to decline to provide or produce such information or documents on the basis that such production might tend to incriminate them. As such, this is an abrogation of the common law protection against self-incrimination. However, the Committee notes that subclause (10) goes on to provide that

> any information so given is not admissible in evidence against the person in any criminal proceedings, other than proceedings for an offence against subsection (8) or (9).

The provision is, therefore, formulated in such a way that the Committee has previously been prepared to accept. Accordingly, the Committee makes no further comment on the clause.

Delegation of power to 'a person'
Subclause 47(11)

Various subclauses of clause 47 of the Bill would permit the Auditor-General 'or an authorised person' to do certain things. Subclause 47(11) defines an 'authorised person' as:

> a person authorised in writing by the Auditor-General to act under this section.

There is no limit on the persons whom the Auditor-General may so authorise. Given the powers and responsibilities which could be delegated by such authorisation, the Committee suggests that there should be a limit on the persons or classes of persons whom the Auditor-General can authorise for the purposes of the provision.

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

'Henry VIII' clause
Subclause 48(3)

Clause 48 of the Bill deals with the University's immunity from taxation. Subclause 48(1) provides that (subject to subclause 48(3)) the University is not to be subject to taxation under the laws of the Commonwealth or of a State or Territory. Similarly, subclause 48(2) provides that (subject to subclause 48(3)) the University is not to be subject to taxation imposed by the Debits Tax Act 1982 or to sales tax. However, subclause 48(3) goes on to provide that the Governor-General may make regulations providing that the provision does not apply in relation to taxation under a specified law.

This is what the Committee would generally regard as a 'Henry VIII' clause, as it would allow the Governor-General (acting with the advice of the Executive Council) to make regulations which, in effect, amend the substantive provisions of the primary legislation. The Committee draws attention to such clauses as a matter of principle. In addition, however, the Committee notes that in the present case there is no indication of the kinds of eventualities which the provision is intended to cover. Accordingly, the Committee draws Senators' attention to the provision, as it may be considered 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 that the reference in subclause 28(2) to 'paragraph 26(m)' would appear to be incorrect and suggests that a reference to paragraph 26(k) is intended. The Committee also notes that the exemption in subclause 48(2) from

'taxation imposed by the Debits Tax Act 1982' would appear to be unnecessary, given that section 4A of that Act provides that such tax is not imposed in relation to debits made on or after 1 January 1991 and bearing in mind that, pursuant to clause 2, the Bill would not commence until 1 January 1992.

CRIMES LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 15 May 1991 by the Attorney-General.

The Bill proposes to amend nine Acts concerned with crime, law enforcement and criminal justice. Significant amendments are proposed to:

- the Passports Act 1938 and Crimes Act 1914, to ensure the effective operation of the Minister's power to cancel or refuse passports to persons charged with, or convicted of, serious offences (particularly drug offences); and

- the Cash Transaction Reports Act 1988, to enable the Attorney-General to provide information obtained under that Act to a foreign law enforcement agency to which the Mutual Assistance in Criminal Matters Act 1987 applies.

Prospective commencement
Clause 2

Clause 2 of the Bill provides for the commencement of the legislation. Subclause 2(3) provides:

> Subject to subsections (4) and (5), section 51 and Part 8 commence on a day or days to be fixed by Proclamation.

Subclause 2(4) provides:

> If the commencement of Part 8 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 Part is repealed on the first day after the end of that period.

Subclause 2(5) provides:

> If section 51 does not commence under subsection (3) 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.

Subclauses 2(4) and (5) are, presumably, drafted with Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 in mind. That drafting instruction provides, in part:

> 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).

Subclause 2(5) appears to satisfy the requirements of paragraph 3 of the drafting instruction. Subclause 2(4) appears to satisfy the requirements of paragraph 5. The Committee makes no further comment on the clause.

General comment

The Committee notes that the Explanatory Memorandum to the Bill states:

> Subclauses 2(3) and 2(5) provide that clause 51, which amends section 98 of the *Proceeds of Crime Act 1987*, commences on a date to be fixed by [P]roclamation. If not proclaimed within 6 months after Royal Assent, clause 50 will commence on the next following day.

The Committee assumes that the reference to **clause 50** should be a reference to **clause 51**.

The Committee makes no further comment on the Bill.

GREAT BARRIER REEF MARINE PARK AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 15 May 1991 by the Minister for the Arts, Sport, the Environment, Tourism and Territories.

The Bill proposes to amend the Great Barrier Reef Marine Park Act 1975, to provide for a system of compulsory pilotage in the areas of the Great Barrier Reef designated as 'Particularly Sensitive Areas' by the International Maritime Organisation.

Reversal of the onus of proof
Clause 10 - proposed new subsections 59H(1) and (3)

Clause 10 of the Bill proposes to insert a new Part VIIA into the Great Barrier Reef Marine Park Act 1975. That proposed new Part deals with compulsory pilotage. This means that when vessels navigate certain areas, they are required to have a qualified pilot on board. The new Part would create various new offences in relation to navigation in those areas without a pilot (see proposed new sections 59B, 59C and 59D).

Proposed new section 59H sets out various defences which would be available in proceedings for an offence against the new sections. Proposed new subsection 59H(1) provides:

> In any proceedings for an offence against section 59B, 59C or 59D, it is a defence if the master or owner (as the case may be) proves

> that the regulated ship navigated in the compulsory pilotage area because of stress of weather or other unavoidable cause.

The provision would require the person charged to 'prove' that the ship navigated in the compulsory pilotage area because of stress of weather or other unavoidable cause. This is what the Committee would ordinarily regard as a reversal of the onus of proof, as it is generally incumbent on the prosecution to prove all the elements of an offence. However, the Committee notes that matters which would need to be proved in such a case are, presumably, matters peculiarly within the knowledge of the person charged. The Committee also notes that proposed new subsection 59H(2) goes on to provide:

> Any defence established under subsection (1) need only be established on the balance of probabilities.

This contrasts with the burden of proof which is placed on the prosecution, which would be required to prove the commission of the offence **beyond reasonable doubt.**

Proposed new subsection 59H(3) deals with proceedings against the owner of a ship in relation to an offence under the proposed new Part. It provides:

> In any proceedings against the owner of a regulated ship for an offence against section 59B, 59C or 59D, it is a defence if the owner proves that the owner:
>
> (a) did not aid, abet, counsel or procure; or
>
> (b) was not in any way, directly or indirectly, knowingly concerned in, or a party to;

the navigation of the ship in the compulsory pilotage area without a pilot.

Once again, the onus of proving the defence to the offence is on the owner of the ship. However, unlike the defence provided in relation to the offence under proposed new subsection 59H(1), it would appear that in this case the owner would be required to prove the defence **beyond reasonable doubt**. If this is the case, the Committee suggests that this is contrary to the burden which would apply under the common law. If it is not the case, the Committee is unable to discern the need for the statement in proposed new subsection 59H(2) that proof on the balance of probabilities is required in relation to the defence under that provision..

In addition, the Committee suggests that it cannot be presumed that whether or not an owner did in fact aid, abet, counsel or procure the commission of an offence is peculiarly within the knowledge of the owner charged with an offence pursuant to paragraph 59H(3)(a). In this regard, the Committee notes that, unlike proposed paragraph 59H(3)(b), which relates to the owner being directly or indirectly concerned in or party to an offence, there is no requirement that the owner prove that they were not 'knowingly' involved, which would, clearly, be something peculiarly within the knowledge of the person raising such a defence.

The Committee would appreciate some further assistance from the Attorney-General on these matters. In particular, the Committee would appreciate the Attorney-General's advice on the burden of proof applicable in each of the proposed new sections referred to above and the reason for any difference.

INDUSTRIAL RELATIONS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 16 May 1991 by Mr Charles as a Private Member's Bill.

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

The Committee has no comment on this Bill.

NATIONAL FOOD AUTHORITY BILL 1991

This Bill was introduced into the House of Representatives on 14 May 1991 by the Minister for Aged, Family and Health Services.

The Bill proposes to establish the National Food Authority. It makes provision for the membership, staffing, function and powers of the Authority. The Bill also prescribes the process by which food standards will be developed, ensuring the participation of consumer, industry and scientific experts in the setting of the standards.

'Henry VIII' clauses
Subclauses 3(1), 31(1), 35(1) and paragraph 39(4)(b)

Subclauses 3(1), of the Bill sets out various definitions for the purposes of the Bill. 'Food' is defined as including:

(a) any substance or thing of a kind used or capable of being used as food or drink by human beings; or

(b) any substance or thing of a kind used or capable of being used as an ingredient or additive in, or substance used in the preparation of, a substance or thing referred to in paragraph (a); or

(c) such other substance or thing as is prescribed;

whether or not it is in a condition fit for human consumption, but does not include a therapeutic good within the meaning of the *Therapeutic Goods Act 1989*.

Paragraph (c) of the definition is what the Committee would ordinarily regard as a 'Henry VIII' clause, as it would allow the definition of 'food' set out in the Bill to be widened by regulation. As such, it would effectively allow the amendment of a piece of primary legislation by way of subordinate legislation.

Clause 31 of the Bill deals with the reconsideration of draft standards or variations of standards by the proposed National Food Authority. It provides that if the National Food Standards Council returns a draft standard or variation of a standard for reconsideration by the Authority (pursuant to proposed paragraphs 20(1)(d) or 28(1)(d)), the Authority must undertake that reconsideration

as soon as practicable but not later than 12 months or such shorter period as may be prescribed for the purpose of subsection 35(1) after the return of the draft.

This means that a shorter period for reconsideration could be prescribed by regulation and that, effectively, the operation of the primary legislation could be amended by subordinate legislation.

Clause 35 of the Bill deals with the Authority's obligation to make a recommendation to the National Food Standards Council concerning a draft standard or variation of a standard which the Authority has prepared in relation to an application made under Part 3 of the Bill. Subclause 35(1) would require the Authority to maker such a recommendation

within 12 months or such shorter period as may be prescribed after the receipt of the application that gave rise to that draft standard or variation.

As with subclause 31(1), the operation of the primary legislation could, in effect, be amended by subordinate legislation.

Clause 39 of the Bill prescribes the manner in which the Authority would be required to deal with confidential commercial information. Subclause 39(1), if enacted, would prohibit a person connected with the Authority from disclosing any confidential commercial information in respect of food that has been acquired by the person in that capacity. However, pursuant to subclause 39(4), the Chairperson of the Authority would be able to disclose such information if the Minister certifies that it is in the public interest. The Chairperson would also be authorised to disclose information to a person involved in the development of variation of a food standard.

Pursuant to paragraph 39(4)(b), the Chairperson would also be able to disclose the information 'to any prescribed authority or person'. If the Governor-General (with the advice of the Executive Council) could, by regulation, prescribe that an authority or person can be given such information, then such a regulation would, in effect, amend the operation of the provision in the legislation prohibiting such disclosure.

As a matter of principle, the Committee draws attention to provisions which would allow for the amendment of primary legislation by means of regulation. While there may be reasons advanced for altering legislation in this way, the amendment of legislation is *prima facie* as much a matter for the Parliament as the passage of the legislation in the first instance. Any interference with the Parliament's power in

relation to the passage and amendment of legislation is a matter of concern to the Committee.

In the case of the provisions discussed above, while they would not enable the amendment of the text of the legislation, they would, nevertheless, enable the operation of the legislation to be amended by subordinate legislation. As such, they are the sorts of provisions to which the Committee will continue to draw attention.

In addition to its in principle concerns, the Committee notes that no justification is given for the clauses referred to being drafted as they are. For example, in the case of the definition of 'food', the Committee wonders what kinds of substances would be likely to fall outside the definition provided and, therefore, require that regulations be promulgated to declare them as such. In the case of the clauses setting time limits on the National Food Authority, the Committee is curious to know the reason why it is necessary that the opportunity exist to shorten this time limit by regulation. Finally, in the case of the disclosure of confidential commercial information, the Committee would like to know what kinds of bodies or persons might be authorised to have such information disclosed to them.

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

NATIONAL HEALTH AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 14 May 1991 by the Minister for Aged, Family and Health Services.

The Bill proposes to effect changes to the funding and regulation of nursing homes and the administration of the Domiciliary Nursing Care Benefit. In particular, the Bill provides for:

- the establishment of a new category of 'adjusted fee government nursing homes';
- new arrangements for determining Commonwealth benefits applicable to 'adjusted fee government nursing homes';
- certain monies to be paid direct to nursing homes;
- alteration of the conditions applicable to exempt nursing homes;
- verification of the Commonwealth's power to take action against homes not providing an adequate standard of care;
- clarification of the role of the Community Visitor; and
- broadening of the categories of people to whom authority can be delegated to approve or reject applications for Domiciliary Nursing Care Benefit.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that various provisions of the Bill are to be taken to have commenced on 1 January 1991. The Explanatory Memorandum states:

> This is to comply with a commitment given by the Government, and ensures that these homes do not lose the benefit of the higher funding due to the time taken to amend the legislation.

The provision would, therefore, appear to be an example of 'legislation by press release', which the Committee generally regards as an undesirable legislative practice. However, as the retrospectivity in this case is likely to be relatively slight and in view of the suggestion in the Explanatory Memorandum that the retrospectivity would be beneficial to persons other than the Commonwealth, the Committee makes no further comment on the clause.

'Henry VIII' clause
Clause 5

Clause 5 of the Bill proposes to insert a new section 4AAA into the National Health Act 1953. That new section, if enacted, would create a new category of nursing homes called 'adjusted fee government nursing homes'. An 'adjusted fee government nursing home' is defined as:

> (a) a nursing home whose name and address are specified in column 2 of an item in Schedule 3, being the nursing home to which the certificate of approval issued by the

Minister under subsection 40AA(2) and bearing the approval number specified in column 3 of that item relates;

(b) any other nursing home prescribed for the purposes of this section.

Definitions should be readily understood by people to whom the legislation applies. This is not the case in the clause referred to above. For example, do the words 'a nursing home whose name and address are specified in column 2 of an item in Schedule 3, being the nursing home to which the certificate of approval issued by the Minister under subsection 40AA(2) and bearing the approval number specified in column 3 of that item relates' mean the same as 'a nursing home whose name and address are specified under an item in column 2 of Schedule 3' or, even, 'a nursing home whose name and address appear in column 2 of Schedule 3'?

In addition, the Committee notes that, pursuant to paragraph (b), the Governor-General (acting on the advice of the Executive Council) could, in effect, add to the list of nursing homes provided in Schedule 3 to the Bill. In addition, pursuant to proposed new subsection 4AAA(2), the Governor-General could also omit nursing homes from Schedule 3 by way of regulation. This means that the operation of the primary legislation could be amended by subordinate legislation. As such, the provision is what the Committee would ordinarily consider to be a 'Henry VIII' clause. The Committee has consistently drawn attention to such provisions, as it is concerned, as a matter of principle, that legislation can be amended in this way.

The Committee draws Senators' attention to the provision, as it may be considered 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 that, in the Bill's Table of Provisions, the reference to section 5 of the Bill, in turn, refers to new section '4B'. This would appear to be an incorrect reference to proposed new section 4AAA.

SERVICE AND EXECUTION OF PROCESS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 15 May 1991 by the Attorney-General.

The Bill proposes to insert a new Part 3A into the Service and Execution of Process Act 1901, to enable Royal Commissions and other investigative tribunals to serve subpoenas on persons interstate, and to provide for the enforcement of subpoenas to give evidence to investigative tribunals.

Adjournment of proceedings for 'a reasonable time'
Clause 5 - proposed new subsection 19Z(3)

Clause 5 of the Bill proposes to insert a new Part 3A into the Service and Execution of Process Act 1901. Division 4 of proposed new Part 3A deals with the execution of warrants issued by or out of a court or investigative tribunal. Proposed new section 19Z sets out the procedure to be followed after a person has been apprehended pursuant to a warrant.

Proposed new subsection 19Z(1) provides that, '[a]s soon as practicable after being apprehended', a person is to be brought before a magistrate. Proposed new subsection (2) provides that a copy of the warrant, if it is available, must be produced to the magistrate. Proposed new subsection (3) provides that if a copy of the warrant is not produced, the magistrate may:

(a) order that the person be released; or

(b) adjourn the proceedings for such reasonable time, not exceeding 7 days, as the magistrate specified and remand the person on bail or in such custody as the magistrate specifies.

This means that if, for whatever reason, the warrant for the apprehension of the person is not produced at the initial appearance, a person may be remanded (on bail or in custody) for up to 7 days, in order to allow the arresting officers time to produce the warrant.

The Committee notes that 7 days may be regarded as an excessive period time for a person to be remanded, possibly in custody, without the relevant warrant being produced. If the warrant is not available at the time that the person is apprehended then it might be considered more appropriate that such a warrant be produced within, say, 1 or 2 days.

In making this comment, the Committee also notes that this power is to be exercised by a magistrate and that the magistrate is to have the discretion to release the person or to remand the person on bail or in custody. In addition, proposed new subsection 19Z(4) provides that if the warrant is not produced by the time the proceeding resumes (ie after the remand, not exceeding 7 days), the magistrate must order that the person be released. This would, presumably, encourage the arresting officers to produce the warrant as soon as possible.

Nevertheless, the Committee is concerned about the possibility of persons being remanded in custody for up to 7 days as a result of a failure on the part of an

arresting authority to produce the relevant warrant in court. The Committee would appreciate the Attorney-General's advice as to the need for the provision in question and the reason for the 7 day limit.

SOCIAL SECURITY (REWRITE) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 16 May 1991 by the Minister representing the Minister for Social Security.

The Bill proposes to amend the Social Security Act 1991 (which is due to commence on 1 July 1991) to provide for amendments made by:

- the Social Welfare (Pharmaceutical Benefits) Amendment Act 1990;
- the Social Security and Veterans' Affairs Legislation Amendment Act (No. 2) 1990; and
- the Social Security Legislation Amendment Act 1990.

The Bill covers areas concerning tax file numbers, deeming (loans and deposits), the liquid assets test for sickness beneficiaries, debt recovery, the employment entry payment for sole parent pensioners, disaster relief payments, the extension of qualification criteria for remote area allowance and the carer pension, the pharmaceutical supplement allowance and provides for international social security agreements with the United Kingdom and Malta.

Provision of tax file numbers
Proposed new sections 46A, 46B, 97A, 97B, 150A, 150B, 210A, 210B, 257A, 257B, 320A, 367A, 412A, 412B, 463A, 463B, 670B, 734A, 734B, 846A, 846B, 900C, 900D, 1039A and 1039B

Clause 3 of the Bill would, if enacted, insert the various amendments proposed by Schedule 1 into the Social Security Act 1991. Those proposed amendments reflect amendments to the legislation made in the Budget sittings of 1990. Of those amendments, the proposed new sections listed above all involve requirements that a person provide their tax file number in relation to the payment of a social security benefit. As the Committee has observed previously in relation to similar provisions (and, indeed, as the Committee observed in relation to the legislation which originally effected these proposed amendments - see Alert Digest No. 5 and Alert Digest No. 9 of 1990), while such provisions may be considered necessary in order to prevent beneficiaries from defrauding the social security system, they may also be regarded as intrusive into personal privacy.

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.

UNIVERSITY OF CANBERRA AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 15 May 1991 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the University of Canberra Act 1989 to:

- provide for a change in the qualifications of the members of the University Council nominated by the Chief Minister of the Legislative Assembly of the Australian Capital Territory to exclude members of the Assembly; and
- change the audit requirements to make them consistent with the institution's non-commercial nature.

The Committee has no comment on this Bill.

VETERANS' ENTITLEMENTS (REWRITE) TRANSITION BILL 1991

This Bill was introduced into the House of Representatives on 16 May 1991 by the Minister for Veterans' Affairs.

The Bill proposes to give effect to the 'plain English' rewrite of Part III of the Veterans' Entitlements Act 1986.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 10 OF 1991

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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

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(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:

* Australian Wool Corporation Bill 1991

* Australian Wool Realisation Commission Bill 1991

Commission of Inquiry (Banking Practices) Bill 1991

* Community Services and Health Legislation Amendment Bill 1991

Council for Aboriginal Reconciliation Bill 1991

* Corporations Legislation Amendment Bill 1991

* Courts (Mediation and Arbitration) Bill 1991

Crimes (Protection of Australian Flags) Bill 1991

Fisheries Agreements (Payments) Bill 1991

Fisheries Legislation (Consequential Provisions) Bill 1991

* Fisheries Management Bill 1991

* Fishing Levy Bill 1991

* Foreign Fishing Licences Levy Bill 1991

Foreign Judgments Bill 1991

* Health Legislation (Pharmaceutical Benefits) Amendment Bill 1991

* Interstate Road Transport Amendment Bill 1991

* Interstate Road Transport Charge Amendment Bill 1991

*** 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.

Law and Justice Legislation Amendment Bill 1991

Local Government (Financial Assistance) Bill 1991

Ombudsman Amendment Bill 1991

* Primary Industries and Energy Research and Development Amendment Bill 1991

* Primary Industries (Industry Councils) Bill 1991

* Proceeds of Crime Legislation Amendment Bill 1991

Quarantine Amendment Bill 1991

* Social Security (Disability and Sickness Support) Amendment Bill 1991

* Social Security Legislation Amendment Bill (No. 2) 1991

* Statutory Fishing Rights Charge Bill 1991

* Superannuation Legislation Amendment Bill 1991

* Therapeutic Goods (Charges) Amendment Bill 1991

* Transport Legislation Amendment Bill 1991

* Veterans' Affairs Legislation Amendment Bill 1991

* Wool Tax (Nos. 1-5) Amendment Bills 1991

* 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 WOOL CORPORATION BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to establish the new Australian Wool Corporation, which will be responsible for wool promotion and marketing. The Corporation will also be responsible for quality control.

Delegation to 'a person'
Clause 10, subclauses 76(4), (5) and (6) and 80(1)

Clause 10 of the Bill provides:

> The [Australian Wool] Corporation may, by writing under its common seal, delegate to any person or body all or any of its powers and functions under this Act.

The functions and powers of the Corporation are set out in clauses 6 and 7 of the Bill, respectively. They are quite extensive, including such functions as promoting the use of wool, developing programs to safeguard and improve the quality of Australian wool and such powers as obtaining and providing regular market intelligence, setting quality standards for wool and prohibiting the offering for sale for export of any wool not meeting those standards.

Clause 76 of the Bill deals with the inspection and auditing of the Corporation's accounts and records. Subclauses 76(4), (5) and (6), respectively, provide that the Corporation auditor 'or a person authorised by the Corporation auditor' can have full and free access to the records of the Corporation, can make copies of such records and can require a person to furnish information. In the case of a requirement to furnish information, failure to comply with such a requirement attracts a penalty of up to $1000.

Part 10 of the Bill deals with quality control. Subclause 80(1) provides:

> The Managing Director may, in writing, appoint a person to be an inspector for the purposes of this Division.

Pursuant to clause 81, an inspector would have various powers in relation to entry and inspection of premises in order to ascertain whether or not wool held on those premises conforms to the standards set by the Corporation.

In respect of each of the clauses referred to above, there is no limit on the persons or classes of persons who may be delegated power, authorised or appointed, as the case may be. Given the significance of the power involved in each case, the Committee considers that it may be appropriate to limit the persons or classes of persons who may exercise these powers.

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

'Henry VIII' clauses
Subclause 91(3) and clause 101

Clause 91 of the Bill deals with the Corporation's liability to taxation. Subclause 91(2) provides that, subject to subclauses (3) and (4), the Corporation is not to be subject to taxation under a State or Territory law. Subclause 91(3) provides:

> The regulations may provide that subsection (2) does not apply in relation to taxation under a specified law of a State or Territory.

This clause is, in effect, what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow the operation of the primary legislation to be amended by subordinate legislation.

Clause 101 provides:

> The regulations may, in respect of a matter not provided for under this Part, make such transitional or consequential provision as is necessary because of:
>
> (a) the repeal of the *Wool Marketing Act 1987*; and
>
> (b) the enactment of this Act and the *Australian Wool Realisation Commission Act 1991*.

This is also a 'Henry VIII' clause. It would allow the Governor-General (with the advice of the Executive Council) to make, by regulation, 'such transition or consequential [provisions] as [are] necessary'. There is no limit on either the matters which may be covered (save the reference to matters 'not provided for under this

Part') or the time within which this 'transitional' power may be exercised.

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

General comment

Pursuant to clause 2, the Bill is to commence on 1 July 1991. The Committee notes that, depending on (if and) when the Bill is passed, this may involve a degree of retrospective operation.

AUSTRALIAN WOOL REALISATION COMMISSION BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to establish the Australian Wool Realisation Commission, which is to be responsible for the disposal of the wool stockpile, the administration and acquittal of the associated debt, and the disposal of other non-wool assets of the Australian Wool Corporation. The Commission, with a life expectancy of seven years maximum, will also be responsible for winding up the Supplementary Payments Scheme.

The Bill also repeals the Wool Marketing Act 1987.

Delegation to 'a person'
Clause 17, subclauses 64(4), (5) and (6)

Clause 17 of the Bill provides:

> The [Australian Wool Realisation] Commission may, by writing under its common seal, delegate to any person or body all or any of its powers and functions under this Act.

The functions of the Commission are set out in clause 6 of the Bill. They include devising and implementing a plan for the proper management and disposal of the

wool stockpile, to sell or otherwise dispose of assets and to make recommendations to the Minister concerning the percentage of any wool tax collected that should be applied toward repayment of any allocated debt.

The 'general' powers of the Commission are set out in clause 7 of the Bill. They are 'to do all things necessary or convenient to be done in relation to the performance of [the Commission's] functions'. In addition, clause 8 sets out further, specific, powers relating to the disposal of the wool stockpile.

Clearly, the powers of the Commission are extensive. Bearing this in mind, the Committee is concerned that, pursuant to clause 17, the Commission would be able to delegate 'all or any' of those powers to 'any person or body'. In the circumstances, it may be appropriate that limits be placed on the persons, bodies, or classes or persons or bodies to whom such powers could be delegated and/or on the powers which could be delegated.

Clause 64 of the Bill deals with inspection and audit of the Commission's accounts and records. Subclauses (4), (5) and (6) would, if enacted, allow the Commission auditor 'or a person authorised by the Commission auditor' to have full and free access to the accounts and records of the Commission, to make copies of these and other documents and to require a person to furnish such other information as is considered necessary. In the case of a failure to furnish information as required, a penalty of up to $1000 applies.

As with Clause 17, there is no limit on the persons or classes of persons who the Commission auditor could authorise. Given the scope of these powers, the Committee considers that it may be appropriate to provide such a limit.

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

'Henry VIII' clauses
Subclause 69(3) and clause 85

Clause 69 of the Bill deals with the Commission's liability to taxation. Subclause 69(2) provides that, subject to subclauses (3) and (4), the Commission is not to be subject to taxation under a law of a State or Territory. Subclause 69(3) provides that the regulations may provide that the exemption contained in subclause (2) does not apply in relation to a specified State or Territory law. This means that, in effect, the operation of the primary legislation could be amended by subordinate legislation. As such, it is what the Committee would generally regard as a 'Henry VIII' clause.

Clause 85 of the Bill provides:

> The regulations may, in respect of a matter not provided for under this Part, make such transitional or consequential provision as is necessary because of:
>
> (a) the repeal of the *Wool Marketing Act 1987*; or
>
> (b) the enactment of the *Australian Wool Realisation Commission Act 1991*; or
>
> (c) the establishment of an R & D Corporation in respect of the wool industry under the *Primary Industries and Energy Research and Development Act 1989*.

This is also a 'Henry VIII' clause. It would allow the Governor-General (acting on the advice of the Executive Council) to make, by regulations, 'such transitional or consequential [provisions] as [are] necessary'. There is no limit on the matters which such regulations could deal with, save that they may not be matters provided for by that Part of the Bill. In addition, despite the fact that the provision is stated to be 'transitional', there is no limit as to the time within which such regulations could be made.

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

COMMISSION OF INQUIRY (BANKING PRACTICES) BILL 1991

This Bill was introduced into the Senate on 28 May 1991 by Senator McLean as a Private Senator's Bill.

The Bill proposes to establish a Commission of Inquiry (the Banking Practices Commission) to examine certain foreign currency dealings of Australian banks.

The Committee has no comment on this Bill.

COMMUNITY SERVICES AND HEALTH LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Community Services and Health.

The Bill proposes to amend:

- the Health Insurance Act 1973, to:
  - insert a new definition of 'professional service'; and
  - require the proprietor of a pathology laboratory whose approval has been revoked to inform referring practitioners and patients that a Medicare benefit will not be payable in respect of pathology services;
- the National Health Act 1953 and the Nursing Homes and Hostels Legislation Amendment Act 1986, to:
  - enable more information about nursing homes to be publicly available;
  - provide a new penalty for nursing homes not complying with conditions of approval; and
  - make technical amendments; and
- the Therapeutic Goods Act 1989, to:
  - decentralise the administration of the Individual Patient Usage Scheme;

- allow for the payment of evaluation fees by instalments where goods are being considered for registration in the Australian Register of Therapeutic Goods (ARTG);

- ensure that individual therapeutic goods that have been 'grouped' will retain their status as separate goods for certain purposes; and

- enable regulations to be promulgated to impose fees for processing the release of information in the ARTG.

Commencement by Proclamation
Subclause 2(2)

Subclause 2(2) of the Bill provides that clause 14 is to commence at the same time as section 7 of the Nursing Homes and Hostels Legislation Amendment Act 1986. Pursuant to subsection 2(4) of that Act, section 7 is to come into operation on a date fixed by Proclamation.

In relation to subclause 2(2) of this Bill, the Explanatory Memorandum states:

> Subclause 2 ensures that the amendments to the National Health Act concerning the definition of government nursing home, and the amendment to the Nursing Homes and Hostels Legislation Amendment Act commence at the same time as the commencement of section 7 of the Nursing Homes and Hostels Legislation Amendment Act, which has not yet been proclaimed.

In relation to clause 14, the Explanatory Memorandum states:

> This is a technical amendment which amends s139B of the Principal Act. It makes the prescribed list of

> Government nursing homes a disallowable instrument. It replaces a previous similar amendment which was originally to have been made by section 22 of the Nursing Homes and Hostels Legislation Amendment Act 1986. The previous amendment was to have commenced by Proclamation, but has not been proclaimed, it is repealed by Clause 16 of this Bill.

The Committee is concerned about subclause 2(2) for two reasons. First, given the fact that the commencement of the relevant clause is, in effect, open-ended, it would appear to be in conflict with the general rule set out in Office of Parliamentary Drafting Instruction No. 2 of 1989. That drafting instruction provides that, as a general rule, a restriction should be placed on the time within which an Act or provisions of an Act can be proclaimed.

Paragraph 6 of the drafting instruction states that clauses providing for commencement by Proclamation but without any restriction as to when such Proclamation must be made,

> should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain (eg enactment of complementary State legislation).

In the present case, the Committee notes that the event upon which the commencement of clause 14 of the Bill depends is the proclamation of a piece of Commonwealth legislation. The Committee suggests that this is not an 'unusual' circumstance in the same way that the enactment of complementary State legislation is considered to be.

The second area of concern to the Committee relates to the history of the provision in question. According to the Explanatory Memorandum, clause 14 is intended to replace a 'previous similar amendment' which was to have commenced by Proclamation 'but [which is] not yet proclaimed'. The Explanatory Memorandum goes on to say that the previous similar amendment is repealed by clause 16 of the Bill.

The Committee is disturbed by several aspects of this explanation. First, the Committee considers that the explanation given is far from clear. Though the Committee believes that it now understands what is intended by the clause and why it is considered to be necessary, the paragraphs in the Explanatory Memorandum relating to clause 14 are not especially helpful. In particular, the Committee suggests that the final sentence on p.8 does not make sense.

Second, the Committee notes that this provision appears to be attempting to correct a previous error using a similar legislative mechanism to that which facilitated the failure to proclaim which has, in turn, led to this amendment being necessary. In the circumstances, amendment of the legislation in this way might be considered to be unwise.

Finally, the Committee is concerned that the failure to proclaim the provision of the Nursing Homes and Hostels Legislation Amendment Act 1986 to which the commencement of clause 14 of this Bill relates, has been identified in the Return to Order relating to Unproclaimed Legislation on the seven occasions on which such a Return to Order has been made to date (see Journals of the Senate for 24 November 1988, 12 April 1989, 27 November 1989, 30 May 1990, 15 November 1990, 30 May 1991). Those Returns to Order (or at least, those made after the first

such Return) are made pursuant to a resolution of the Senate on 29 November 1988, which provides:

> That there be laid on the Table of the Senate, on or before 31 May and 30 November each year, details of all provisions of Acts which come into effect on proclamation and which have not been proclaimed, together with a statement of reasons for their non-proclamation and a timetable for their operation.

The Committee considers that it is imperative the amendment which clause 14 proposes to make is finalised. In addition (and bearing in mind the unfortunate history of the provision upon which the commencement of clause 14 is to depend), the Committee has an in principle concern that the commencement of clause 14 is to be, in effect, open-ended. Accordingly, the Committee draws attention to subclause 2(2) of this Bill, as it may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

'Henry VIII' provision
Clause 10 - proposed new paragraph 45DC(2)(c)

Clause 10 of the Bill proposes to insert two new sections into the National Health Act 1953. The proposed new sections relate to the provision to the public of information about approved nursing homes. They provide for release of the following information:

> (a) details of action taken by the Minister, whether before or after the commencement of this

section, in relation to the nursing home under section 40AA, 40AD, 43A, 44, 44A, 45A, 45E or 45EA;

(b) details of any action the Minister intends to take in relation to the nursing home under section 40AA, 40AD, 43A, 44, 44A, 45A, 45E or 45EA;

(c) such other information (if any) as is specified in the regulations.

Paragraph (c) is what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow the range of information which could be made available to the public pursuant to the primary legislation to be, in effect, amended by subordinate legislation.

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

Fee for release of information
Clause 32 - proposed new subsections 61(8A) and (8B)

Clause 32 of the Bill proposes to add three new subsections to section 61 of the Therapeutic Goods Act 1989. Proposed new subsections 61(8A) and (8B) would allow the Governor-General (acting on the advice of the Executive Council) to make regulations providing for the charging of fees in relation to applications for information pursuant to subsection 61(6) of the Act. Provision is also made for the payment of deposits in relation to such applications. There is no limit in the

proposed new subsections on the level of fee which the regulations could set. This may be considered a matter which, without some sort of upper limit, should not be left to the regulations.

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

CORPORATIONS LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 29 May 1991 by the Attorney-General.

The Bill proposes to amend the Corporations Act 1989 and the Australian Securities Commission Act 1989 to:

- wind up the National Companies and Securities Commission;
- require the consolidation of accounts of companies and subsidiaries for financial reporting purposes;
- reform insider trading regulation;
- confer on the Family Court of Australia and the Family Court of Western Australia jurisdiction in relation to civil matters arising under the Corporations Law,
- allow the Australian Securities Commission to regulate compliance with trust deeds;
- propose a statutory moratorium on the requirement for companies to include their Australian Company Number on business documents and negotiable instruments; and
- require retiring directors to notify a changeover in ownership of a company.

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

Retrospectivity
Subclauses 2(2), (6) and (9)

Subclause 2(2) of the Bill provides that, subject to subclause (3), the amendments to the Corporations Act 1989 that are to be made by clause 4 are to be taken to have commenced on 1 January 1991. Clause 4 proposes to amend that Act as set out in Schedule 1 of the Bill. Subclause 2(3) provides that certain specified amendments contained in Schedule 1 are to commence by Proclamation.

Subclause 2(6) of the Bill provides that, subject to subclauses (7) and (8), the amendments to the Australian Securities Commission Act 1989 that are to be made by clause 11 are also to commence on 1 January 1991. Clause 11 proposes to amend that Act as set out in Schedule 7 of the Bill. Subclause (7) provides that certain specified amendments contained in Schedule 7 are to commence on Royal Assent. Subclause (8) provides that certain other specified amendments are to commence on the day on which clause 8 (of this Bill) commences.

Subclause 2(9) of the Bill provides that Part 5 of the Bill, which proposes to make certain amendments to the Crown Debts (Priority) Act 1981, are also to be taken to have commenced on 1 January 1991.

In relation to the retrospective operation of the amendments to the Corporations Act and the Australian Securities Commission Act, the Explanatory Memorandum states:

> These provisions principally deal with technical and machinery matters relating to the way the new national administrative and enforcement framework of the scheme operates. The purpose of commencing the relevant

> provisions as from that date is because the provisions seek to establish consistency of expression and coverage with the relevant corresponding provisions of the State Application Laws that came into force on 1 January 1991. The effect of applying the Commonwealth provisions, as proposed to be amended, from the same date will avoid any argument that might otherwise arise than an inconsistency in language as between the Commonwealth and State laws meant that they had a different operation in relation to each other.

In relation to the proposed amendments to the Crown Debts (Priority) Act, the Explanatory Memorandum states:

> The Bill replaces the present incorrect reference in section 4 of the [Crown Debts (Priority)] Act to the 'Corporations Law' with the appropriate reference to the Corporations Act 1989.

In the light of these explanations, the Committee makes no further comment on the clauses.

Commencement by Proclamation
Subclauses 2(3), (4), (10), (11) and (12)

As noted above, subclause 2(3) of the Bill provides that certain specified amendments to the Corporations Act are to commence by Proclamation. There is no limit as to the time within which such a Proclamation must be made. As such, the clause contravenes the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

However, the Committee notes that, in relation to this subclause, the Explanatory Memorandum states:

> [T]he specified proposed amendments of the [Corporations Act] set out in Schedule 1 of the Bill to come into operation by virtue of subclause 3(3) [sic], which relate to the conferment of jurisdiction on the Family Courts, will commence on a day to be fixed by Proclamation. These proposed amendments are not subject to the usual requirement for amendments to automatically commence after the expiration of 6 months from Royal Assent, because they rely on the subsequent passage of legislation by the States for their effective operation under the national scheme arrangements ...

This explanation fits within the exception set out in paragraph 6 of Drafting Instruction No. 2, since the commencement is dependent on 'unusual circumstances', as contemplated by that paragraph. As a result, the Committee makes no further comment on the clause.

Subclause 2(4) of the Bill provides that, subject to subclause (5), clauses 7 and 8 of the Bill commence on a day or days to be fixed by Proclamation. However, the Committee notes that, in accordance with Drafting Instruction No. 2, subclause (5) provides that if those clauses have not been proclaimed within six months of Royal Assent, they are to commence on the following day. Accordingly, the Committee makes no further comment on the clause.

Subclause 2(10) of the Bill provides that, subject to subclause (11), the provisions of Part 6 of the Bill (which deals with the winding up of the National Companies and Securities Commission) are to commence on a day or days to be fixed by Proclamation. Subclause (11) provides:

> A Proclamation under subsection (10) must not fix a day for the commencement of section 14 that is earlier than the first day on which all the provisions of Division 2 and 3 of Part 6 are in operation.

Contrary to the general rule in Drafting Instruction No. 2 of 1989, there is no limit on the time within which the Proclamation must be made. In fact, as a result of subclause (11), the limits on Proclamation pursuant to subclause (10) are on the time within which a Proclamation must not be made.

Subclause 2(12) provides that the provisions of the new Part 16 of the Australian Securities Commission Act (which is to be added by clause 23 of the Bill) are to commence on a day or days to be fixed by Proclamation. That proposed new Part provides for transitional arrangements which would apply to the winding up of the National Companies and Securities Commission. There is no limit on the time within which such a Proclamation must be made.

By way of explanation, the Explanatory Memorandum states:

> It would not be appropriate to make [these] provisions subject to [the requirement of automatic commencement] because it is possible that not all the administrative action necessary to complete the winding up processes will be completed within 6 months of the commencement of the Bill so that all relevant provisions can come into operation at that time.

While the Committee accepts this as a valid justification for the provisions not commencing within six months, the Committee suggests that it may still be appropriate that the provisions commence automatically after, say, a 12 month

period. The Committee would appreciate the Attorney-General's views in relation to this suggestion.

'Henry VIII' clauses
Schedule 3 - proposed new sections 294A and 294B

Schedule 3 of the Bill contains various proposed amendments to the Corporations Law which are to be effected pursuant to clause 7 of the Bill. Among other things, the Schedule proposes to insert a new Division 4A into the Corporations Law. That new Division deals with the consolidated accounts of a company and the entities it controls.

Proposed new subsection 294A(1) provides that the regulations may define the meaning of various expressions for the purposes of the legislation. Proposed new subsection 294A(3) provides that a definition contained in an accounting standard may (subject to any regulations) also be applied in respect of the expressions.

Proposed new subsection 294B(1) provides that the regulations may provide for the determination of the question as to whether or not an entity controls another entity. Proposed new subsection 294B(3) provides that a definition contained in an accounting standard may (subject to any regulations) also be applied to determine whether or not an entity controls another entity.

These provisions are what the Committee generally considers to be 'Henry VIII' clauses, as they would allow the operation of the primary legislation to be amended, in effect, by subordinate legislation. The definitions to which they relate appear to be crucial to the operation of the proposed new part. Accordingly, the Committee

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

COUNCIL FOR ABORIGINAL RECONCILIATION BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Aboriginal Affairs.

The Bill proposes to establish a Council for Aboriginal Reconciliation, which is intended to promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community.

The Committee has no comment on this Bill.

COURTS (MEDIATION AND ARBITRATION) BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Attorney-General.

The Bill proposes to amend the Family Law Act 1975 and Federal Court Act 1976, in order to facilitate alternative dispute resolution in those courts.

'Henry VIII' clause
Clause 4

Clause 4 of the Bill proposes to add various definitions to the interpretation section of the Family Law Act 1975 (section 4). One of those proposed new definitions is set out as follows:

> **'Part VIII proceedings'** means proceedings under Part VIII for orders with respect to spousal maintenance or the property of parties to a marriage, but does not include any proceedings specified in the regulations for the purposes of this definition.

This means that the definition set out in the primary legislation can, in effect, be amended by regulation. As a result, this is what the Committee would generally regard as a 'Henry VIII' clause.

The Explanatory Memorandum to the Bill states:

> Regulations will be made to exclude proceedings such as proceedings for the approval of a maintenance agreement under section 87 of the [Family Law] Act.

The Committee's in principle objection to the use of 'Henry VIII' clauses is not removed by this explanation. If it is intended that proceedings under section 87 of the Family Law Act are to be excluded from the definition, the Committee suggests that this should be included in the definition. Indeed, in the light of the explanation quoted above, the Committee seeks the Attorney-General's advice as to why this was not included in the definition. It would also be of assistance to the Committee (and the Senate) if some indication could be given as to what other proceedings might be excluded from the definition by the regulations.

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

CRIMES (PROTECTION OF AUSTRALIAN FLAGS) BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by Mr Cobb as a Private Member's Bill.

The Bill is identical in substance to two Bills which were introduced into the House of Representatives on 4 May 1989 and 31 May 1990 respectively, but which lapsed. The Bill proposes to impose a penalty of $5000 (or imprisonment for two years, or both) on any person who desecrates, dishonours, burns, mutilates or otherwise destroys the Australian National Flag or an Australian Ensign.

The Committee has no comment on this Bill.

FISHERIES AGREEMENTS (PAYMENTS) BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to collect payments from foreign governments or commercial interests in relation to fishing boat access to the Australian fishing zone, where formal access agreements exist. The Australian Fisheries Management Authority (which is to be set up pursuant to the Fisheries Administration Bill 1990) will be empowered to suspend a licence if the amount specified in an access agreement is not paid.

The Committee has no comment on this Bill.

FISHERIES LEGISLATION (CONSEQUENTIAL PROVISIONS) BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to provide consequential provisions arising from the Fisheries Administration Bill 1990 and Fisheries Management Bill 1991, including the repeal of the Continental Shelf (Living Natural Resources) Act 1968, the Fisheries Agreement (Payments) Act 1981 and the Fisheries Act 1952 (other than Part IVA). The Bill also amends the Primary Industries and Energy Research and Development Act 1989, in order to establish a research and development corporation for the fishing industry.

The Committee has no comment on this Bill.

FISHERIES MANAGEMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to replace the Fisheries Act 1952 and Continental Shelf (Living Natural Resources) Act 1968. The Bill provides the newly established Australian Fisheries Management Authority with the powers to undertake the restructured management of fisheries. Further, this Bill proposes to establish the Statutory Fishing Rights Allocation Review Panel, which is to consider appeals against the allocation of statutory fishing rights under a plan of management.

Prospective commencement
Subclause 2(2)

Part 5 of the Bill deals with co-operation between the Commonwealth, the States and the Northern Territory in relation to the management of fisheries. Subclause 2(2) of the Bill provides:

> Part 5 commences upon the repeal or the ceasing to have effect (as the case may be) of Part IVA of the *Fisheries Act 1952*.

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 the Part will

commence. By way of explanation, the Explanatory Memorandum to the Bill states:

> Part 5 which implements the fisheries component of the Offshore Constitutional Settlement with the States will require matching State legislation. Part IVA of the Fisheries Act 1952 will be retained until these amendments have been made.

The Committee accepts that the requirement for matching State legislation is an 'unusual circumstance' as contemplated by paragraph 5 of Drafting Instruction No. 2 of 1989. In addition, the Committee notes that subclause 7(3) of the Fisheries Legislation (Consequential Provisions) Bill 1991 (which is part of the same package) provides:

> Part IVA of the *Fisheries Act 1952*, unless sooner repealed, ceases to have effect at the end of the period of 2 years beginning on the day on which this section commences.

Pursuant to clause 2 of the Fisheries Legislation (Consequential Provisions) Bill, clause 7 of that Bill will commence no later than six months from Royal Assent. The commencement of Part 5 of this Bill is, therefore, effectively fixed. In the light of the explanation and the effect of the consequential provision, the Committee makes no further comment on the clause. However, the Committee suggests that it would have been helpful if the full explanation which the Committee has set out above had been set out in the Explanatory Memorandum to this Bill.

Reversal of the onus of proof
Subclauses 14(3), 93(6) and 164(1)

Subclause 14(1) of the Bill, if enacted, would prohibit the taking of certain fish from the Australian fishing zone (AFZ). Subclause 14(2) would prohibit the taking of certain other fish from outside the AFZ. An offence against either provision would carry a fine of up to $5000.

Subclause 14(3) provides:

> It is a defence to a prosecution for an offence against this section if the person charged satisfies the court that, upon becoming aware of the taking of the fish or other animal, he or she took steps immediately to return the fish or other animal to its natural environment.

This is what the Committee would generally consider to be a reversal of the onus of proof. It is ordinarily incumbent on the prosecution to prove all the necessary elements of an offence. Requiring a person to satisfy the court of his or her defence (and thereby negating the prosecution's obligation to prove the contrary in relation to those matters), reverses that onus. However, as these are matters which would, presumably, be peculiarly within the knowledge of the person charged, the Committee makes no further comment on the clause.

Delegation to 'a person'
Subclause 63(1)

Clause 63 of the Bill would, if enacted, allow a Joint Authority (as provided for by clause 59) to delegate any of its powers (other than certain prescribed powers) to

the Australian Fisheries Management Authority 'or any other person'. The functions and powers of a Joint Authority are set out in clauses 60, 76 and 77. Those powers and functions appear to be wide and onerous. Accordingly, it may be considered inappropriate that a Joint Authority be authorised to delegate its powers to 'a person', without any limit on the persons or classes of persons to whom the power might be delegated.

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

FISHING LEVY BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to collect a levy from fishermen who have been granted access to fisheries under the Fisheries Management Bill 1991.

Setting of levy by regulation
Clause 6

Clause 6 of the Bill provides that the amount of the levy imposed by the Bill is 'such amount as is prescribed'. This means that the amount of the levy will be set by regulation. There is nothing in the Bill to limit the level of levy that might be prescribed. This might be considered an inappropriate matter to be left to the regulations.

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

> This clause does not attempt to fix any maximum amount of levy. The levy payable by fishermen can vary considerably from fishery to fishery, depending on its components. Its main purpose is to recover from fishermen part of the cost of administering fisheries and it will also be used to collect a levy for fisheries research and development. The levy can, however, have other components. For example, in the northern prawn fishery,

> it is also used to collect the fishermen's contributions to the restructuring (buy-back) scheme as well as a contribution fishermen have elected to make to specific research projects.

The Explanatory Memorandum goes on to say:

> This situation is further compounded by the different management schemes employed in each fishery. In some fisheries the fishing 'unit' on which levy is imposed is a fishing boat. In others a 'unit' may determine the quantity of engine power or hull size that may be used. (In the northern prawn fishery where a hull size/engine power unit is used, the average boat is over 400 units). In fisheries where catch quotas are used, the unit can be a proportion of the total catch. As an example of the wide variation of levy rates the current levy per unit (use of one boat of up to 40 metres in length for one year) in the Great Australian Bight trawl fishery is $6,000 while the levy per unit (the right to take one kilogram of fish) in the gemfish fishery is 13.5 cents.

In view of the detailed explanation provided (and bearing in mind that a regulation setting a levy would, of course, be disallowable) the Committee makes no further comment on the clause.

FOREIGN FISHING LICENCES LEVY BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to impose fees and levies in relation to foreign fishing licences when there is no formal agreement with overseas governments or commercial interests.

Setting of levy be regulation
Subclause 5(1)

Subclause 5(1) of the Bill provides that (subject to certain provisos) the amount of the levy to be imposed by the Bill is to be 'such amount as is prescribed by the regulation or as is calculated in accordance with the regulations'. There is nothing in the Bill to limit the level of the levy that might be prescribed. This might be considered an inappropriate matter to be left to the regulations.

By way of explanation, the Explanatory Memorandum states:

> This clause contains no provision for determining maximum payments. It is the Government's policy to obtain the maximum amount possible from foreigners given the right to exploit the Australian Fishing Zone. Under these circumstances, the fixing of maximum levies is not considered appropriate.

The Committee makes no further comment on the clause.

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

FOREIGN JUDGMENTS BILL 1991

This Bill was introduced into the House of Representatives on 29 May 1991 by the Attorney-General.

The Bill proposes to replace existing State and Territory legislation which provides for the enforcement of foreign superior court civil judgments for payment of money by registration of those judgments in State and Territory Supreme Courts.

The Committee has no comment on this Bill.

HEALTH LEGISLATION (PHARMACEUTICAL BENEFITS) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Community Services and Health.

The Bill proposes to amend the Health Insurance Commission Act 1973 and the National Health Act 1953, in order to streamline the administration of the Pharmaceutical Benefits Scheme.

Retrospectivity
Subclauses 2(2) and (3)

Subclause 2(2) of the Bill provides that subclause 10(1) is to be taken to have commenced on 1 January 1991. The amendments proposed by subclause 10(1) appear to be beneficial to persons other than the Commonwealth (though the Explanatory Memorandum gives no indication of this). Accordingly the Committee makes no further comment on the subclause.

Subclause 2(3) provides that certain other provisions are to commence on 1 July 1991. The Committee notes that, depending on (if and) when the Bill is passed, this may also involve a degree of retrospective operation.

The Committee makes no further comment on the clause.

Provision of information by 'relevant authorities'
Clause 4 - proposed new paragraph 8D(3)(b)

Clause 4 of the Bill proposes to insert a new section 8D into the Health Insurance Commission Act 1973. That new section deals with the provision of computer facilities and the programming of the Health Insurance Commission's computer system. Proposed new paragraph 8D(3)(b) provides:

> [F]or the purpose of carrying out the function referred to in paragraph (a), [ie 'ensuring that the Commission's computer system is appropriately programmed to supply status information to persons accessing the system through dedicated computer facilities and to no other persons'] [the Commission may obtain] from the relevant authority the requisite information about each person:
>
> (i) to whom or in respect of whom there is payable a pension, allowance or other benefit under the *Social Security Act 1991* or the *Veterans' Entitlements Act 1986*; and
>
> (ii) who is, because he or she is entitled to that pension, allowance or benefit, a concessional beneficiary (within the meaning of Part VII of the *National Health Act 1953*) or a pensioner for the purposes of that Act ...

The Commission is also to revise and keep up to date such information.

This provision, if enacted, would appear to authorise the exchange of certain information held on individuals. Though this exchange of information would, presumably, be subject to both the relevant secrecy and confidentiality provisions of the Acts mentioned as well as any relevant provisions of the Privacy Act 1988,

the Committee is concerned that this clause might also facilitate the exchange of personal information. As such, it might be considered an undue trespass on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference. The Committee would, therefore, appreciate some further information from the Minister on both the need for the amendment and the kind of information which might be sought.

INTERSTATE ROAD TRANSPORT AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Land Transport.

The Bill proposes to provide for the registration and regulation (under the Federal Interstate Registration Scheme) of prime movers which are to be used as part of a B-double combination. The Bill also provides for the making of regulations covering roadworthiness, designation of routes and technical requirements.

Ministerial determinations
Clause 7

Clause 7 of the Bill proposes to insert a new section 43A into the Interstate Road Transport Act 1945. That proposed new section provides:

> (1) The Minister may determine, in writing, that certain roads or categories of roads are to be routes for the carriage of passengers or goods between prescribed places or for any purpose that is incidental to carriage of that kind.
>
> (2) The Minister may determine, in writing, conditions to which the operation of a B-double on a federal route is subject.
>
> (3) The Minister must cause a notice of a determination made under this section to be published in the *Gazette*.

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

Clause 5 of the Bill proposes to insert a new section 12B into the Interstate Road Transport Act. That proposed new section would allow regulations to be promulgated to govern the operation of B-doubles (which are defined in proposed new section 3A - they are a type of motor vehicle).

Proposed new paragraph 12B(2)(c) provides that the regulation may prohibit the operation of a B-double in breach of conditions determined under proposed new subsection 43A(2). If this is the case, the Committee suggests that those determinations could have an effect which approaches that of legislation. If so, it is appropriate that the determinations be, at least, tabled in the Parliament and, perhaps, should be subject to disallowance.

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

INTERSTATE ROAD TRANSPORT CHARGE AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Land Transport.

The Bill proposes to remove provisions from the Interstate Road Transport Charge Act 1985 which permit only road maintenance costs to be taken into account in determining registration charges for B-double combinations and limit the charges that can be imposed on vehicles registered under the Federal Interstate Registration Scheme.

Removal of limits on charges
Clauses 3 and 4

Clause 3 proposes to delete those provisions of the Interstate Road Transport Charge Act 1985 which presently limit the factors that can be taken into account in determining the charge applicable to motor vehicles and trailers. According to the Minister's Second Reading speech on the Bill, this is to reflect a reinterpretation of section 92 of the Constitution by the High Court (in the case of Cole v Whitfield (1988) 165 CLR 360), the effect of which is to allow construction costs to be taken into account in determining the charge. The clause also proposes to delete the limits on the level of the charge which currently apply pursuant to subsections 5(4) and (5).

Clause 4 proposes to repeal section 6 of the Interstate Road Transport Charge Act.

That section provides for indexation of the limits which currently apply pursuant to subsections 5(4) and (5). The repeal is proposed on the basis that if the limits are no longer to apply, then the indexation provisions are redundant.

The Explanatory Memorandum to the Bill offers no justification for the removal of the limits on the charge. However, the Minister's Second Reading speech, in addition to referring to the High Court decision, indicates that the purpose of the Bill is to enable registration charges to be determined on a 'full cost recovery' basis. The Second Reading speech also states:

> Given that industry has the opportunity to reap significant efficiency gains through the operation of B-Doubles on a national basis, it is reasonable to expect that they be prepared to accept the costs involved.

The Minister goes on to say:

> While it is not proposed to review existing charges on the basis of full cost recovery in these amendments, it is not appropriate to amend the Act so that there are two separate sets of charging principles - one for B-Doubles and one for all other categories.

The Committee is concerned that these charges could be set in such a way that they might be more appropriately categorised as a tax. If this is the case, they should be set by primary legislation and subject to full parliamentary scrutiny. The Committee suggests that it is inappropriate to set such charges by regulation, particularly in the absence of any limits on the charges which could be set.

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

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 29 May 1991 by the Attorney-General.

This portfolio Bill proposes to amend the following 11 Acts within the Attorney-General's portfolio:

- Australian Security Intelligence Organisation Act 1979;
- Trade Practices Act 1974;
- Acts Interpretation Act 1901;
- Administrative Appeals Tribunal Act 1975;
- Australian Capital Territory Supreme Court Act 1933;
- Bill of Exchange Act 1909;
- Commonwealth Legal Aid Act 1977;
- Family Law Act 1975;
- Federal Court of Australia Act 1976;
- Law Officers Act 1964; and
- Statutory Declarations Act 1959.

The Committee has no comment on this Bill.

LOCAL GOVERNMENT (FINANCIAL ASSISTANCE) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 29 May 1991 by the Minister for Local Government.

The Bill proposes to:

- untie funds paid to local governments for local roads, or paid to State Governments where they are responsible for local roads, via general purpose grants;
- adjust the funding formula to account for the transfer of the Debits Tax base to the States and Territories, effective from 1 January 1991;
- provide the Treasurer with discretion to make adjustments to the factor by which general purpose assistance to Local Government is adjusted to reflect changes in Commonwealth/State funding arrangements; and
- provide for movement in general purpose assistance to Local Government to be directly linked to the movement in general revenue assistance to the States and the Northern Territory.

The Committee has no comment on this Bill.

OMBUDSMAN AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by Mr MacKellar as a Private Member's Bill.

The Bill proposes to amend section 5 of the Ombudsman Act 1976, to allow the Ombudsman to be able to respond to and investigate complaints relating to programming decisions of the Australian Broadcasting Corporation.

The Committee has no comment on this Bill.

PRIMARY INDUSTRIES AND ENERGY RESEARCH AND DEVELOPMENT AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the Primary Industries and Energy Research and Development Act 1989, to provide for:

- the establishment, constitution and operation of the Wool Research and Development Corporation, effective from 1 July 1991; and
- the removal of the 65 years age limit for directors of all research and development corporations established under the Principal Act.

Making of 'transitional and consequential' provisions by regulation Clause 17 - proposed new section 147A

Clause 17 of the Bill proposes to insert a new section 147A into the Primary Industries and Energy Research and Development Act 1989. That proposed new subsection provides:

> If the [Research and Development] Corporation in respect of the wool industry is established on 1 July 1991, the regulations may make such transitional and

consequential provisions as are necessary because of:

(a) the repeal of the *Wool Marketing Act 1987*; and

(b) the enactment of the *Australian Wool Realisation Commission Act 1991*; and

(c) the establishment of the Corporation.

The Explanatory Memorandum states that

> [u]nder this clause regulations may be made to provide for matters not already provided for under the Act.

No indication is given of the kinds of matters which the regulations might deal with. The Committee is concerned that the regulations might include matters that are more appropriately the subject of primary legislation. Accordingly, the Committee seeks the Minister's advice as to the matters or kinds of matters with which it is anticipated that the regulations will deal.

General comment

Pursuant to clause 2, the Bill is to commence on 1 July 1991. The Committee notes that, depending on (if and) when the Bill is passed, this may involve some degree of retrospective operation.

PRIMARY INDUSTRIES (INDUSTRY COUNCILS) BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to provide for the establishment, by regulation, of industry councils for primary industries. Initially, councils will be established for the wool and grains industries.

General comment

Pursuant to clause 2, the Bill is to commence on 1 July 1991. The Committee notes that, depending on (if and) when the Bill is passed, this may involve some degree of retrospective operation.

PROCEEDS OF CRIME LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Attorney-General.

The Bill proposes to establish the Confiscated Assets Trust Fund, into which will be paid all those funds recovered under the Proceeds of Crime Act 1987, the drug trafficking provisions of the Customs Act 1901, and any money or property recovered under section 9 of the Crimes Act 1914. The Bill also provides that the major proportion of these funds will be distributed to drug education and rehabilitation programs.

Delegation of power to 'a person'
Clauses 9, 15 and 17 - proposed new subsections 208DA(4), 20(3A) and 30(4A)

Clause 9 of the Bill proposes to insert proposed new section 208DA into the Customs Act 1901. That proposed new section deals with the disposal of narcotic-related goods. Proposed new subclause 208DA(4) would impose certain obligations on the Attorney-General 'or a person authorised by the Attorney-General for the purposes of this section'. Those include a power to direct that narcotic goods be disposed of.

There is no limit on the persons whom the Attorney-General could authorise. Given that this would appear to involve a fairly onerous obligation, the Committee

suggests that it may be appropriate to limit the persons or classes of persons whom the Attorney-General could authorise.

Clause 15 of the Bill proposes to insert a new subsection 20(3A) into the Proceeds of Crime Act 1977. That proposed new subsection deals with the effects of a forfeiture order pursuant to that Act. It would allow the Attorney-General 'or a person authorised by the Attorney-General for the purposes of this subsection' direct that property that is subject to a forfeiture order be disposed of.

As with the clause referred to above, there is no limit on the persons or classes of persons whom the Attorney-General may so authorise.

Clause 17 of the Bill proposes to insert a new subsection 30(4A) into the Proceeds of Crime Act. That proposed new subsection deals with the forfeiture of restrained property. It would allow the Attorney-General 'or a person authorised by the Attorney-General for the purposes of this subsection' to direct that property forfeited under section 30 of that Act be disposed of.

There is no limit as to who the Attorney-General could authorise.

Given the apparent gravity of the powers and obligations involved in each case, the Committee draws attention to the clauses, as they may be considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Henry VIII' clause
Clause 19 - proposed new subsection 34C(2)

Clause 19 proposes to insert a new Part IIA into the Proceeds of Crime Act. That new Part deals with the proposed Confiscated Assets Trust Fund. Proposed new section 34C deals with payments out of that Trust Fund. Paragraph 34C(1)(b) deals with the payment of funds out of the trust fund in relation to a 'relevant offence'. Subsection 34C(2) provides that a 'relevant offence'

> means an offence under section 29A, 29B, 29C, 29D, 71, 86 or 86A of the *Crimes Act 1914* or a prescribed offence.

This means that the Governor-General (acting on the advice of the Executive Council) can make regulations prescribing further offences as 'relevant' offences for the purposes of proposed new section 34C. As such, proposed new subsection 34C(2) is what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow the operation of the primary legislation to be amended by subordinate legislation.

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

QUARANTINE AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the Quarantine Act 1908 to:

- provide that the Commonwealth may retain goods undergoing quarantine and in relation to which charges are owing, even though the quarantine period has ended; and
- enable the Commonwealth to enter into agreements with the owners of animals, plants or goods in relation to payment of quarantine expenses.

The Committee has no comment on this Bill.

SOCIAL SECURITY (DISABILITY AND SICKNESS SUPPORT) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister Representing the Minister for Social Security.

The Bill proposes to amend the Social Security Act 1991 and the Health Insurance Act 1973 to effect a restructuring of income support for the disabled and sick. The changes in this Bill are based widely on the report of the Social Security Review, entitled 'Income Support for People with Disabilities'.

Retrospectivity
Subclause 2(1)

Subclause 2(1) of the Bill provides that Parts 1 and 2 of the Bill are to be taken to have commenced on 1 July 1991. The Committee notes that, depending on (if and) when the Bill is passed, this may involve some degree of retrospective operation. However, the Committee also notes that the amendments proposed by those Parts are either formal or technical in nature. Accordingly, the Committee makes no further comment on the clause.

Provision of tax file numbers
Clauses 13 and 17 - proposed new sections 111, 112, 130 131, 676 and 703

Clause 13 of the Bill proposes to repeal and replace Part 2.3 of the Social Security Act 1991. That proposed new Part deals with disability support pensions. It includes several proposed new subsections (111, 112, 130 and 131) which would require a person to supply his or her tax file number (or that of his or her partner) in relation to the payment of certain benefits.

Clause 17 of the Bill proposes to repeal and replace Part 2.14 of the Social Security Act. That proposed new Part deals with sickness allowances. It includes two proposed new subsections (676 and 703) which would require a person to supply his or her tax file number (or that of his or her partner) in relation to the payment of certain benefits.

The provisions are similar in effect to provisions which the Committee has previous drawn attention to, most recently in Alert Digest No. 7 of 1991, in relation to provisions in the Social Security (Job Search and Newstart) Amendment Bill 1991. As the Committee observed at that time, while such provisions may be seen as necessary to prevent persons defrauding the social security system, they may also be considered as unduly intrusive upon 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.

Abrogation of the privilege against self-incrimination
Clauses 13 and 17 - proposed new subsections 134 and 727

Pursuant to proposed new sections 132 and 133, the Secretary would be empowered to require persons to provide information in certain circumstances. Pursuant to proposed new subsection 134(1), a person would not be excused from providing such information on the ground that it might tend to incriminate him or her.

The Secretary would similarly be empowered to require that information be provided pursuant to proposed new sections 725 and 726. Proposed new subsection 727 would prevent a person from refusing to provide such information on the ground that it might tend to incriminate him or her.

This is what the Committee would ordinarily consider to be an abrogation of the privilege against self-incrimination. However, in each case, the provisions provide that any information obtained is not admissible in evidence against the person in a criminal proceeding other than a proceeding under, or arising out of the relevant section. The provisions are, therefore, drafted in a way that the Committee has previously been prepared to accept. Accordingly, the Committee makes no further comment on the provisions.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister Representing the Minister for Social Security.

The Bill proposes to amend:

- the Social Security Act 1947, to make a benefit payable (from 15 April 1991) to a person who holds an extended eligibility (spouse) entry permit;
- the Social Security Act 1991, to make it correspond to the Social Security Act 1947 as in force on 30 June 1991;
- the Social Security Act 1991, in relation to the indexation of maintenance income free areas and pharmaceutical allowances, the portability of wife's and class B widow's pensions and to give effect to a reciprocal social security agreement with the Netherlands; and
- the National Health Act 1953 and Data-matching Program (Assistance and Tax) Act 1990, to make minor technical amendments.

Retrospectivity
Subclauses 2(2) and (5)

Subclause 2(2) of the Bill provides that Part 2 of the Bill is to be taken to have commenced on 15 April 1991. Subclause 2(5) provides that Part 5 is to be taken

to have commenced on 1 March 1991. However, as the retrospectivity in each case is beneficial to claimants, the Committee makes no further comments on those clauses.

Non-reviewable decision
Clause 20 - proposed new paragraph 1250(1)(m)

Clause 20 of the Bill proposes to amend section 1250 of the Social Security Act 1991. That section provides that certain decisions under the Act are not subject to review by the Social Security Appeals Tribunal. Clause 20 of this Bill proposes to add to the list of non-reviewable decisions which is contained in that section, decisions under subsection 1237(3) of the Act. That subsection provides that the Minister may, by determination in writing, give directions to the Secretary in relation to the latter's power to waive debts.

Principle 1(a)(iii) of the Committee's terms of reference requires it to draw attention to provisions which make rights, liberties and obligations unduly dependent upon non-reviewable decisions. On that basis, the Committee draws Senators' attention to this provision.

STATUTORY FISHING RIGHTS CHARGE BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to collect charges which are to be paid by those seeking statutory fishing rights allocated by auction, tender or ballot pursuant to Part 3 of the Fisheries Management Bill 1991.

Fixing of charge by regulation
Paragraph 7(c)

Clause 7 of the Bill provides for the amount which is to be charged in relation to a statutory fishing right. It provides:

> The amount of the charge payable in respect of the grant of a statutory fishing right is such amount as is equal to:
>
> (a) if the right is auctioned - the amount of the highest bid made at the auction by the grantee of the right; or
>
> (b) if tenders were called in respect of the grant of the right - the amount of the bid submitted by the grantee of the right; or
>
> (c) if the grant of the right is made otherwise than by auction or by calling tenders - such amount as is calculated in accordance with the regulations.

Pursuant to paragraph (c), the level of the charge can be fixed by regulation. Given that there is no limit on the level of charge that can be fixed, the Committee suggests that this may be a matter which is not appropriate to be left to the regulations.

By way of explanation, the Explanatory Memorandum states:

> No maximum amounts are indicated for the purpose of this clause. Where statutory fishing rights are allocated by auction or tender, the price paid will be based on the person's assessment of the commercial value of that right. Where the amount to be paid is determined by regulation, the fixing of an appropriate upper limit would still be very difficult because of the variety of forms a statutory fishing right could take, the varying time periods for which such rights could be granted and because of the very wide range of potential profitability from different fisheries. (For example access to a known aggregation of orange roughy could have a very high value while some other fishery might appear at best to offer only marginal profitability).

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

SUPERANNUATION LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 29 May 1991 by the Minister for Finance.

The Bill proposes to amend the following Acts relating to superannuation for Commonwealth sector employees:

- Superannuation Act 1976;
- Superannuation Act 1990;
- Superannuation Benefits (Supervisory Mechanisms) Act 1990; and
- Superannuation (Productivity Benefit) Act 1988.

The amendments are intended to:

- bring the 1976 Commonwealth Superannuation Scheme into line with Occupational Superannuation Standards;
- streamline the administration of the above Acts;
- remove anomalies in benefit provisions; and
- make amendments of a technical nature.

Retrospectivity
Subclauses 2(2), (3) and (4), clause 59

Subclause 2(2) of the Bill provides that clause 26 is to be taken to have commenced on 18 December 1986. By way of explanation, the Explanatory Memorandum states:

> Clause 26 amends section 73A of the [Superannuation Act 1976] which provides for the reduction of invalidity pension payable to a person under the 1976 Act when the person's earnings from personal exertion are higher than a certain limit. That limit may be based on the salary that would have been payable to the person if he or she had not been retired.
>
> 64. The clause provides that the salary taken into account for the purposes of determining the limit is the same salary that was used to calculate the invalidity pension.
>
> 65. The amendment takes effect retrospectively to the commencement of the provisions relating to earnings of invalidity pensioners. This has been done because at least one person is known to have been adversely affected by the use of different salaries for pension and earnings purposes and there may be other persons similarly affected.

In view of this explanation, which appears to suggest that the proposed amendment is beneficial to persons other than the Commonwealth, the Committee makes no further comment on the subclause.

Subclause 2(3) of the Bill provides that clauses 82, 83 and 84 are to be taken to have commenced on 1 July 1990. Those clauses propose to amend the Superannuation (Productivity Benefit) Act 1988. According to the Explanatory Memorandum, clause 82 makes 'minor amendments' to that Act, clause 83 is intended to improve the operation of the Act and clause 84 is intended to ensure the consistent operation of the interest provisions under the Act. In the light of these explanations, the Committee makes no further comment on the subclause.

Subclause 2(4) of the Bill provides that clauses 10, 11 and 60 are to be taken to have commenced on 1 April 1991. Those clauses proposed to amend the Superannuation Act 1976. Though the Explanatory Memorandum contains no statement to that affect, it appears that the retrospective operation of the clauses is beneficial to persons other than the Commonwealth. In the absence of such a statement, the Committee would appreciate the Minister's confirmation that this is the case.

Clause 59 of the Bill proposes to amend section 168 of the Superannuation Act 1976, in order to allow regulations made for the purposes of sections 126, 180 or 183 or that Act to

> be expressed to have taken effect from and including a day not earlier than the day of that commencement.

This means that such regulations could operate retrospectively. However, such regulations could only be made within 12 months of the commencement of clause 59 (which is to commence on Royal Assent).

The Explanatory Memorandum offers little assistance as to the need for the capacity to make retrospective regulations or the likely effect of such retrospectivity. The Committee would appreciate the Minister's assistance in relation to these matters.

'Henry VIII' clause
Clause 4 - definition of 'deferred annuity'

Clause 4 of the Bill proposes to amend section 3 of the Superannuation Act 1976. Among other things, it proposes to insert the following definition:

> **'deferred annuity'** means an annuity that cannot be surrendered or assigned by the person in respect of whom it was purchased until that person attains the age of 55 years and under which benefits are payable to, or in respect of, the person only in one or more of the following circumstances:
>
> (a) the person retired from the workforce and attained an age of not less than 55 years;
> (b) the retirement of the person from the workforce before attaining the age of 55 years on the ground of permanent invalidity;
> (c) the death of the person;
> (d) the permanent departure of the person from Australia;
> (e) such other circumstances as the Insurance and Superannuation Commissioner within the meaning of the *Occupational Superannuation Standards Act 1987* approves;
> (f) such circumstances as are prescribed;

Paragraph (f) is what the Committee would ordinarily regard as a 'Henry VIII' clause. It would appear to allow the Governor-General (acting on the advice of the Executive Council) to make regulations prescribing 'circumstances' which would make what would otherwise be an annuity a 'deferred annuity'. The clause, in effect, would allow the operation of the primary legislation to be amended by subordinate legislation.

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

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

THERAPEUTIC GOODS (CHARGES) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Community Services and Health.

The Bill proposes to amend the Therapeutic Goods (Charges) Act 1989, to reflect amendments made to the Therapeutic Goods Act 1989 by the Community Services and Health Legislation Amendment Bill 1991. Primarily, the amendments concern the continuing application of a single set of annual registration or listing charges to a 'group' of therapeutic goods included in the Australian Register of Therapeutic Goods.

Fixing charges by regulation
Clause 3 - proposed new subsection 4(1A)

Clause 3 of the Bill proposes to insert a new subsection 4(1a) into the Therapeutic Goods (Charges) Act 1989. That new subsection would allow the application of a charge (by regulation) in relation to 'grouped' therapeutic goods. There is no limit as to the level of any such charge. As a result, the Committee suggests that this may not be an appropriate matter to be left to the regulations.

The Committee notes that in its Eighteenth Report of 1989 it made similar comments in relation to clause 4 of the (then) Therapeutic Goods (Charges) Bill 1989. Accordingly, the Committee draws attention to the clause, as it may b considered an inappropriate delegation of legislative power, in breach of principle 1(a)(iv) of the Committee's terms of reference.

TRANSPORT LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 29 May 1991 by the Minister for Land Transport.

This portfolio Bill proposes to amend the following five Acts:

- Australian Maritime Safety Authority Act 1990;
- Australian National Railways Commission Act 1983;
- Civil Aviation Act 1988;
- Federal Airports Corporation Act 1986; and
- Protection of the Sea (Prevention of Pollution from Ships) Act 1983.

Retrospectivity
Subclauses 2(2) and (5)

Subclause 2(2) of the Bill provides that Part 3 of the Bill is to be taken to have commenced on 17 February 1984. Part 3 proposes to amend the Australian National Railways Commission Act 1983. The proposed retrospective commencement relates to the commencement date of that Act. Since the proposed amendments appear to be for the purposes of correcting drafting errors, the Committee makes no comment on the subclause.

Subclause 2(5) of the Bill provides that paragraphs 18(a) and (c) and clause 22 of the Bill are to be taken to have commenced 'immediately before 1 April 1991'. The Explanatory Memorandum to the Bill indicates that this is a technical amendment which is intended to prevent duplication of certain statutory obligations. Accordingly, the Committee makes no further comment on the subclause.

Monitoring warrants
Clause 12 - proposed new section 32AD

Clause 12 of the Bill proposes to insert a new Part IIIA into the Civil Aviation Act 1988. That new Part would, if enacted, give the Civil Aviation Authority certain 'investigation powers'. Proposed new section 32AD would allow an 'investigator' appointed for the purposes of proposed Part IIIA to obtain a warrant for the purposes of 'monitoring' compliance with the Civil Aviation Act, the regulations issued under that Act and the Civil Aviation Orders. Such a warrant would authorise the investigator to enter the relevant premises for the purposes of monitoring compliance.

An investigator would be able to obtain such a warrant without there being any suggestion of any offence being committed. The Committee notes that a warrant could only be issued by a magistrate and only after the magistrate has been satisfied (by information on oath) that it is reasonably necessary. The Committee also notes that, pursuant to paragraph 32AD(4)(c), it would be possible for such a warrant to be valid for up to one month after issue.

The Committee is concerned both about the need for the warrants themselves and the necessity that they be valid for up to one month. Accordingly, the Committee would appreciate some further information from the Minister on these matters.

Abrogation of privilege against self-incrimination
Clause 12 - proposed new section 32AJ

Proposed new subsection 32AJ(1) would, if enacted, allow an investigator who is in or on premises that he or she has entered pursuant to a warrant require a person to answer questions and produce documents. Failure to comply with such a requirement would attract a fine of up to $3000.

Pursuant to proposed new subsection 32AJ(3), a person would not be entitled to refuse to answer such questions or produce such documents on the ground that to do so would tend to incriminate him or her. This is an abrogation of the privilege against self-incrimination. However, the Committee notes that proposed new subsection (3) goes on to provide that

> the answer to any question, or any book, record or document produced, or any information or thing obtained as a direct or indirect consequence of answering the question or producing the book, record or document is not admissible in evidence against the person in any criminal proceedings, other than proceedings for an offence against subsection (2).

While this provision is in a form which the Committee has previously been prepared to accept, the Committee would appreciate the Minister's advice as to the kind of information which might be sought pursuant to proposed new section 32AJ.

Adoption of extrinsic material by regulation
Clause 15 - proposed new subsection 98(3A)

Clause 15 of the Bill proposes to amend section 98 of the Civil Aviation Act, which sets out the regulation making power of that Act. Among other things, clause 15 proposes to add a new subsection 98(3A), which provides:

> The regulations may make provision for or in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in a written instrument or other document, as in force at a particular time or from time to time.

By way of explanation, the Explanatory Memorandum states:

> [T]his subclause ensures that the regulations can validly make provision for flight manuals, operations manuals, maintenance manuals, procedures manuals and other similar manuals relating to the safe operation of aircraft. The requirements for such manuals are set out in Annexes 6 and 8 to the Chicago Convention and such manuals are part of the regulatory system of all leading overseas aviation countries. Because such manuals were not previously expressly mentioned in the regulation making power in section 98 there was some legal doubt about the validity of Australian regulations relating to such manuals. This subclause, together with the validation provision in subclause 15(2), puts beyond doubt the validity of existing and future regulations relating to such manuals and will ensure that Australia continues to meet its international obligations in relation to the safety of air navigation.

While the Committee accepts the argument that it is essential that Australia meet its international obligations in relation to the safety of air navigation, it is equally essential that material which operates with the force of law is subject to scrutiny of Parliament. If the regulations are able to apply, adopt or incorporate matters contained in non-legislative instruments or documents 'as in force ... from time to time', the result would be to allow such extra-Parliamentary documents to be amended and to allow such amendments to have the force of law, without the Parliament having the opportunity to scrutinise them. Clearly, the competing considerations here must be balanced by the Parliament.

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

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 30 May 1991 by the Minister for Veterans' Affairs.

The Bill proposes to extend the same benefits to dependants of eligible female veterans as applies to male veterans' dependants. The Bill also proposes to:

- repeal obsolete provisions relating to Boer War veterans;
- allow payment of pharmaceutical allowance to orphans not in receipt of orphan's pension;
- index the pharmaceutical allowance;
- amend the Repatriation Commission's review powers relating to decision commencement dates;
- remove an anomaly affecting the adjustment of pension for lump sum compensation payments;
- amend the definition of 'disease';
- index the maintenance free area; and
- make several minor changes to the administration of service pensions.

Retrospectivity
Clause 2

Clause 2 of the Bill would, if enacted, give various provisions of the Bill retrospective effect. The earliest date from which such provisions would apply is

22 January 1991. Since the Explanatory Memorandum indicates that any retrospectivity is beneficial to persons other than the Commonwealth, the Committee makes no further comment on the clause.

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

WOOL TAX (NO. 1) AMENDMENT BILL 1991
WOOL TAX (NO. 2) AMENDMENT BILL 1991
WOOL TAX (NO. 3) AMENDMENT BILL 1991
WOOL TAX (NO. 4) AMENDMENT BILL 1991
WOOL TAX (NO. 5) AMENDMENT BILL 1991

These Bills were introduced into the House of Representatives on 30 May 1991 by the Minister for Primary Industries and Energy.

The Bills propose to:

- reduce the wool tax on shorn wool produced in Australia from 30 to 15 percent;
- reduce the actual rate of wool tax on shorn wool, except for carpet wool, from 25 to 15 percent;
- increase the tax on carpet wool from 3.85 to 4 percent; and
- repeal a provision which imposes an additional tax surcharge on shorn wool, other than carpet wool (this surcharge has never been imposed).

General comment

Each of these Bills is expressed to commence on 1 July 1991. The Committee notes that, depending on (if and) when the Bills are passed, they may involve some degree of retrospective operation.

SCRUTINY OF BILLS ALERT DIGEST

NO. 11 OF 1991

19 JUNE 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* Australian Wool Industry Council Bill 1991

General Insurance Supervisory Levy Amendment Bill 1991

* Insurance Acquisitions and Takeovers Bill 1991

* Insurance Laws Amendment Bill 1991

Life Insurance Policy Holders' Protection Levies Bill 1991

Life Insurance Policy Holders' Protection Levies Collection Bill 1991

Life Insurance Supervisory Levy Amendment Bill 1991

* The Committee has commented on these Bills

AUSTRALIAN WOOL INDUSTRY COUNCIL BILL 1991

This Bill was introduced into the Senate on 17 June 1991 by the Minister Representing the Minister for Primary Industries and Energy.

The Bill replaces the Primary Industries (Industry Councils) Bill 1991, which has been withdrawn. It proposes to establish an industry council for the wool industry.

'Henry VIII' clause - Conferral of functions by regulation
Clause 6

Clause 6 of the Bill sets out the functions of the proposed Australian Wool Industry Council. Paragraphs 6(a)-(e) list various functions. Paragraph (f) then provides that the Council shall have

> such other functions as are conferred on the Council by this Act or the regulations or by another Act.

This is what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow the functions set out in the primary legislation to be, in effect, added to by subordinate legislation.

The Committee also notes that, pursuant to clause 4 of the Bill, 'regulations' includes 'orders'. Though such orders would be disallowable, pursuant to subclause 38(3), there would appear to be no obligation to publish such orders, as they are

explicitly excluded from the printing, publication and availability for public purchase requirements of the Statutory Rules Publication Act 1905.

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

GENERAL INSURANCE SUPERVISORY LEVY AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 June 1991 by the Minister Assisting the Treasurer.

The Bill is one of a package of six Bills concerning the protection of life and general insurance policy holders. The Bill proposes to amend the General Insurance Supervisory Levy Act 1989, to allow the increased cost of supervision of companies required to lodge accounts under the Insurance Act 1973 to be recouped.

The Committee has no comment on this Bill.

INSURANCE ACQUISITIONS AND TAKEOVERS BILL 1991

This Bill was introduced into the House of Representatives on 6 June 1991 by the Minister Assisting the Treasurer.

The Bill is one of a package of six Bills concerning the protection of life and general insurance policy holders. The Bill proposes to set out rules governing the control and compulsory notification of proposals relating to:

- the acquisition or issue of shares in Australian life and general insurance companies;
- the acquisition or leasing of assets of Australian life and general insurance companies; and
- the entering into of agreements relating to directors of Australian life and general insurance companies.

Definition of 'reviewable decision'
Clause 4

Clause 4 of the Bill sets out the meaning of various terms which are used in the Bill. A 'reviewable decision' is defined as:

> a decision of the Minister under Part 2, 3 or 4 (other than section 28, 42 or 56) or paragraph 66(1)(b).

The effect of this definition is to make decisions pursuant to clauses 28, 42 or 56 non-reviewable.

Clause 28, if enacted, would allow the Minister to make a 'temporary restraining order', prohibiting certain acquisitions or issue of shares in insurance companies.

The Explanatory Memorandum states:

> The purpose of this clause is to give the Minister additional time in which to decide whether the proposal may proceed or should be prohibited as contrary to the public interest. The time period cannot be extended indefinitely. The additional time conferred by a temporary restraining order may only be extended by one further period of time before a decision must be made.

Pursuant to subclause 28(3), the maximum period for a temporary restraining order is 60 days from the date that the order comes into operation. With an extension, the maximum period would be 120 days.

Clause 42, if enacted, would allow the Minister to make a temporary restraining order in relation to the control of acquisition or leasing of assets of Australian-registered insurance companies. The Explanatory Memorandum offers the same explanation as is provided in relation to clause 28. As with that clause, there is a limit as to the time that a temporary restraining order could operate.

Clause 56, if enacted, would allow the Minister to make a temporary restraining order in relation to agreements concerning to the directors of Australian-registered insurance companies. The Explanatory Memorandum offers the same explanation

as is offered in relation to clauses 28 and 42. The operation of such a restraining order is similarly limited.

Principle 1(a)(iii) of the Committee's terms of reference require it to draw attention to provisions which make rights, liberties or obligations unduly dependent on non-reviewable decisions. However, in view of the explanations provided in each case and, in particular, bearing in mind the temporary nature of the restraining orders in each case, the Committee makes no further comment on the clauses.

Retrospectivity
Subclause 64(2)

Clause 64 of the Bill, if enacted, would give the Minister certain powers in relation to schemes which have been entered into for the sole or dominant purpose of avoiding the provisions of Parts 2, 3 or 4 of the Bill (which, respectively, deal with the acquisition or issue of shares in, the acquisition or leasing of assets of and the entering into of agreements relating to directors of Australian life and general insurance companies).

Subclause 64(2) provides:

> This section applies to a scheme entered into after 6 June 1991.

The effect of the clause, therefore, is to allow the provisions of clause 64 to operate retrospectively. However, the Committee notes that the Explanatory Memorandum states:

> Subclause (2) provides that this clause applies to any scheme entered into after the date of introduction of this Bill into the Parliament [ie 6 June 1991].

In the light of this explanation, and bearing in mind that clause 64 is intended to prevent the avoidance of the substantive provisions of the Bill, the Committee makes no further comment on the subclause.

Abrogation of privilege against self-incrimination
Subclause 73(9)

Clause 73 of the Bill, if enacted, would allow the Minister to obtain information and documents about matters relating to the exercise of his or her powers under the legislation. The Minister would be empowered to require a person to give such information or produce such documents. Pursuant to subclause 73(5), failure to comply with such a requirement would be an offence, punishable by imprisonment for up to 6 months.

Pursuant to subclause 73(9), a person would not be excused from giving information or producing documents on the ground that the information or production might tend to incriminate them. As such, this is an abrogation of the privilege against self-incrimination. However, the Committee notes that subclause (9) goes on to provide that:

> (a) giving information or producing the document or copy; or
>
> (b) any information, document or thing obtained as a direct or indirect

consequence of giving the information or producing the document or copy;

is not admissible in evidence against the person in any criminal proceedings other than proceedings under, or arising out of, this section.

The provision is, therefore, in a form which the Committee has previously been prepared to accept. Accordingly, the Committee makes no further comment on the clause.

INSURANCE LAWS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 June 1991 by the Minister Assisting the Treasurer.

The Bill is one of a package of six Bills concerning protection of life and general insurance policy holders. The Bill proposes to amend the Insurance Act 1973 and Life Insurance Act 1945 to:

- provide measures to disqualify a person who has been bankrupt or who has been convicted of an offence relating to insurance or dishonest conduct from appointment to a senior management position with a life or general insurance company; and
- enhance provisions dealing with investigations, appointment of inspectors and the giving of directions to insurance companies.

Reversal of the onus of proof
Clauses 24 and 46

Clause 24 of the Bill proposes to insert a new section 117A into the Insurance Act 1973. Proposed new section 117A, if enacted, would prohibit bankrupts and persons convicted of certain offences from acting as directors or principal executive officers of 'authorised insurers'. Proposed new subsections 117A(3) and (4), respectively, would make it an offence for a body corporate or a foreign body corporate to

permit such a person to be or act as a director, etc. of the body corporate. In each case, a fine of up to $25,000 is applicable to an offence.

Proposed new subsection 117A(5) provides:

> In a prosecution under subsection (3) or (4), it is a defence if the defendant proves that:
>
> (a) the defendant did not know, and had no reasonable grounds to suspect, that the person was a disqualified person; and
>
> (b) the defendant had made all reasonable efforts to ascertain whether the person was a disqualified person.

Clause 46 of the Bill proposes to insert a new section 146A into the Life Insurance Act 1945. That proposed new section, if enacted, would prohibit bankrupts and persons convicted of certain offences from acting as directors or principal executive officers of registered life insurers. Subsections (3), (4) and (5) of the proposed new section are in similar terms to subsections (3), (4) and (5) of proposed new section 117A of the Insurance Act.

These provisions, in each case, involve a reversal of the onus of proof, as they would require a body corporate charged with an offence to prove that it did not know and had no reasonable grounds to suspect that a person was not entitled to be appointed as a director, etc. Ordinarily, it is incumbent on the prosecution to prove all the elements of an offence, of which, knowing involvement in an offence would ordinarily be one. Further, the Committee notes that the effect of the provisions would appear to be to make bodies corporate criminally liable for what

amounts to a failure to take reasonable care (ie in ensuring that a director, etc. is not a disqualified person).

In addition, the Committee notes that, in each case, the prohibition is against a disqualified person being or acting as a director, principal executive officer, etc. Bearing in mind the discussion above, this would appear to impose on an existing body corporate to which the legislation relates an obligation to make reasonable efforts to ascertain that their existing directors and principal executive officers are not disqualified persons. The Committee would appreciate the Minister's advice as to whether or not this is the case and, if so, how much time a body corporate would be allowed in order to make inquiries about the past conduct of its directors and principal executive officers.

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.

LIFE INSURANCE POLICY HOLDERS' PROTECTION LEVIES BILL 1991

This Bill was introduced into the House of Representatives on 6 June 1991 by the Minister Assisting the Treasurer.

The Bill is one of a package of six Bills concerning protection of life and general insurance policy holders. The Bill proposes to impose one or more levies on life insurance companies registered under the Life Insurance Act 1945, to raise revenue to a maximum of $65 million which is intended to provide protection to the policy holders of Occidental Life Insurance Company of Australia Limited and Regal Life Insurance Limited.

The Committee has no comment on this Bill.

LIFE INSURANCE POLICY HOLDERS' PROTECTION LEVIES COLLECTION BILL 1991

This Bill was introduced into the House of Representatives on 6 June 1991 by the Minister Assisting the Treasurer.

The Bill is one of a package of six Bills concerning protection of life and general insurance policy holders. The Bill proposes to provide the machinery for the collection and application of levies imposed by regulations under the Life Insurance Policy Holders' Protection Levies Bill 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.

LIFE INSURANCE SUPERVISORY LEVY AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 June 1991 by the Minister Assisting the Treasurer.

The Bill is one of a package of six Bills concerning protection of life and general insurance policy holders. The Bill proposes to amend the Life Insurance Supervisory Levy Act 1989, in order to recoup the increased cost of supervision of companies required to lodge accounts under the Life Insurance Act 1945.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 12 OF 1991

14 AUGUST 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* Acts Interpretation (Delegated Legislation) Amendment Bill 1991

Arts, Sport, Environment and Tourism Legislation Amendment Bill 1991

*** The Committee has commented on this Bill**

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.

ACTS INTERPRETATION (DELEGATED LEGISLATION) AMENDMENT BILL 1991

This Bill was introduced into the Senate on 20 June 1991 by Senator Harradine as a Private Senator's Bill.

The Bill proposes to provide for the:

- publication of draft delegated legislation before it is made;
- removal of the possibility of retrospective operation of regulations; and
- disallowance of parts of provisions in delegated legislation.

General comment

The Committee notes that in his Second Reading speech on this Bill, Senator Harradine drew attention to the fact that the Bill proposes to put into effect reforms which have been recommended at various times by the Senate Standing Committee on Regulations and Ordinances.

ARTS, SPORT, ENVIRONMENT AND TOURISM LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 21 June 1991 by the Minister for the Arts, Tourism and Territories.

This omnibus portfolio Bill proposes to amend the following 15 Acts falling within the responsibility of the Arts, Sport, the Environment, Tourism and Territories:

- Australia Council Act 1975;
- Australian Film Commission Act 1975;
- Australian Film, Television and Radio School Act 1973;
- Australian National Maritime Museum Act 1990;
- Australian Sports Commission Act 1989;
- Australian Sports Drug Agency Act 1990;
- Australian Tourist Commission Act 1987;
- Environment Protection (Alligator Rivers Region) Act 1978;
- Great Barrier Reef Marine Park Act 1975;
- Hazardous Waste (Regulation of Exports and Imports) Act 1989;
- National Gallery Act 1975;
- National Library Act 1960;
- National Museum of Australia Act 1980;
- National Parks and Wildlife Conservation Act 1975; and
- Protection of Movable Cultural Heritage Act 1986.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 13 OF 1991

21 AUGUST 1991

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

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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

(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:

* Carriage of Goods by Sea Bill 1991
* Crimes Amendment Bill 1991
* Crimes (Aviation) Bill 1991
* Freedom of Information Amendment Bill 1991

  Ombudsman Amendment Bill 1991
* Political Disclosures (Donations) Bill 1991

*** 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.

CARRIAGE OF GOODS BY SEA BILL 1991

This Bill was introduced into the Senate on 14 August 1991 by the Minister for Shipping and Aviation Support.

The Bill proposes to repeal the Sea-Carriage of Goods Act 1924 and update Australia's marine cargo liability regime to take account of international developments since 1924.

Commencement by Proclamation
Subclause 2(2)

Part 3 of the Bill deals with the application of the 'Hamburg Rules', which are the substantive provisions of the Hamburg Convention on the Carriage of Goods by Sea. These rules govern the liability of ocean carriers for any loss or damage to cargo which occurs while the cargo is in their possession. Schedule 2 of the Bill sets out the text of the rules.

Subclause 2(2) of the Bill provides that Part 3 and Schedule 2 are to commence

> on a day to be fixed by Proclamation, being a day not sooner then the day on which the Hamburg Convention enters into force in respect of Australia.

By way of explanation for this method of commencement, the Explanatory Memorandum 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 come into force internationally and do not provide a viable alternative marine cargo liability regime at this stage. The Hamburg Rules will enter into force one year after the 20th contracting party accedes to the Convention. As at 1 August 1991, 19 countries have acceded to the Hamburg Convention. None of Australia's major trading partners have become contracting States.
>
> 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.

This explanation accords with the requirements of Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, as the need for commencement by Proclamation is related to a particular eventuality. However, the Committee notes that there is no obligation on the government of the day to ratify the convention to which the Hamburg Rules relate. Similarly, there would be no obligation on that government to proclaim the relevant parts of the Bill if and when the Hamburg Rules enter into force. In that sense, the commencement of those parts remains within the discretion of the government of the day, which will, no doubt, have to take into account the prevailing 'domestic interests'. It is not unlikely that those domestic interests will differ over the time which will elapse between the passage of the Bill and the proclamation of the relevant parts.

The Committee has a long-standing concern about legislation, or parts of legislation, which is passed by the Parliament, subject to commencement by Proclamation, without there being any requirement that the necessary Proclamation be made. Given that concern, and in the light of the discussion above, the Committee would appreciate the Minister's views as to whether it would be appropriate in the present case to include a sunset-type provision, to the effect that if the relevant parts are not proclaimed within a certain time, then they are repealed. If this is an acceptable course, the Committee would also appreciate the Minister's views on what period of time would be appropriate.

CRIMES AMENDMENT BILL 1991

This Bill was introduced into the Senate on 14 August 1991 by the Minister for Justice and Consumer Affairs.

The Bill proposes to amend the Crimes Act 1914, to allow police to search aircraft, vehicles and vessels without a warrant in emergencies.

General comment

The Committee notes that, if enacted, this Bill would confer on a 'constable' (defined as 'a member or special member of the Australian Federal Police or a member of the police force of a State or Territory') the power to, in certain circumstances, search without warrant an aircraft, vehicle or vessel. However, the Committee notes that the circumstances in which the power might be exercised are limited to 'serious and urgent' situations.

The Committee makes no further comment on the Bill.

CRIMES (AVIATION) BILL 1991

This Bill was introduced into the Senate on 14 August 1991 by the Minister for Justice and Consumer Affairs.

The Bill proposes to consolidate and consequently repeal the 4 Acts forming the current legislative package relating to aviation crimes, namely:

- the Crimes (Hijacking of Aircraft) Act 1972;
- the Civil Aviation (Offenders on International Aircraft) Act 1970;
- the Crimes (Protection of Aircraft) Act 1973; and
- the Crimes (Aircraft) Act 1963.

Power to arrest without warrant
Subclause 34(1)

Subclause 34(1) of the Bill provides:

> The person in command of a prescribed aircraft may, with such assistance as is reasonably necessary, arrest, without warrant, anyone whom he or she finds committing, or reasonably suspects has committed, an offence against a provision of Part 2 [which prohibits hijacking, endangering the safety of aircraft, etc] on board the aircraft.

While the Committee is always concerned about powers to arrest without warrant, two aspects of this particular power should be noted. First, it is clear that the circumstances which are contemplated by the provisions are both serious in nature and limited in scope. Second, it appears that the power of arrest to be granted by the subclause is no wider than that which an ordinary person would have at common law. Accordingly, the Committee makes no further comment on the subclause.

Power to remand a person in custody
Clauses 39 and 40

Clause 39 of the Bill provides:

> (1) Where:
> (a) a person is brought or appears before a magistrate under this Act; and
> (b) a warrant of the kind described in paragraph 38(b) [ie a warrant for arrest for the purposes of criminal or extradition proceedings in relation to an offence under the Bill] for the arrest of the person is not produced to the magistrate;
> the magistrate must:
> (c) if satisfied that more time is reasonably required for deciding whether criminal or extradition proceedings should be started against the person - remand the person, either in custody or on bail, for a period not longer than 7 days; or
> (d) if not satisfied - order that the person be released from custody.
>
> (2) A person remanded for a period under subsection (1) must be brought before a magistrate at the end of that period.
>
> (3) If a person remanded on bail under subsection (1) does not appear before a magistrate in accordance with the person's recognizance, a magistrate may issue a warrant for the arrest of the person and for bringing the person before a magistrate.

Clause 40 then provides:

> (1) Where a person remanded in custody under section 39 is still held in that custody at the end of the prescribed period, the person may apply to the Supreme Court of the State or Territory in which he or she is so held to be released.
>
> (2) Where, on an application by a person under subsection (1), the court is satisfied that the Attorney-General has been given reasonable notice of the making of the application, the court must, unless reasonable cause is shown for delaying the person's release, order that the person be released from custody.
>
> (3) In this section:
> **"prescribed period"**, in relation to a person, means 2 months after:
> (a) the date of the order under section 39 under which the person is held in custody; or
> (b) if the person has applied for a writ of *habeas corpus* - the day on which that application, or any appeal relating to it, is finally determined;
> whichever is later.

The Committee notes that 'remand' is defined in clause 3 of the Bill to include 'further remand'.

Two aspects of these provisions cause the Committee some concern. First, it appears that the effect of the provisions is to allow a person to be remanded in custody, albeit by a magistrate, for up to 2 months (with renewals every 7 days), without there ever having been a warrant issued for the arrest or extradition of the person. The only basis for this continued confinement is that the magistrate must be satisfied that more time is required before the relevant authorities decide whether or not to commence criminal or extradition proceedings. Though it appears from the Explanatory Memorandum that these provisions do no more than re-draft the existing provisions dealing with the types of offences with which the Bill deals,

this power to remand in custody may, nevertheless, be considered an undue trespass on personal rights and liberties.

Second, the Committee is unclear about the operation of subclause 40(1) and, in particular, the effect on that subclause of the definition of 'prescribed period' in subclause 40(3). The Committee is unsure about which is the relevant 'order' under section 39 from which the 2 month 'prescribed period' runs pursuant to paragraph (3)(a). Similarly, the Committee is unsure as to whether the effect of paragraph (3)(b) is to permit the continued detention of a person for up to 2 months after an application for a writ of *habeas corpus* has been finally determined in favour of the applicant. While this latter interpretation of the provision would seem improbable, the Committee is of the view that, on the face of the legislation, the interpretation is plausible. In any event, the Committee suggests that the intention of the clause is not clear.

The Committee would appreciate the Attorney-General's further views on the need for this particular power to remand and, in particular, on the interpretations of clause 40 which have been discussed above.

FREEDOM OF INFORMATION AMENDMENT BILL 1991

This Bill was introduced into the Senate on 14 August 1991 by the Minister for Justice and Consumer Affairs.

The Bill proposes to implement a number of recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs in its 1987 Report on the Operation and Administration of Freedom of Information Legislation.

Retrospectivity
Subclause 29(2)

Clause 29 of the Bill proposes to amend section 41 of the Freedom of Information Act 1982, which governs the release of documents affecting personal privacy. According to the Explanatory Memorandum, the amendments propose to replace the 'limited and uncertain' concept of 'information relating to personal .. affairs' with the term 'personal information' which is defined in clause 3(d) of the Bill. The amendments also detail the circumstances in which information on a person provided by psychologists, marriage guidance counsellors or social workers can be released to the person. According to the Explanatory Memorandum, these amendments are proposed by way of implementing a recommendation of the Senate Standing Committee on Legal and Constitutional Affairs.

Subclause 29(2) provides:

> The amendments made by this section apply to any documents in respect of which a request for access was or is made under this Act before or after the commencement of this section, other than a request that was finally disposed of before the commencement of this section.

The Committee notes that this means that the amendments, if enacted, would be able to operate, in effect, retrospectively, to determine applications for access to personal information made prior to the commencement of this Bill.

The Committee makes no further comment on the Bill.

OMBUDSMAN AMENDMENT BILL 1991

This Bill was introduced into the Senate on 14 August 1991 by Senator Herron as a Private Senator's Bill.

The Bill proposes to amend section 5 of the Ombudsman Act 1976, to allow the Ombudsman to be able to respond to and investigate complaints relating to programming decisions of the Australian Broadcasting Corporation.

The Committee has no comment on this Bill.

POLITICAL DISCLOSURES (DONATIONS) BILL 1991

This Bill was introduced into the Senate on 14 August 1991 by Senator Powell as a Private Senator's Bill.

The Bill proposes to amend the Commonwealth Electoral Act 1918, *to require full* disclosure of all donations to registered political parties, including a requirement for annual reporting of income and expenditure.

'Henry VIII' clause
Clause 7 - proposed new subsection 314AA(2)

Clause 7 of the Bill proposes to insert a new Division 5A into the Commonwealth Electoral Act 1918. That new Division, if enacted, would require all registered political parties to lodge with the Australian Electoral Commission annual returns of income and expenditure.

Proposed new subsection 314AA(1) would require a registered political party to include various particulars in their annual return. However, proposed new subsection 314AA(2) goes on to provide that these particulars need not be included in 'the prescribed circumstances'. This is, therefore, what the Committee would ordinarily regard as a 'Henry VIII' clause, as it would allow the Governor-General (acting on the advice of the Executive Council) to 'prescribe' (by regulation) circumstances in which certain provisions of the legislation would not apply. There *is no suggestion as to what kinds of circumstances are contemplated.*

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

SCRUTINY OF BILLS ALERT DIGEST

NO. 14 OF 1991

4 SEPTEMBER 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

Commonwealth-owned Enterprises Bill 1991

* Defence Force (Home Loans Assistance) Bill 1991

* Health Insurance Amendment Bill 1991

Honey Levy (No. 1) Amendment Bill 1991

Honey Levy (No. 2) Amendment Bill 1991

Honey Export Charge Amendment Bill 1991

Loan Bill (No. 2) 1991

* Primary Industries Legislation Amendment Bill (No. 2) 1991

* Sales Tax (Exemptions and Classifications) Amendment Bill 1991

*** The Committee has commented on these Bills**

COMMONWEALTH-OWNED ENTERPRISES BILL 1991

This Bill was introduced into the House of Representatives on 22 August 1991 by Mr Beale as a Private Member's Bill.

The Bill proposes to facilitate the transfer from the public to private sector of certain government business enterprises. Under the Bill, enterprises would initially be able to convert into public companies, after which an assessment would be conducted to ascertain whether the enterprise (or its assets) should be transferred to the private sector.

The Committee has no comment on this Bill.

AD14/91

DEFENCE FORCE (HOME LOANS ASSISTANCE) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 22 August 1991 by the Minister for Defence Science and Personnel.

The Bill proposes to adjust the operation of the new Defence Home Loans Assistance Scheme in its application to members who have been on operational service, particularly the Gulf conflict, by:

- waiving the six year basic service period for members transferring from the previous scheme;
- providing a minimum subsidy period of 16 years;
- including Iraq and Kuwait in the Middle East operational area and setting a cut-off date of 9 June 1991 for service in that area; and
- ensuring that benefits flow on to members' widows and widowers.

Retrospectivity
Subclause 2(2)

Paragraph 4(a) of the Bill proposes to amend the definition of 'Middle East operational area' which is contained in section 3 of the Defence Force Home Loans Assistance Act 1990. The proposed amendment would add Kuwait and Iraq to the definition.

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 2(2) of the Bill, this amendment would, if enacted, operate from 21 January 1991. The Explanatory Memorandum to the Bill notes that this is the date of commencement of the existing definition (ie the date of Royal Assent).

While the proposed amendment is clearly retrospective in operation, the Committee notes that it appears to operate to the benefit of members of the Defence Force who have been on operational service, particularly in the recent Gulf conflict. Consequently, the Committee makes no further comment on the Bill.

HEALTH INSURANCE AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 20 August 1991 by the Minister for Health, Housing and Community Services.

The Bill proposes to:

- reduce the level of medicare benefit for prescribed general practitioner services by a total of $3.50 (from 1 November 1991), $5.00 (from 1 November 1992) and $5.00 indexed (from 1 November 1993);
- enable medical practitioners to charge up to $3.50 for services when a patient assigns the right to payment of the medicare benefit to the practitioner;
- ensure that the patient contribution to the cost of a single professional service does not exceed the greatest permissible gap, initially to be $26.80;
- introduce new 'safety-net' arrangements for families and individuals;
- provide for the review of decisions made in respect of the refusal to issue additional or replacement 'safety-net' concession cards and in respect of the withdrawal and cancellation of these cards; and
- provide for the indexation of:
  - reduced medicare benefit from 1 November 1993;

. the greatest permissible gap from 1 November 1991; and

. family and individual 'safety nets' from 1 January 1993.

'Henry VIII' clauses
Proposed new paragraph 10(2)(a) and clause 8

Clause 4 of the Bill proposes to omit subsections 10(2)-(6) of the Health Insurance Act 1973 and substitute four new subsections. Section 10 of that Act deals with individuals' entitlements to medicare benefits. Subsection 10(1) provides:

> Where, on or after 1 February 1984, medical expenses are incurred in respect of a professional service rendered in Australia to an eligible person, medicare benefit calculated in accordance with sub-section (2) is payable, subject to and in accordance with this Act, in respect of that professional service.

Proposed new subsection 10(2) provides:

> (a) in the case of a service of the kind referred to in paragraph (da) of the definition of 'basic private table' or 'basic table' in subsection 4(1) of the *National Health Act 1953* **(not being a service, or a service in a class of services, that, under the regulations, is excluded from this paragraph)** - an amount equal to 75% of the Schedule fee; or
> (b) in any other case (not being a case to which paragraph (c) applies) - an amount equal to 85% of the Schedule fee; or
> (c) in the case of a prescribed GP service, where the patient is not a concessional beneficiary or a concessional beneficiary's dependant - an amount equal to 85% of the Schedule fee less:

(i) *in the year beginning on 1 November 1991* - $3.50; or
(ii) in the year beginning on 1 November 1992 - $5; or
(iii) in the year beginning on 1 November 1993 or a later year beginning on 1 November - $5 indexed under section 10A. [Emphasis added]

The effect of proposed new paragraph 10(2)(a) is to allow the Governor-General (on the advice of the Federal Executive Council) to issue regulations to exclude certain services or classes of services from the definition referred to and to, thereby, amend the definition set out in the legislation. This is, therefore, what the Committee would consider to be a 'Henry VIII' clause, as it would allow the operation of the primary legislation to be amended by subordinate legislation.

Clause 8 of the Bill is a 'transitional' provision. It provides:

> (1) For the purposes of ensuring that no person is disadvantaged by the repeal of subsections 10(3), (4A), (5) and (6) of the [Health Insurance] Act, the regulations may provide for the application of those provisions in respect of the year beginning on 1 January 1991 subject to such modifications and adaptations as the regulations may provide.
>
> (2) The regulations may also provide for such other transitional arrangements as are necessary to facilitate the introduction of the amendments of the [Health Insurance] Act made by this Act.

Once again, this is a 'Henry VIII' provision, as both subclauses (1) and (2) would, if enacted, allow the operation of the primary legislation to be amended by subordinate legislation. However, the Committee notes that the express purpose of

the clause is to ensure that no individual is disadvantaged by the repeal of the subsections referred to.

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

HONEY EXPORT CHARGE AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 21 August 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to increase the maximum allowable rate of levy which can be charged on honey from 0.50 cent to 0.75 cent per kilo, imposed as either a levy or as an export charge. This levy provides funding for honey research and development by the Honeybee Research and Development Council.

The Committee has no comment on this Bill.

HONEY LEVY (NO. 1) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 21 August 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to increase the maximum allowable rate of levy on honey produced and sold in Australia from 0.50 cent to 0.75 cent per kilo. This levy provides funding for honey research and development by the Honeybee Research and Development Council.

The Committee has no comment on this Bill.

HONEY LEVY (NO. 2) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 21 August 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to increase the maximum allowable rate of levy on honey produced in Australia and used in the production of other goods from 0.50 cent to 0.75 cent per kilo. This levy provides funding for honey research and development by the Honeybee Research and Development Council.

The Committee has no comment on this Bill.

LOAN BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 20 August 1991 by the Minister for Finance.

The Bill proposes to enable certain defence expenditures to be met from the Loan Fund (rather than from the Consolidated Revenue Fund) and to supplement the moneys available to the Consolidated Revenue Fund.

The Committee has no comment on this Bill.

PRIMARY INDUSTRIES LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 20 August 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the following Acts:

- Australian Horticultural Corporation Amendment Act 1991;
- Australian Wool Corporation Act 1991;
- Australian Wool Realisation Commission Act 1991; and
- Primary Industries and Energy Research and Development Act 1989.

The amendments provide additional transitional arrangements for the following new organisations:

- the Australian Dried Fruits Board;
- the Australian Wool Realisation Commission;
- the Australian Wool Corporation; and
- the Wool Research and Development Corporation.

Retrospectivity
Subclause 2(2)

Clause 6 of the Bill proposes to amend section 48 of the Australian Wool Corporation Act 1991. Subclause 2(2) would, if enacted, make that amendment

operate retrospectively, from the commencement of that Act (ie 1 July 1991). However, as the Explanatory Memorandum makes it clear that this is to correct a drafting error, the Committee makes no further comment on the subclause.

SALES TAX (EXEMPTIONS AND CLASSIFICATIONS) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 20 August 1991 by the Minister Assisting the Treasurer.

The Bill proposes to change the current exemption for certain goods and motor vehicles for use by people with disabilities. The changes are primarily based on proposals recommended by the Industry Commission Report on Aids and Appliances for People with Disabilities.

Retrospectivity
Clause 2

Clause 2 of the Bill provides:

> This Act is taken to have commenced at 3.00 p.m., by standard time in the Australian Capital Territory, on 20 August 1991.

The clause will, if enacted, give the Bill a slightly retrospective effect. However, the Committee notes that the amendments proposed by the Bill appear to be beneficial to individuals, as they widen the exemption from sales tax for certain goods and motor vehicles used by people with disabilities. Accordingly, the Committee makes no further comment on the Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 15 OF 1991

11 SEPTEMBER 1991

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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 from Standing Order 24

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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

(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:

* Aboriginal Education (Supplementary Assistance) Amendment Bill 1991

* AUSSAT Repeal Bill 1991

International Monetary Fund (Quota Increase and Agreement Amendments) Bill 1991

Overseas Students Charge Amendment Bill 1991

Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991

* Rice Levy Bill 1991

Student Assistance Amendment Bill (No. 2) 1991

*** 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.

ABORIGINAL EDUCATION (SUPPLEMENTARY ASSISTANCE) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 3 September 1991 by the Minister for Aboriginal Affairs.

The Bill proposes to amend the Aboriginal Education (Supplementary Assistance) Act 1989, to reflect the transfer of the higher education funding component of the Aboriginal Education Strategic Initiatives Program to the Higher Education Funding Act 1988 and to make minor changes to the administration of the Program.

General comment

The Committee notes that there is what appears to be a drafting error in clause 3 of the Bill, which proposes to amend section 12 of the Aboriginal Education (Supplementary Assistance) Act 1989. In particular, the Committee notes that paragraph 3(a) of the Bill proposes to omit the existing paragraphs (1)(b) and (c) and substitute two new paragraphs. These proposed new paragraphs are designated as paragraphs "(a)" and "(b)". The Committee suggests that either the proposed new paragraphs should be designated as "(b)" and "(c)" or else the proposed amendments should also omit the existing paragraph (1)(a).

The Committee makes no further comment on the Bill.

AUSSAT REPEAL BILL 1991

This Bill was introduced into the House of Representatives on 5 September 1991 by the Minister for Transport and Communications.

The Bill proposes to:

- appropriate monies from the Consolidated Revenue Fund to pay out existing obligations of AUSSAT prior to its sale;
- empower the Treasurer to guarantee AUSSAT's borrowings;
- prevent AUSSAT's tax losses in income years prior to the sale being used as a tax deduction for income tax purposes from the time of sale; and
- repeal the AUSSAT Act 1984 and make consequential amendments to other Acts.

Retrospectivity/prospective commencement
Subclause 2(2)

Clause 2 of the Bill provides for the commencement of the various Parts of the Bill. It provides:

> (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
>
> (2) Part 3 commences, or is taken to have commenced, as the case requires, on a day to be fixed by Proclamation.

(3) A Proclamation may fix under subsection (2) a day that is earlier than the day on which the Proclamation is published in the *Gazette*, but only if the day so fixed is:

(a) the day after the day on which:
  (i) a person (other than the Commonwealth or a nominee of the Commonwealth) acquires a controlling interest in AUSSAT; or
  (ii) 2 or more such persons together acquire such a controlling interest, or acquire interests in AUSSAT that together constitute such a controlling interest; or
(b) some later day.

(4) If the commencement of Part 3 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, Parts 2 and 3 are repealed on the first day after the end of that period.

This clause would, if enacted, allow for both retrospective and prospective commencement of the various Parts of the Bill. However, the Committee notes that any retrospective commencement is limited by subclause 2(3), which links such commencement to the acquisition by persons other than the Commonwealth or its nominee of a controlling interest in AUSSAT. Any prospective commencement is limited by subclause 2(4), which is drafted in accordance with Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989.

In addition, the Committee notes that the Explanatory Memorandum to the Bill states:

> It is intended that Part 3 should commence on the day after the sale of AUSSAT occurs. A proclamation of a commencement date usually takes effect on its publication in the *Gazette*. Clauses 2(2) and (3) enable the proclamation to fix a date earlier than the date of

publication. Provision for this is included because of the nature of the sale process. The sale will depend on commercial negotiation, and if a party is not able to complete at the time fixed by the contract, further time may be agreed between the parties for completion. Accordingly, it will be undesirable to proclaim the commencement in advance of the completion of the sale, as the completion date may change if there are last minute difficulties.

Clause 2(3) places a limitation on the commencement date that can be proclaimed under clause 2(2) if a day earlier than the day of publication in the *Gazette* is chosen. The commencement date must be either the day after the buyer acquires a controlling interest in AUSSAT or a later day. The reason for choosing the day after the sale for commencement is that the payout of AUSSAT's debt may occur on the day of the sale itself, and it is considered undesirable to repeal the AUSSAT Act until after the sale is completed.

Clause 2(4) provides for the automatic repeal of Parts 2 and 3 if a proclamation of the commencement of Part 3 is not made within 6 months of Royal Assent. This ensures that in the unlikely circumstances that the sale falls through, Parts 2 and 3 do not have a long-standing continuing effect.

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

Adoption or incorporation in the legislation of extrinsic material
Clause 11, Schedule 2

Clause 11 of the Bill provides for various proposed amendments to the telecommunications legislation to be made, as set out in Schedule 2 of the Bill. One of the amendments contained in the Schedule is a proposed new section 407 of the Telecommunications Act 1991. The proposed new section provides:

Instruments under this Act may provide for matters by reference to any other instrument

407.(1) In this section:

'instrument under this Act' means the regulations or another instrument made under this Act.

(2) An instrument under this Act may make provision in relation to a matter by applying, adopting or incorporating (with or without modifications) provisions of any Act, or of any regulations or rules under an Act, as in force at a particular time or as in force from time to time.

(3) An instrument under this Act may make provision in relation to a matter by applying, adopting or incorporating (with or without modifications) matter contained in any other instrument or writing whatever:

(a) as in force or existing at a particular time; or

(b) as in force or existing from time to time.

(4) A reference in subsection (3) to any other instrument or writing includes a reference to an instrument or writing:

(a) made by any person or body in Australia or elsewhere (including, for example, the Commonwealth, a State or Territory, an officer or authority of the Commonwealth or of a State or Territory, or an overseas entity); and

(b) whether of a legislative, administrative or other official nature, or of any other nature; and

(c) whether or not having any legal force or effect;

for example:

(d) a State Act, a law of a Territory, or regulations or any other instrument made under such an Act or law; or

(e) an international technical standard or performance indicator; or

(f) a written agreement or arrangement or an instrument or writing made unilaterally.

(5) Nothing in this section limits the generality of anything else in it.

(6) Since this section deals differently with the topic dealt with by section 49A of the *Acts Interpretation Act 1901*, that section does not apply in relation to an instrument under this Act.

Three aspects of this proposed new section should be noted. First, if enacted, it would allow for the application, adoption or incorporation, with or without modification of 'matter contained in any other instrument or writing whatever'.

Second, the proposed new section would also allow this application, adoption or incorporation to be effected by instrument, rather than by regulation. The Committee notes, however, that all the relevant 'instruments' under the existing legislation appear to be 'disallowable instruments' for the purposes of section 46A of the Acts Interpretation Act 1901.

Third, proposed new subsection 407(6) proposes, in effect, to disapply section 49A of the Acts Interpretation Act. That section provides:

> **Prescribing matters by reference to other instruments**
>
> 49A. (1) Where an Act authorizes or requires provision to be made for or in relation to any matter by regulations, the regulations may, unless the contrary intention appears, make provision for or in relation to that matter by applying, adopting or incorporating, with or without modification;
>
> (a) the provisions of any Act, or of any regulations, as in force at a particular time or as in force from time to time; or
>
> (b) any matter contained in any other instrument or writing as in force or existing at the time when the first-mentioned regulations take effect;
>
> but, unless the contrary intention appears, regulations shall not, except as provided by this subsection, make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

(2) In this section **"regulations"** means regulations or rules under an Act.

The effect of section 49A is to prevent ('unless otherwise provided') the application, adoption or incorporation of 'any matter contained in an instrument or other writing as in force or existing from time to time'. In other words, the only material which can be applied, adopted or incorporated as it is in force at the time (ie with any amendments taken into account) is material which is contained in an Act or in regulations.

By way of explanation for the proposed new section 407, the Explanatory Memorandum states:

> The usual rule under section 49A of the *Acts Interpretation Act 1901* is that in relation to matters contained in instruments other than Commonwealth regulations or Acts, those matters can only be adopted or incorporated as existing at a particular time. The reason for this rule is that if it does not apply, documents adopted and thereby having the force of law can be amended without the Parliament being given the opportunity to scrutinise them. However, the Parliament has passed laws allowing exceptions to this rule in particular cases.
>
> It is proposed that an exception be allowed in the case of the Telecommunications Act because of the rapid pace of technological change in the field of telecommunications and its global nature. For example, it is envisaged that conditions of carrier licences declared under section 64 or 65 will require carriers to comply with relevant technical standards set by international bodies such as the CCITT (the International Telegraph and Telephone Consultative Committee of the International Telecommunications Union), the requirements of which are updated from time to time. Licence conditions would need to be updated continuously if they could not apply existing international standards as they are developed to apply to new types of services. The rapid pace of technological change in relation to telecommunications means that new standards relating to technical

engineering matters such as the configuration for interfaces between different networks are constantly being developed and updated.

Another example of the need for the provision relates to AUSTEL technical standards - it is envisaged that carrier licence conditions will require the carriers to comply with AUSTEL technical standards. Without the benefit of the amendment, licence conditions will need to be changed each time AUSTEL prepares a new standard or updates an existing standard.

Also, the National Code under section 117 which will provide for environmental and planning standards may need to incorporate other instruments by reference such as Australian standards, including standards of the Australian Standards Association, or particular State standards or international standards) and it may be desirable, in the case of particular standards, for changes to such standards to automatically have effect for the purpose of the code. There are currently no appropriate existing technical standards for masts and towers under any State or Territory law, as they are used for telecommunications facilities which historically have not been subject to such laws. Accordingly, it may be necessary for the National Code to require carriers to comply with standards for masts and towers upon their being developed by the Commonwealth in conjunction with the States.

While this explanation appears to be reasonable, the Committee is concerned about the range of material which might be applied, adopted or incorporated in this way. In particular, the Committee is concerned that there is no indication of what kinds of 'technical standards' will be applied, nor of what 'international bodies' might set these standards. The Committee and, indeed, the Senate would be assisted if the Minister could provide further information on these matters.

In addition, the Committee is concerned that it will be difficult for the individuals and organisations to whom these standards would apply to know what the relevant standards are at a particular time. The Committee has maintained the view that it

is important for people to know or to be able to ascertain what the law is. If there is to be scope for, say, international standards to apply 'as they are in force from time to time', the Committee would appreciate the Minister's advice as to how any changes to an international standard will be notified to those to whom they apply.

General comment

The Committee notes that there appears to be an omission from subclause 9(2) of the Bill. On page 4, at line 29, the figure "5" should be inserted after "Part".

INTERNATIONAL MONETARY FUND (QUOTA INCREASE AND AGREEMENT AMENDMENTS) BILL 1991

This Bill was introduced into the House of Representatives on 4 September 1991 by the Minister Assisting the Treasurer.

The Bill proposes to:

- authorise an increase in Australia's quota in the International Monetary Fund (IMF) and provide for the payment; and
- amend the Schedule (which reproduces the Articles of Agreement of the IMF) with the relevant proposed amendments to the IMF's Articles.

The Committee has no comment on this Bill.

OVERSEAS STUDENTS CHARGE AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 5 September 1991 by the Minister for Employment, Education and Training.

The Bill proposes to fix the charges payable for the 1992 academic year by overseas students enrolled in Australian education institutions under the subsidised program governed by the Overseas Students Charge Act 1979.

The Committee has no comment on this Bill.

PARLIAMENTARY PRIVILEGES AMENDMENT (EFFECT OF OTHER LAWS) BILL 1991

This Bill was introduced into the Senate on 9 September 1991 by Senator Crichton-Browne as a Private Senator's Bill.

The Bill proposes to amend the Parliamentary Privileges Act 1987, to ensure that parliamentary privilege is not affected by a statutory provision unless the provision expressly states that the powers, privileges and immunities of the Parliament are affected.

The Committee has no comment on this Bill.

RICE LEVY BILL 1991

This Bill was introduced into the House of Representatives on 4 September 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to apply a levy to rice produced in Australia (and delivered to a rice processor) to raise funds for a research and development program.

'Henry VIII' clause
Paragraph 3(1)(b)

Clause 3 of the Bill sets out various definitions for the purposes of the Bill. 'Leviable rice' is defined in subclause 3(1) as

> rice of a variety that is:
> (a) specified in the Schedule; or
> (b) prescribed by the regulations as leviable rice for the purposes of this Act

This means that the definition of 'leviable rice', which is of particular importance for the operation of the legislation, could be, in effect, amended by regulation. As such, this is what the Committee would ordinarily consider to be a 'Henry VIII' clause, as it would allow the amendment of primary legislation by subordinate legislation.

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

STUDENT ASSISTANCE AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 4 September 1991 by the Minister for Higher Education and Employment Services.

The Bill proposes to amend the Student Assistance Act 1973 to:

- appropriate funds to pay allowances under the AUSTUDY, ABSTUDY and Assistance for Isolated Children schemes;
- extend the AUSTUDY scheme to students living on the Cocos (Keeling) Islands; and
- remove the Living Allowances for English as a Second Language Scheme from the Act's responsibility, the scheme now being integrated into the social security payment system.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 16 OF 1991

9 OCTOBER 1991

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 from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* Broadcasting Amendment Bill 1991

* Customs Tariff Amendment Bill (No. 2) 1991

  Disability Services Amendment Bill 1991

* Electoral and Referendum Amendment Bill 1991

* Excise Tariff Amendment Bill 1991

* Export Finance and Insurance Corporation Bill 1991

  Export Finance and Insurance Corporation (Transitional Provisions and Consequential Amendments) Bill 1991

  Federal Court of Australia Amendment Bill 1991

  Health Insurance Amendment Bill (No. 2) 1991

* Hearing Services Bill 1991

  National Crime Authority Amendment Bill 1991

* Special Broadcasting Service Bill 1991

* Threatened Species Bill 1991

*** The Committee has commented on these Bills**

BROADCASTING AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 12 September 1991 by the Minister for Transport and Communications.

The Bill proposes to amend the *Broadcasting Act 1942* to:

- require that the Australian Broadcasting Tribunal (ABT) be given prior written notice of acquisition of interests which may breach ownership and control rules of the Act;
- increase the ABT's powers to gather information on the ownership and control arrangements for media outlets, in order to assist the ABT in determining whether the ownership and control rules of the Act have been, or are likely to be, contravened; and
- strengthen the Federal Court's power to protect licensees and other companies and to prevent, or prevent the continuation of, contraventions of the ownership and control rules, either on an interim basis to enable proposed acquisitions of interests to be appropriately investigated or on a more permanent basis.

'Henry VIII' clauses
Clauses 5 and 6 - proposed new sections 90HC and 92EC

Clause 5 of the Bill proposes to insert new sections 90HA, 90HB and 90HC into the *Broadcasting Act 1942*. Proposed new section 90HA would, if enacted, require

a person who holds, or proposes to acquire, an interest in a commercial radio licence that may contravene the Broadcasting Act to notify the Australian Broadcasting Tribunal of that interest. Proposed new section 90HB would require the Tribunal to have regard to the 'associates' of a person (as defined in proposed section 90HA) in exercising its powers under the section. However, proposed section 90HC would allow the Tribunal to disregard certain classes of associates for the purposes of proposed sections 90HA and 90HB. It provides:

> **Exempt classes of associates**
>
> 90HC (1) The Tribunal may, by notice published in the *Gazette*, determine that a specified class of associates is to be disregarded for the purposes of sections 90HA and 90HB.
>
> (2) The Tribunal may only make such a determination if it is satisfied that the interests that are or may be held by that class of associates are not like to contribute to contraventions of this Part by persons with whom they are associated.
>
> (3) A determination is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

This is what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow the Tribunal to, in effect, alter the definition of 'associates' set out in proposed new section 90HA. It would, therefore, allow the effect of the primary legislation to be altered by a determination of the Tribunal.

By way of explanation for this provision, the Explanatory Memorandum states:

> This provision will allow the ABT the flexibility to exclude persons with interests of minimal concern. When the ABT exercises this power, the instrument will be tabled in, and is subject to disallowance by either House of Parliament.

Similarly, proposed new section 93EC provides that certain classes of 'associates' may be disregarded for the purposes of proposed new sections 92EA and 92EB, which would require persons who hold or propose to acquire certain interests in a commercial television licence to notify the Tribunal. These classes of interests could be disregarded on the determination of the ABT. Such a determination would be a disallowable instrument for the purposes of the *Acts Interpretation Act 1901.*

Two aspects of these provisions cause the Committee concern. The first is the fact that they are 'Henry VIII' clauses, to which the Committee maintains an in principle objection. The second aspect of concern is that the definition of 'associates' in proposed new subsections 90HA(10) and 92EA(10) is very wide. Proposed new section 90HA(10), for example, states:

> For the purposes of this section, a person is the **associate** of another person if the first person:
>
> (a) is related to the other person by blood or marriage; or
>
> (b) is the de facto spouse of the other person; or
>
> (c) is related to the de facto spouse of the other person by blood or marriage;
>
> (d) is, or has been, at any time during the past 5 years:
>
> (i) a partner of the other person; or
>
> (ii) an employee or employer of the other person; or
>
> (iii) if the other person is a company - an officer of that company; or
>
> (iv) if the other person is a company holding a commercial radio licence or a commercial television licence - the holder of interests in that company amounting to a prescribed interest in that licence; or
>
> (v) a legal, financial or accounting adviser or representative on retainer to the other person or one who has acted in that capacity for the other person on more than one occasion; or

(vi) a beneficiary under a trust of which the other person is a trustee or a beneficiary; or

(vii) acting, or intended, accustomed or expected to act (whether under an arrangement or understanding or not), in accordance with the directions, instructions or wishes, or in concern with, the other person; or

(viii) if the other person is a company - a related company; or

(ix) an associate of an associate of the other person (including an associate of the other person by any other application or applications of this subparagraph).

The Committee would appreciate the Minister's advice as to why it is necessary for such a wide definition.

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

CUSTOMS TARIFF AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 11 September 1991 by the Minister for Small Business and Customs.

The Bill proposes to amend the *Customs Tariff Act 1987* to:

- effect a number of administrative changes as a result of amendments contained in the *Customs Tariff Amendment Act 1991;*
- effect a number of administrative changes announced in the 1991 Industry Statements;
- provide free rates of duty for certain leathers;
- provide a free rate of duty for wheelchair parts;
- further define 'orange juice';
- accord Developing Country Status to Czechoslovakia and Namibia;
- implement new preference arrangements for certain goods for the Republic of Korea, Hong Kong, Taiwan Province and Singapore;
- reduce the rate of duty on aviation gasoline to 0.321 cents per litre;
- implement measures consequent upon Australia's partial accession to the Florence Agreement, including the introduction of free rates of duty for education, scientific and cultural material; and
- correct an anomaly relating to excise duty on methylated spirits.

Retrospectivity
Subclauses 2(2), (3), (4), (5) and (6)

Subclauses 2(2), (3), (4) (5) and (6) of the Bill would, if enacted, give various clauses of the Bill a retrospective effect. In the case of subclauses (2), (4), (5) and (6), this retrospectivity is relatively slight (to 12 March 1991, 1 January 1991, 10 April 1991 and 1 July 1991, respectively). However, the retrospectivity to be effected by subclause (3) is to 1 January 1988.

According to the Explanatory Memorandum and the 'Summary of Amendments', the amendments which are to be given retrospective effect correct errors, redress anomalies and clarify the meaning of existing provisions. On the basis of these explanations, the Committee makes no further comment on the Bill.

DISABILITY SERVICES AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 12 September 1991 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 the Parliament of principles, objectives and guidelines governing the operation of the Act;
- allow for approval and, if necessary, amendment of such principles, objectives and guidelines by either House of the Parliament;
- extend the transition date for the provision of financial assistance from 1992 to 1995;
- establish appeals to the Administrative Appeals Tribunal in relation to certain decisions under the Act; and
- approve funding for staff training services and vocational services.

The Committee has no comment on this Bill.

ELECTORAL AND REFERENDUM AMENDMENT BILL 1991

This Bill was introduced into the Senate on 12 September 1991 by the Minister for Administrative Services.

The Bill proposes to enact recommendations made by the Joint Standing Committee on Electoral Matters in its Report No 3 (which flowed from its Inquiry into the Conduct of the 1987 Federal Election and the 1988 Referendums) not already given effect administratively or by regulation.

Retrospectivity
Subclause 2(3)

Clause 46 of the Bill proposes to make the various minor amendments set out in Schedule 3. Subclause 2(3), if enacted, would make these amendments retrospective to 30 September 1990. According to the Explanatory Memorandum, the proposed amendments 'correct a number of misdescriptions and errors' contained in amendments effected by the *Electoral and Referendum Amendment Act 1989*. The proposed retrospective effect is to the date of commencement of that Act. In the light of this explanation, the Committee makes no further comment on the provision.

Reversal of the onus of proof / strict liability offence
Clause 27 - proposed new subsection 339(4) of the *Commonwealth Electoral Act 1918*

Clause 27 of the Bill proposes to amend section 39 of the *Commonwealth Electoral Act 1918*, which sets out various offences relating to ballot papers. Paragraph 27(1)(c) proposes to add three new subsections to section 339. Proposed new subsections (3) and (4) provide:

> (3) A person must not:
>
> (a) make a statement in his or her nomination paper that is false or misleading in a material particular; or
> (b) omit from a statement in his or her nomination paper any matter or thing without which the statement is misleading in a material particular.
>
> Penalty: Imprisonment for 6 months.
>
> (4) In a prosecution of a person for an offence against subsection (3), it is a defence if the person proves that he or she:
>
> (a) did not know; and
> (b) could not reasonably be expected to have known;
>
> that the statement to which the prosecution relates was false or misleading.

These provisions involve a reversal of the onus of proof. While proposed new subsection (4) provides a statutory defence to an offence (ie that a person did not know and could not reasonably be expected to know that a statement was false or misleading) under proposed new subsection (3), it places the onus of proving this defence on the defendant. It is generally incumbent on the prosecution to prove all the elements of an offence, including matters going to the accused's intent to

commit an offence. As the provision is drafted, the offence takes on the appearance of one of strict liability.

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

Reversal of the onus of proof
Clause 42 - proposed new section 140A of the *Referendum (Machinery Provisions) Act 1984*

Clause 42 of the Bill proposes to insert a new section 140A into the *Referendum (Machinery Provisions) Act 1984.* That proposed new section provides:

> In proceedings for an offence against section 45 of this Act [which deals with compulsory voting], an averment by the prosecutor contained in the information of complaint is taken to be proof of the matter averred in the absence of evidence to the contrary.

This is a reversal of the onus of proof, as the provision would (if enacted) require a defendant to prove that matters averred to by the prosecutor were not, in fact, correct. Ordinarily, it would be incumbent on the prosecution to prove all the matters contained in the averment.

The Committee strongly disapproves of this type of provision. In making this statement, the Committee notes that the Senate Standing Committee on Constitutional and Legal Affairs (as it then was), in its influential report entitled The burden of proof in criminal proceedings (Parliamentary paper no 319/1982), also indicated its disapproval of the use of such provisions. In that report, the

Constitutional and Legal Affairs Committee recommended that '[a]s a matter of legislative policy averment provisions should be kept to a minimum.' (at para 7.16 of the report).

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.

EXCISE TARIFF AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 11 September 1991 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Bill proposes to:

- increase the excise rate on LPG (liquefied petroleum gas) for the period 1 April to 1 July 1991 from $5.78 to $35.94 per kilolitre (from 1 July 1991 the excise has been replaced by a resource rent tax);
- reduce the excise rate on Avgas (gasoline used in aircraft) from 27.395 cents to 27.074 cents per litre, effective from 1 July 1991.

Retrospectivity
Subclauses 2(2) and (3)

Subclauses 2(2) and (3) of the Bill provide that clauses 3 and 4 are to be taken to have commenced on 1 July and 1 April 1991, respectively. However, the Committee notes that, according to the Explanatory Memorandum, Excise Tariff Proposals have been properly tabled (pursuant to section 160B of the *Excise Act 1901)* in each case. In the light of this explanation, the Committee makes no further comment on the Bill.

EXPORT FINANCE AND INSURANCE CORPORATION BILL 1991

This Bill was introduced into the House of Representatives on 12 September 1991 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Bill proposes to re-establish the Export Finance and Insurance Corporation as an independent statutory authority, thereby separating the export finance and insurance function from the other operations of the Australian Trade Commission.

'Henry VIII' clause
Paragraph 3(4)(b)

Subclause 3(4) of the Bill defines 'capital goods' as:

> (a) machinery; or
>
> (b) any goods or class of goods declared by the Minister, in writing, to be capital goods for the purposes of subsection (3) [which defines 'eligible export transaction'].

Paragraph 3(4)(b) is what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow the definition of 'capital goods' set out in the primary legislation to be, in effect, amended by Ministerial declaration, which would not be subject to Parliamentary scrutiny.

The Committee draws Senators' attention to the provision, as it may be considered 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 that the reference to 'subsection (1)' in clause 89(3) of the Bill is, apparently, an incorrect reference to subsection (2).

EXPORT FINANCE AND INSURANCE CORPORATION (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1991

This Bill was introduced into the House of Representatives on 12 September 1991 by the Minister Representing the Minister for Industry, Technology and Commerce.

The Bill (which is complementary to the Export Finance and Insurance Corporation Bill 1991) proposes to:

- provide transitional arrangements;
- transfer the assets and liabilities of the Australian Trade Commission associated with export finance and insurance activities to the Export Finance and Insurance Corporation;
- repeal provisions in the *Australian Trade Commission Act 1985* relating to export finance and insurance and make minor administrative changes to the Act; and
- make consequential amendments to five other Acts.

The Committee has no comment on this Bill.

FEDERAL COURT OF AUSTRALIA AMENDMENT BILL 1991

This Bill was introduced into the Senate on 12 September 1991 by the Minister for Justice and Consumer Affairs.

The Bill proposes to provide for a new procedure in the Federal Court to allow a person to bring an action on behalf of a group of seven or more persons if the persons all have claims against the same respondent.

The Committee has no comment on this Bill.

HEALTH INSURANCE AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 11 September 1991 by the Minister for Health, Housing and Community Services.

The Bill proposes to:

- provide that a medical practitioner must notify a patient when a medicare benefit is not payable for service provided to that patient;
- ensure that medicare payments are only paid when a medical practitioner provides a service within the State of his or her registration;
- require a medical practitioner who has been found to have rendered excessive services to appear before a Medicare Participation Review Committee;
- impose a penalty when a medical practitioner has been found to have rendered excessive services.

The Committee has no comment on this Bill.

HEARING SERVICES BILL 1991

This Bill was introduced into the House of Representatives on 11 September 1991 by the Minister for Aged, Family and Health Services.

The Bill proposes to establish a Hearing Services Authority (to replace the National Acoustic Laboratories), with effect from 1 July 1992.

'Henry VIII' clause
Sub-clause 4(1) - definition of 'hearing products'

Sub-clause 4(1) of the Bill defines the phrase 'hearing products' as including

(a) hearing aids; and
(b) alternate listening devices; and
(c) listening systems; and
(d) tests, procedures, documents and computer software associated with the provision of hearing services; and
(e) **such other products as the Minister determines to be hearing products within the meaning of this Act;**

Sub-clause 4(3) provides that a determination under paragraph (e) of the above definition is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901.*

This is what the Committee would generally consider to be a 'Henry VIII' clause, as the effect of the provisions is that the Minister would be given the power to

extend the meaning of the phrase 'hearing products' by subordinate legislation. The exercise of this discretion would, however, be subject to parliamentary scrutiny by virtue of sub-clause 4(3). The Committee nevertheless considers paragraph (e) of the definition of 'hearing products' to be a 'Henry VIII' clause, as it would allow the effect and application of primary legislation to be extended by delegated legislation.

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

'Henry VIII' clause
Paragraph 5(1)(h)

Sub-clause 5(1) of the Bill sets out in a series of paragraphs the classes of persons who are to be treated as 'eligible persons' for the purposes of the Bill. One reason for this provision is that, by virtue of paragraph 8(1)(a) the Authority to be established by this Bill is to provide hearing services for such persons. Paragraph (h) of sub-clause 5(1) provides that a category of eligible person for the purposes of the Bill is

> a person included in a class of persons that the Minister determines, in writing, to be eligible persons for the purposes of this Act.

Sub-clause 5(2) provides:

> A determination under paragraph (1)(h) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

These provisions, when read together, mean that the Minister would have the power to extend, by subordinate legislation, the classes of persons who may be taken to be eligible persons for the purposes of the Bill, subject to parliamentary scrutiny and review. This is, therefore, what the Committee would generally consider to be a 'Henry VIII' clause, since it would allow the operation of aspects of the Bill to be extended by subordinate legislation.

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

'Henry VIII' clause
Sub-clause 66(5)

Clause 66 is concerned with the protection of the name 'National Acoustic Laboratories' and the acronym 'NAL' against unfair business competition. For this purpose, the clause creates a criminal offence, carrying a penalty of a fine of up to $3,000, if anyone should, without permission from Australian Hearing Services, use either of those names in their trade or business. The means by which the protection is given to the Authority is to prohibit the improper use of a 'protected name'. Sub-clause 66(5) provides that the phrase 'protected name' means:

(a) "NAL"
(b) "National Acoustic Laboratory"
(c) such other names as are prescribed for the purposes of this section.

Thus, paragraph (c) of that definition would permit the phrase 'protected name' to be extended by regulation rather than by amendment to the primary legislation. The Committee considers this power to extend the meaning of words by subordinate (rather than primary) legislation to be a 'Henry VIII' clause.

The Committee draws Senators' attention to the clause 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.

Delegation to 'a person'
Clause 70

Clause 70 provides that Australian Hearing Services

> may, by written instrument, delegate to a person all or any of its powers under this or any other Act.

The purpose of this Bill is to set up an Authority (to be known as 'Australian Hearing Services'), to bestow upon it the various functions listed in clause 8 and to grant it all the powers listed in clause 9.

As clause 70 reads, there is no limit as to qualifications or attributes on the person to whom the Authority may delegate any of the powers listed in clause 9, or indeed any of the powers which may be conferred on the Authority by any other Act. Given the extensive range of powers that the Authority is granted by clause 9, the Committee considers that it may be appropriate to limit the classes of person to whom those powers may be delegated.

The Committee also notes that the Explanatory Memorandum is misleading in its comments on clause 70. That memorandum describes clause 70 as follows:

> **Clause 70 - Delegation by Authority**
>
> This clause provides that the Authority may delegate any of its powers under this or any other Act to a person who is a member of the Authority or a member of the staff of the Authority.

The Committee observes that if clause 70 were in the terms so described, it would have no objection to that provision. However, the Committee draws Senators' attention to clause 70 in its present form as making rights, liberties of obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

NATIONAL CRIME AUTHORITY AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 12 September 1991 by the Attorney-General.

The Bill proposes to amend the *National Crime Authority Act 1984* to:

- enable the National Crime Authority (NCA) to prohibit disclosure of the existence of, or information about, summonses or notices issued under the Act or any proceedings or matters connected with them;
- enable the NCA to apply for a warrant of apprehension where a person fails or refuses to attend an NCA meeting;
- allow the Chairman of the NCA (rather than the Attorney-General) to appoint counsel to the NCA; and
- authorise the NCA to inform relevant members of the Inter-Governmental Committee about general investigations being conducted in their jurisdiction.

The Committee has no comment on this Bill.

SPECIAL BROADCASTING SERVICE BILL 1991

This Bill was introduced into the House of Representatives on 12 September 1991 by the Minister for Transport and Communications.

The Bill proposes to establish the Special Broadcasting Service (SBS) as a statutory authority, setting out the SBS's Charter, structure, powers and responsibilities.

Commencement by Proclamation
Subclause 2(2)

Clause 53 of the Bill, if enacted, would allow the Special Broadcasting Service to engage 'such employees as are necessary for the performance of its functions and the exercise of its powers' and to determine the terms and conditions of employment of such employees. Subclause 2(2) of the Bill provides that clause 53 is to commence 'on a day 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 a Proclamation pursuant to subclause 2(2) must be made. However, by way of explanation, the Explanatory Memorandum states:

> Until [clause 53] commences, the staff will continue to be employed under the *Public Service Act 1922* (see clause 52). Clause 81(3) requires the SBS to consult with relevant unions before determining the new terms and conditions. The staffing provision will commence

> on a date to be proclaimed to allow the SBS time to consult with relevant unions and finalise the new arrangements.
>
> The standard provision requiring commencement within 6 months if commencement has not been earlier proclaimed has not been included as it is possible that the consultations with the unions will take longer than this. The Bill does not, therefore, impose a time limit for the commencement of the provision.

While this explanation is, on its face, perfectly reasonable, the Committee suggests that it is nevertheless preferable to limit the time within which a Proclamation must be made. If six months is not sufficient time, then perhaps a 12 month period (or some other period) is appropriate, rather than simply leaving the period open-ended.

The Committee would appreciate the Minister's views on this suggestion.

THREATENED SPECIES BILL 1991

This Bill was introduced into the Senate on 9 September 1991 by Senator Coulter as a Private Senator's Bill.

The Bill proposes to establish:

- a community-based Commonwealth Threatened Species Advisory Committee; and
- a Scientific Advisory Panel.

These bodies are intended to oversee endangered species programs, give guidance on a Commonwealth Threatened Species Conservation Strategy and prepare Species Recovery Plans and Threatening Process Action Plans.

The bodies and programs to be established by the Bill will be administered by the Threatened Species Unit.

'Henry VIII' clauses
Subclauses 23(3) and 24(3)

Clause 23 of the Bill provides for a list of threatened species, populations and ecological communities in Australia. Subclause 23(1) provides:

> Schedule 1 sets out a list of species, populations and ecological communities which are threatened in Australia.

(In fact, in its present form, the Bill does not contain a Schedule 1.)

Subclause 23(2) provides:

> Any species listed in the ANZACCOM [which is not defined in the Bill] endangered species list at the commencement of this Act is deemed to be included in Schedule 1.

Subclause 23(3) provides:

> The regulations may, in accordance with the objects of the Act and on the recommendation of the [Scientific Advisory Panel], add species or remove species from Schedule 1.

Subclause (3) is what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow the definition of 'threatened species' for the purposes of the primary legislation to be amended by subordinate regulation.

Similarly, clause 24 deals with threatened species, populations and ecological communities overseas. Subclause 24(1) provides:

> Schedule 2 sets out a list of species populations and ecological communities which are threatened overseas.

(In fact, in its present form, the Bill does not contain a Schedule 2.)

Subclause 24(2) provides:

> Any species listed under Appendix 1 of the Convention for the International Trade in Endangered Species (CITES), the Convention

> on Conservation of Migratory Species of Wild Animals (the Bonn Convention), the Japan-Australia Migratory Bird Agreement (JAMBA), or the China-Australia Migratory Bird Agreement (CAMBA), at the commencement of this Act is deemed to be included in Schedule 2.

Subclause 24(3) provides:

> The regulations may, in accordance with the objects of the Act and on the recommendation of the SAP [Scientific Advisory Panel], add species or remove species from Schedule 2.

Subclause (3) is also a 'Henry VIII' clause, for similar reasons as discussed in relation to subclause 23(3) above.

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

Insufficiently-defined offence
Clause 29

Clause 29 of the Bill would, if enacted, create an offence of interfering with, destroying, injuring, harming, threatening or endangering a species listed in Schedules 1 or 2 or its habitat. For individuals, the offence carries a penalty, on conviction, of up to 12 months imprisonment or a $1,000,000 fine, or both. For a corporation, an offence carries a $1,000,000 fine. Aside from the fact that the Bill presently contains no such Schedules, it is difficult to determine what would constitute an offence under the provision as drafted, since 'habitat' is not defined

(though the Committee notes that 'critical habitat' is defined in clause 3).

Given that the clause, as drafted, would make it difficult for a person to know whether he or she was committing an offence, the Committee draws Senators' attention to the clause, 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.

Power to appoint 'a person'
Subclause 65(1)

Clause 65 of the Bill deals with the appointment and powers of inspectors under the legislation. Subclause (1) provides

> The Minister may, in writing, appoint a person to be an inspector for the purposes of this Act.

There is no suggestion of what qualifications or attributes such a person should possess. The Minister could appoint anyone as an inspector.

The Committee draws Senators' attention to the provision as it may be considered to make personal rights, liberties or obligations unduly dependent on insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

SCRUTINY OF BILLS ALERT DIGEST

NO. 17 OF 1991

16 OCTOBER 1991

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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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

Family Law Amendment Bill (No 2) 1991

* Financial Legislation Amendment Bill 1991

Fringe Benefits Tax Amendment Bill 1991

Income Tax (Deferred Interest Securities)(Tax File Number Withholding Tax) Bill 1991

Income Tax (International Agreements) Bill (No. 2) 1991

Medicare Levy Amendment Bill 1991

* Social Security Legislation Amendment Bill (No. 3) 1991

States Grants (General Purposes) Bill 1991

* Taxation Laws Amendment Bill (No. 3) 1991

*** 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.

FAMILY LAW AMENDMENT BILL (NO 2) 1991

This Bill was introduced into the House of Representatives on 9 October 1991 by the Attorney-General.

The Bill proposes to effect a recommendation contained in the first report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act that the maximum retiring age for Family Court judges be increased from 65 years to 70 years.

The Committee has no comment on this Bill.

FINANCIAL LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 10 October 1991 by the Minister Assisting the Treasurer.

The Bill proposes to:

- amend the *Currency Act 1965,* to provide the Treasurer with the authority to approve new coins, determine variations to design and/or other characteristics (by disallowable instrument), without reference to Executive Council; and
- amend the *Financial Corporations Act 1974,* to permit the Treasurer to:
  - delegate to the Governor/Deputy Governor of the Reserve Bank responsibility for varying and publishing the list of non-bank financial institutions which fall under the Act; and
  - publish the varied list as appropriate rather than being restricted to the *Gazette;* and
- repeal the *Special Employment-related Programs Act 1982.*

'Henry VIII' clauses
Clause 4 - Proposed new sections 13 and 13A of the *Currency Act 1965*

Clause 4 of the Bill proposes to repeal section 13 of the *Currency Act 1965* and

replace it with sections 13 and 13A. Proposed new subsection 13(1) provides:

> **Standard composition of coins**
>
> 13.(1) Subject to paragraph (2)(a), the standard composition of the coins of the denominations specified in the Schedule is as specified in the Schedule.

Proposed new subsection 13(2) provides:

> (2) The Treasurer may, by signed instrument, determine that this Act is to have effect, on and after a day specified in the determination, as if:
>
> (a) a reference in the Schedule, opposite to the denomination of a coin, to the standard composition of coins of that denomination were a reference to such other standard composition as is specified in the determination; or
>
> (b) there were included in the Schedule a reference to a denomination of money specified in the determination and there were specified in the Schedule opposite to that denomination, as the standard composition of coins of that denomination, the standard composition that is specified in the determination.

The existing section 13 provides:

> (1) The standard composition of the coins of the denominations specified in the Schedule is, subject to subsection (2), as specified in the Schedule and the standard weight of those coins is as prescribed.
>
> (2) The regulations may, from time to time, provide that this Act shall have effect, on and after a date specified in the regulations, as if a reference in the Schedule, opposite to the denomination of a coin, to the standard composition of coins of that denomination were a reference to such other standard

composition as is specified in the regulations and, where any such regulations are made, the standard composition specified in the regulations shall, on and after the date specified in the regulations and while the regulations remain in force, be deemed to be specified in the Schedule opposite to that denomination in lieu of the standard composition actually specified in the Schedule.

(3) Regulations made for the purposes of this section may specify more than one standard composition or weight in relation to coins of a particular denomination.

This means that, currently, the composition of the coins is set out in the Act but can be varied by regulation, as can the standard weight.

Under the proposed new section 13, the composition of the coins would be, in effect, as set out in the Schedule or as the Treasurer otherwise determines. As such, this is a 'Henry VIII' clause, as it would allow the requirements regarding composition set out in the primary legislation to be amended by subordinate legislation. Moreover, such amendments could be made by Ministerial determination rather than by regulation, as is the case under the existing provision.

In making this comment, the Committee acknowledges that such Ministerial determinations would, pursuant to proposed new subclause 13(6), be disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*. However, the Committee noted that, in general, such instruments are not as well drafted as regulations, nor as readily accessible.

Similarly, the Committee notes that proposed new section 13A provides:

Standard weight, design and dimension of coins

13A. (1) The Treasurer may, by signed instrument,

determine, on and after a day specified in the determination, the standard weight, the allowable variation from that standard weight, the design and the dimensions of a coin whose denomination is specified, or taken to be specified, in the Schedule.

(2) The Treasurer may specify in a determination more than one standard weight, design or set of dimensions, in relation to a coin of a particular denomination.

(3) Where the Treasurer specifies in a determination more than one standard weight in respect of a coin of a particular denomination, the Treasurer must specify in that determination an allowable variation in respect of each such standard weight.

(4) A determination is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901.*

If enacted, this would allow matters such as the standard weight, the allowable variations from the standard weight, the design and the dimensions of the various coins specified in the Schedule to be amended by Ministerial determination. Under the existing section 13, standard weight could only be varied by regulation. In either event, this is a 'Henry VIII' clause, as it would facilitate the amendment of the primary legislation by subordinate legislation.

The Committee has maintained an in principle objection to the use of 'Henry VIII' clauses. In the present case, the 'Henry VIII' process is being made even less acceptable by changing the method of amendment from regulations to Ministerial determinations. The Committee notes that, on the whole, regulations are well-drafted and, by virtue of their being published in the Statutory Rules series, relatively easy to find. The drafting of Ministerial determinations is often not up to this same standard and there is no such obligation to publish them, which can make them difficult to find.

The Committee would appreciate the Treasurer's views as to why it is necessary to change the method of amendment from regulations to Ministerial determinations.

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

FRINGE BENEFITS TAX AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 10 October 1991 by the Minister Assisting the Treasurer.

The Bill proposes to amend the *Fringe Benefits Tax Act 1986*, to increase the rate of tax on fringe benefits from 47% to 48.25%.

The Committee has no comment on this Bill.

INCOME TAX (DEFERRED INTEREST SECURITIES)(TAX FILE NUMBER WITHHOLDING TAX) BILL 1991

This Bill was introduced into the House of Representatives on 10 October 1991 by the Minister Assisting the Treasurer.

The Bill proposes to impose a withholding tax on investment bodies and investors in relation to certain deferred interest investments made on or after 1 February 1992 where a tax file number is not quoted.

The Committee has no comment on this Bill.

INCOME TAX (INTERNATIONAL AGREEMENTS) BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 10 October 1991 by the Minister Assisting the Treasurer.

The Bill proposes to amend the *Income Tax (International Agreements) Act 1953*, to provide legislative authority to comprehensive double taxation agreements between Australia and India and Australia and Poland.

The Committee has no comment on this Bill.

MEDICARE LEVY AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 10 October 1991 by the Minister Assisting the Treasurer.

The Bill proposes to amend the *Medicare Levy Act 1986* so that:

- individuals with taxable incomes up to $11,745 will not be required to pay the levy (unchanged from last year);
- married couples and sole parents with incomes up to $19,674 will not be required to pay the levy (this threshold will increase by $2,100 for each dependent child or student).

The Committee has no comment on this Bill.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL (NO. 3) 1991

This Bill was introduced into the House of Representatives on 10 October 1991 by the Minister for Aged, Family and Health Services.

The Bill proposes to amend, primarily, the:

- *Social Security Act 1991;*
- *Health Insurance Act 1973;*
- *National Health Act 1953;* and
- *Income Tax Assessment Act 1936*

to effect measures announced in the 1991-92 Budget. These amendments are mainly concerned with:

- an education entry payment for sole parents;
- eligibility for the job search and sickness allowances;
- the child disability allowance;
- conditions concerning payment of the family allowance and supplement and double orphan pension;
- the introduction of a family assets test for family allowance;
- an increase in the income threshold at which the full rate family allowance supplement is payable;
- restriction of health care entitlements;
- modification of the assets test for primary producers;
- the rules for assessing notional ordinary income;

- excluded securities;
- payment of allowances in the event of a child's death;
- extension of the widowed person allowance;
- rent assistance waiting periods and eligibility for certain persons; and
- minor consequential amendments to various other Acts.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that Division 1 of Part 2 and Part 2 of the Schedule of the Bill are to be taken to have commenced on 17 August 1991. Division 1 of Part 2 contains a series of proposed amendments relating to special child bereavement payments. Part 2 of the Schedule contains some minor, technical amendments which are consequent upon the amendments contained in Division 1 of Part 2.

Though it does not appear to be stated anywhere in either the Explanatory Memorandum or the Minister's Second Reading speech,this retrospectivity appears to be beneficial to recipients of Social Security benefits. As a result, the Committee makes no further comment on the subclause.

General comment

The Committee notes that the Note to subclause 2(5) of the Bill appears to contain two errors. The Committee suggests that the reference to 'section 5' should be to 'section 4' and the reference to 'Part 4' should be to 'Part 5'.

STATES GRANTS (GENERAL PURPOSES) BILL 1991

This Bill was introduced into the House of Representatives on 10 October 1991 by the *Minister Assisting the Treasurer.*

The Bill proposes to put arrangements in place for the provision of general purpose funding to the States and the Northern Territory in 1991-92, estimated at $13,734 million (about 13% of estimated budget outlays for 1991-92).

The Committee has no comment on this Bill.

TAXATION LAWS AMENDMENT BILL (NO. 3) 1991

This Bill was introduced into the House of Representatives on 10 October 1991 by the Minister Assisting the Treasurer.

The Bill proposes to amend 37 taxing Acts, to effect changes in the following areas:

- fringe benefits tax (living away from home allowances);
- exemption of pay and allowances of members of the Defence Force serving in Iraq and Kuwait;
- pensions, benefits and allowances;
- investment-related lottery winnings;
- deductions for Petroleum Resource Rent Tax instalments;
- extension of the research and development activities concession;
- gifts to gift funds of cultural organisations;
- environmental impact studies;
- life insurance protection levy;
- general mining exploration and prospecting expenditure;
- timing of franking credits;
- capital gains tax cost base;
- provisional tax amendments;
- tax file number withholding tax;
- exemption from medicare levy for blind pensioners and sickness beneficiaries;
- medicare levy low income thresholds;
- taxation of foreign source income;

- garnishee notices;
- deferral of initial payment of company income tax and consequences for dividend imputation;
- PAYE;
- direct lodgment of taxation appeals and applications for review with the Federal Court and Administrative Appeals Tribunal;
- occupational superannuation standards;
- registered organisations; and
- miscellaneous minor clarifying amendments.

Retrospectivity / 'legislation by press release'
Subclauses 2(2), (4) and (9); subclauses 85(3), (4), (8),(9), (12) and (13); and subclause 85(19)

Pursuant to subclauses 2(2), (4), (5) and (9), if enacted, various provisions of the Bill would be taken to have commenced on 22 January, 21 August, 20 August and 1 July 1991, respectively. However, since the various provisions referred to either make technical or consequential amendments or give effect to measures announced in the Budget, the Committee makes no further comment on the clauses.

Pursuant to subclauses 85(3), (4), (8), (9), (12) and (13), various other amendments proposed by the Bill, while not expressed to come into force until Royal Assent, are to apply to transactions which have taken place before the date of Royal Assent. However, since those amendments appear to be beneficial to taxpayers, the Committee makes no further comment on the clauses.

Pursuant to subclause 85(19), the amendment to be made by clause 82 of the Bill would apply to activities occurring after 28 June 1991. The explanation set out on pages 8-9 of the Explanatory Memorandum states that the relevant date is the date on which the Treasurer issued a press release in relation to the proposed amendment. As such, this is a example of 'legislation by press release', a practice in relation to which this Committee maintains an in principle objection.

However, the Committee notes that, in accordance with the Senate's resolution of 8 November 1988, this Bill has been introduced within 6 months of the announcement to which clause 82 is to give effect. The resolution of 8 November states:

> **Taxation Bills - Retrospectivity**
>
> That, where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of a draft Bill within 6 calendar months after the date of that announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill. (*Journals of the Senate*, No 109, 8 November 1988, pp1104-5)

In the light of the foregoing, the Committee makes no further comment on the clause.

SCRUTINY OF BILLS ALERT DIGEST

NO. 18 OF 1991

6 NOVEMBER 1991

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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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* Cash Transaction Reports Amendment Bill 1991

* Civil Aviation (Carriers' Liability) Amendment Bill 1991

* Evidence Bill 1991

Higher Education Funding Amendment Bill (No. 2) 1991

Income Tax Assessment (Valueless Shares) Amendment Bill 1991

* Migration Amendment Bill (No. 2) 1991

* Prime Minister and Cabinet Legislation Amendment Bill 1991

States Grants (TAFE Assistance) Amendment Bill (No. 2) 1991

* Transport and Communications Legislation Amendment Bill 1991

o

*** The Committee has commented on these Bills**

CASH TRANSACTION REPORTS AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 15 October 1991 by the Attorney-General.

The Bill proposes to:

- require cash dealers to report to the Cash Transaction Reports Agency (CTRA) all international funds transfer instructions, sent or received by them, which effect a payment of funds either in Australia or a foreign country;
- change the name of legislation (to the Financial Transaction Reports Act) and the agency (to the Australian Transaction Reports and Analysis Centre); and
- clarify the exact time when a person is required to report to a customs officer when bringing currency into or out of Australia.

Commencement by Proclamation
Subclauses 2(2) and (3)

Subclause 2(1) of the Bill provides that clauses 1, 2, 3 and 7 are to commence on Royal Assent. Subclause 2(2) provides that the remaining clauses are to commence by Proclamation. However, subclause 2(3) provides:

> *If the provisions referred to in [subclause] (2) do not commence*

> within the period of 12 months beginning on the day on which this Act receives the Royal Assent, those provisions commence on the first day after the end of that period.

This provision is, essentially, in accordance with the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, insofar as it limits the time within which the provisions must be proclaimed. However, the drafting instruction relies on a 6 month period, as opposed to the 12 month period specified in this case. By way of explanation for this longer period, the Explanatory Memorandum to the Bill states:

> The 12 month delay will enable banks to modify their computer facilities to produce and transmit reports and enable the Cash Transaction Reports Agency to acquire and program new computer equipment to receive and analyse the data.

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

'Henry VIII' clause
Clause 6 - proposed definition of 'international funds transfer instruction'

Clause 6 of the Bill proposes to insert various new definitions into clause 3 of the *Cash Transaction Reports Act 1988*. Included in those proposed amendments is the following definition:

> **'international funds transfer instruction'** means an instruction for a transfer of funds that is transmitted into or out of Australia electronically or by telegraph, but does not include an instruction of a prescribed kind.

This is what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow the definition contained in the primary legislation to be, in effect, amended (by having certain 'instructions' specifically excluded by the definition) by regulation.

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

'Henry VIII' clause
Clause 9 - proposed new subsection 17B(8)

Clause 9 of the Bill proposes to insert a new Division 3 into the *Cash Transaction Reports Act 1988*. That proposed new division deals with international funds transfer instructions and, if enacted, would require certain transactions to be reported within a certain time. Proposed new subclause 17B (8) provides that

> **'reporting time'**, in relation to an instruction means:
>
> (a) if the instruction is transmitted into Australia - 14 days after the day that the transmission is received or such later time as is specified in the regulations;
>
> (b) if the instruction is transmitted out of Australia -14 days after the day that the instruction is transmitted or such later time as is specified in the regulations.

Paragraphs (a) and (b) are what the Committee would generally consider to be 'Henry VIII' clauses, as they would allow the definition contained in the primary legislation to be amended, in effect, by regulation.

The Committee draws attention to the provisions, as they 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.

CIVIL AVIATION (CARRIERS' LIABILITY) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 17 October 1991 by the Parliamentary Secretary to the Minister for Transport and Communications.

The Bill proposes to amend the *Civil Aviation (Carriers' Liability) Act 1959* to:

- ratify Additional Protocol No. 3 of Montreal 1975 (which amends the Warsaw Convention of 1929), which increases international carriers' liability limits and establishes limits in terms of the International Monetary Fund's Special Drawing Rights (SDR);
- ratify Montreal Protocol No. 4 of Montreal 1975, which introduces modern cargo handling terminology;
- apply the increased liability limits for passenger death and injury to Australia's international airlines; and
- convert the Warsaw Convention and Hague Protocol Poincare gold franc liability limits to SDR.

Commencement by Proclamation
Subclauses 2(2) and (3)

Clause 2 of the Bill provides:

> (1) Sections 1 to 10 and 14, 16 and 17 commence on the day on which this Act receives the Royal Assent.

> (2) Section 11 and subsections 13(1) and 15(1) commence on a day to be fixed by Proclamation, being a day not earlier than that on which the Montreal Protocol No. 3 enters into force for Australia.
>
> (3) Section 12 and subsections 13(2) and 15(2) commence on a day to be fixed by Proclamation, being a day not earlier than that on which the Montreal Protocol No. 4 enters into force for Australia.

The effect of subclauses 2(2) and (3) is to make the commencement of several of the Bills most important clauses dependent on a Proclamation for their commencement. Further, and contrary to the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989, the period within which such a Proclamation can be made is open-ended.

Drafting Instruction No. 2 states that if the (6 month) time limit for Proclamation set down as the general rule is not to be followed, the reason for doing so should be set out in the Explanatory Memorandum to the Bill. In this case, the Explanatory Memorandum offers little guidance, apart from noting that commencement of the relevant provisions is to be linked to Australia's ratification of the two protocols. However, the Committee notes that the Parliamentary Secretary's Second Reading speech on the Bill states:

> It is my understanding that should the United States Senate accept the supplemental compensation scheme (called the S-Plan) ... then it will support United States ratification of the Montreal Protocols Numbers 3 and 4 by the President. It is also my understanding that this ratification may be accompanied by a denunciation of the Warsaw Convention. Unless Australia also ratifies the Montreal Protocols, this action could expose Australian carriers, particularly Qantas, to unlimited liability in the United States.

> Since it is our firm belief that the US ratification of the two Protocols will lead to their early entry into force, they will in the not too distant future apply to carriage between Australia and the majority of countries. I understand that the US Senate may be voting on the Protocols in the near future.

The Committee notes that, while the explanation set out in the Second Reading speech seems reasonable, there is, nevertheless, no obligation to proclaim the relevant sections once the Protocols enter into force. In this regard, the Committee notes that this situation is similar to that which the Committee drew attention to in relation to the Carriage of Goods by Sea Bill 1991 (Alert Digest No. 13 and Reports Nos. 14 and 15 of 1991). The Committee would appreciate the Minister's views as to why the proclamation of the relevant provisions in this Bill could not be, in effect, 'sunsetted', by means of a provision similar to section 2 of what is now the *Carriage of Goods by Sea Act 1991.*

EVIDENCE BILL 1991

This Bill was introduced into the House of Representatives on 15 October 1991 by the Attorney-General.

The Bill proposes to:

- provide a modern law of evidence applicable in all federal courts and, until the Australian Capital Territory enacts its own evidence legislation, in ACT courts; and
- provide for the use of Commonwealth records as evidence in all Australian courts and tribunals.

The Bill is substantially based on the recommendations of the Law Reform Commission's report on *Evidence*, which was produced in relation to a reference to the Commission resulting from a recommendation of the Senate Standing Committee on Constitutional and Legal Affairs in November 1977. Further, this Bill will repeal and re-enact, with modifications, most of the provisions of the *Evidence Act 1905*.

Cessation by Proclamation
Subclause 11(3)

Subclause 11(3) of the Bill provides:

> This Act (other than the provisions of extended application) ceases to apply in relation to proceedings in an ACT court on a day fixed by Proclamation.

Since there is no limit on the time within which such a Proclamation must be made, this provision is contrary to the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989 (though the Committee acknowledges that that drafting instruction applies explicitly to commencement by Proclamation). However, the Committee notes that the Explanatory Memorandum states:

> Responsibility for evidence law in the Australian Capital Territory will pass to the Australian Capital Territory Government on or before 1 July 1992. The Proclamation will enable evidence legislation enacted by the Australian Capital Territory Legislative Assembly to apply in ACT courts.

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

HIGHER EDUCATION FUNDING AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 17 October 1991 by the Minister for Higher Education and Employment Services.

The Bill proposes to provide $3610 million for grants of financial assistance to the States and the Northern Territory for higher education institutions.

The Committee has no comment on this Bill.

INCOME TAX ASSESSMENT (VALUELESS SHARES) AMENDMENT BILL 1991

This Bill was introduced into the Senate on 17 October 1991 by Senator Watson as a Private Senator's Bill.

The Bill proposes to allow losses on valueless shares to be claimed as a capital loss in circumstances where the company which is the subject of the investment is in liquidation.

The Committee has no comment on this Bill.

MIGRATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 15 October 1991 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to:

- define 'offences against the Migration Act';
- permit the obtaining of information and documents about the identify and location of illegal entrants;
- provide for the making of regulations to authorise the Minister to limit the number of visas or permits of a particular class which may be granted in a financial year;
- create offences relating to the arranging of marriages or *de facto* relationships for the purposes of obtaining permits to remain in Australia;
- impose new penalties for arranging contrived marital relationships in order to gain Australian residence; and
- provide for the making of regulations in relation to certain matters to be specified by the Minister in a *Gazette* notice.

Requirement to provide information
Clause 3 - proposed new section 22A

Clause 3 of the Bill proposes to insert a new Division 1A into the *Migration Act*

1958. That proposed new division deals with the power to obtain information and documents about illegal entrants. Proposed new section 22A, if enacted, would allow the Minister, if he or she believes that a person has information or documents relevant to ascertaining the whereabouts of an illegal entrant, to issue a notice requiring the person to produce that information or those documents. Proposed new section 22D would make it an offence, punishable by imprisonment for up to 6 months, to fail to comply with such a notice without 'reasonable excuse'. Proposed new subclause 22D(2) sets out two possible 'reasonable excuses'.

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

Abrogation of privilege against self-incrimination
Clause 3 - proposed new section 22G

Proposed new section 22G of the Migration Act provides:

> A person is not excused from giving information or producing a document or a copy of a document under this Division on the ground that the information or the production of the document or copy might tend to incriminate the person, but:
>
> (a) giving the information or producing the document or copy; or
> (b) any information, document or thing obtained as a direct or indirect consequence of giving the information or producing the document or copy;

> is not admissible in evidence against the person in any criminal proceedings other than proceedings under, or arising out of, this Division.

The provision involves an abrogation of the privilege against self-incrimination. However, since the provision is in a form which the Committee has previously been prepared to accept, the Committee makes no further comment on the provision.

Inappropriate delegation of legislative power
Clauses 4 and 5 - proposed new subsections 23(3A) and 33(3A)

Clauses 4 and 5 of the Bill propose to insert new subsections 23(3A) and (3B) and 33(3A) and (3B), respectively, into the Migration Act. Section 23 of the Migration Act sets out the matters in relation to visas that may be dealt with by the regulations. Subsection 23(2) provides that the regulations may provide that, subject to section 28 of the Act (which gives the Minister the power to suspend a visa application), a person is entitled to be granted a visa if the satisfy all the relevant criteria. Subsection 23 (3) provides that the criteria that may be prescribed include the criterion that the applicant receives the necessary score when assessed under the 'points system' set out in Subdivision B of Division 2 of the Act.

Proposed new subsection 23(3A) provides:

> In spite of section 49A of the *Acts Interpretation Act 1901*, a prescribed criterion for visas of a class may be the criterion that the grant of the visa would not cause the number of visas of that class granted in a particular financial year to exceed whatever number is fixed by the Minister, by notice published in the *Gazette*, as the maximum number of such visas that may be granted in that year (however the criterion is expressed).

Section 49A of the Acts Interpretation Act provides:

> (1) Where an Act authorises or requires provision to be made for or in relation to any matter by regulations, the regulations may, unless the contrary intention appears, make provision for or in relation to that matter by adopting or incorporating, with or without modification:
>
> (a) the provisions of any Act, or of any regulations, as in force at a particular time or as in force from time to time; or
>
> (b) any matter contained in any other instrument or writing as in force or existing at the time when the first-mentioned regulations take effect;
>
> but, unless the contrary intention appears, regulations shall not, except as provided by this subsection, make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force from time to time.
>
> (2) In this section, **"regulations"** means regulations or rules under an Act.

The effect of proposed new subsection (3A), if enacted, would be to allow the Minister to 'prescribe' a further criterion (based on numbers of visa applications granted in a financial year) to be satisfied by an applicant for a visa by publishing a notice in the *Gazette*. Such a notice would not be subject to any form of Parliamentary scrutiny. Given the effect of such a notice, it is preferable that such scrutiny is available.

Proposed new subsection 33(3A) proposes to make substantially identical amendments in relation to applications for entry permits.

The Committee draws Senator's attention to the clauses, as they may be considered 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
Clause 8 - proposed new subsection 83D(3)

Clause 8 of the Bill proposes to insert a new Subdivision B into Division 3 of the Migration Act. That proposed new subdivision sets out various proposed new offences in relation to marriages and *de facto* relationships entered into with the purpose of obtaining permanent resident status. Proposed new section 83D provides:

> (1) A person must not arrange a marriage between other persons for the purpose of assisting one of those other persons to get a stay permit by satisfying a criterion for the permit because of the marriage.
>
> (2) Subsection (1) applies whether or not the purpose is achieved.
>
> (3) It is a defence to an offence against subsection (1) if the defendant proves that, although one purpose of the marriage was to assist a person to get a stay permit, the defendant believed on reasonable grounds that the marriage would result in a genuine and continuing marital relationship.

An offence against the proposed new section would carry with it, on conviction, a penalty of $100 000 or imprisonment for 10 years or both.

Proposed new subsection 83D(3) involves a reversal of the onus of proof, as it would require a defendant to prove that they believed that the marriage would result in a genuine and continuing marital relationship. Ordinarily, it is incumbent on the prosecution to prove all the elements of an offence. In the absence of this proposed subsection, the prosecution would presumably be required to prove that the person did not believe on reasonable grounds that a genuine and continuing marital relationship would result from the marriage.

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.

PRIME MINISTER AND CABINET LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 17 October 1991 by the Parliamentary Secretary to the Prime Minister.

This omnibus Bill proposes to amend the following nine Acts administered within the portfolio of the Prime Minister:

- *Complaints (Australian Federal Police) Act 1981;*
- *Governor-General Act 1974;*
- *Inspector-General of Intelligence and Security Act 1986;*
- *Maternity Leave (Commonwealth Employees) Act 1973;*
- *Merit Protection (Australian Government Employees) Act 1984;*
- *Ombudsman Act 1976;*
- *Public Service Act 1922;*
- *Public Service Reform Act 1984;* and
- *Resource Assessment Commission Act 1989.*

The Bill further amends various pieces of legislation relating to the Public Service Board, removing the requirement for government agencies to obtain approval from the Public Service Commissioner for terms and conditions of employment for staff.

General comment

The Committee notes with approval that in his Second Reading speech on the Bill, the Parliamentary Secretary to the Prime Minister said:

> This Bill ... repeals a provision in the *Public Service Reform Act 1984* [subsection 151(6)] which is unproclaimed and is no longer required. This repeal is in accordance with the view expressed by the Senate Standing Committee for the Scrutiny of Bills that unproclaimed provisions should be repealed.

The Committee has no further comment on this Bill.

STATES GRANTS (TAFE ASSISTANCE) AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 17 October 1991 by the Minister for Higher Education and Employment Services.

The Bill proposes to provide $359.861 million for grants of financial assistance to the States and Territories for technical and further education.

The Committee has no comment on this Bill.

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 17 October 1991 by the Parliamentary Secretary to the Minister for Transport and Communications.

This omnibus Bill proposes to amend the following seven Acts administered within the Transport and Communications portfolio:

- *Australian Maritime Safety Authority Act 1990;*
- *Australian National Railways Commission Act 1983;*
- *Civil Aviation Act 1988;*
- *Federal Airports Corporation Act 1986;*
- *Navigation Act 1912;*
- *Parliamentary Proceedings Broadcasting Act 1946;* and
- *Trade Practices Act 1974.*

Retrospectivity
Subclauses 2(2) to (12)

Pursuant to subclauses 2(2) to (12) of the Bill, if enacted, various provisions in the Bill would be given retrospective effect, to dates as far back as 17 February 1984. However, in each case, the reason for the retrospectivity is set out in the Explanatory Memorandum to the Bill. Further, the Committee notes that the amendments essentially propose to either correct drafting errors or to clarify the

effect of existing provisions and would not appear to adversely affect any person or body. Accordingly, the Committee makes no further comment on the subclauses.

Delegation to 'a person'
Clause 14 - proposed new subsection 98(3B) of the *Civil Aviation Act 1988*

Clause 14 of the Bill proposes to insert a new subsection 98(3B) into the *Civil Aviation Act 1988*. Section 98 of the Civil Aviation Act sets out the regulation making power associated with the Act. Proposed new subsection (3B) provides:

> Nothing in this Act (including, in particular, paragraph 9(1)(a), subsection 13(4) and section 94) is to be taken to prevent regulations being made which provide for the delegation of:
>
> (a) a function conferred on the [Civil Aviation] Authority under paragraph 9(1)(a); or
> (b) a power of the Authority for or in connection with the performance of that function;
>
> to a person who is not a member or an officer.

Section 94 of the Civil Aviation Act sets out the current limits on delegation by the Authority. It provides:

> The Authority may, by writing under its common seal, delegate all or any of its powers under this Act to:
>
> (a) a member;
> (b) the Chief Executive Officer;
> (c) an officer [which is defined in section 3 of the Act as a member of the staff of the Authority]; or
> (d) a person in respect of whose services arrangements under paragraph 91(3)(a) [which provides for

> secondments of personnel from the Australian Public Service and elsewhere] are in force.

This proposed amendment would over-ride those limits and allow the Authority to delegate (under the regulations) any or all of its functions (and the powers connected with those functions) to 'a person', without any limits on the attributes and qualifications of such a person. The Committee has consistently drawn attention to such powers of delegation.

The Committee notes that, in relation to this particular provision, the Explanatory Memorandum to the Bill states:

> This amendment [would remove] any legal doubt about the Authority's power to delegate certain air safety functions under the Civil Aviation Regulations to industry bodies as has been done for at least the last 30 years.

While the Committee appreciates that this may be a valid explanation for the provision being drafted in this way, the Committee would appreciate the Minister's advice as to the 'certain air safety functions' involved and the 'industry bodies' to whom they are to be delegated. In particular, the Committee would appreciate the Minister's advice as to what limits exist as to the persons who can, on behalf of those industry bodies, carry out those functions and, if there are none, how the power of delegation might be limited in order to allay the Committee's concerns.

SCRUTINY OF BILLS ALERT DIGEST

NO. 19 OF 1991

13 NOVEMBER 1991

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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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* Australian Capital Territory Self-Government Legislation Amendment Bill 1991

* Australian Citizenship Amendment Bill 1991

Australian Institute of Health Amendment Bill 1991

Bank Integration Bill 1991

* Broadcasting Amendment Bill (No. 2) 1991

* Corporations Legislation Amendment Bill (No. 2) 1991

* Corporations (Unlisted Property Trusts) Amendment Bill 1991

* Health and Community Services Legislation Amendment Bill 1991

Health Insurance (Pathology) Amendment Bill 1991

Health Insurance (Pathology) Amendment (No. 2) Bill 1991

Health Insurance (Pathology)(Licence Fee) Bill 1991

Health Insurance (Pathology)(Fees) Bill 1991

* Law and Justice Legislation Amendment Bill (No. 2) 1991

Migration Amendment Bill (No. 3) 1991

* Migration (Health Services) Charge Bill 1991

*** 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.

Radio Licence Fees Amendment Bill 1991

* Repatriation Institutions (Staff) Bill 1991

* Sales Tax Laws Amendment Bill (No. 3) 1991

* Social Security Legislation Amendment Bill (No. 4) 1991

* States Grants (Schools Assistance) Amendment Bill 1991

Television Licence Fees Amendment Bill 1991

* Veterans' Affairs Legislation Amendment Bill (No. 2) 1991

Veterans' Entitlements (Provision of Treatment) Amendment Bill 1991

*** The Committee has commented on these Bills**

AUSTRALIAN CAPITAL TERRITORY SELF-GOVERNMENT LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 November 1991 by the Minister for the Arts, Tourism and Territories.

The Bill proposes to:

- pass on to the Australian Capital Territory Legislative Assembly the power of control of the Territory's electoral system after the next general election in the Territory;
- transfer to the Legislative Assembly the power to determine by enactment the number of Ministers; and
- provide that the Territory no longer require the Treasurer's approval in order to give certain guarantees.

'Henry VIII' clause
Clause 12 - proposed new subsection 16(3A) of the *Australian Capital Territory (Electoral) Act 1988*

Clause 12 of the Bill proposes to insert a new subsection 16(3A) into the *Australian Capital Territory (Electoral) Act 1988*. Section 16 of that Act applies certain specified parts of the *Commonwealth Electoral Act 1918* to general elections in the Australian Capital Territory. Proposed new subsection (3A) provides:

> The Parts referred to in subsection (3) [ie Parts II, IV, VI, VIII, IX and X] apply subject to modifications prescribed by the regulations.

This is what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow the operation of a piece of primary legislation to be amended by subordinate legislation. However, the Committee considers this proposed amendment to be basically of a technical nature and, accordingly, makes no further comment on the clause.

AUSTRALIAN CITIZENSHIP AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to amend the *Australian Citizenship Act 1948,* to provide for certain persons to obtain Australian citizenship by descent.

'Henry VIII' clause
Clause 3 - proposed new paragraph 10C(5)(d)

Clause 3 of the Bill proposes to insert a new section 10C into the *Australian Citizenship Act 1948.* That new section, if enacted, would provide for citizenship by descent for persons over 18 years of age. Proposed new subsection 10C(4) provides that the Minister must register a person who applies for registration as an Australian citizen if:

(a) a natural parent of the applicant was an Australian citizen at the time of the birth of the applicant; and

(b) that natural parent is an Australian citizen at the time of the application (or is dead and was an Australian citizen at the time of their death); and

(c) the applicant (i) was outside of Australia on or after 26 January 1949; (ii) is 18 years or over at the commencement of the section; and (iii) has failed to register as an Australian

citizen previously for 'an acceptable reason'; and

(d) the Minister is satisfied that the person is of good character.

Proposed new subsection 10C(5) then provides:

> For the purposes of subparagraph (4)(c)(iii), an applicant has an acceptable reason if and only if:
>
> (a) an Australian passport has been issued to the applicant; or
> (b) the applicant's name has been on an Electoral Roll under the *Commonwealth Electoral Act 1918; or*
> (c) the applicant was unaware of the requirement of registration for the purposes of obtaining Australian citizenship by descent under section 10B or under section 11 of this Act as in force at any time before the commencement of section 10B; *or*
> (d) the applicant has a reason for failing to become registered that is declared by the regulations to be an acceptable reason for the purposes of this section.

Paragraph (d) above is what the Committee would generally consider to be a 'Henry VIII' clause. While the proposed new section sets out to limit the 'acceptable' reasons to those specified by paragraphs (a), (b) and (c), proposed new paragraph 10C(5)(d) would allow further reasons to be specified by regulation. As a result, the definition set out in the primary legislation could be amended by subordinate legislation.

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

AUSTRALIAN INSTITUTE OF HEALTH AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Health, Housing and Community Services.

The Bill proposes to amend the *Australian Institute of Health Act 1987*, to enable the Institute to collect, analyse and publish statistics in the areas of welfare services and housing assistance.

The Committee has no comment on this Bill.

BANK INTEGRATION BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister Assisting the Treasurer.

The Bill proposes to provide further legislative framework to facilitate the integration of savings bank subsidiaries into their trading bank partners within banking groups.

The Committee has no comment on this Bill.

BROADCASTING AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 6 November 1991 by the Minister for Transport and Communications.

The Bill proposes to amend the *Broadcasting Act 1942,* to enable new FM commercial and supplementary radio services to be made available to regional areas under the Regional Radio Program. In particular, it proposes to:

- abolish establishment and AM/FM conversion fees and replace them with an FM access fee;
- define the term 'commercial viability' and limit the circumstances in which commercial viability is considered by the Australian Broadcasting Tribunal when conducting certain inquiries;
- enable the granting of a supplementary radio licence to serve an area smaller than that served by the related commercial radio licence; and
- enable separation of a supplementary radio licence from the related commercial radio licence two years after the supplementary service commences.

Retrospectivity
Subclause 23(4)

Part 4 of the Bill contains certain 'transitional' and 'savings' provisions. Clause 23 sets out various transitional and savings provisions in relation to commercial radio

licences. Subclause 23(4) sets out certain matters which are to apply in relation to applications for non-metropolitan FM commercial radio licences which have not been dealt with at the time that clause 23 commences. In that sense, the provision may have a retrospective operation. However, the Committee notes that the Explanatory Memorandum states:

> Clause 23(4) ensures that where the Tribunal notified a person after 2 July 1991 that a commercial radio licence is available and at the time of commencement the fee has not yet been paid, the new FM access fee provisions inserted by clauses 13 and 17 [of the Bill] apply. This will give the applicant the benefit of a smaller fee and a longer time before the fee has to be paid.

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

CORPORATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Attorney-General.

The Bill proposes to amend:

- the *Corporations Legislation Amendment Act 1990*; and
- the *Corporations Act 1989*,

primarily to clarify certain aspects of the new national scheme for corporate regulation which came into operation on 1 January 1991.

The major amendments in the Bill concern:

- the introduction of fixed date settlement for market transactions;
- corporate fundraising;
- registration numbers of companies and registrable bodies; and
- miscellaneous substantive and technical amendments.

Retrospectivity
Subclause 2(3)

Subclause 2(3) of the Bill provides that Part 4 is to be taken to have commenced on 1 January 1991 (being the date on which the new corporations scheme

commenced). However, as the amendment proposed by Part 4 merely corrects a drafting oversight, the Committee makes no further comment on the provision.

Retrospectivity
Schedule 6 - proposed new section 1368

Schedule 6 of the Bill provides for the commencement and application of changes to the Corporations Law resulting from the Bill. Various nominated provisions are to be taken to have commenced on 1 January 1991, being the date on which the new corporations scheme commenced. Though it is not set out in the part of the Explanatory Memorandum relating to this particular Schedule, it appears that each of the amendments referred to is either of a technical nature or corrects a drafting error. The Committee would appreciate the Attorney-General's confirmation that this is the case.

General comment

The Committee makes a general observation that it did not find the Explanatory Memorandum particularly helpful in relation to this Bill, largely because of the difficulty in locating those parts of the memorandum relevant to the provisions which caused concern. An index, along the lines of those provided in explanatory memoranda produced within the Treasurer's portfolio in recent months, would have been of assistance.

CORPORATIONS (UNLISTED PROPERTY TRUSTS) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Attorney-General.

The Bill proposes to amend the *Corporations Act 1989,* to impose a standard 12 month notice of withdrawal period in respect of 'public' unlisted property trusts. Further, the Bill contains provisions to facilitate investor participation in the affairs of unit trusts and other collective investment schemes.

Retrospectivity / 'Legislation by press release'
Clause 11 - proposed new sections 1365 and 1366 of the Corporations Law

Clause 11 of the Bill proposes to insert a new division into the Corporations Law. Included in that proposed new division is new section 1365, which provides that certain amendments to section 1069 of the Corporations Law (which are set out in clause 8 of the Bill) are to be taken to have commenced on 1 January 1991 (being the date on which the new corporations scheme came into operation). However, as those amendments (according to the Explanatory Memorandum) are intended to clarify the meaning of certain provisions in the Bill, the Committee makes no further comment on the provision.

Proposed new section 1366 provides that certain other amendments contained in the Bill are to be taken to have commenced at 4.50pm Australian Eastern Standard Time on 23 July 1991. The Attorney-General's Second Reading speech on the Bill

indicates that this is the date on which he and the Treasurer announced a range of measures which would effect the unlisted property trust industry. This is, therefore, an example of 'legislation by press release', a practise which the Committee consistently has commented on unfavourably.

However, the Committee notes that in the present case the legislation intended to implement the announcements has been introduced with 6 months of the announcements. In that sense, the legislation complies with the rule-of-thumb on retrospectivity which is set out in the Senate's resolution of 8 November 1988 (see Journals of the Senate, No. 109, 8 November 1988, pp 1104-5. The Committee accepts, of course, that this resolution only applies to taxation legislation.). Further, the Committee notes that the proposed amendments appear to be beneficial to members of the public investing in the unlisted property trust industry. For those reasons, the Committee makes no further comment on the provision.

Inappropriate delegation of legislative power
Clause 11 - proposed new section 1367

Clause 11 of the Bill also proposes to insert a new section 1367 into the Corporations Law. That new section, if enacted, would allow the Australian Securities Commission to make written orders in relation to things done in relation to deeds and trusts which are effected by the amendments which are to operate retrospectively pursuant to proposed new section 1366. Such orders could, however, only be made in relation to things done during the period of retrospectivity.

Given that they could have the effect of overriding the (retrospectively applied) primary legislation, this might be considered an inappropriate delegation of

legislative power. However, the Committee notes that, according to the Explanatory Memorandum, the proposed new section is intended to ensure that certain things done (by unit holder meetings, etc) during the period of retrospectivity are not rendered invalid by the retrospective application of the proposed amendments. In the light of this explanation, the Committee makes no further comment on the provision.

HEALTH AND COMMUNITY SERVICES LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Aged, Family and Health Services.

The Bill proposes to amend the following Acts:

- the *Aged or Disabled Person Homes Act 1954,* to implement aged care measures announced in the Budget, including (a) the payment of assistance to organisations providing care to persons not in institutions, (b) restructuring of the Personal Care subsidy, and (c) controlling the quality of people operating hostels under the Act;
- the *Health Insurance Act 1973,* to enable benefits to be paid for referred diagnostic imaging services and allow a Medical Services Committee to examine cases of excessive pathology services;
- the *Health Legislation Amendment Act 1982,* to repeal a number of redundant provisions;
- the *National Food Authority Act 1991,* to remedy drafting relating to food standards matters in process before the commencement of the Act;
- the *National Health Act 1953,* to amend the definition of 'basic private table' and 'basic table' to make various amendments relating to nursing home matters; and
- the *Nursing Homes Assistance Act 1974,* to revoke approvals to certain homes and hostels when Commonwealth/State Disability

Agreements operate in each State.

Retrospectivity
Subclause 2(3)

Subclause 2(3) of the Bill provides that the amendments proposed by Part 5 of the Bill are to be taken to have commenced on 19 August 1991. Part 5 proposes to make certain amendments to the *National Food Authority Act 1991*. According to the Explanatory Memorandum, the amendments are intended to correct deficiencies in and make minor technical amendments to that Act. The proposed period of retrospective operation relates to the commencement of that Act. In the light of the explanation provided, the Committee makes no further comment on the provision.

HEALTH INSURANCE (PATHOLOGY) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Health, Housing and Community Services.

The Bill proposes to amend the *Health Insurance Act 1973*, to allow the payment of fees after the Minister has accepted undertakings from approved pathology authorities and practitioners and has approved premises as accredited pathology laboratories.

The Committee has no comment on this Bill.

HEALTH INSURANCE (PATHOLOGY) AMENDMENT (NO. 2) BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Health, Housing and Community Services.

The Bill proposes to:

- introduce a licensing scheme for pathology specimen collection centres;
- allow for certain circumstances in which a medicare benefit for a pathology service is not payable;
- enable the Minister to grant a certain number of licences for temporary collection centres for two years from 1 February 1991; and
- provide for reconsideration by the Minister and review by the Administrative Appeals Tribunal of decisions not to grant a licence for a collection centre.

The Committee has no comment on this Bill.

HEALTH INSURANCE (PATHOLOGY)(FEES) BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Health, Housing and Community Services.

The Bill proposes to provide that approval and acceptance fees be payable by approved pathology authorities, approved pathology practitioners and accredited pathology laboratories once undertakings have been made and accepted by those bodies indicating that they intend to comply with certain legislative and administrative arrangements.

The Committee has no comment on this Bill.

HEALTH INSURANCE (PATHOLOGY)(LICENCE FEE) BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Health, Housing and Community Services.

The Bill proposes to allow for the introduction of a licence fee ($1 000) for a pathology specimen collection centre, payable by the approved pathology authority which owns the centre.

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.

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the Senate on 7 November 1991 by the Minister for Justice and Consumer Affairs.

The Bill proposes to amend the following four Acts:

- the *Commonwealth Places (Application of Laws) Act 1970,* to ensure that State Policy, when investigating applied Commonwealth offences, are not bound by Part 1C of the Crimes Act;
- the *Family Law Act 1975,* to:
  - widen the Family Court's powers to make certain orders for children subject to State child welfare legislation; and
  - ensure a Family Court judge who becomes aware that a party has offered settlement is not disqualified from that case;
- the *Judiciary Act 1903,* to prevent the application of laws, in civil suits, to the Commonwealth and States to which they are not subject; and
- the *Trade Practices Act 1974,* to effect two minor drafting changes.

Commencement by Proclamation
Subclause 2(2)

Subclause 2(2) of the Bill provides that the proposed amendment of the *Judiciary Act 1903* which is contained in Part 2 of the Schedule to the Bill is to commence

on a date to be fixed by Proclamation. There is no limit as to when such a proclamation must be made. In that regard, the provision is contrary to the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. By way of explanation for this open-ended proclamation provision, the Explanatory Memorandum states:

> A proclamation will not be made until the proposed amendments to the Crown Proceedings legislation of the States are in force. For example, the Crown Proceedings Acts of certain of the States do not at present subject the Crown in right of another State to liability in tort or to ordinary actions in contract. States propose to remove those general immunities. It would not be appropriate to amend section 64 [of the Judiciary Act] as proposed until that is done.

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

Retrospectivity
Subclause 2(3)

Subclause 2(3) of the Bill provides that the amendment to the *Commonwealth Places (Application of Laws) Act 1970,* which is to be made by Part 1 of the Schedule to the Bill is to have been taken to have commenced on 1 November 1991. The proposed amendment is intended to ensure that, in certain circumstances, State police are not bound by the new Part 1C of the *Crimes Act 1914.*

The Explanatory Memorandum indicates that the date from which the amendments are to operate is the date from which section 3 of the *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* operates. That section inserted the new Part 1C into the Crimes Act. In the light of this explanation, the Committee makes no further comment on the provision.

Exclusion of Commonwealth from liability for breach of statutory duty under a State or Territory law
Schedule - proposed amendment to section 64 of the *Judiciary Act 1903*

The Schedule to the Bill includes a proposed amendment to section 64 of the *Judiciary Act 1903*. That section currently provides:

> In any suit to which the Commonwealth or a State is a party, the rights of the parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

The proposed amendment would, if enacted, add the following subsection (2):

> Where the Commonwealth is a party to a suit, subsection (1) does not give to another party, as against the Commonwealth:
>
> (a) any right under the provisions of a law of:
>
> (i) a State; or
> (ii) the Australian Capital Territory; or
> (iii) the Northern Territory; or
> (iv) Norfolk Island;

unless that party would have had that right, as against the State or Territory, in suit to which the State or Territory was a party in similar circumstances; or

(b) any right to damages for a breach of statutory duty under the provisions of a prescribed law of a State or of a Territory mentioned in paragraph (a).

Paragraph (b) may be regarded as an interference with personal rights and liberties, insofar as it would appear to allow the Commonwealth to exclude (by regulation) a person's right to damages from the Commonwealth for breach of a statutory duty under a State law.

By way of explanation for the provisions, the Explanatory Memorandum states:

> Paragraph (a) will overcome one of the main anomalies of [the High Court's decision in The Commonwealth v Evans Deakin Industries], ie that the Commonwealth may in effect be bound by a State or Territory law which the enacting State or Territory legislature has decided is not suitable to bind the State or Territory itself.

The Committee notes that, ordinarily, the Commonwealth is not bound by State or Territory laws. The Explanatory Memorandum goes on to say:

> Paragraph (b) will act as a reserve mechanism by which the Commonwealth may prevent itself from becoming liable for damages for a breach of a duty under a State or Territory law (whether or not the law applies to the enacting State or Territory). This mechanism is designed to deal with State or Territory laws that are enacted from a State or Territory

> viewpoint and do not adequately address the Commonwealth's special problems and needs. A regulation made for the purposes of the paragraph will only operate prospectively and will not affect accrued rights against the Commonwealth.

On the basis of what is set out in the paragraph reproduced above, it appears that the only rights which could be affected are those which might be given by State or Territory legislation passed after the commencement of this legislation. In that sense, this provision would not appear to trespass unduly on existing rights. Accordingly, the Committee makes no further comment on the clause.

General comment

The Committee had some difficulty in comprehending what was meant by the proposed amendment to section 64 of the Judiciary Act. While the Committee found the explanation set out in the Explanatory Memorandum to be relatively clear, it had difficulty in ascribing that meaning to the actual wording of the proposed amendment. In particular, in relation to the reference to 'prescribed' State and Territory laws, the members of the Committee recognised the potential for confusion about who might prescribe such laws, the Commonwealth or the States. The Committee would, therefore, greatly appreciate from the Attorney-General some further information on the proposed amendment by way of clarification of what is intended.

MIGRATION AMENDMENT BILL (NO. 3) 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to amend the *Migration Act 1958*, to clarify the Minister's powers to grant or refuse visas and entry permits, consequent upon the introduction of the Migration (Health Services) Charge.

The Committee has no comment on this Bill.

MIGRATION (HEALTH SERVICES) CHARGE BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Immigration, Local Government and Ethnic Affairs.

The Bill proposes to impose a charge of $822 (subject to the All Group Consumer Price Index) on certain classes of migrants and persons approved for permanent residence.

Retrospectivity
Subclause 5(1)

Subclause 5(1) of the Bill provides that a charge would be applicable in relation to applications for visas or entry permits made after 21 August 1991. If enacted, the provision would, therefore, operate retrospectively. However, the Committee notes that this is a Budget measure and that the proposed date for commencement of operation is the date on which the measures were announced in the Treasurer's Budget Speech. Accordingly, the Committee makes no further comment on the Bill.

RADIO LICENCE FEES AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 November 1991 by the Minister for Transport and Communications.

The Bill, which complements the *Broadcasting Amendment Bill (No. 2) 1991*, proposes to:

- decrease the level of annual commercial, supplementary and remote radio licence fees;
- abolish establishment and AM/FM conversion fees and replace them with an FM access fee; and
- require the payment of annual licence fees payable by commercial radio licensees on 31 December each year.

The Committee has no comment on this Bill.

REPATRIATION INSTITUTIONS (STAFF) BILL 1991

This Bill was introduced into the House of Representative on 6 November 1991 by the Minister for Veterans' Affairs.

The Bill, which complements the *Veterans' Affairs Legislation Amendment Bill (No. 2) 1991*, proposes to:

- effect the separation from Commonwealth employment of staff from the Repatriation General Hospitals when they are integrated into the State systems; and
- set out the terms and conditions for staff who either accept or reject offers of continuing employment with the States.

'Henry VIII' clauses
Subclauses 3(2) and 4(3)

Clause 3 of the Bill sets out various definitions which are relevant to the remaining provisions of the Bill. One of the definitions set out is 'appropriate State institution'. Subclause 3(2) also provides:

> The Secretary to the Department may, in writing, declare an institution operated by a State or an authority of a State to be an appropriate State institution for the purposes of this Act.

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

This is what the Committee would generally consider to be a 'Henry VIII' provision, as it would allow the Secretary to amend, in effect, the definition of 'appropriate State institution' set out in the primary legislation by declaring an institution which does not fit within the definition set out to, nevertheless, be an appropriate State institution for the purposes of the legislation. Moreover, the Committee notes that the instrument by which the Secretary would effect such a declaration would not be subject to any form of parliamentary scrutiny.

Similarly, clause 4 of the Bill sets out a definition of 'affected employee'. Subclause 4(3) then provides:

> The Secretary to the Department may, in writing, determine that specified officers or employees employed, or usually employed, at a repatriation institution are not affected employees of the institution.

If enacted, this provision would allow the Secretary to (by written determination) exclude from the operation of the legislation officers or employees who would otherwise come within the definition set out in the primary legislation. Such a determination would not be subject to any form of parliamentary scrutiny. The Committee suggests that, as with the determinations under subclause 3(2), such a determination should be tabled in both Houses of the Parliament and subject to disallowance by either House.

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

SALES TAX LAWS AMENDMENT BILL (NO. 3) 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Treasurer.

The Bill proposes to amend the *Sales Tax (Exemptions and Classifications) Act 1935,* to extend exemptions to:

- goods producers, including primary production, mining (and exploration) and manufacturing;
- research and development entities;
- cargo handlers at sea and international airports; and
- subcontractors who undertake activities on behalf of any of the classes above.

Retrospectivity / 'Legislation by press release'
Clause 8

Clause 8 of the Bill provides that the amendments proposed by the Bill in relation to 'eligible business goods' are to apply to goods purchased after 12 March 1991. The date nominated is the date of the Government's Industry Statement in which these measures were announced. This is, therefore, an example of 'legislation by press release'. The Committee has consistently commented unfavourably on the practice.

In addition, the Committee notes that on 8 November 1988, the Senate passed the following resolution in relation to retrospectivity in taxation bills:

> That, where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of a draft Bill within 6 calendar months after the date of that announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill. (Journals of the Senate, No. 109, 8 November 1988, pp 1104-5)

This Bill would appear to transgress the 6 month rule set out in the resolution. The Committee suggests that, apart from contravening the terms of the resolution, the delay in introducing the legislation has no doubt resulted in confusion on the part of those persons affected by the measures proposed by the Bill. However, the Committee notes that the proposed amendments referred to above appear to be beneficial to taxpayers. Accordingly, the Committee makes no further comment on the clause.

SOCIAL SECURITY LEGISLATION AMENDMENT BILL (NO. 4) 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Aged, Family and Health Services.

The Bill proposes to amend the *Social Security Act 1991* and the *Data-matching Program (Assistance and Tax) Act 1990*, to effect a number of budgetary and non-budgetary measures, including changes affecting the following areas:

- indexation of earnings credit;
- rent assistance for job search and newstart allowances recipients;
- treatment of compensation payments;
- rate payable of certain allowances to certain partnered persons;
- pharmaceutical allowance and payment of advance allowances;
- child disability allowance;
- rates of benefit when one partner is an ABSTUDY recipient;
- penalties under the Act relating to fraud;
- payments under the Aboriginal Employment Incentive Scheme;
- tabling in Parliament of Ministerial determinations approving a scholarship;
- to revive and establish international social security agreements with the United Kingdom, Ireland and Portugal;
- recovery of pre-paid benefits; and
- minor and technical amendments.

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

Retrospectivity
Subclauses 2(7), (9) and (10)

Subclauses 2(7) of the Bill provides that the proposed amendments contained in part 1 of Schedule 1 and Part 1 of Schedule 2 of the Bill are to be taken to have commenced on 1 July 1991. The Explanatory Memorandum indicates that the changes involved in those Parts are either beneficial to beneficiaries or intended to correct drafting errors and omissions. In the light of this explanation, the Committee makes no further comment on the provision.

Subclause 2(9) provides that the proposed amendments contained in Part 2 of Schedule 2 and Part 1 of Schedule 4 are to be taken to have commenced on 12 November 1991. The Explanatory Memorandum indicates that the amendments involved are essentially technical and their commencement is linked to that of the *Social Security (Disability and Sickness Support) Amendment Act 1991,* which commenced on that date. Accordingly, the Committee makes no further comment on the provision.

Subclause 2(10) provides that Part 4 of Schedule 2 of the Bill 'commences, or is taken to have commenced', immediately after the commencement of Part 3 of the Schedule to the *Social Security Legislation Amendment Act (No. 3) 1991.* That 'Act' is still before the Senate. However, since the Explanatory Memorandum indicates that the amendments contained in Part 4 propose to make 'further improvements in clear English drafting', the Committee makes no further comment on the provision.

Commencement by Proclamation
Subclause 2(8)

Subclause 2(8) of the Bill provides:

> Part 3 of Schedule 1 commences on a day to be fixed by Proclamation, being a day not earlier than the day on which the agreement on Social Security between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland dated 1 October 1990 comes into force for Australia, and not later than 3 months after that day.

The Committee notes with approval that, though the commencement of the relevant provisions is conditional on an international agreement coming into force in Australia, the commencement of the provisions is, nevertheless, fixed as a result of the way subclause 2(8) is expressed.

General comment

The Committee notes with approval that Part 2 of Schedule 1 of the Bill contains a proposed new subsection 24A(2) of the *Social Security Act 1991*. That new subsection, if enacted, would require the Minister to table in the Parliament a copy of a determination approving a scholarship or class of scholarships for the purposes of exclusion from the ordinary income test. The Explanatory Memorandum indicates (at p 47) that the amendment is in response to concerns raised by the Committee (see Alert Digest No. 5 of 1991 and the Sixth Report of 1991). The Committee thanks the Minister for formulating the proposed amendment.

STATES GRANTS (SCHOOLS ASSISTANCE) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 7 November 1991 by the Minister for Employment, Education and Training.

The Bill proposes to amend the *States Grants (Schools Assistance) Act 1988*, to:

- supplement existing appropriations for 1991 schools programs and appropriate funds for 1992 programs;
- provide funds for the National Element of the Country Areas Program;
- provide funds for the School Language and Literacy Program;
- defer to 1993 part of the planned 1992 expenditure under the Senior Secondary Support Element of the Capital Grants Program;
- provide for the first stage in the four-year implementation of the phasing-out of prospective cost supplements for non-government schools;
- provide funds under the Award Restructuring Assistance Program to meet the Commonwealth's share of introducing Advanced Skills Teacher positions and the increase in the salary benchmark for four-year trained teachers;
- make consequential amendments upon the *Migration Act 1958*, to ensure refugees' eligibility for certain programs; and
- give residents of the Cocos (Keeling) Islands eligibility for certain entry permits.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that paragraph 3(e) of the Bill is taken to have commenced on 19 December 1989. However, since the Explanatory Memorandum indicates that the proposed amendment referred to merely corrects an incorrect cross-reference to the *Migration Act 1958*, the Committee makes no further comment on the provision.

TELEVISION LICENCE FEES AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 November 1991 by the Minister for Transport and Communications.

The Bill, which complements the Broadcasting Amendment Bill (No. 2), proposes to require the payment on 31 December each year of annual licence fees payable by commercial broadcasters.

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.

VETERANS' AFFAIRS LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 6 November 1991 by the Minister for Veterans' Affairs.

The Bill proposes numerous amendments to the Veterans' Affairs legislation, including provisions for:

- the maximum amount of earnings credit applicable to the ordinary income test, to be indexed in line with the consumer price index;
- extending the co-payment arrangements for pharmaceutical benefits under the Pharmaceutical Benefits Scheme to the Repatriation Pharmaceutical Benefits Scheme from 1 January 1991 and, consequently, payment of a fortnightly allowance to offset the patient contribution;
- changes in arrangements for payment of advances for pharmaceutical allowances;
- changes to include the areas of Iraq and Kuwait as 'operational areas' and specify the period during which certain areas are to be regarded as operational.

Retrospectivity
Paragraphs 19(a), (b) and (d)

Clause 19 of the Bill provides:

> 19. Schedule 2 to the [*Veterans' Entitlements Act 1986*] is amended:
>
> (a) by omitting from Column 2 of item 5 "31 July 1962 to and including 11 January 1973" and substituting "28 May 1963 to and including 19 April 1967";
>
> *Commencement: Immediately after the commencement of the Veterans' Entitlements Act 1986*
>
> (b) by omitting from Column 2 of item 7 "7 July 1965" and substituting "17 August 1964";
>
> *Commencement: Immediately after the commencement of the Veterans' Entitlements Act 1986*
>
> (c) by inserting in Column 2 of item 10 "to and including 9 June 1991" after "1990";
>
> *Commencement: Day of Royal Assent*
>
> (d) by adding at the end the following:
>
> | | | |
> |---|---|---|
> | "11. | The area comprising Iraq and Kuwait | The period from and including 23 February 1991 to and including 9 June 1991". |
>
> *Commencement: 23 February 1991*

Schedule 2 of the *Veterans' Entitlements Act 1986* describes and defines (in geographical and chronological terms) 'operational areas'. These definitions are intrinsic to many of the benefits provisions of the legislation. While the effect of the

proposed amendments would be retrospective, the Explanatory Memorandum indicates that they would be beneficial to veterans. The Committee notes that the amendment proposed by paragraph (a) would appear to disentitle veterans who served in the relevant area between 31 July 1962 and 27 May 1963 and between 20 April 1967 and 22 January 1973.

However, the Committee also notes that clause 20 of the Bill would appear to preserve the rights of any veterans who might otherwise be adversely affected by the amendments proposed by paragraph 19(a). According to the Explanatory Memorandum, the saving provisions operate in relation to claims applications or benefits granted on or after 7 November 1991 (the day after the legislation was introduced) and claims or applications not finally determined before 8 November 1991,

> in which case the claim or application will be determined as though the amendments proposed by clause 19 had not been made.

The Committee would appreciate some further information on the intention and the effect of these proposed amendments. In particular, the Committee would appreciate the Minister's advice as to whether a person who served in a relevant area at a time which is to be excluded from the definition by these proposed amendments and who, say, sustained an injury which does not manifest itself until after 8 November 1991 would, as a result of the amendments, be denied a benefit under the legislation.

VETERANS' ENTITLEMENTS (PROVISION OF TREATMENT) AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 6 November 1991 by the Minister for Veterans' Affairs.

The Bill proposes to provide legislative authority for the establishment of the Repatriation Private Patient Principles (which will be disallowable instruments and, therefore, subject to parliamentary scrutiny), following the integration of the Repatriation General Hospitals into the health systems of the various States.

The Committee has no comment on this Bill.

SCRUTINY OF BILLS ALERT DIGEST

NO. 20 OF 1991

1991

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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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* Bankruptcy Amendment Bill 1991

* Industrial Relations Legislation Amendment Bill (No. 3) 1991

* National Rail Corporation Agreement Bill 1991

* National Road Transport Commission Bill 1991

Primary Industry Councils Bill 1991

Public Service Amendment Bill 1991

* Textiles, Clothing and Footwear Development Authority Amendment Bill 1991

* Therapeutic Goods Amendment Bill 1991

*** 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.

BANKRUPTCY AMENDMENT BILL 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister Representing the Attorney-General.

The Bill proposes to amend the *Bankruptcy Act 1966,* to amend the provisions relating to discharge from and annulment of bankruptcy, contributions by bankrupts to the bankrupt estate from their income and the practice and procedure to be followed at meetings of creditors.

Inappropriate delegation of legislative power
Clause 4 - Proposed new paragraph 6B(2)(a)

Clause 4 of the Bill proposes to repeal section 6A of the *Bankruptcy Act 1966* and replace it with proposed new sections 6A and 6B. Section 6A presently requires bankrupts and debtors to file statements of their financial affairs at the outset of bankruptcy proceedings or any of the other insolvency proceedings provided for under the Bankruptcy Act. The proposed new section 6A sets out new requirements to apply to bankrupts and debtors, essentially requiring them to file a statement of affairs with the Registrar in Bankruptcy.

Proposed new section 6B, if enacted, would impose similar requirements in relation to deceased estates which are being administered in bankruptcy. Pursuant to proposed new paragraph 6B(2)(a), a statement of affairs in relation to a deceased estate which is being administered in this way will be required to contain 'such

information as is prescribed' for the purposes of the provision.

Paragraph 6B(2)(a) could be regarded as an inappropriate delegation of legislative power, as it would appear to leave significant matters to the regulations. In addition, in order for the administrator of a deceased estate to work out their obligations under the Bankruptcy Act, it would require both the Act and the regulations to be consulted.

While the Committee accepts that this may be a matter which is appropriately left to the regulations, the Committee would appreciate the Minister's advice as to what sorts of matters might be prescribed under the regulations.

Delegation to 'a person'
Clause 5 - proposed new section 12(4)

Clause 5 of the Bill proposes to add a new subsection 12(4) to the Bankruptcy Act. Section 12 sets out the functions of the Inspector-General in Bankruptcy. Proposed new subsection (4) provides:

> The Inspector-General, ***or a person authorised in writing by the Inspector-General to exercise the powers of the Inspector-General under this subsection:***
>
> (a) is entitled to attend any meeting of creditors held under this Act; and
>
> (b) subject to section 64ZA [which, if enacted, would govern the voting entitlements to apply at creditors' meetings], is entitled to participate in any such meeting as the Inspector-General thinks fit. (emphasis added)

The Committee has consistently maintained an in-principle objection to unqualified delegations to 'a person'. As the clause is drafted, the Inspector-General could delegate his or her power under the provision to anybody, as long as the delegation is in writing.

The Committee draws Senators' attention to the clause, as it may be considered to make rights liberties and obligations subject to insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

'Henry VIII' clause
Clause 25 - proposed new paragraph 139T(2)(f)

Clause 25 of the Bill proposes to insert a new Division 4B into the Bankruptcy Act. That proposed new division deals with contributions by the bankrupt and recovery of property. Proposed new section 139T provides that the Official Receiver may vary a bankrupt's contribution if the bankrupt suffers hardship.

Proposed new subsection 139T(1) provides that if a bankrupt considers that, if required to pay the contribution set, he or she will suffer hardship for a reason or reasons set out in subsection (2), he or she may apply to the Official Receiver for a determination. The reasons set out include illness or disability requiring on-going medical attention and costs which constitute a substantial part of his or her income, the requirement to pay the cost of child day-care in order to work, the cost of accommodation, the cost of substantial travelling expenses and the inability, due to unemployment, illness or injury, of the bankrupt's spouse to contribute to the cost of maintaining the bankrupt's household.

Paragraph 139T(2)(f) also provides for 'any other prescribed reason'. This may be considered to be a 'Henry VIII' clause, as it would allow the definition set out in the primary legislation to be, in effect, amended by regulation. However, the Committee notes that it may be a beneficial measure, in the sense that it may allow more people to take advantage of the hardship exemption. The Committee would appreciate the Minister's advice as to whether or not this is the intention of the clause.

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

No requirement to notify right of review
Clause 25 and 26 - proposed new subsections 139T(5), 139ZE(6), 149P(6) and 149ZM(6)

Clauses 25 and 26 of the Bill propose to insert, respectively, a new Division 4B and a new Part VII into the Bankruptcy Act. As discussed above, the proposed new Division 4B relates to contributions by the bankrupt and recovery of property. The proposed new Part VII deals with discharge and annulment of bankruptcy and, if enacted, would replace the existing Part VII. Various provisions in the proposed new division and part raise a similar concern in relation to the absence of an obligation to notify appeal rights.

As discussed above, proposed new section 139T, if enacted, would allow a bankrupt to apply to the Official Receiver to have their contributions varied on grounds of hardship. Proposed new subsection 139T(4) provides that the Official Receiver

must decide such an application 'as soon as is practicable, and in any event not later that 30 days, after the day on which the application is received'. However, subsection (5) goes on to provide:

> If the Official Receiver does not make a decision on the application within that period of 30 days, the Official Receiver is taken to have made a decision at the end of that period refusing the application.

The effect of proposed new subsection (5) is, therefore, to deem that an application has been refused if the Official Receiver has not made a decision within 30 days.

Proposed new subsection (6) would allow the Official Registrar to vary the contribution if he or she is satisfied that the bankrupt will suffer hardship if required to pay the contribution. Proposed new subsection (7) requires the official Receiver to refuse an application if he or she is not satisfied that the bankrupt will suffer hardship.

Proposed new subsection (10) provides that, if the Official Trustee makes a determination under proposed new subsection (6), he or she must supply the bankrupt with a written notice setting out a) the decision, b) the evidence and other material on which the decision was based and c) the reasons for the decision. Proposed new subsection (11) provides that a statement issued pursuant to proposed new subsection (10) must include a statement advising the bankrupt that if they are dissatisfied with the decision they are entitled to apply to the Administrative Appeals Tribunal for review of the decision.

Proposed new subsections (13) and (14) deal further with the question of review by the Tribunal. Proposed new subsection (14) provides:

> An application may be made to the Administrative Appeals Tribunal for the review of a decision by the Official Receiver under this section.

The reference to a decision by the Official Receiver under the section would appear to include a 'deemed' decision pursuant to proposed subsection (5). However, unlike the situation applying to a decision pursuant to proposed subsection (6), there would appear to be no obligation on the Official Receiver to advise an unsuccessful applicant in these circumstances of the existence of this appeal right.

Subdivision G of proposed new Division 4B provides for review by the Inspector-General in Bankruptcy of assessments by the trustee of a bankrupt estate as to the bankrupt's income and contribution. As with proposed new subsection 139T(5) above, proposed new subsection 139ZE(6) provides that if the Inspector-General fails to make a decision on an application for review within 60 days of the application being lodged, the Inspector-General is to be taken to have confirmed the original decision. As above (and unlike other decisions referred to in the proposed new subdivision), while this 'deemed' decision would appear to be subject to review by the Administrative Appeals Tribunal, there appears to be no obligation to notify a dissatisfied applicant of that right of review.

Similarly, in clause 26, proposed new subsection 149P(6) deems the Inspector-General to have confirmed a decision in relation to certain notices of objection if he or she has not given a written notice of his or her decision within 60 days of an application for review being lodged. Proposed new subsection 149ZM(6) makes similar provision in relation to applications for review of a rejection of an application for early discharge. Despite such 'deemed' decisions being apparently

to review by the Administrative Appeals Tribunal, there appears to be no obligation to advise unsuccessful applicants of that right in such circumstances.

The Committee draws 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.

Reversal of the onus of proof
Clause 25 - proposed new subsection 139ZP(2)

Proposed new section 139ZL provides for the Official Receiver to issue a notice to the employer of a bankrupt requiring them to pay to the Official Receiver such amounts as are specified out of any monies due to the bankrupt. Proposed new subsection 139ZP(1) provides that an employer must not dismiss a bankrupt, injure the bankrupt in his or her employment or alter the bankrupt to the bankrupt's prejudice as a result of the giving of such a notice. The penalty for a breach is imprisonment for 6 months.

Subsection 139ZP(2) provides:

> In a prosecution for an offence against subsection (1), it is not necessary for the prosecutor to prove that the defendant's reason for the action charged was the giving of the notice but it is a defence to the prosecution if the defendant proves that the action was not taken because of the giving of the notice.

This is a reversal of the onus of proof, as it is ordinarily incumbent on the prosecution to prove all the elements of an offence. As the provision is drafted, a

person who is accused of such an offence would have to prove his or her innocence of the offence.

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.

Strict liability offences
Clause 45 - proposed new sections 267A and 267C

Clause 45 of the Bill proposes to repeal section 267 of the Bankruptcy Act and to replace it with a series of new sections. Those proposed new sections relate to false and misleading declarations and statements by debtors.

Proposed new section 267A provides:

> A bankrupt must not give a statement to the trustee under section 139U [which would require a bankrupt to provide evidence of their income] that is false or misleading in a material particular.
>
> Penalty: Imprisonment for 12 months.

Proposed new section 267C provides:

> A person must not:
>
> (a) in a statement given to the trustee under section 139U; or

(b) pursuant to a requirement contained in a notice given to the person under subsection 6A(3) [which relates to omissions from a statement of affairs], paragraph 77C(1)(a) [which would give the Official Receiver power to obtain information or evidence] or section 139V [which would allow the trustee to require a bankrupt to provide additional evidence];

provide information that is, or produce books that are, false or misleading in a material particular.

Penalty: Imprisonment for 12 months.

These sections would appear to involve offences of strict liability, as they do not appear to allow for bankrupts providing information or making statements which, though in fact false, they genuinely believed (for good reason) to be true.

The Committee draws Senators' attention to 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.

INDUSTRIAL RELATIONS LEGISLATION AMENDMENT BILL (NO. 3) 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister for Industrial Relations.

The Bill proposes to amend:

- the *Commonwealth Employees Rehabilitation and Compensation Act 1988* and *Occupational Health and Safety (Commonwealth Employment) Act 1991*, to separate the regulatory and service functions currently performed by Comcare;
- the *Industrial Chemicals (Notification and Assessment) Act 1989*, to allow importers or manufacturers of the same industrial chemical to make joint application for an assessment certificate for the chemical;
- the *Long Service Leave (Commonwealth Employees) Act 1976*, to enable regulations to be made to provide that certain payments are excluded from 'salary' for the purposes of calculating long service leave entitlements;
- the *Navigation Act 1912*, to enable regulations to be made to effect the Medical Examination (Seafarers) Convention, 1946 (No. 73), the Accommodation of Crews Convention (Revised), 1949 (No. 92) and the Accommodation of Crews (Supplementary Provisions) Convention 1970; and
- the *Pipeline Authority Act 1973*, to correct a minor drafting error.

'Henry VIII' clause
Clause 26

Clause 26 of the Bill provides:

> (1) The Governor-General may make regulations making such other transitional or savings provisions as are necessary or convenient as are necessary as a result of the amendment of the [*Commonwealth Employees' Rehabilitation and Compensation Act 1988*]and the [*Occupational Health and Safety (Commonwealth Employment) Act 1991*] by this Act.
>
> (2) Regulation made under subsection (1) may exclude or alter the operation of any other provision of this Division in relation to specified matters.

This is what the Committee would consider to be a 'Henry VIII' clause, as it would allow the amendment of primary legislation by subordinate legislation. However, the Committee notes that the provisions which might be modified in this manner are transitional provisions and, as a result, of a temporary nature. Accordingly, the Committee makes no further comment on the clause.

'Henry VIII' clause
Clause 36 - proposed new section 8A of the *Long Service Leave (Commonwealth Employees) Act 1976*

Clause 36 of the Bill proposes to insert a new section 8A into the *Long Service Leave (Commonwealth Employees) Act 1976*. That proposed new section provides:

The regulations may:

(a) provide that payments of a specified kind are not included in salary; or

(b) specify the extent to which payments of a specified kind are not included in salary; or

(c) prescribe the circumstances in which payments of a specified kind are not included in salary;

for the purposes of this Act or a provision of this Act.

This is what the Committee would consider to be a 'Henry VIII' clause, as it would allow the definition of 'salary' for the purposes of the Act to be, in effect, amended by regulation.

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

NATIONAL RAIL CORPORATION AGREEMENT BILL 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister Representing the Minister for Transport and Communications.

The Bill proposes to establish (further to a Shareholders' Agreement signed on 30 July 1991 at the Special Premiers' Conference) the National Rail Corporation as a company to conduct interstate rail freight operations in Australia on a commercial basis.

Commencement by Proclamation
Clause 2

Clause 2 of the Bill provides:

> This Act commences on a day to be fixed by Proclamation.

There is no limit as to the time within which such a Proclamation must be made. In that regard, the provision is contrary to the general rule set out in Office of Parliamentary Counsel Drafting Instruction No. 2 of 1989. By way of explanation, the Explanatory Memorandum on the Bill states:

> [Proclamation] will occur when all the parties to the Agreement have enacted legislation approving the Agreement.

The Committee notes that, while the necessity to enact legislation may be considered an 'unusual circumstance' within the meaning of Drafting Instruction No. 2, there is still no obligation to proclaim this piece of legislation once the other parties to the Agreement (ie New South Wales, Queensland, Victoria and Western Australia) have enacted legislation to approve the Agreement.

The Committee draws Senators' attention to the clause, as it may be considered 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 that the Agreement which this legislation seeks to implement appears to raise the same sort of issues in terms of the power of the Commonwealth and State Parliaments as are discussed elsewhere in this Alert Digest, in relation to the National Road Transport Commission Bill 1991. The Committee would appreciate any views which the Minister may care to put on this matter.

NATIONAL ROAD TRANSPORT COMMISSION BILL 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister Representing the Minister for Transport and Communications.

The Bill proposes to establish (further to an agreement signed on 30 July 1991 at the Special Premiers' Conference) the National Road Transport Commission as an independent statutory authority, responsible to a Ministerial Council.

Inappropriate delegation of legislative power
Clause 3, paragraph 8(1)(a), clauses 34 and 43

The Committee has received a detailed submission in relation to this Bill from the Road Transport Industry Forum. That submission suggests that the Bill involves a series of inappropriate delegations of legislative power.

The submission states:

> Clause 8(1)(a) of the Bill provides that the [National Road Transport Commission] has those functions and powers given to it by the Agreement. Clause 3 of the Bill defines the 'Agreement' as being the 'Agreement' set out in the Schedule [to the Bill] or, if that Agreement is amended, that Agreement as so amended.
>
> This definition, when read in conjunction with [paragraphs] 8(1)(a), (e) and (f) has a profound affect on the functions and powers of the Commission.

> In particular, the Commission can be given completely new functions and powers without any reference to the Parliament.
>
> The Ministerial Council could, for example, change the Agreement so that the Commission has the power to enter the premises of trucking companies without a warrant. It would then automatically have that power without the Federal Parliament being able to do anything about it.
>
> In essence, the Bill, working together with the Agreement, 'trespass(es) unduly on personal rights and liberties' and 'make(s) rights, liberties or obligations unduly dependent upon non-reviewable decisions'.

While the example given by the submission indicates a potential for such a trespass on personal rights and liberties, the Committee suggests that this is probably better categorised as an inappropriate delegation of legislative power.

The submission goes on to say:

> Clause 34 of the Agreement would even prohibit the Government from introducing legislation to amend the Bill without the approval of the Ministerial Council.
>
> So, as it is set up, the Bill would allow the National Road Transport Commission and Governments acting through the Ministerial Council to completely escape Parliamentary scrutiny.
>
> This is not only very unusual and objectionable, but is also in conflict with [paragraphs] 14(3)(b) and ... 15(2)(b), which provide that decisions made by the Ministerial Council relating to the remuneration and benefits of members of the National Road Transport Commission are disallowable instruments and therefore

subject to oversight by the Federal Parliament.

The submission suggests that

> [a]t a minimum, the powers of the Ministerial Council under [paragraphs] 8(1)(a), (e) and (f) should be made disallowable instruments to ensure that there is at least some opportunity for Parliamentary review.
>
> In addition, there is every case for the definition of 'Agreement' to be amended so that any amendments to the Agreement would need to be considered by Parliament before they would come into effect.

The Committee would appreciate the Minister's views on the suggestion.

The submission goes on to say:

> Clause 43 of the Bill, working in conjunction with [paragraphs] 8(1)(e) and (f) ... also allows an unacceptable delegation of legislative power. Clause 43 provides for the Ministerial Council to delegate to one of its members any of its functions and powers under the Bill. Further, [paragraphs] 8(1)(e) and (f) provide for each Minister to confirm powers on the National Commission subject to the consent of the Ministerial Council. So it would be possible for the same Minister to act on behalf of the Council, under the delegation provided in clause 43, and also to refer State powers to the Commission under [paragraphs] 8(1)(e) or (f). This would provide no opportunity for Parliamentary review.
>
> It would seem more appropriate for the delegation power under clause 43 to exclude actions under clause 8.

The Committee would appreciate the Minister's views on the suggestion.

The submission concludes by saying:

> The National Road Transport Commission Bill proposes to set up structures and arrangements which will have far-reaching effects on the Australian community and the road transport industry. The National Road Transport Commission and the Special Premiers' Conference agreement could become the chief legislative instrument governing the activities of over 400,000 people directly or indirectly employed in the road transport industry.

The Committee thanks the Road Transport Industry Forum for this submission and takes this opportunity to indicate that it welcomes such input from the general community. As to the views expressed in the submission, the Committee is concerned about the matters raised by the submission.

The Committee notes that the scheme which is to be set up by the Bill is, in some respects, similar to the national uniform companies and securities scheme which operated prior to the enactment of the Corporations Law. In relation to that scheme, the Committee suggested in its 1985-86 Annual Report that it

> [deprived] the Parliament of its role of a legislature and [placed] legislative power in the hands of the Ministerial Council. (Parliamentary paper no. 447/1986, at page 6)

This comment would appear to be equally applicable here. While, as a matter of law, the Parliament would retain the right to reject legislation put forward by the Ministerial Council (since it is the Government rather than the Parliament which is a party to the Agreement), there would nevertheless be a certain amount of

political pressure to pass such amendments in order to preserve the operation of the Agreement. Further, the Committee notes that the operation of the Agreement may also raise questions of accountability, in that this Ministerial Council arrangement may operate in such a way that no single Minister, Commonwealth or State, can be regarded as having responsibility for the legislation or the scheme it will set up.

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

PRIMARY INDUSTRY COUNCILS BILL 1991

This Bill was introduced into the Senate on 13 November 1991 by the Minister Representing the Minister for Primary Industries and Energy.

The Bill proposes to:

- establish a statutory policy council for the grains industry; and
- provide for the establishment of particular primary industries councils in the future.

The Committee has no comment on this Bill.

PUBLIC SERVICE AMENDMENT BILL 1991

This Bill was introduced into the Senate on 13 November 1991 by the Minister Assisting the Prime Minister for Public Service Matters..

The Bill proposes to amend provisions contained in Part IV of the *Public Service Act 1922*, so that people with Public Service mobility rights who become redundant have only one option, ie to take up the redundancy arrangements or return to the Public Service (making 'double dipping' unacceptable).

The Committee has no comment on this Bill.

TEXTILES CLOTHING AND FOOTWEAR DEVELOPMENT AUTHORITY AMENDMENT ACT 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister for Industry, Technology and Commerce.

The Bill proposes to amend the *Textiles, Clothing and Footwear Development Authority Act 1988,* to consolidate a number of the Authority's former programs into two programs: the Incentives for International Competitiveness Program and Infrastructure Support Program.

Retrospectivity
Subclause 2(2)

Subclause 2(2) of the Bill provides that clause 3 is to be taken to have commenced on 9 March 1990. Clause 3 proposes to repeal section 3 of the *Textiles, Clothing and Footwear Development Authority Act 1988* and replace it with a new section. As the Explanatory Memorandum to the Bill indicates that the amendment is intended to correct a drafting oversight, the Committee makes no further comment on the subclause.

Retrospectivity / 'Legislation by press release'
Subclause 2(3)

Subclause 2(3) of the Bill provides that the provisions of the Bill, other than

clause 3, are to be taken to have commenced on 1 July 1991. The Explanatory Memorandum to the Bill states that this date is

> the date that the Government announced in its 12 March 1991 'Building a Competitive Australia' statement as the commencement date of the [Textiles, Clothing and Footwear Development Authority's] new Industries Development Strategy.

As a result, this is an example of 'legislation by press release', since the proposed date from which the legislation is to operate has been set by a Government announcement. In this regard, the Committee notes that, though this legislation has not been introduced within 6 months of the proposal being announced, if the legislation is passed by the Parliament during this current this session its retrospective effect will be less than 6 months. In making this observation, the Committee accepts that the 6 month rule on retrospectivity (as contained in the Senate's resolution of 8 November 1988) only applies to taxation legislation. However, the Committee suggests that it would assist the Senate if this rule-of-thumb were applied to all such legislation.

THERAPEUTIC GOODS AMENDMENT BILL 1991

This Bill was introduced into the Senate on 14 November 1991 by the Minister Representing the Minister for health, Housing and Community Services.

The Bill proposes to amend the *Therapeutic Goods Act 1989*, to implement recommendations made by Professor Peter Baume in his Report on The Future of Drug Evaluation in Australia relating to the drug approval process.

'Henry VII' clauses
Subclause 4(1) - proposed new subsection 18(1); clause 5 - proposed new subclauses 19(6) and (7)

Clause 4 of the Bill proposes to repeal section 18 of the *Therapeutic Goods Act 1989* and to insert a new section 18. Proposed new subsection 18(1) provides:

> (1) The regulations may, subject to such conditions (if any) as are specified in the regulations, exempt:
>
> (a) all therapeutic goods, except those included in a class of goods prescribed for the purposes of this paragraph; or
>
> (b) specified therapeutic goods; or
>
> (c) a specified class of therapeutic goods;
>
> from the operation of this Part.

This may be classified as a 'Henry VII' clause, as it would allow for the disapplication of the provisions of Part 3 of the Therapeutic Goods Act in relation to goods specified by regulation. It would, in effect, permit the amendment of the primary legislation by subordinate legislation.

Clause 5 of the Bill proposes to add a series of new subsections to section 19 of the Therapeutic Goods Act. That section deals with exemptions for special and experimental users. The proposed new subsections provide:

> (5) The Secretary may, in writing, authorise a specified medical practitioner to supply:
>
> (a) specified therapeutic goods for use in the treatment of humans; or
>
> (b) a specified class of such goods;
>
> to the class or classes of recipients specified in the authority.
>
> (6) An authority under subsection (5) may only be given:
>
> (a) to a medical practitioner included in a class of medical practitioners included in a class of medical practitioners prescribed by the regulations for the purposes of this paragraph; and
>
> (b) in relation to a class or classes of recipients prescribed by the regulations for the purposes of this paragraph.
>
> (7) The regulations may prescribe the circumstances in which therapeutic goods may be supplied under an authority under subsection (5).

Proposed new subsections (8) and (9) are not relevant for the purposes of this comment.

Proposed new subclause (6) may be regarded as a 'Henry VIII' clause, as it would allow the limiting, by regulation, of the authorities which could be given pursuant to proposed new subsection (5).

Similarly, proposed new subclause (7) would allow the limiting, by regulation, of the circumstances under which an authority could be given under proposed new subsection (5).

The Committee is also concerned that the power contained in subclause (5) is to be exercised by the Secretary rather than the Minister.

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

ROAD TRANSPORT INDUSTRY FORUM

GPO Box 1679 Canberra ACT 2601 Phone (06) 247 5699 Fax (06) 247 0476

25 November 1991

Mr S Argument
Secretary
Committee for the Scrutiny of Bills
Australian Senate
Parliament House
Canberra ACT 2600

Dear Mr Argument

I wish to raise a number of concerns regarding the National Road Transport Commission Bill 1991 introduced into the Senate on 14 November 1991 on behalf of the Road Transport Industry Forum which encompasses the Australian Road Transport Federation, the National Transport Federation, the Long Distance Road Transport Association, the Australian Livestock Transporters Association and the Northern Territory Road Transport Association.

Our concerns relate to the unacceptable delegation of legislative power which is proposed in the National Road Transport Commission Bill.

Clause 8(1)(a) of the Bill provides that the Commission has those functions and powers given to it by the agreement. Clause 3 of the Bill defines "agreement" as being the agreement set out in the Schedule or, if that agreement is amended, that agreement as so amended.

This definition, when read in conjunction with clause 8(1)(a), (e) and (f) has a profound affect on the functions and powers of the Commission.

In particular, the Commission can be given completely new functions and powers without any reference to the Parliament.

The Ministerial Council, could for example, change the agreement so that the Commission has the power to enter the premises of trucking companies without a warrant. It would then automatically have that power without the Federal Parliament being able to do anything about it.

In essence, the Bill working together with the agreement, "trespass(es) unduly on personal rights and liberties" and "make(s) rights, liberties or obligations unduly dependent upon non-reviewable decisions".

Clause 34 of the Agreement would even prohibit the Government from introducing legislation to amend the Bill without the approval of the Ministerial Council.

So, as it is set up, the Bill would allow the National Road Transport Commission and Governments acting through the Ministerial Council to completely escape Parliamentary scrutiny.

This is not only very unusual and objectionable, but is also in conflict with clause 14(3)(b) and clause 15(2)(b) which provide that decisions made by the Ministerial Council relating to the remuneration and benefits of members of the National Road Transport Commission are disallowable instruments and therefore subject to oversight by the Federal Parliament.

At a minimum, the powers of the Ministerial Council under Clause 8(1)(a), (e) and (f) should be made disallowable instruments to ensure that there is at least some opportunity for Parliamentary review.

In addition, there is every case for the definition of "agreement" to be amended so that any amendments to the agreement would need to be considered by Parliament before they would come into effect.

Clause 43 of the Bill working in conjunction with Clause 8(1)(e) and (f) and also allows an unacceptable delegation of legislative power. Clause 43 provides for the Ministerial Council to delegate to one of its members any of its functions and powers under the Bill. Further, Clause 8(1)(e) and (f) provides for each Minister to confirm powers on the National Commission subject to the consent of the Ministerial Council. So it would be possible for the same Minister to act on behalf of the Council, under the delegation provided in Clauses 43, and also to refer State powers to the Commission under Clause 8(1)(e) or (f). This would provide no opportunity for Parliamentary review.

It would seem more appropriate for the delegation power under Clause 43 to exclude actions under Clause 8.

The National Road Transport Commission Bill proposes to set up structures and arrangements which will have far-reaching effects on the Australian community and the Road Transport Industry. The National Road Transport Commission and the Special Premiers' Conference agreement could become the chief legislative instrument governing the activities of over 400,000 people directly or indirectly employed in the Road Transport industry.

The principles which are within the purview of the Scrutiny of Bills Committee which are breached by the National Road Transport Commission Bill are therefore not only important in their own right, but also important in their potential impact on a broad range of the community.

Should you require any further clarification, please do not hesitate to contact the Forum Secretariat.

Yours sincerely

B D McIver
Forum Chairman

SCRUTINY OF BILLS ALERT DIGEST

NO. 21 OF 1991

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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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* Arts, Sport, Environment and Territories Legislation Amendment Bill 1991

* Forest Conservation and Development Bill 1991

* Poultry Industry Assistance Amendment Bill 1991

* Primary Industries and Energy Legislation Amendment Bill (No. 2) 1991

* 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.

ARTS, SPORT, ENVIRONMENT AND TERRITORIES LEGISLATION AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 28 November 1991 by the Minister for the Arts, Sport, the Environment, Tourism and Territories.

The Bill proposes to amend the following Acts:

- the *Australian Capital Territory (Planning and Land Management) Act 1988,* to:
  - introduce a Ministerial power of direction in relation to the National Capital Plan; and
  - empower the National Capital Planning Authority to charge for planning and related approvals;
- the *Australian Sports Drug Agency Act 1990,* to:
  - ensure the notification of international anti-doping arrangements in the regulations;
  - change the reporting requirements regarding negative test results;
  - exempt the Australian Sports Drug Agency from taxation; and
  - enable the Agency to delegate certain powers to its employees;
- the *Environment Protection (Sea Dumping) Act 1981* and the *Wildlife Protection (Regulation of Exports and Imports) Act 1982,* to enable

analysts to give evidence and overcome gaps in evidence in judicial proceedings;

- the *National Parks and Wildlife Conservation Act 1976,* to enable botanic gardens, parks and reserves to be managed under the Act and insert three international agreements into the Schedule;
- the *Norfolk Island Act 1979,* to delegate powers to the Acting and Deputy Administrators when the Administrator is absent; and
- the *Protection of Movable Cultural Heritage Act 1986,* to allow the National Cultural Heritage Committee to approve a recommendation or report without convening a meeting.

'Henry VIII' clause
Schedule - proposed new subsection 65A(3) of the *Australian Sports Drug Agency Act 1990*

The Schedule to the Bill contains, among other things, several proposed amendments to the *Australian Sports Drug Agency Act 1990.* Included in those proposed amendments is a proposed new section 65A. That proposed new section provides:

> (1) Subject to subsection (3), the Agency is not subject to taxation under an law of the Commonwealth or of a State or Territory.
>
> (2) Subject to subsection (3), the transactions of the Agency in respect of goods for use (whether as goods or in some other form), and not for sale, by the Agency are not subject to the laws of the Commonwealth relating to sales tax.

(3) The regulations may provide that subsection (1) or (2) does not apply in relation to taxation under a specified law.

Proposed new subsection 65A(3) is what the Committee would generally consider to be a 'Henry VIII' clause, as it would allow the Governor-General (acting on the advice of the Federal Executive Council) to promulgate regulations to disapply subsections (1) or (2) in relation to taxation under a specified law. In effect, it would allow the amendment of the operation of the primary legislation by subordinate legislation.

The Committee draws Senators' attention to the clause, as it may be considered 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 that neither the Explanatory Memorandum nor the Minister's Second Reading speech on this Bill advert to the inclusion of proposed new subsection 65A(3) of the *Australian Sports Drug Agency Act 1990.*

FOREST CONSERVATION AND DEVELOPMENT BILL 1991

This Bill was introduced into the House of Representatives on 28 November 1991 by the Minister for Resources.

The Bill proposes to identify and facilitate the protection of forest areas of significant environmental, cultural and heritage value and facilitate investment by enterprises in major wood processing projects to produce goods for import replacement and/or export.

Non-reviewable decision
Subclause 10(1), clauses 11 to 15 and 17 to 21

Subclause 10(1) of the Bill provides:

> If the Minister is satisfied that the conditions imposed by [clauses] 11 to 15 (inclusive) have been met in relation to a particular wood processing project, the Minister must, by instrument in writing, declare that this Act applies to the project.

Clauses 11 to 15 set out five conditions which are to be met, including conditions relating to the dominant purpose of a wood processing project, the completion of an appropriate assessment process, the enactment of appropriate State laws, etc.

The Committee notes that a decision by the Minister under subclause 10(1) would not appear to be subject to any form of review on the merits. As a result, such a decision would only appear to be subject to challenge as to its legality under, for example, the *Administrative Decisions (Judicial Review) Act 1975.*

Similarly, the Committee notes that, under clauses 11 to 15, 'the designated Ministers' would be given a discretion to determine whether or not the various conditions set out in those clauses had been met. The clauses appear to offer no scope for a review of those Ministerial decisions on their merits.

Finally, the Committee notes that clauses 17 to 21 would give 'the designated Ministers' a discretion in relation to certain 'exceptions' under the legislation. Those exceptions would operate against subclause 15(2), which provides that the Commonwealth must not exercise any of its other decision making powers in such a way as to prevent or obstruct a wood processing project. The various Ministerial decisions involved do not appear to be subject to any form of review on the merits.

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

Designation of species as being 'threatened'
Subparagraph 17(3(a)(i)

Clause 17 of the Bill provides that the first exception to the general rule that other Commonwealth laws are not to operate so as to prevent or obstruct a wood processing project is if the designated Ministers are satisfied that major and

unforseen environmental or cultural impact will result if the project goes ahead. Subclause 17(2) makes specific provision in relation to threatening species of fauna and flora. Paragraph 17(3)(a) provides that a species of fauna or flora is taken to be 'threatened' for the purposes of subclause (3) if:

> (i) the designated Ministers have, by instrument published in the *Gazette*, declared the species to be a threatened species; or
> (ii) it comes within one of the threatened species set out in the Schedule [to the Bill].

Subparagraph 17(3)(a)(i) may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, as it would allow the designated Ministers to declare a species of fauna or flora to be 'threatened' (and thereby open up the possibility of the security of a wood processing project being subject to an exception) by simply publishing a notice in the *Gazette*. In the circumstances, it may be appropriate for such a declaration to be subject to tabling in both Houses of the Parliament and, perhaps, to disallowance by either House.

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

POULTRY INDUSTRY ASSISTANCE AMENDMENT BILL 1991

This Bill was introduced into the House of Representatives on 28 November 1991 by the Minister for Primary Industries and Energy.

The Bill proposes to amend the *Poultry Industry Assistance Act 1965,* to enable the Commonwealth to recover from the egg industry the cost of collecting and disbursing outstanding Commonwealth hen levies.

Retrospectivity
Paragraph 3(a) - proposed new subsection 6(1)

Clause 3 of the Bill proposes to amend section 6 of the *Poultry Industry Assistance Act 1965.* That section deals with the application of monies paid into the Poultry Industry Trust Fund. Paragraph 3(a) of the Bill proposes to omit the existing subsection 6(1) and replace it with the following proposed new subsection:

> The purposes of the [Poultry Industry Trust] Fund are:
>
> (a) to make payments to the Commonwealth of amounts equal to the expenses incurred by the Commonwealth on or after 12 October 1990 in relation to:
>
> (i) the collection or recovery of amounts of levy or penalty referred to in paragraph 5(1)(a) or 5(1)(aa) that are receivable by the Commonwealth; or

(ii) the administration of subsection 5(1); and

(b) to make payments in accordance with approvals of the Minister under this section or section 6A or 6AA.

If enacted, this clause would operate retrospectively, as it would allow for payments out of the Fund in relation to expenses incurred by the Commonwealth on or after 12 October 1990.

The Committee notes that the Explanatory Memorandum to the Bill states:

> The hen levy is no longer operative, however there are a number of egg producers, all in New South Wales, who owe outstanding levy debts. Prior to the termination of the New South Wales Egg Corporation on 12 October 1990 the responsibility for collecting those levies rested with that body. The Corporation could under the Act seek reimbursement of any costs incurred in collecting the levies from the industry, through the Poultry Industry Trust Fund. From 12 October 1990 the Commonwealth assumed responsibility for collecting the debts. The Bill will enable the Commonwealth to be paid reimbursements from the Trust Fund for any expenses incurred from that date as a result of that responsibility. In effect this retrospective provision of the Bill will not adversely affect the rights or impose any liabilities on the industry in a manner different to that which existed prior to 12 October 1990, in that levy collection expenses will continue to be met from the Poultry Industry Trust Fund. When any outstanding levies have been recovered, such monies are to be used for the benefit of the Australian egg industry.

The Committee makes no further comment on the Bill.

PRIMARY INDUSTRIES AND ENERGY LEGISLATION AMENDMENT BILL (NO. 2) 1991

This Bill was introduced into the House of Representatives on 28 November 1991 by the Minister for Primary Industries and Energy.

The portfolio Bill proposes to amend the following Acts:

- the *Meat Inspection Act 1983*, to:
  - limit the definition of 'authorised officer' to Secretarial appointments;
  - remove references to monetary penalties where imprisonment penalties also occur (section 4B of the *Crimes Act 1914* will apply);
  - amend the regulation making power to enable regulations to be made for the remission of fees paid;
  - create an offence of authorised officers receiving goods or services from owners of prescribed premises without the Secretary's written approval;
- the *National Water Resources (Financial Assistance) Act 1978*, to:
  - transfer responsibility for determining the form of audited financial statements required under the Act, from the Minister for Finance to the Minister for Primary Industries and Energy;

- permit acquittal of program expenditures by senior executive officers of certain organisations receiving Commonwealth funds;
- make the Australian Capital Territory and the Northern Territory eligible to receive assistance under the Act;

. the *Petroleum (Submerged Lands) Act 1976,* to enable delegation of joint Authority powers under the *Petroleum (Submerged Lands) Act 1978* to cover subsidiary Acts; and

. the *Wheat Marketing Act 1989,* to:

- extend to 1 September the date by which the Australian Wheat Board (AWB) is required to submit its Corporate Plan to the Minister;
- provide for the preparation of Annual Operational Plans (based on the Corporate Plan) by 1 October, to be presented to the Minister (for information only) before the commencement of the AWB's financial year.

Retrospectivity
Clause 11

Clause 11 of the Bill relates to the *Meat Inspection Act 1983.* It provides:

> **Saving - Meat Inspection (Fees) Orders**
> 11. Order 18 of the Meat Inspection (Fees) Orders made under the Meat Inspection (Orders) Regulations has effect, and is taken to have always had effect, as if section 5 of this Act had commenced immediately before that order was made.

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

In relation to clause 5 of the Bill, the Explanatory Memorandum states:

> This clause amends paragraph 20(2)(b) of the Principal Act to confirm that the regulations may provide for the remission of fees, as well as the imposition of such fees. It is reasonable to argue that a regulation providing for the remission of fees may be regarded as an order "in relation to ... the imposition of fees". But the later addition of paragraph 20(2)(ba) which specifically provides for the making of regulations to allow for the remission of fees, casts doubt on that argument. This amendment removes that doubt.

In relation to clause 11 it states:

> This clause saves order 18 of the Meat Inspection (Fees) Orders as amended, made under the regulations, which provides for the remission of fees in circumstances where the Secretary thinks there is sufficient reason. Thus any fees remitted under order 18 will have been remitted validly, even if the doubt referred to in the note to clause 5 proves to be well founded.

Since the retrospectivity would be beneficial to persons other than the Commonwealth, the Committee makes no further comment on the clause.

SCRUTINY OF BILLS ALERT DIGEST

NO. 22 OF 1991

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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 R Crowley
Senator I Macdonald
Senator J Powell
Senator N Sherry

TERMS OF REFERENCE

Extract from Standing Order 24

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make 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:

* Whistleblowers Protection Bill 1991

* The Committee has commented on this Bill

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.

WHISTLEBLOWERS PROTECTION BILL 1991

This Bill was introduced into the Senate on 12 December 1991 by Senator Vallentine as a Private Senator's Bill.

The Bill proposes to establish a Whistleblowers Protection Agency, with powers to investigate claims of corruption (within government or government agencies) made by Commonwealth employees or members of the public.

Inappropriate delegation of legislative power
Clause 4

Clause 4 of the Bill sets out various definitions relevant to the Bill. It defines '*prescribed authority*' as:

> (a) a body corporate, or an unincorporated body, established by or in accordance with the provisions of, an enactment, other than:
>
> (i) a body that under subsection (2) or the regulations is not to be taken to be a prescribed authority for the purposes of this Act; or
>
> (ii) the Legislative Assembly of the Northern Territory; or
>
> (iii) the Legislative Assembly of the Australian Capital Territory; or

(b) an other body, whether incorporated or unincorporated, being:

(i) a body established by the Governor-General or a Minister; or

(ii) an incorporated company over which the Commonwealth, or a body that is, by the application of another paragraph or subparagraph of this definition, a prescribed authority, is in a position to exercise control.

Subclause 4(2) provides:

> (2) An unincorporated body, being a board council, committee, sub-committee or other body established by, or in accordance with the provisions of, an enactment for the purpose of assisting, or performing functions connected with, the federal public service shall not be taken to be a separate prescribed authority for the purposes of this Act but shall be treated as incorporated in the part of the federal public service that is so assisting or in connection with which it is performing functions.

Subparagraph 4(a)(i) may be regarded as an inappropriate delegation fo legislative power, as it would allow the Governor-General (acting on the advice of the Federal Executive Council) to promulgate regulations exempting bodies which would otherwise be subject to the legislation from the operation of the legislation. In so doing, the regulations could significantly alter the scope of the legislation.

Clause 4 also contains a definition of 'statutory office'. It provides that a statutory office is:

(a) an office or appointment established by an enactment; or

(b) any other office or appointment the holder of which is appointed by the Governor-General or a Minister;

other than:

(c) an office or appointment declared by the regulations not to be a statutory office for the purposes of this Act; or

(d) an office of Justice or Judge of the High Court, of a court established by the Parliament or of the Supreme Court of a Territory; or

(e) an office the holder of which has, by virtue of an enactment, the status of a Justice or Judge of a court referred to in paragraph (d); or

(f) an office or appointment in the Australian Public Service; or

(g) an office of Member of the Parliament, member of the Legislative Assembly of the Northern Territory or member of the Legislative Assembly of the Australian Capital Territory; or

(h) an office or appointment the holder of which performs the duties of the office as an officer or employee of the federal public service or a member of the staff of a prescribed authority; or

(i) an office of member of a body; or

(j) an office established by an enactment for the purposes of a prescribed authority.

Paragraph (c) of the definition may also be regarded as an inappropriate delegation of legislative power. If enacted, it would allow the Governor-General to promulgate regulations to exempt certain statutory offices from the operation of the legislation and, potentially, limiting the scope of the legislation.

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

Abrogation of the privilege against self-incrimination
Subclause 14(1)

Subclause 14(1) of the Bill provides:

> Notwithstanding the provisions of any enactment, a person is not excused from furnishing any information, producing a document or other record or answering a question when required to do so under this Act on the ground that the furnishing of the information, the production of the document or record or the answer to the question:
>
> (a) would contravene the provisions of any other Act, would be contrary to the public interest or might tend to incriminate the person or make him or her liable to a penalty; or
>
> (b) would disclose legal advice the disclosure of which would otherwise be privileged;
>
> but the answer to the question is not admissible in evidence against the person in proceedings other then proceedings for an offence against section 51.

This may be regarded as an abrogation of the privilege against self-incrimination, which would ordinarily operate to allow a person to decline from answering a question on the grounds that the answer might tend to incriminate them.

In making this comment, the Committee notes that any such answer would not be admissible in evidence against the person in proceedings other than proceedings for an offence against clause 51 of the Bill. That clause sets out offence provisions applicable to a failure to, for example, answer a question, produce a document or furnish information. The relevant penalty is a $5000 fine, imprisonment for 1 year or both.

In its present form, the clause contains what the Committee would regard as a 'use' indemnity on any information obtained. This means, simply, that the person would be indemnified against the direct use of the information in any other proceedings. However, there is no such protection afforded in the case of any indirect use of theinformation. In the circumstances, such derivative-use indemnity may be regarded as appropriate.

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

The Committee notes that the Bill appears to contain a number of typographical errors. For example, the Committee suggests that on page 2, line 9, '(1)' should appear between '4' and '.'. The Committee suggests that on page 3, line 30, 'contributes' should actually be 'constitutes'. Finally, the Committee suggests that subclause 2(2) is unnecessary and should be omitted.