Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 1 of 1999

15 February 1999

ISSN 1329-668X

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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- **The Committee has commented on these bills**

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A New Tax System (Aged Care Compensation Measures Legislation Amendment) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Aged Care]

One of a package of 16 bills to reform the taxation system, the bill proposes to amend the *Aged Care Act 1997* to ensure that pensioners and certain non-pensioners do not pay increased residential aged care fees as a result of the pension increase.

The Committee has no comment on this bill.

A New Tax System (Australian Business Number) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to introduce the Australian Business Number (ABN) as a single business identifier. An ABN will be available to all companies registered under the Corporations Law, government and business entities and entities which require to be registered for the Goods and Services Tax, such as charitable and religious institutions.

Reversal of the onus of proof
Subclause 16(3)

Proposed clauses 14 and 15 of this bill impose an obligation to notify the Registrar of the Australian Business Register of relevant information and of changes in that information. Proposed subclause 16(1) imposes this obligation on each member of a partnership, but states that it may be discharged by any of the partners. Similarly, proposed subclause 16(2) imposes this obligation on each member of the management committee of an unincorporated association, but states that it may be discharged by any of those members.

Proposed subclause 16(3) goes on to provide a defence for persons prosecuted for such offences under section 8C of the *Taxation Administration Act 1953* as members of partnerships or unincorporated associations. In general terms, subclause 16(3) reverses the onus of proof, requiring those prosecuted to prove that they were not involved or knowingly concerned in the conduct which led to the commission of the offence.

This provision has been included because section 8C of the *Taxation Administration Act 1953* would otherwise impose strict criminal liability on such persons. However, a number of other matters are not clear from the structure of the legislation. For example, the bill does not canvass liability or the availability of defences where such offences are committed by other legal entities such as trusts, incorporated associations or corporations. Similarly, it is not clear whether this approach to liability and defences is characteristic of the approach taken elsewhere in the taxation legislation, or has been developed with specific reference to these offences.

In general terms, it is not clear whether those who might seek to use the proposed subsection 16(3) defences are being treated more or less favourably than, or the

same as, others who commit these offences on behalf of other legal entities, or others who commit similar offences under other parts of the taxation legislation. The Committee, therefore, **seeks the Treasurer's advice** on these matters.

Pending the Treasurer's advice, 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.

A New Tax System (Australian Business Number Consequential Amendments) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to amend the *Taxation Administration Act 1953* to:

- enable any person acting as Commissioner of Taxation to exercise all the powers and functions of the Australian Business Registrar ;
- enable the Commissioner to delegate powers and functions as Registrar to a Deputy Commissioner or another person; and
- enable tax file numbers to be requested in connection with the proper functioning of the Australian Business Number without an offence being committed by the person making the request.

The Committee has no comment on this bill.

A New Tax System (Bonuses for Older Australians) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Family and Community Services]

One of a package of 16 bills to reform the taxation system, the bill proposes to provide for a special one-off, tax-free, lump sum payment to pensioners and self-funded retirees.

The Committee has no comment on this bill.

A New Tax System (Compensation Measures Legislation Amendment) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Family and Community Services]

One of a package of 16 bills to reform the taxation system, the bill proposes to amend the following Acts:

Social Security Act 1991 to:

- provide a 4 per cent increase in the rate of social security income support payments and a 2.5 per cent increase in the income and assets test free areas applicable to social security income support payments;
- double the provisional fortnightly family tax payment rate;
- increase the family allowance income test free area;
- reduce the 50 per cent income taper applicable to family allowance to 30 per cent; and
- reduce the 50 per cent taper applicable to the pension income test to 40 per cent;

Veterans' Entitlements Act 1986 to provide for:

- a 4 per cent increase for pensions and allowances paid to veterans and eligible dependants and a 2.5 per cent increase in the income and assets test free areas applicable to veterans;
- a 2.5 per cent increase to seniors health card income limits and limits applicable to certain service pensioners' eligibility for a Gold Card;
- a reduction of the 50 per cent taper applicable under the income test for pension payments to 40 per cent; and
- limited period of adjustment to the indexation of pensions and allowances; and

National Health Act 1953 to directly align the domiciliary nursing care benefit with the rate of child disability allowance.

The Committee has no comment on this bill.

A New Tax System (End of Sales Tax) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to abolish wholesale sales tax.

The Committee has no comment on this bill.

A New Tax System (Fringe Benefits Reporting) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to require that, from the 1999-2000 year of income, employers identify on group certificates the grossed-up taxable value of certain employee fringe benefits.

Retrospectivity
Schedule 3, item 2

Item 2 of Schedule 3 to the bill inserts a definition of 'HEC repayment income'. In part, this definition is apparently retrospective in referring to income of a person "in relation to the year of income ending on 30 June 1996 or any preceding year of income". However, as paragraph 1.115 of the Explanatory Memorandum observes, this proposed new definition is essentially a rewriting of existing provisions.

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

A New Tax System (Goods and Services Tax Administration) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to amend the *Taxation Administration Act 1953* to:

- establish who is to administer the GST law;
- support the collection and recovery of GST;
- set maximum penalties for breaching GST obligations;
- permit entities to rely on the Commissioner's interpretation of the law;
- set time limits on GST liability and on credit entitlements;
- adopt existing mechanisms for the review of assessments and other GST decisions;
- confer powers on the Commissioner for the gathering of information; and
- protect the confidentiality of information disclosed for GST purposes.

Non-reviewable discretions?
Proposed new section 62

Item 7 of Schedule 1 to this bill adds a new Part VI to the *Taxation Administration Act 1953*. This Part includes proposed new section 62, which provides for the review of the exercise of many of the discretions granted to the Commissioner of taxation under the A New Tax System (Goods and Services Tax) Bill 1998 ("the GST Bill").

Under proposed section 33-20 of the GST Bill, the Commissioner may extend the time for payment of GST-related amounts, or may allow them to be paid by instalments or on terms determined by him or her.

Under proposed section 33-25 of the GST Bill, if the Commissioner has reason to believe that a person may leave Australia before a particular GST-related payment becomes due, then that amount becomes due for payment on the day the Commissioner fixes.

Neither of these discretions is reviewable under proposed section 62 of the Administration Act. The Committee, therefore, **seeks the Treasurer's advice** on the reasons for excluding these discretions from review under proposed section 62.

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

Search and entry
Proposed new section 66

As noted above, Item 7 of Schedule 1 to this bill adds a new Part VI to the *Taxation Administration Act 1953*. This Part includes proposed new section 66, which will allow an officer authorised by the Commissioner of Taxation to enter and search any premises and inspect and analyse any documents, goods and other property. No provision is made for obtaining a judicially sanctioned warrant, which is a generally accepted safeguard in such circumstances.

In addition, the clause does not attempt to limit or categorise those who might be authorised to carry out such searches – for example, by specifying certain required attributes or qualifications. Requiring such attributes or qualifications is an approach adopted in some other statutes (for example, section 258 of the *Superannuation Industry (Supervision) Act 1993*) and, arguably, provides some reassurance against possible abuses of a power of such width. The Explanatory Memorandum provides no information beyond that included in the clause itself. The Committee, therefore, **seeks the Treasurer's advice** on the reasons why proposed section 66 authorises entry onto premises without the need to obtain a warrant, and why that provision does not specify certain attributes or qualifications to be possessed by officers before they can become authorised officers.

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

A New Tax System (Goods and Services Tax) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to implement a broad based indirect goods and services tax (GST) to replace the wholesale sales tax and a number of indirect State taxes by establishing:

- the basic rules for the GST;
- which supplies, acquisitions and importations are GST-free or input taxed;
- special rules, which modify the application of the general rules; and
- miscellaneous and interpretative provisions relating to the GST.

Apparently excessive powers
Proposed new Division 165

As noted in proposed new subsection 165-1, proposed Division 165 of this bill is intended to deter schemes to give benefits by reducing GST, increasing refunds or altering the timing of payment of GST or refunds. If the dominant purpose or a principal effect of a scheme is to give an entity such a benefit, the Commissioner may negate the benefit an entity gets from the scheme by declaring how much GST or refund would have been payable, and when it would have been payable, apart from the scheme.

In particular, under proposed new subsection 165-55, the Commissioner may, for the purposes of making such a declaration:

- treat a particular event that actually happened as not having happened; and
- treat a particular event that did not actually happen as having happened; and
- treat a particular event that actually happened as having happened at a time different from the time it actually happened, or having involved particular action by a particular entity (whether or not the event actually involved any action by that entity).

These are apparently wide discretionary powers. However, the Committee understands that, in general terms, these powers have been modelled on the Commissioner's existing powers in Part IVA of the *Income Tax Assessment Act*

1936. The Committee also notes that declarations under proposed section 165 are to be reviewable under amendments to the *Taxation Administration Act 1953*.

Nevertheless, the Committee would expect that the exercise of such wide powers would be subject to some guidelines or codes of practice. The Committee also expects that such powers would be used infrequently, and considers that the frequency of their use is something that should be brought to the attention of the Parliament. The Committee, therefore, **seeks the Treasurer's advice** as to whether any guidelines are to be issued to govern the exercise of the Commissioner's powers under Division 165. The Committee also **seeks the Treasurer's advice** on the feasibility of tabling, in each House of the Parliament, an annual report indicating the frequency with which the Commissioner has used these powers, and outlining in broad terms the general categories of conduct that have prompted their exercise.

> *Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers in breach of principle 1(a)(ii) of the Committee's terms of reference.*

A New Tax System (Goods and Services Tax Imposition—Customs) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to impose a 10 per cent goods and services tax on importations to the extent that it is a duty of customs.

The Committee has no comment on this bill.

A New Tax System (Goods and Services Tax Imposition—Excise) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to impose a 10 per cent goods and services tax on supplies to the extent that it is a duty of excise.

The Committee has no comment on this bill.

A New Tax System (Goods and Services Tax Imposition—General) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to impose a 10 per cent goods and services tax to the extent that it is neither a duty of customs nor a duty of excise.

The Committee has no comment on this bill.

A New Tax System (Goods and Services Tax Transition) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to provide for:

- arrangements to establish whether a taxpayer's entitlements and obligations will be determined under the wholesale sales tax or goods and services tax (GST) systems;
- the registration of entities for GST purposes prior to the implementation date of the GST;
- a special credit for wholesale sales tax embedded in certain stock on hand at the date of implementation of the GST;
- a two year phase-in of input tax credits for motor vehicles; and

amends the ***Sales Tax Assessment Act 1992*** and ***Sales Tax (Exemptions and Classifications) Act 1992*** to reduce the wholesale sales tax rate on certain goods from 32 to 22 per cent prior to the implementation of the GST.

The Committee has no comment on this bill.

A New Tax System (Income Tax Laws Amendment) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes amend the following Acts:

Income Tax Assessment Act 1997 to:

- provide that bonus payments made to certain older Australians will be exempt from income tax;
- repeal the savings and investment income tax offset;

Income Tax Assessment Act 1936 to make amendments consequential on the repeal of the savings and investment income tax offset; and

Income Tax Regulations to provide for an increase in the maximum rebate available to low income aged persons and certain pensioners.

The Committee has no comment on this bill.

A New Tax System (Medicare Levy Surcharge—Fringe Benefits) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to impose a 1 per cent Medicare levy surcharge on persons whose taxable income, including reportable fringe benefits, exceed prescribed thresholds and do not have private health insurance.

The Committee has no comment on this bill.

A New Tax System (Personal Income Tax Cuts) Bill 1998

This bill was introduced into the House of Representatives on 2 December 1998 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of 16 bills to reform the taxation system, the bill proposes to amend the *Income Tax Rates Act 1986* to provide for personal income tax rates and to increase the tax-free threshold for certain taxpayers with dependent children under the Family Tax Assistance scheme. The bill further proposes to amend the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to make consequential amendments.

The Committee has no comment on this bill.

A New Tax System (Trade Practices Amendment) Bill 1998

This bill was introduced into the House of Representatives on 10 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

Consequential upon the introduction of the new taxation system, the bill proposes to amend the *Trade Practices Act 1974* to prohibit price exploitation by:

- enabling the Australian Consumer and Competition Council (ACCC) to monitor prices for three years from 1 July 1999;
- empowering the ACCC to seek proceedings to impose penalties or injunctions against corporations or persons involved in consumer exploitation or excessive profit taking;
- requiring the ACCC to publish guidelines about when a price may be regarded as being in contravention of the prohibition on price exploitation;
- requiring the ACCC to report quarterly to the Minister on certain operations; and
- establishing the New Tax System Price Exploitation Code which will be applied through State and Territory legislation.

The Committee has no comment on this bill.

Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the following Acts:

Agriculture and Veterinary Chemicals (Administration) Act 1992 to provide five years protection for undisclosed text and/or other data submitted to the National Registration Authority for Agricultural and Veterinary Chemicals for the evaluation of a new active constituent for an agricultural or veterinary chemical product;

Dairy Produce Act 1986 to provide for special payments from the Domestic Market Fund to manufacturers who paid manufacturing milk levy on milk disposed of at the factory and milk producers who disposed of milk on farm as a result of the Victorian gas crisis;

Export Control Act 1982 to:

- clarify the power of the Secretary to approve quality assurance arrangements for the production of prescribed goods for export and to facilitate the administration of these systems to ensure that international market requirements are met; and

- bring the powers of authorised officers and enforcement provisions of the Act in line with current Commonwealth legal policy;

Imported Food Control Act 1992 to:

- exempt foods from inspection imported as trade samples;

- make it an offence to deal with food contrary to the requirements of a Food Control Certificate;

- permit the publication of information relating to all food found to be failing food whether retained or released from AQIS' control;

- permit the payment of compensation for foods destroyed as a result of sampling for the purposes of inspection; and

- make minor technical amendments; and

Plant Breeder's Rights Act 1994 to allow a duplication of variety names provided varieties with the same name are from a different "plant class" and are unlikely to be confused in the market place.

The Committee has no comment on this bill.

Appropriation Bill (No. 3) 1998-99

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to appropriate money ($1,382 million) out of the Consolidated Revenue Fund, additional to those made by Appropriation Act (No. 1) 1998-99, to meet payments for the ordinary annual services of the government for the year ending on 30 June 1999.

The Committee has no comment on this bill.

Appropriation Bill (No. 4) 1998-99

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to appropriate money ($255 million) out of the Consolidated Revenue Fund, additional to those made by Appropriation Act (No. 2) 1998-99, to meet payments for capital works and services, payments to or for the States, the Northern Territory and the Australian Capital Territory; advances and loans, and for other services for the year ending on 30 June 1999.

The Committee has no comment on this bill.

Appropriation (Parliamentary Departments) Bill (No. 2) 1998-99

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to appropriate money ($1 million) out of the Consolidated Revenue Fund, additional to those made by Appropriation (Parliamentary Departments) Act 1998-99, to meet recurrent expenditures of the parliamentary departments for the year ending on 30 June 1999.

The Committee has no comment on this bill.

Australian Sports Drug Agency Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Sport and Tourism. [Portfolio responsibility: Sport and Tourism]

The bill proposes to amend the *Australian Sports Drug Agency Act 1990* to:

- remove detailed operational procedural matters and place them in either subordinate legislation or in Australian Sports Drug Agency (ASDA) operational manuals outside the legislation;
- remove operational procedural matters relating to the public interest testing program and place them in the regulations as "drug testing schemes";
- enable the ASDA to apply best practice principles in complying with requests from all International Sporting Federations and other organisations in relation to sample collection, sample testing and result management;
- establish an Australian Sports Drug Medical Advisory Committee (ASDMAC) within ASDA;
- enable State and Territory governments to enact legislation to confer powers and functions on the ASDA to enable ASDA to undertake drug testing on State level competitors; and
- enable the ASDA to receive information from the Australian Customs Service about the illegal importation of banned sport performance enhancing substances.

The Committee has no comment on this bill.

Civil Aviation Amendment Bill 1998

This bill was introduced into the House of Representatives on 9 December 1998 by the Minister for Transport and Regional Services. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to amend the *Civil Aviation Act 1988* to:

- facilitate the introduction of a new set of regulations that are harmonised with civil aviation laws internationally;
- enable the Civil Aviation Safety Authority (CASA) to issue design standards for unusual aircraft for which common design standards are not in place;
- provide for new powers in relation to the retention and destruction of goods seized by CASA during the course of investigating breaches;
- clarify the power of CASA to impose fees by regulation;
- provide for limited late-payment penalties to be imposed; and
- make a minor technical amendment.

The Committee has no comment on this bill.

Corporate Law Economic Reform Program Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to implement key elements of the Corporate Law Economic Reform Program (CLERP) in the areas of fundraising, directors' duties and corporate governance, accounting standards and takeovers.

Retrospective effect
Schedule 7, item 12

By virtue of subclause 2(4), the amendment proposed by item 12 of Schedule 7 to the bill is taken to have commenced retrospectively on the day on which the *Financial Sector Reform (Consequential Amendments) Act 1998* received Royal Assent. However, the purpose of this amendment appears to be solely to correct a drafting error in earlier legislation.

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

Reversal of the onus of proof
Proposed new sections 206A, 606, 670D, 670F, 731, 732 and 733

The prosecution is normally required to prove all the elements of a criminal offence. A number of provisions proposed to be inserted by this bill require an accused person to disprove criminal liability in a variety of circumstances. These circumstances include managing a corporation while disqualified; acquiring a relevant interest in the voting shares of certain companies; making a misstatement in certain takeover and other offer documents; not proceeding with a publicly proposed bid; and making a misstatement in a prospectus or other similar document. It is not clear whether these sections simply represent a continuation of provisions currently included in the legislation, or a change to those provisions. The Committee, therefore, **seeks the Minister's advice** on whether these provisions represent a change in policy, and, if so, on any reasons for that change in policy.

Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they may be considered to trespass

unduly on personal rights and liberties in breach of principle 1(a)(i) of the Committee's terms of reference.

Customs (Anti-dumping Amendments) Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Customs Act 1901* to:

- provide a special approach for determining normal value of allegedly dumped goods from countries that are in the process of transition to a market economy when it is established that the selling price of those goods is subject to government control;

- provide a new methodology for determining the normal value of allegedly dumped goods from countries that are in the process of transition to a market economy and a raw material input into the goods which accounts for more than 10 per cent of the costs of producing or manufacturing the goods is supplied by a State owned enterprise;

- clarify provisions which relate to the manner in which interim dumping and countervailing duties are collected; and

- ensure consistency with amendments implemented by the *Customs Legislation (Anti-dumping Amendments) Act 1998*.

Retrospective effect
Subclause 2(3)

By virtue of subclause 2(3) of the bill, a number of the amendments proposed are to commence retrospectively on 1 January 1993. The Explanatory Memorandum notes that these amendments all involve "clarifying" the collection of interim dumping and countervailing duties. An interim duty regime was introduced by the *Customs Legislation (Anti-Dumping Amendments) Act 1992*, which commenced on 1 January 1993. Interim duties have been collected since that date in accordance with the intention of that regime and these amendments are designed to ensure "that approximately $12 million in interim duties collected since 1 January 1993 is not subject to legal challenge". The Explanatory Memorandum also states that the amendments "will not require importers to pay an amount of dumping duty beyond that which has previously been demanded".

Provisions in a similar form were previously commented on by the Committee in its consideration of the Customs Legislation (Anti-Dumping) Amendment Bill 1997

(see *Nineteenth Report of 1997*). In response to a request from the Committee for advice, the then Minister for Customs and Consumer Affairs noted:

> The amendments are intended to remove the possibility that the relevant provisions of the *Customs Act 1901* and the *Customs Tariff (Anti-Dumping) Act 1975* might be interpreted so as to require actual values to be ascertained before interim dumping and countervailing duties can be imposed. The possibility of such an interpretation was discovered in the general process of ongoing review of the terms of the legislation by officers of the Australian Customs Service and the Anti-Dumping Authority. The relevant provisions have not been the subject of judicial interpretation and there are no cases currently pending which would be affected by the passage of the proposed amendments.

The Committee thanked the Minister for this response. Approximately 16 months have passed since that response was received. The Committee, therefore, **seeks the Minister's advice** as to whether any cases have arisen since the bill was last introduced (or are pending) which might be affected by the passage of these proposed amendments.

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

Retrospective effect
Subclause 2(4)

By virtue of subclause 2(4) of the bill, a number of the amendments proposed are to commence retrospectively on 24 July 1998. However, the Explanatory Memorandum notes that these are simply technical amendments intended to ensure "that the new terms 'preliminary affirmative determination' and 'Dumping Duty Act' are used consistently throughout the Customs Act" as from that date.

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

Customs Tariff (Anti-Dumping) Amendment Bill (No. 2) 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Customs Tariff (Anti-Dumping) Act 1975* to clarify provisions of that Act and the *Customs Act 1091* relating to the manner in which interim dumping and countervailing duties are collected.

Retrospective effect
Subclause 2(1)

By virtue of subclause 2(1) of the bill, a number of the amendments proposed are to commence retrospectively on 1 January 1993. As noted above (with reference to the Customs (Anti-Dumping Amendments) Bill 1998), these amendments are said to involve "clarifying" the collection of interim dumping and countervailing duties, and ensuring that the collection of interim duties since 1 January 1993 is not potentially subject to legal challenge.

A Ministerial explanation involving provisions in a similar form was previously accepted by the Committee in its examination of the Customs Tariff (Anti-Dumping) Amendment Bill 1997 (see *Nineteenth Report of 1997*). Nevertheless, the Committee notes that approximately 16 months have passed since that explanation was received. The Committee, therefore, **seeks the Minister's advice** as to whether any cases have arisen since the bill was last introduced (or are pending) which might be affected by the passage of these proposed amendments.

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

Environmental Reform (Consequential Provisions) Bill 1998

This bill was introduced into the Senate on 10 December 1998 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

Consequent upon the Environment Protection and Biodiversity Conservation Bill 1998, the bill proposes to:

- repeal the five Acts replaced by the Environment Protection and Biodiversity Conservation Bill 1998: the *Endangered Species Protection Act 1992*, the *Environment Protection (Impact of Proposals) Act 1974*, the *National Parks and Wildlife Conservation Act 1975*, the *Whale Protection Act 1980* and the *World Heritage Properties Conservation Act 1983*;

- provide savings and transitional arrangements;

- make consequential amendments to Acts affected by the repeal of the five Acts above and to Acts affected by the Environment Protection and Biodiversity Conservation Bill 1998.

Retrospective effect
Subclauses 2(3) and (4)

By virtue of subclause 2(3) and (4) of the bill, two of the amendments proposed in Schedule 7 would have retrospective effect. The Explanatory Memorandum states that these amendments correct minor drafting errors in the *Hazardous Waste (Regulation of Exports and Imports) Amendment Act 1996*, and the *Wildlife Protection (Regulation of Exports and Imports) Amendment Act 1995*.

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

General Interest Charge (Imposition) Bill 1998

This bill was introduced into the House of Representatives on 10 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

Complementary to the Taxation Laws Amendment Bill (No.5) 1998, the bill proposes to impose the new general interest charge (applied to outstanding tax debts) as a tax to the extent to which the charge cannot validly be imposed as a penalty.

The Committee has no comment on this bill.

Health Legislation Amendment Bill (No. 4) 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the following Acts:

National Health Act 1953 to:

- enable the Minister to determine the maximum percentage of discount that a health fund can offer contributors, based on the administrative savings of the health fund;

- enable health funds to offer loyalty bonus schemes to contributors in recognition of the period of time over which they have paid premiums;

- allow for waiting periods to be extended for certain conditions, ailments or illnesses;

- allow health funds to cover the Pharmaceutical Benefits Scheme patient co-payment for prescribed pharmaceutical benefits for in-hospital treatment;

- allow procedures which would otherwise have been performed in a hospital or day hospital facility to be performed in an "approved procedures facility";

- allow the Minister to specify which Medicare Benefit Schedule items are appropriate to be performed as "out-of-hospital procedure" and in an "approved procedures facility";

- create a new class of benefit payable by health funds to cover specialist medical services;

- establish separate provisions to deal with health fund rule changes which relate to changes in premium rates and all other rule changes;

- enable the Minister to disallow any given rule changes on two additional grounds; and

- transfer the rates of contribution rule change provisions from the Minister to the Private Health Insurance Administration Council; and

National Health Act 1953 and ***Health Insurance Act 1973*** to make consequential amendments.

Commencement
Subclauses 2(4) and (5)

In general terms, Schedule 3 of this bill contains provisions which broaden the Minister's power to monitor changes to health fund rules relating to premiums. Items 8 to 15 of this Schedule contain provisions which, within two years, transfer the premium monitoring provisions from the Minister to the Private Health Insurance Administration Council. Items 16 to 18 of this Schedule contain provisions which "at an appropriate time" increase the independence and flexibility that health funds have with respect to premium increases.

Specifically, subclause 2(4) of the bill provides that the amendments proposed by items 8 to 15 are to commence on a day to be fixed by Proclamation that occurs after, but not more than 24 months after, the day on which the items referred to in subsection 2(3) commence. Subclause 2(5) provides that the amendments proposed by items 16 to 18 are to commence on a day to be fixed by proclamation that occurs after, but not more than 24 months after, the day on which the items referred to in subsection (4) commence.

In effect, these provisions are to commence at a time that is fixed by reference to the date of Assent. To that extent, their commencement is not a matter of Executive discretion, which has often been a matter of concern to the Committee. However, the Explanatory Memorandum provides no reason for the considerable length of time between Assent to the bill and the coming into force of these particular provisions (up to 48 months). In this respect, the Committee notes that *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel, refers to the desirability of an explanation where a commencement period longer than 6 months after Royal Assent is chosen. The Committee, therefore, **seeks the Minister's advice** on the reasons for the length of time provided for before proclaiming the commencement of these provisions.

> *Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they may be considered to inappropriately delegate legislative power in breach of principle 1(a)(iv) of the Committee's terms of reference.*

Human Rights Legislation Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend anti-discrimination legislation to:

- confer on the President of the Human Rights and Equal Opportunity Commission (HREOC) the role and functions of Chief Executive Officer;
- centralise complaint investigation and conciliation in the office of the President;
- implement common definitions and procedural provisions for complaint handling in the one Act;
- make substantial changes to the *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984* to remove provisions dealing with complaints;
- simplify dispute resolution procedures by eliminating the second tier of review in HREOC;
- provide that matters which cannot be conciliated will be dealt with in the Federal Court of Australia;
- provide that the Federal Court will not be bound by technicalities or legal forms in considering proceedings brought before it under this legislation;
- enable Federal Court Judges to delegate some functions in this area to Judicial Registrars;
- make provision for transitional arrangements; and
- make consequential amendments to five Commonwealth Acts.

The Committee has no comment on this bill.

Industry Research and Development Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to amend the *Industry Research and Development Act 1986* to:

- allow companies a longer period for the lodgement of registration applications;
- allow the Industry Research and Development Board to require different levels of information from different classes of applicant;
- allow the Board a limited discretion to accept late applications to correct minor errors in registrations;
- make the effective date of certification for offshore research and development the date on which the application was received, rather than the date of the Board decision;
- clarify the Board's powers regarding the exploitation of results of research and development activities and overseas expenditure on research and development; and
- make minor administrative changes relating to communications, Board and committee appointments; recruitment of consultants, and the Registered Research Agency scheme.

The Committee has no comment on this bill.

Judiciary Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Judiciary Act 1903* to establish the Australian Government Solicitor as a separate statutory authority to provide legal and related services for government purposes, and makes transitional provisions and consequential amendments to 10 Acts.

Insufficient Parliamentary scrutiny
Proposed new Part VIIIC

This bill is, in all material respects, identical to a bill of the same name which was introduced into the House of Representatives on 20 November 1997 and on which the Committee commented in *Alert Digest No 17 of 1997* and in its *First Report of 1998*.

As the Committee previously noted, the bill proposes to insert a new Part VIIIC in the Judiciary Act. This new Part enables the Attorney-General to issue Legal Services Directions which must be complied with by a variety of persons or bodies, not all of whom are otherwise under the control of the Commonwealth.

It appeared to the Committee that, while these Directions might be legislative in character, the bill made no provision for them to be disallowable instruments for the purposes of the *Acts Interpretation Act 1901*.

The Attorney-General advised the Committee that Legal Services Directions would be capable of applying either generally to Commonwealth legal work, or to specific legal work being performed in relation to a particular matter. The Government considered it appropriate for Legal Services Directions that were legislative in character (these are most likely to be Directions of general application) to be subject to Parliamentary scrutiny. The most effective process for subjecting such Directions to such scrutiny was under the Legislative Instruments Bill.

In response, the Committee expressed the view that, as an interim measure, until the Legislative Instruments Bill became law, alternative provision should be made for Parliamentary scrutiny of such Directions.

The Committee notes that the Legislative Instruments Bill still has not been passed, and reaffirms its view as to the desirability of Parliamentary scrutiny under the *Acts Interpretation Act 1901* as an interim measure. The Committee, therefore, **seeks the Attorney's advice** on how Legal Services Directions that are legislative in

character are to be scrutinised by the Parliament if issued prior to the passage of the Legislative Instruments Bill.

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

Law and Justice Legislation Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the following Acts:

Administrative Appeals Tribunal Act 1975 to implement certain recommendations made by the Senate Legal and Constitutional Legislation Committee report entitled "Role and Function of the Administrative Review Council" and *Australian Law Reform Commission (Repeal, Transitional and Miscellaneous) Act 1996* to make consequential amendments;

Australian Protective Service Act 1987 to enable the Director of the Protective Service to charge non-Commonwealth persons and bodies for services;

Evidence Act 1995 to:

- enable a party to give evidence of the contents of a document that is not available to it by adducing evidence from a witness in oral or written form;
- effect regulations which provide for a certificate or other document to have evidentiary effect;
- enable evidence of a Commonwealth document to be given in proceedings in all Australian courts without having to a call a witness; and
- make minor drafting corrections;

Federal Court of Australia Act 1976 to:

- allow additional judges of the Supreme Court of the Australian Capital Territory to be included on the Full Court of the Federal Court;
- provide that the Registrar of the Court may authorise officers or employees of the Court to administer oaths and witness affidavits; and
- insert a regulation making power;

High Court of Australia Act 1979 to insert a regulation making power;

Judges' Pensions Act 1968 to include service as a judge of the Supreme Court of the Australian Capital Territory in the definition of "prior judicial service";

Judiciary Act 1903 to:

- expressly exclude the conferral of criminal jurisdiction upon the Federal Court except where that jurisdiction is conferred on the Court by other Commonwealth legislation;

- provide that the restriction that a superior court is not invested with federal jurisdiction over a summary offence against the Commonwealth is confined to the exercise of federal criminal jurisdiction by courts of summary jurisdiction; and

eight other Acts to correct minor drafting errors.

Retrospective effect
Subclauses 2(2) to (9)

By virtue of subclauses 2(2) to (9) of the bill, various proposed amendments will have retrospective effect. However, as noted in the Explanatory Memorandum, in all cases these amendments do no more than correct minor drafting errors and make no substantive change to the law.

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

Migration Legislation Amendment Bill (No. 2) 1998

This bill was introduced into the Senate on 3 December 1998 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to:

- ensure that provisions of the *Human Rights and Equal Opportunity Commission Act 1986* and the *Ombudsman Act 1976* do not apply to persons who are in immigration detention, having arrived in Australia as unlawful citizens, unless such persons themselves initiate a written complaint to HREOC or orally or in writing to the Ombudsman; and

- clarify the duties of the Minister and officials concerning advice relating to applications for visas and on access to legal and other advice.

Introduction

In general terms, this bill is similar in form to the Migration Legislation Amendment Bill (No 2) 1996 ("the 1996 bill"), which was introduced into the Senate on 20 June 1996, and on which the Committee reported in its *Sixth Report of 1996*. The following comments draw on the discussion in that report.

Background

The bill deals with the relationship between section 256 of the *Migration Act 1958* and paragraphs 20(6)(b) of the *Human Rights and Equal Opportunity Commission Act 1986* and 7(3)(b) of the *Ombudsman Act 1976*.

In general terms, section 256 of the Migration Act states that, where a person is in immigration detention under that Act, the person responsible for his or her detention shall, at the request of the person detained, afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

The relevant provisions of the Human Rights and Equal Opportunity Commission Act and the Ombudsman Act enable a detainee to have a sealed envelope delivered to him or her.

The Explanatory Memoranda for 1996 bill and the current bill ("the 1998 bill") both note that the legislation has been proposed in response to the decision of the Federal

Court in *Human Rights and Equal Opportunity Commission v Secretary of the Department of Immigration and Multicultural Affairs* (the 'Teal' case). In that case, the Commission successfully challenged the refusal of the Department to deliver sealed envelopes to persons in immigration detention who had not made a complaint to the Commission. The effect of such a delivery would have been to ensure that those detainees received access to legal advice despite the fact that no such advice had been requested.

The issue of the bill's retrospective effect: previous consideration

Clause 2

Clause 2 of the 1996 bill provided that the proposed amendments were to commence on the date the bill was introduced into Parliament. This meant that the bill had a limited retrospective effect. With regard to this commencement provision, the Committee observed that:

- it was opposed in principle to retrospective legislation by which vested rights were taken away;

- retrospective operation to any extent places departmental officers in an invidious position in situations arising between the date of retrospective effect and the date a bill is passed (assuming that it is passed) – in this case "if the custodial officers act within the rule of law and obey the law as it stands the proposed retrospective effect will be nullified. In order to give the proposed law retrospective effect the officers concerned need to break the present law"; and

- "on the other side of the coin is the detainee who has a right to have [an] envelope delivered. If the envelope is not delivered, that right is taken away, not by law, but by a presently unlawful act on the dubious grounds that perhaps Parliament will pass a proposed law that will have retrospective effect to make the unlawful act lawful. This is an instance of where retrospectivity could have a very serious effect on the rights of people".

In response to a request for advice on the obligations of officers of his department; the Minister told the Committee that:

- the rights of a particular group of detainees had been clarified following orders made by the Federal Court by consent settling an appeal;

- both the Human Rights Commissioner and the Commonwealth Ombudsman had given undertakings that they would act as if the bill had been passed; and

- departmental officers had, therefore, not been placed in an invidious position.

In conclusion, the Committee acknowledged that the lodging and settlement of an appeal in the 'Teal' case in 1996 (together with the continuance of a stay order) had averted a series of particular problems. However, the Committee noted that "should another boat arrive before the legislation is passed, the invidious position could recur".

Retrospective effect and the current bill
Clause 2

Clause 2 of the 1998 bill provides that the proposed amendments are to commence on the date the bill was introduced into the Senate (ie 3 December 1998). In commenting on this provision, the Committee notes that, for more than 2 years between 1996 and 1998, the law was apparently administered on the basis of legislation which was said to operate retrospectively and yet was never passed by the Parliament. It is conceivable that such a situation might again arise in the case of the present bill.

It is also conceivable that the bill may ultimately be passed in an amended form. Again, this may have implications for the way the law will be administered in the period between the introduction of the bill, and its final passage through the Parliament.

The Committee reiterates that it is opposed in principle to retrospective legislation which detrimentally affects rights. The Committee considers that, in principle, legislation which changes the nature of people's access to justice should commence from the date it is passed by the Parliament rather than the date it is introduced into the Parliament. Given the experience of the 1996 bill, the Committee **seeks the Minister's advice** on the reasons for making this bill operative from its introduction rather than its passage, and on the implications of this for Departmental officers and administration should the bill again not be passed, or be passed in an amended form.

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

The issue of access to justice

In its *Sixth Report of 1996*, the Committee stated that the substantive amendments which were proposed in the 1996 bill appeared to be based on an inaccurate view of section 256 of the *Migration Act 1958* (set out above).

The Committee pointed out that section 256 placed a positive obligation on the person responsible for the immigration detention of a person to provide access to obtaining legal advice if the detainee requested it. However, the section did not provide that it was to be an exhaustive code of all the ways in which such a detainee may have access to legal advice. The section was not restrictive in the sense that it denied all access to legal advice except through its provisions. In this respect, the Committee took issue with the second paragraph of the Explanatory Memorandum for the 1996 Bill (also included in the Explanatory Memorandum to the 1998 bill) which asserted that section 256 established that a person in immigration detention had a right to access legal advice only when they requested it.

In response to a Committee request for advice, the Minister indicated that:

> The Committee seems to be suggesting that detainees have further rights of access to legal advice sourced elsewhere in the common law or in statute. But the Committee fails to specify where these rights are to be found. However, in recent litigation *Wu Yu Fang v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 583 an opportunity was provided to establish the existence of such rights. None were established. Furthermore, it is quite clear from that case that there is no obligation on departmental officers to inform unauthorised arrivals on entering Australia of any rights to legal advice, unless the persons have made a request for such advice.
>
> In this Bill the Government is seeking to make absolutely clear that unauthorised arrivals have no right of access to legal advice unless they specifically request.

The Committee concluded that it was all too conscious of this declared purpose of the bill, but disagreed that the bill merely clarified the situation:

> If it were true that unauthorised arrivals have no right of access to legal advice unless they request it under section 256 of the Migration Act 1958, there would be no need for this bill. Why else does the bill provide that paragraph 20(6)(b) of the *Human Rights and Equal Opportunity Commission Act 1986* not apply to a person in immigration detention? In dealing with the implications of section 256, the committee may not have specified that paragraph 20(6)(b) of that Act and the corresponding provision in the *Ombudsman Act 1976* are sources in statute that enable access to legal advice outside the *Migration Act 1958*.

The issue of a hierarchy of Acts

In its *Sixth Report of 1996*, the Committee also expressed the view that the Minister's Second Reading Speech in relation to the 1996 bill might be seen mistakenly to assume that there is a hierarchy of Acts of Parliament. That speech referred to the use of the *Ombudsman Act 1976* and the *Human Rights and Equal Opportunity Commission Act 1986* to "undermine" the intention of section 256 of the Migration Act.

The Second Reading Speech for the 1998 bill similarly speaks of a need to ensure that Parliament's intention in relation to the management of unauthorised arrivals in immigration detention, cannot be "subverted" through the use of those other Acts.

In its *Sixth Report of 1996* the Committee stated that:

> The result of the Federal Court case that has prompted this legislation is clear proof that the intention of Parliament, as found by the only institution that can authoritatively say what that intention is, in passing the *Ombudsman Act 1976* and the *Human Rights and Equal Opportunity Commission Act 1986* was to provide a method of access to legal advice alternative to that provided in the *Migration Act 1958*. Any impression that somehow Parliament made a mistake that now has to be fixed is quite false.

The Minister responded that it was not a question of a 'hierarchy of Acts'. Rather it was a question of making the position on access to lawyers clear. The Federal Court decision in the 'Teal' case had shown that there was a conflict in the law. This bill sought to resolve that conflict.

The issue of the right to knowledge

In its *Sixth Report of 1996*, the Committee also noted that the legal maxim that ignorance of the law is no excuse was based on an assumption that people were able to find out what the law was that affected them. The Committee expressed the view that the provisions of the 1996 bill were "clearly designed to make it as difficult as possible for the people subject to these laws to find out what rights they have in law". The Committee rejected the notion that this was justified because it would cost money to enable those people to exercise those rights if they found out about them: "the protection of rights ought not to be governed by cost-benefit analysis".

On this issue, the Minister responded that the bill "seeks to clarify the situation in relation to certain unauthorised arrivals and their access to legal advice. The Bill makes it clear that such persons have no right to legal advice unless they make a specific request".

The issue of the International Covenant on Civil and Political Rights

In its *Sixth Report of 1996*, the Committee also pointed out that article 26 of the International Covenant on Civil and Political Rights provides that all persons are entitled without any discrimination to the equal protection of the law. The Committee questioned whether the bill discriminated against unlawful non-citizens by precluding a presently lawful means of obtaining access to legal advice.

On this issue, the Minister responded that, based on the best available legal advice, he was satisfied that the bill, taken with Australia's long-standing practices in this area, was not in breach of Australia's obligations under the Covenant.

Committee conclusions on the 1996 bill

The Committee thanked the Minister for his assistance with the 1996 bill. However it did not agree that it was a matter of resolving conflict between different laws, or clarifying the appropriate source and terms of a right of access to legal advice. In the Committee's view:

> the bill will take away rights under the *Human Rights and Equal Opportunity Commission Act 1986* and the *Ombudsman Act 1976* which presently exist and which presently provide the only means not controlled by immigration authorities of giving advice to unauthorised arrivals of other rights that they may have under this country's laws.
>
> For the committee, the issue is whether taking away these rights trespasses unduly on their personal rights and liberties. In the Alert Digest the committee stated it was not convinced that the reasons given in the explanatory memorandum and in the second reading speech justified the proposal. It remains unconvinced by the Minister's response …
>
> In the committee's view, it is contrary both to international standards (as expressed in Article 26 of the ICCPR) and to the fundamental values of the common law to entrench a discriminatory rule which effectively precludes a person from finding out what rights they might have under the law.

Committee conclusions on the 1998 bill

The Second Reading Speech to the 1998 bill states that it is "largely the same" as the 1996 bill. Only two minor amendments have been made: the 1998 bill is to commence on a different date, and no longer contains a requirement that complaints to the Ombudsman must be "in writing".

> *Given these similarities, the Committee reiterates the comments it made in relation to the earlier version of the bill and continues to draw Senators' attention to its 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.*

Migration Legislation Amendment (Judicial Review) Bill 1998

This bill was introduced into the Senate on 2 December 1998 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* and *Administrative Decisions (Judicial Review) Act 1977* to:

- introduce a new judicial review scheme;
- apply the new judicial review scheme to both the Federal Court and the High Court; and
- allow specified decisions to be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

Introduction

In general terms, this bill is similar in form to the Migration Legislation Amendment Bill (No 5) 1997 ("the 1997 bill"), which was introduced as a separate bill in the House of Representatives on 3 September 1997. The provisions of the Bill were originally included in Migration Legislation Amendment Bill (No 4) 1997 as Schedule 4, and were reported on by the Committee at pages 295-297 of its *Thirteenth Report of 1997*. The following comments draw on the discussion in that report.

Ousting of judicial review
Proposed new Part 8

Item 7 of Schedule 1 to the bill proposes to repeal Part 8 of the *Migration Act 1958*, which deals with the review of decisions by the Federal Court, and replace it with a new Part 8 covering judicial review. This new Part 8 would impose substantial limitations on the ability of those affected by various decisions to seek judicial review of those decisions.

Proposed new subsection 474(2) introduces the concept of a 'privative clause decision'. This is defined as a decision of an administrative character made, proposed to be made or required to be made under the Migration Act or its regulations, or other instruments made under that Act, with the exception of some decisions made under certain specified provisions.

Proposed new subsection 474(1) states that privative clause decisions are "final and conclusive"; "must not be challenged, appealed against, reviewed, quashed or called in question in any court"; and are "not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account".

The Explanatory Memorandum notes that a privative clause is a provision which "on its face purports to oust all judicial review". However, such provisions in operation, by altering the substantive law, effectively limit review by the courts to certain grounds.

Such a clause was discussed by Dixon J in *R v Hickman; Ex parte Fox and Clinton*. (1945) 70 CLR 598 at 615 in the following terms:

> [Privative clauses] are not interpreted as meaning to set at large the courts or other judicial bodies to whose decisions they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.
>
> The matter has been expressed in somewhat different ways. In *Baxter v New South Wales Clickers' Association*, O'Connor J said that such a provision should be construed as freeing the court or authority from the control or supervision of the superior court in all cases where the proceedings of the former show on the face of them that they have relation to the subject matter over which the statute has given it jurisdiction.

The effect of including such a clause is to give decision-makers wider lawful operation for their decisions and to narrow the grounds on which those decisions can be challenged. In practice, a decision will be lawful and not challengeable provided the decision-maker:

- acted in good faith;
- had been given the authority to make the decision concerned (for example, had the authority delegated to him or her by the Minister, or had been properly appointed as a tribunal member); and
- did not exceed constitutional limits.

The effect of including this clause in the Migration Act will be to prevent judicial review of decisions taken during the process of reviewing, on the merits, decisions affecting visas and refugee status as well as putting a 28 day time limit on the right to apply for mandamus and the other prerogative writs in respect of certain other decisions.

In its *Thirteenth Report of 1997*, the Committee stated that the ousting of judicial review was not a matter to be undertaken lightly by the Parliament. It had the potential to upset the delicate arrangement of checks and balances on which our constitutional democracy was based. It is the function of courts in our society to ensure that executive action affecting those subject to Australian law is carried out according to law. Therefore, it was cause for the utmost caution when one arm of government (in this case, the Executive) sought the approval of the second arm of government (the Parliament) to exclude the third arm or government (the Judiciary) from its legitimate role whatever the alleged efficiency, expediency or integrity of programs is put forward in justification.

The Committee sought the advice of the Minister on this issue. In response, the Minister stated that:

- the current scheme for judicial review had been introduced by the previous Government on 1 September 1994 with the intention of reducing Federal Court litigation, since that scheme required merits review rights to be exhausted before Federal Court review was possible, and restricted the grounds of review available before that Court;

- the current scheme had not reduced the volume of cases before the courts (applications to the Federal and High Courts had grown from nearly 400 in 1994-95, to approximately 600 in 1995-96, to 749 in 1996-97, with an expected 850 in 1997-98);

- in migration cases, litigation can be an end in itself – there is a "high incentive" for refused applicants to delay their removal from Australia in order to establish ties in Australia which they hoped would entitle them to a visa through another pathway;

- the Government's election immigration policy stated that access to the courts for review beyond the established two tiered system "should be restricted in all but exceptional circumstances";

- the consensus of expert legal advice was that, because of the constitutional guarantee of access to the High Court, the only practical option to implement this policy was the imposition of a privative clause;

- as well as meeting the Government's policy objective, the proposed new judicial review scheme would also consolidate the existing two review schemes for visa decisions into primarily one scheme; and

- the Government remained committed to preserving an open and credible migration program, and a balance between the 'rights' of the individual and the interests of the wider Australian community – the use of a privative clause was appropriate in the area of immigration decision-making where there was an

entitlement to the grant of a visa if an applicant met the legal criteria and extensive access to independent merits review, and where unrestricted access to the courts was an incentive for certain individuals to delay resolution of their claims.

The Committee noted the Minister's statement about preserving a balance between the 'rights' of individuals and the interests of the wider Australian community. Whether the proposed use of this privative clause struck the appropriate balance was a matter which the Committee believed should be left for ultimate resolution by debate in the Chamber.

The Committee reiterates this view and continues to draw Senators' attention to its 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.

Migration (Visa Application) Charge Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration (Visa Application) Charge Act 1997* to:

- provide that only the index numbers published in terms of the most recently published reference base for the Consumer Price Index are used to calculate the visa application charge limit; and

- provide that calculations disregard index numbers that are published in substitution for previously published index numbers, except where the substituted numbers are published to take account of changes in the reference base; and

- make minor technical amendments.

Retrospective effect
Clause 2

By virtue of clause 2, the bill is to be taken to have commenced immediately after the commencement of the *Migration (Visa Application) Charge Act 1997*. The Explanatory Memorandum states that this date is necessary to ensure that the visa application charge limit is updated from the time that the visa application charge commenced.

The amendments included in the bill appear to do no more than correct drafting errors, and make no substantive change to the law.

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

Motor Vehicle Standards Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Transport and Regional Services. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to amend the *Motor Vehicle Standards Act 1989* to:

- enable the development of a standard for model specific fuel consumption labelling;
- create a position of Associate Administrator; and
- make minor technical amendments.

The Committee has no comment on this bill.

National Measurement Amendment (Utility Meters) Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to amend the *National Measurement Act 1960* to provide a national system for metrological control of specified utility meters comprising mandatory national pattern approval and verification systems harmonised to international standards.

The Committee has no comment on this bill.

National Residue Survey (Customs) Levy Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *National Residue Survey (Customs) Levy Act 1998* to make consequential changes following the repeal of various levies and charges Acts and the enactment of the proposed Primary Industries (Customs) Charges Act 1998 and the Primary Industries (Excise) Levies Act 1998.

The Committee has no comment on this bill.

National Residue Survey (Excise) Levy Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *National Residue Survey (Excise) Levy Act 1998* to:

- make consequential changes following the repeal of various levies and charges Acts and the enactment of the proposed Primary Industries (Customs) Charges Act 1998 and the Primary Industries (Excise) Levies Act 1998; and

- remove the 1 July 2000 sunset clause applicable to National Residue Survey dairy levies.

The Committee has no comment on this bill.

Navigation Amendment (Employment of Seafarers) Bill 1998

This bill was introduced into the House of Representatives on 9 December 1998 by the Minister for Transport and Regional Services. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to amend the following Acts:

Navigation Act 1912 to abolish the Marine Council and remove provisions relating to:

- prohibiting the demand or receipt of fees for the supply of seamen ("crimping");
- prohibiting the use of a crew engaged in overseas voyages for handling cargo or ballast while the ship is in an Australian port;
- requirements to enter into a prescribed form of "articles of agreement" covering conditions of employment;
- certain procedures in relation to the discharge of seamen from ship service and methods for wage payment; and

Navigation Act 1912 and ***Occupational Health and Safety (Maritime Industry) Act 1993*** to make consequential amendments.

The Committee has no comment on this bill.

Ozone Protection Amendment Bill 1998

This bill was introduced into the Senate on 9 December 1998 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

The bill proposes to amend the *Ozone Protection Act 1989* to effect Australia's obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer in relation to the importation, manufacture and export of hydrochlorofluorocarbons and methyl bromide.

The Committee has no comment on this bill.

Primary Industries (Customs) Charges Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to:

- replace provisions for the imposition of export charges made on produce of primary industry contained in 13 primary industries charge Acts;
- enable the Governor-General, on the advice of the Minister, to set the operative charge rate on primary industry products; and
- make minor technical amendments.

Setting a rate of levy by regulation
Schedule 14

Schedule 14 to this bill provides that primary industries charges may be imposed by regulation. This is a matter to which the Committee has often drawn attention, as there is a risk that a levy may in fact become a tax, and it is for the Parliament to set rates of taxation, not the makers of subordinate legislation.

Where a rate of levy needs to be changed frequently and expeditiously, the question arises as to whether this can best be done by subordinate legislation rather than by statute. Where a compelling case can be made out for the rate to be set by subordinate legislation, the Committee seeks to have the enabling Act prescribe a maximum figure, or a formula by which it can be set.

This bill does provide for a maximum amount of any charge.

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

Primary Industries (Excise) Levies Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to:

- replace provisions for the imposition of excise levies made on produce of primary industry contained in 27 primary industries levy Acts;
- enable the Governor-General, on the advice of the Minister, to set the operative levy rate on primary industry products; and
- make minor technical amendments.

Setting a rate of levy by regulation
Schedule 27

Schedule 27 to this bill provides that primary industries levies may be imposed by regulation. For the reasons noted above in relation to the Primary Industries (Customs) Charges Bill 1998, this is a matter to which the Committee has often drawn attention. However, again, this bill provides for a maximum amount of any levy.

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

Primary Industries Levies and Charges (Consequential Amendments) Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to:

- repeal 40 charge and levy Acts;
- make amendments consequential on the repeal of those charge and levy Acts and enactment of the new charge and levy bills;
- provide transitional arrangements from the old to the new charge and levy bills; and
- make minor technical amendments.

The Committee has no comment on this bill.

Privacy Amendment (Office of the Privacy Commissioner) Bill 1998

This bill was introduced into the House of Representatives on 9 December 1998 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to separate the Privacy Commissioner from the Human Rights and Equal Opportunity Commission and create a statutory Office of the Privacy Commissioner.

The Committee has no comment on this bill.

Quarantine Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *Quarantine Act 1908* to:

- extend the scope of quarantine to the environment and economic activities;
- require consultation with the Minister for Environment in certain circumstances;
- amend provisions relating to the managed risk approach;
- clarify pre-arrival reporting obligations;
- provide greater flexibility in relation to where a vessel is to perform quarantine;
- bring the detail of the Quarantine (Plants) Regulations into the Act and allow for the destruction of plants grown from plants that have been ordered into quarantine;
- provide that quarantine officers may be accompanied by animals and use the animal to assist them in the exercise of certain powers;
- enable an emergency response not only in relation to diseases that have been declared by proclamation to be quarantinable diseases, but also to unproclaimed diseases or pests;
- provide that offending goods can be required to be exported from Australia in order to encourage compliance with Australia's quarantine requirements and to keep quarantine issues off-shore;
- introduce a system of rectification enabling importers to rectify deficiencies that might otherwise cause their goods to be seized and disposed of;
- enable a consistent approach in relation to the special risks associated with overseas vessels and aircraft travelling in the Special Quarantine Zone and the Protected Zone;
- provide a framework for the issuing, revoking and suspension of approvals for commercial quarantine premises
- clarify that compliance agreements can be entered into in relation to procedures under the Act, regulations, proclamations, conditions on permits or approvals

and in connection with activities carried out in the performance of functions related to quarantine;

- redraft offence provisions so elements of an offence are distinguished and the rules in relation to mental and fault elements, the burden of proof and evidentiary provisions apply; and

- make miscellaneous and technical amendments.

Non-reviewable subordinate legislation
Schedule 1, items 51, 60, 110 and 141

Schedule 1 to this bill extensively amends the *Quarantine Act 1908*. Item 51 amends the Act to define a quarantinable pest as any pest declared by the Governor-General, by Proclamation, to be so declared. Item 60 amends the Act to enable the Minister to declare Special Quarantine Zones. Item 110 refers to Proclamations exempting certain animals or plants from import prohibitions. Item 141 inserts two new provisions dealing with entry by air from certain proclaimed places, and aircraft subject to quarantine landing at unauthorised places.

Each of these instruments is apparently legislative in character, and yet no provision seems to have been made for Parliamentary scrutiny of them. Therefore, the Committee **seeks the Minister's advice** on the reasons for exempting the above subordinate legislation from Parliamentary scrutiny. The Committee also **seeks the Minister's advice** on the feasibility of tabling, in each House of the Parliament, an annual report indicating the frequency with which such Proclamations and Declarations have been made, and outlining in broad terms the circumstances which have prompted their use.

> *Pending the Minister's advice, the Committee draws Senators' attention to these provisions, as they 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.*

Strict liability offences
Schedule 1, items 145, 153, 183, 242, 259, 263, 267 and 269

Items 145, 153, 183, 242, 259, 263, 267 and 269 of Schedule 1 to the bill specify that offences are to be offences of strict liability. While the Committee normally seeks advice about the creation of such offences, in each of the cases referred to

above it appears that the specification of the offence as one of strict liability is simply declaratory of the existing law. The reason for including an express specification would seem to be that item 312 of Schedule 1 applies Chapter 2 of *Criminal Code* to all offences against the Principal Act. Chapter 2 provides that offences are of strict liability only when expressly specified.

Nevertheless, the Committee **seeks the Minister's assurance** that the amendments noted above are no more than declaratory of the existing law. If so, the Committee also **seeks the Minister's advice** on why it is thought necessary to continue to impose strict criminal liability in the situations referred to above.

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

Abrogation of the privilege against self-incrimination
Proposed new section 79A

Items 295 proposes to insert a new section 79A in the Principal Act. This provision excludes the privilege against self-incrimination in certain circumstances, but provides that derivative use immunity applies to information or documents obtained as a result. The Committee has been prepared to accept that such an approach strikes a reasonable balance between the requirements of law enforcement and the protection of individual rights.

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

Sales Tax Legislation Amendment Bill (No. 1) 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following acts:

Sales Tax Assessment Act 1992 and ***Sales Tax (Exemptions and Classifications) Act 1992*** to provide exemptions from sales tax for:

- satellites, space launch vehicles and other commercial space equipment; and
- certain goods imported by, or on behalf of, non-Australian Sydney 2000 Olympic and Paralympic Family Members and delegations and participants in the Sydney 2000 Olympics, Paralympic and associated events; and

Sales Tax Assessment Act 1992 to:

- change the sales tax rules for the computer industry; and
- provide that goods imported into Australia under a temporary importation exemption, used in Australia, exported and then re-imported are subject to sales tax at the time of the later importation.

Indeterminate commencement
Subclause 2(2)

Subclause 2(2) provides that a number of items in Schedule 2 are to commence on a day to be fixed by Proclamation, with no further time fixed for automatic commencement or repeal.

The Committee has frequently commented on such provisions in the context of *Drafting Instruction No 2 of 1989* issued by the Office of Parliamentary Counsel. This *Drafting Instruction* states that, as a general rule, a restriction should be placed on the time within which an Act should be proclaimed. The commencement clause should fix either a period or a date after Royal Assent, together with a provision stating that, if no proclamation has been made, the Act either commences at the fixed time, or is to taken to be repealed at that time. The *Drafting Instruction* concludes that clauses providing for commencement by proclamation without the restrictions mentioned above should be used "only in unusual circumstances, where the commencement depends on an event whose timing is uncertain".

Paragraph 3.13 of the Explanatory Memorandum to this bill states that the new rules for exported goods will start from a date to be prescribed "to give exporters time to

apply for accreditation". If exporters were given a fixed time after Assent within which to apply for accreditation, then the amendments referred to in subclause 2(2) would commence as suggested within the Drafting Instruction. The Committee, therefore, **seeks the Minister's advice** as to why this commencement provision cannot be made more certain by fixing a time for exporters to apply for accreditation.

Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to inappropriately delegate legislative powers in breach of principle 1(a)(iv) of the Committee's terms of reference.

Superannuation (Entitlements of same sex couples) Bill 1998

This bill was introduced into the House of Representatives on 7 December 1998 by Mr Albanese as a Private Member's bill.

The bill proposes to amend the *Superannuation Industry (Supervision) Act 1993* to enable same sex couples to receive the same superannuation benefits as heterosexual couples.

The Committee has no comment on this bill.

Superannuation Legislation Amendment Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Bankruptcy Act 1966 to ensure that members of exempt public sector superannuation schemes within the meaning of the Superannuation Industry (Supervision) Act are afforded the same protection in respect of their superannuation entitlement as members of regulated superannuation funds from creditors;

Superannuation Industry (Supervision) Act 1993 to:

- include various arrangements outlined in the *Bankruptcy Act 1966* in the definition of ***insolvent under administration***;
- insert a definition of ***invest***;
- amend the definition of ***governing rules***;
- permit a trustee of a superannuation fund to amend the governing rules of the fund to enable the acceptance of binding death benefit nominations from certain members;
- apply the 'in-house asset' rules to individual sub-funds;
- treat unrelated groups of associated employer-sponsors separately for the purposes of the 'in-house asset' rules;
- apply alternative 'in-house asset' rules to certain defined benefit funds with large accumulated surpluses;
- improve the operation of gazettal requirements for orders disqualifying a person from being an approved auditor under the Act;
- remove an anomaly with the operation of the trust account provisions;
- clarify to whom contributions should be refunded when a member withdraws from a public offer fund during the cooling-off period;
- extend from 5 June 1997 to 5 June 1998 the transitional period during which tax file numbers already quoted for superannuation purposes may be taken to have also been quoted for surcharge purposes;

- enable the Insurance and Superannuation Commissioner (now the Australian Prudential Regulation Authority (APRA)) to revoke an approval of a trustee without ministerial approval where the revocation is requested by the trustee;

- enable superannuation benefits to be recovered under the *Australian Federal Police Act 1979* and the *Crimes (Superannuation Benefits) Act 1989*;

- improve the operation of APRA's and the Australian Securities and Investment Commission's monitoring and investigative powers;

- remove the right of a body corporate to claim privilege against self-incrimination in respects of certain issued notices; and

Superannuation (Resolution of Complaints) Act 1993 to:

- enable the Superannuation Complaints Tribunal to be constituted by one, two or three members and to confer responsibility for the operation and administration for the Tribunal on the Tribunal Chairperson;

- ensure that certain provisions apply to complaints about trustees decisions to admit persons to life policies made prior to 12 December 1995; and

- clarify the scope of a trustee, insurer or RSA provider's duty to notify potential persons who may have an interest in the payment of death benefits and to reduce the penalty for failure to provide notification.

Retrospective effect
Subclause 2(3) and Schedule 2, Part 3

By virtue of subclause 2(3), the amendments proposed by Part 3 of Schedule 2 to this bill are to commence retrospectively on 5 June 1997. However, paragraphs 98 and 99 of the Explanatory Memorandum note that the amendments are beneficial to employees as members of superannuation funds.

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

Taxation Laws Amendment Bill (No. 4) 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury] The bill was first introduced into Parliament on 2 July 1998 as Schedule 3 to the Taxation Laws Amendment Bill (No 5) 1998, but lapsed when Parliament was prorogued for the election.

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1936 to:

- widen the interest withholding tax (IWT) exemption provided by removing, for debentures issued by companies, the present requirements that they be issued outside Australia and that the interest be paid outside Australia;

- allow the issue of debentures or interests in debentures to Australia residents and allow the IWT exemption;

- extend the definition of ***company*** to include a company acting in the capacity of a resident trustee, provided the trust is not a charitable trust and the beneficiaries of the trust are companies;

- make a consequential amendment relating to the issue of bearer debentures to residents operating a business offshore;

- extend the range of entities eligible to register as offshore banking units;

- provide a tax exemption for income and capital gains of overseas charitable institutions managed by an offshore banking unit;

- extend the range of eligible offshore banking unit activities;

- remove an anti-avoidance measure preventing Australia being used as a conduit to channel loans to other countries;

- reduce the capital gains tax liability where non-residents dispose of interests in offshore banking unit offshore investment trusts;

- provide a foreign tax credit for foreign tax paid by Australian resident offshore banking units regardless of whether a double tax agreement applies;

- remove the requirement that offshore banking units maintain separate nostro and vostro accounts for transactions;

- reduce the rate of offshore banking unit withholding penalty tax for breaches of the IWT concession from 300 per cent to 75 per cent;

- enable Australian subsidiaries of a foreign bank to raise certain ITW exempt funds and on-lend those funds to a related Australian branch without affecting the subsidiary's thin capitalisation position;

- provide an exemption from the foreign investment fund (FIF) measures for interests in certain US;

- change the calculation method in FIF measures; and

- make consequential amendments to provisions relating to taxing trusts;

- require that the forgiven amount of a debt be applied, where relevant, to reduce unrecouped net capital losses in respect of all years of income before the forgiveness year of income, rather than the immediately preceding year of income;

- require that where a taxpayer incurs a net capital loss in a year of income earlier than the forgiveness year of income, and the loss is reduced by the operation of the debt forgiveness provisions, the loss will also be reduced for the purposes of the capital gains tax provisions;

- prevent franking credit trading and misuse of the intercorporate dividend rebate by denying the franking benefit or intercorporate dividend rate from a dividend where the taxpayer does not satisfy certain rules;

- limit the source of franking credits available for trading by introducing a new rule; and

- prevent franking credit trading and misuse of the intercorporate dividend rebate by denying the franking benefit or intercorporate dividend rate from a trust or partnership distribution attributable to a dividend where the distribution is equivalent to interest;

Income Tax Assessment Act 1997 to:

- set a common base for the depreciation deductions for plant that can be claimed by exempt entities which become taxable and by taxable entities which purchase plant from an exempt entity in connection with the acquisition of a business; and

- allow deductions for gifts of $2 or more made to the Menzies Research Centre Public Fund.

Retrospective effect
Subclause 2(2) and Schedule 4, item 24

By virtue of subclause 2(2), item 24 of Schedule 4 is to commence retrospectively on 16 April 1998. This item modifies the definition of a family trust in Schedule 2F to the *Income Tax Assessment Act 1936* "to include a category of trust where the only group able to benefit under the trust are family members" (whether or not they are able to control the trustee). The Explanatory Memorandum gives no indication of the reason for retrospectivity in this instance. The Committee, therefore, **seeks the Treasurer's advice** as to the reasons for retrospectivity in this instance.

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

Retrospective effect
Schedule 1, items 39 and 46

Schedule 1 to the bill, which deals with amendments concerning the interest withholding tax exemption, the offshore banking unit regime, the foreign investment fund measures and the thin capitalisation provisions of the Act, is to apply from 2 July 1998 (see items 39 and 46). However, the amendments proposed by this Schedule are beneficial to taxpayers.

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

Retrospective effect
Schedule 5

Schedule 5 to the bill is to apply from 13 May 1997 (being the date of the 1997 Budget). The provisions in this Schedule are identical with those in Schedule 13 of Taxation Laws Amendment Bill (No 4) 1998, which was introduced into the House of Representatives on 1 April 1998, and on which the Committee commented in *Alert Digest No 5 of 1998*. Those comments focussed on that bill as apparently in breach of the '6 month rule'.

The Assistant Treasurer responded to those comments in a letter dated 11 August 1998 (copy appended to this *Digest*). In that letter, the Assistant Treasurer stated that:

- the delay in introducing the bill into the Parliament was caused, in part, by lengthy consultations with taxpayer groups in relation to the franking credit trading measure generally, and also by the need to give priority to other related measures (such as the anti-streaming, general anti-avoidance and 45 day rules);

- the extensive consultation held with key groups including the tax profession, industry groups and the International Banks and Securities Association between May 1997 and March 1998 enabled concerns relating to the operation of the measure to be assessed leading to a number of changes;

- on 8 August 1997, the Treasurer, in a Press Release, announced 3 major changes to the measure, and further consultations led the Government to extend the period of time that companies could be held by non-residents from 6 months to 12 months before franking credits were cancelled; and

- should the date of effect be moved forward, companies that had so far complied with the rules could be unfairly prejudiced, and unfairness would be created regarding the commencement date of other franking credit measures which applied from 13 May 1997.

Given this explanation, the Committee makes no further comment on this provision.

Retrospective effect
Schedule 6

Schedule 6 to the bill, which amends the Act to allow income tax deductions for gifts of $2 or more made to the Menzies Research Centre Public Fund, will apply from 2 April 1998. The Explanatory Memorandum states that this was the date after which this measure was intended to operate when it was first introduced into the previous Parliament. Elsewhere, the Explanatory Memorandum notes that this proposal was first announced by the Treasurer's in his Press Release No 102, dated 10 October 1996.

The measure included in Schedule 6 is clearly beneficial to taxpayers, and would not normally be the subject of further comment from the Committee. However, the significant lapse of time between the date of announcement and the date of effect of this measure prompts the Committee to **seek the Treasurer's advice** as to whether

proposed changes to the tax laws which are beneficial to taxpayers ought not to be applied from the date of their announcement in the same manner as occurs with changes to the taxation laws which seek to increase revenue.

While seeking the Treasurer's advice, the Committee makes no further comment on this provision.

Legislation by press release
Schedules 3, 4 and 7

By virtue of subitem 33(1), Schedule 3 to the bill (which deals with the way in which depreciation is to be calculated on plant owned by a previously exempt entity) will, in general terms apply from 4 August 1997. This date has been chosen as the date on which the Treasurer issued a Press Release on the matters covered by this Schedule.

By virtue of item 25, Schedule 4 to the bill (which seeks to prevent franking credit trading and misuse of the intercorporate dividend rebate) will, in general terms, apply from 1 July 1997. Some provisions are to apply from 13 May 1997 (the night of the 1997 Budget) and others from 31 December 1997 (being the date on which the Assistant Treasurer issued an amending Press Release).

Schedule 7 to the bill (which seeks to ensure that certain trust or partnership distributions which consist of dividends, but which are effectively in the nature of interest, do not carry franking benefits or receive the intercorporate dividend rebate) will also commence on 13 May 1997 – the night of the 1997 Budget.

In each case the legislation may effectively be regarded as 'legislation by press release'. In each case, the application date is well outside the 6 months referred to in the Senate resolution of 8 November 1988. The Committee, therefore, **seeks the Treasurer's advice** as to why it has taken between 16 and 19 months from the date of the Treasurer's announcements for the introduction of legislation giving effect to those announcements.

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

Taxation Laws Amendment Bill (No. 5) 1998

This bill was introduced into the House of Representatives on 10 December 1998 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to:

amend the ***Income Tax Assessment Act 1936*** to:

- align the remittance dates for medium and small PAYE, PPS and RPS payers from the 7th to the 21st of the month;
- enable anti-avoidance provisions to apply to schemes designed to acquire or generate foreign tax credits; and
- ensure that penalties applicable to anti-avoidance schemes will apply to foreign tax credit schemes; and

amend various Acts to:

- replace the existing late payment penalty provisions with a tax deductible general interest charge on outstanding tax debts;
- introduce a penalty for failing to notify the Commissioner of an obligation to remit a source deduction or sales tax;
- introduce a penalty for failing to give the Commissioner an annual reconciliation statement of source deductions made; and
- make other consequential amendments in relation to the above measures; and
- introduce a system of running balance style accounts to account for and administer debts under the sales tax, PAYE, PPS and RPS arrangements for the year commencing 1 July 1999.

Retrospective effect
Subclauses 2(5) to (7) and Schedule 3, items 3 to 8

By virtue of subclauses 2(5) to (7), items 3 to 8 in Schedule 3 to the bill will have some retrospective effect. However, in each case, the amendments proposed by those items merely correct drafting errors in earlier legislation, and make no substantive changes to the law.

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

Wildlife Protection (Regulation of Exports and Imports) Amendment Bill 1998

This bill was introduced into the Senate on 9 December 1998 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

The bill proposes to amend the *Wildlife Protection (Regulation of Export and Imports) Act 1982* to implement Australia's obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora by strengthening controls on the illegal import, export and possession of products that contain endangered species in their ingredients.

The Committee has no comment on this bill.

Workplace Relations and Other Legislation Amendment (Superannuation) Bill 1998

This bill was introduced into the House of Representatives on 3 December 1998 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Employment, Workplace Relations and Small Business]

The bill proposes to amend the *Workplace Relations Act 1996* and the *Superannuation Guarantee (Administration) Act 1992* to:

- provide that the Australian Industrial Relations Commission (AIRC) will not be permitted to deal with disputes about superannuation by arbitration;
- provide that the AIRC will not be permitted to prevent or settle disputes about superannuation by making awards or orders to maintain the settlement of such disputes by varying awards or orders;
- provide that the AIRC will be precluded from making an "exceptional matters order" about superannuation;
- make transitional and consequential amendments.

The Committee has no comment on this bill.

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. The following Table sets out the penalties for such offences in the legislation covered in this *Digest.*

TABLE

Act	Section/Subsection	Offence	Penalty
Taxation Administration Act 1953	65(1)	Fail to provide information, give evidence or produce documents	$2000 (first offence); $4000 (second offence); $5000 and/or 12 months (subsequent offence)
Trade Practices Act 1974	75AY(4)	Fail to provide information or produce documents; intentionally or recklessly provide false or misleading information or documents	20 penalty units
Export Control Act 1982	11P(4) 11Q(3)	Fail to provide information or produce documents Fail to provide information or produce documents relating to the export of prescribed goods	30 penalty units 12 months
Human Rights and Equal Opportunity Commission Act 1986	46PM	Fail to provide information or produce documents	10 penalty units

National Measurement Act 1960	18ZR(3)	Fail to answer questions or produce documents	200 penalty units
	18ZR(5)	Knowingly give false or misleading information	12 months
Quarantine Act 1908	28(5), (6) and (7)	Fail to answer question; fail to verify an answer by written declaration	50 penalty units
	28(8) and(9)	Knowingly give false or misleading answer	5 years
	28(10)	Fail to correct an incorrect answer	50 penalty units
	70A(3)	Fail to answer question re searched goods	60 penalty units
	70A(4)	Knowingly provide false or misleading answer re searched goods	2 years
	74C(1)	Fail to answer question or produce document	1 year
	74C(2)	Fail to deliver a sample	1 year
	74C(3)	Knowingly provide false or misleading answer	2 years
	74C(4)	Knowingly produce false or misleading document	2 years

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 2 of 1999

17 February 1999

ISSN 1329-668X

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

CONTENTS

• **The Committee has commented on these bills**

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

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Airports Amendment Bill 1999

This bill was introduced into the House of Representatives on 11 February 1999 by the Minister for Transport and Regional Services. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to amend the *Airports Act 1996* to:

- extend the time available to some airport lessees to have access undertakings to airport services approved by the Australian Competition and Consumer Commission;
- capture activities of a non-structural nature that intrude into protected airspace and may impair the ability to pilot an aircraft; and
- make technical amendments.

The Committee has no comment on this bill.

Bounty (Ships) Amendment Bill 1999

This bill was introduced into the House of Representatives on 10 February 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to amend the *Bounty (Ships) Act 1989* to:

- extend the payment of the shipbuilding construction bounty from 1 July 1999 until 31 December 2000 at a rate of three per cent;
- establish a phasing arrangement for vessels which are contracted for sale on or before 31 December 2000 and delivered on or before 31 December 2003;
- provide transitional arrangements;
- provide for the payment of a research and development bounty (the Shipbuilding Innovation Scheme (SIS)) to registered shipbuilders for eligible research and development expenditure;
- provide that SIS apply only to construction and modification completed on or before 30 June 2004; and
- make amendments consequential on new administrative arrangements.

The Committee has no comment on this bill.

Customs Tariff Amendment Bill (No. 1) 1999

This bill was introduced into the House of Representatives on 11 February 1999 by the Minister representing the Minister for Industry, Science and Resources. [Portfolio responsibility: Justice and Customs]

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

- phase down the customs rate of duty for textiles, clothing and footwear from 1 January 2005; and
- repeal the Textiles, Clothing and Footwear Import Credits Scheme from 30 June 2000.

The Committee has no comment on this bill.

Financial Management Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 10 February 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to enable Commonwealth financial legislation to move to an integrated accrual budgeting, resource management and financial reporting framework primarily by:

- repealing provisions dealing with "fund accounting" and establishing "Special Accounts" within the Consolidated Revenue Fund (CRF);
- effecting the merger of the Loan Fund, Reserved Money Fund and Commercial Activities Fund with the CRF;
- removing the requirement for debiting and crediting various transactions to the CRF;
- repealing the *Loan Consolidation and Investment Reserve Act 1955*; and
- removing the requirement for monthly reporting of the cash transactions of funds, with arrangements for a phase-in of accrual based monthly statements from 1 July 1999.

Insufficient Parliamentary scrutiny
Proposed new section 22

Item 17 in the Schedule to this bill proposes to insert a new section 22 in the *Financial Management and Accountability Act 1997*. This section will apply to determinations made by the Finance Minister relating to the establishment of "Special Accounts". Under proposed section 22, such determinations are disallowable instruments, but the disallowance motion must be passed within 5 sitting days of the tabling of the determination. Under proposed subclause 22(4), if no such resolution is passed, the determination becomes effective on the day immediately after the last day on which such a resolution could have been passed.

The Committee notes that the usual period for disallowance (under the *Acts Interpretation Act 1901*) is 15 days. In principle, a reduction in this period may constrain the ability of the Parliament to undertake proper scrutiny of disallowable instruments. Any such constraint should be justified by weighty reasons.

The Committee notes that proposed section 22 is in much the same form as the existing provision. This provision was considered by the Committee in *Alert Digest No 1 of 1997*. In its consideration of that provision, the Committee observed that:

- subclause 22(4), which provides that a determination is not to come into effect until after the expiry of the disallowance period, differs from the usual approach under which a determination takes effect before the disallowance period and remains operative unless it is disallowed; and

- the Explanatory Memorandum notes that subclause 22(4) thus avoids the legal and practical problem that drawings against a lawfully available appropriation cannot be subsequently disallowed and recovered.

With regard to the existing section 22, the Committee concluded that it "achieves the necessary balance between the need to allow sufficient time for Parliamentary scrutiny of the determinations and the need not to delay unduly legitimate financial transactions of the Government".

The Explanatory Memorandum to the current bill states that proposed section 22 "serves the same purpose as the repealed section 22, but refers to determinations relating to Special Accounts" (which are intended to replace the Funds regulated by the existing provision).

The Committee's acceptance of the existing provision is equally applicable to the provision which proposes to replace it. A shorter disallowance period, together with a qualification that ensures that the subordinate legislation cannot take effect until after that disallowance period has passed, seems to achieve an appropriate balance between the financial needs of government and the need for Parliamentary scrutiny.

However, the Committee is concerned that the Parliament may not be aware that a shorter disallowance period applies to such determinations. Where such determinations are introduced, the Committee suggests that the Parliament should be specifically informed that they are subject to a disallowance period of less than 15 days. Indeed, as a matter of principle, the Parliament should be informed of shorter disallowance periods whenever they apply to disallowable instruments tabled in either House.

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

Further 1998 Budget Measures Legislation Amendment (Social Security) Bill 1999

This bill was introduced into the House of Representatives on 11 February 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the following Acts:

Social Security Act 1991 to:

- abolish the concept of "special maintenance";
- provide for a Community Development Employment Projects (CDEP) participant supplement of $20 per fortnight;
- provide access for CDEP workers to rent assistance, bereavement payments, telephone allowance; pharmaceutical allowance and the health care card;
- rationalise income tests in relation to CDEP wages to provide for a direct deduction up to the equivalent of the maximum basic rate of allowance;
- introduce a special employment advance for people in financial hardship moving from social security payments into work where money has been earned but not yet paid;
- abolish the employment entry payment and narrow application of the education entry payment provisions;
- establish a one-off crisis payment to assist people in financial hardship when they are forced to leave their home and establish a new one due to a limited number of circumstances;
- extend the application of the payment of a social security pension to people overseas to people who have transferred to an age pension whilst overseas;
- amend provisions relating to the rates of pensions payable under portability arrangements;
- allow the waiver of some debts arising under an international social security agreement;
- ensure that persons who seek, and are offered, work outside of their local area will be required to accept that work, or be subject to an activity test breach;

- tighten arrangements for unemployed persons who move to an area of lower employment prospects;

- remove inconsistencies in the application of the liquid assets test waiting period to claims for newstart allowance and sickness allowance where the claimant or their partner is an education leaver;

- introduce a two-tiered payment structure for austudy pensioner education supplement, geared to the study load taken by the student;

Social Security Act 1991 and ***Health Insurance Act 1973*** to ensure the newly arrived residents' waiting period is consistently applied to all prospective migrants and that the waiting period is served in Australia; and

Health Insurance Act 1973 to make a minor technical correction.

The Committee has no comment on this bill.

Taxation Laws Amendment (Software Depreciation) Bill 1999

This bill was introduced into the House of Representatives on 11 February 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Assessment Act 1936* and *Income Tax Assessment Act 1997* to:

- allow a taxation deduction to be claimed over 2½ years for spending incurred in acquiring, commissioning or developing software; and
- allow an immediate deduction for expenditure in acquiring new software or substantially rebuilding current software which has the predominant nature of ensuring Y2K compliance.

Retrospective effect
Item 21

Item 21 in the Schedule to this bill states that the amendments made by this Schedule apply to expenditure on software after 10am on 11 May 1998 – the day before last year's Budget. However, these amendments are beneficial to taxpayers.

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

Textile, Clothing and Footwear Strategic Investment Program Bill 1999

This bill was introduced into the House of Representatives on 11 February 1999 by the Minister representing the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to establish the framework for the implementation of a five year Textile, Clothing and Footwear Strategic Investment Program.

Abrogation of the privilege against self-incrimination
Clause 36

Clause 36 of this bill, if enacted, will abrogate the privilege against self-incrimination. However, proposed subclause 36(2) states that any information obtained, either directly or indirectly, as a result of compulsion will be inadmissible in evidence in criminal proceedings against the person compelled (other than proceedings for making a false statement).

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

Year 2000 Information Disclosure Bill 1999

This bill was introduced into the House of Representatives on 11 February 1999 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to provide for voluntary disclosure and exchange of information about Year 2000 problems, remediation efforts and compliance.

The Committee has no comment on this bill.

Youth Allowance Consolidation Bill 1999

This bill was introduced into the House of Representatives on 11 February 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the:

- *Social Security Act 1991* to incorporate provisions contained in the Social Security (Fares Allowance) Rules 1998, Social Security Student Financial Supplement Scheme 1998, the Social Security (Family Actual Means Test) Regulations 1998; and

- *Social Security Act 1991* and five other Acts to make consequential and technical amendments related to the implementation of the youth allowance package.

Retrospective effect
Subclauses 2(3) to (13)

Schedule 4 to this bill proposes to amend the *Social Security Act 1991* "to address certain technical issues identified during the implementation of the youth allowance package". The Explanatory Memorandum notes that these amendments make "minor drafting clarifications and technical refinements to ensure that the youth allowance package operates in line with the original policy intentions, including the alignment where appropriate with the pre-existing AUSTUDY provisions". By virtue of subclauses 2(3) to (13), the items in Part 2 of Schedule 4 are to be taken to have commenced at various times on 1 July 1998.

Schedule 5 to the bill amends legislation other than the Social Security Act to reflect the new placement and structure of the student financial supplement scheme provisions. By virtue of subclause 2(3), Part 2 of Schedule 5 is also to be taken to have commenced on 1 July 1998.

By virtue of subclause 2(14), Part 3 of Schedule 4 is to be taken to have commenced on 20 September 1998, and by virtue of subclause 2(15), Part 4 of Schedule 4 is to be taken to have commenced on 1 January 1999.

While it is likely that the various amendments proposed in these Schedules are technical or consequential, and make no substantive change to the law, the Explanatory Memorandum does not clarify the need for retrospectivity. The Committee, therefore, **seeks the Minister's advice** on the need for retrospectivity in the application of Schedules 4 and 5 of the bill.

Pending the Minister's advice, 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.

Use of tax file numbers
Proposed new sections 1061ZZBP and 1061ZZBQ

Schedule 2 to this bill proposes to amend the *Social Security Act 1991* (the Act) to incorporate the student financial supplement provisions currently contained in separate legislation. The Explanatory Memorandum notes that, for the most part, "there is no change in effect between the provisions of the Financial Supplement Scheme and those of the new Chapter 2B [of the Social Security Act]".

Among the provisions to be incorporated in Chapter 2B of the Act are proposed new sections 1061ZZBP and 1061ZZBQ. These sections, if enacted, would make the payment of financial assistance to category 2 students conditional upon the recipient providing either his or her tax file number, or that of his or her parent or parents.

With regard to these provisions, the Explanatory Memorandum states that "the tax file number provisions have been put into the standard Social Security Act form". It further states that "these provisions are applicable only to category 2 students because category 1 students are already subject to such rules under their substantive payments".

The Committee recognises that these clauses are not new, and have been included to minimise the opportunity for fraud against the Commonwealth. The provision of a tax file number is now a common requirement throughout social security (and other related) legislation. However, the Committee notes the words of the then Treasurer in the Parliament on 25 May 1988 when referring to the proposed introduction of the tax file number scheme:

> The only purpose of the file number will be to make it easier for the Tax Office to match information it receives about money earned and interest payments.
>
> This system is for the exclusive and limited use of the Tax Office – it will simply allow the better use of information the Tax Office already receives.

The Committee also notes the words of the then member for Kooyong in the Parliament on 21 December 1990, that "since the inception of the tax file number in

1988 as an identifying system, we have seen the gradual extension of that system to other areas by way of a process sometimes referred to as function creep".

This process has continued and grown over a number of years, irrespective of the governing party of the day, and in spite of assurances that it would not occur. The provisions of this bill represent yet another example of this process.

> *In these circumstances, 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.*

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. The following Table sets out the penalties for such offences in the legislation covered in this *Digest.*

TABLE

Act	Section/Subsection	Offence	Penalty
Textile, Clothing and Footwear Strategic Investment Program Bill 1999	34(3)	Fail to comply with a notice requiring information or the giving of evidence	20 penalty units
	45	Knowingly provide false or misleading information	12 months
	46	Knowingly provide false or misleading evidence	12 months
	47	Knowingly provide false or misleading document	12 months
Social Security Act 1991	1061ZZBW	Fail to comply with notice requiring information as to stated events or changed circumstances	6 months

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 3 of 1999

10 March 1999

ISSN 1329-668X

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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Assistance for Carers Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 17 February 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the *Social Security Act 1991* to extend the carer payment to people who are caring for an adult with a level of disability that is not sufficient to qualify their carer for income support. Further, the bill proposes to combine the child disability allowance and domiciliary nursing care benefit to provide a single income supplement for carers of adults and children (the carer allowance). Consequential and technical amendments are made to nine other Acts.

Retrospective effect
Subclauses 2(3) and (4)

By virtue of subclauses 2(3) and (4), some provisions of this bill are to commence retrospectively. However, the Explanatory Memorandum notes that the amendments referred to in subclause 2(3) are technical in nature, and make no substantive change to the law, while the amendments referred to in subclause 2(4) are beneficial to taxpayers.

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

Australian Capital Territory (Planning and Land Management) Amendment Bill 1999

This bill was introduced into the Senate on 17 February 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Regional Services, Territories and Local Government]

The bill proposes to amend the *Australian Capital Territory (Planning and Land Management) Act 1988* to extend the maximum term of an Australian Capital Territory estate to 999 years and remove the requirement for prescribing periods longer than the current 99 years.

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.

Human Rights Legislation Amendment Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 17 February 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to provide for the reorganisation of the Human Rights and Equal Opportunity Commission (HREOC) by:

- renaming HREOC as the Human Rights and Responsibilities Commission (HRRC);
- providing for an executive structure consisting of a President and three Deputy Presidents;
- making education, dissemination of information on human rights and assistance to business and the general community central functions of the HRRC;
- creating an Office of the Privacy Commissioner as a separate statutory authority;
- enabling the Attorney-General to approve an intervention by the HRRC in court proceedings which involve human rights or discrimination issues;
- abolishing the Community Relations Council and providing for the establishment of advisory committees;
- providing for the repeal and consolidation into one delegation provision in the renamed Act for the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*;
- not allowing the HRRC to recommend the payment of damages or compensation following inquiries into certain types of complaints under the renamed Act;
- enabling the appointment of a person aged over 65 years as a member of the HRRC or for such a person's term to extend beyond their 65th birthday; and
- makes consequential amendments.

The Committee has no comment on this bill.

National Health Amendment Bill (No. 1) 1999

This bill was introduced into the Senate on 17 February 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *National Health Act 1953* to prevent drugs supplied under the Pharmaceutical Benefits Scheme (PBS) from being inappropriately carried out of or exported from Australia. Further, the bill proposes to allow a person (the exporter) to take a reasonable quantity of PBS drugs overseas for the personal treatment of the exporter or another person, such as a child or elderly relative, accompanying the exporter.

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.

Radiocommunications Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 18 February 1999 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the *Radiocommunications Act 1992* and the *Radiocommunications Taxes Collection Act 1983* to:

- allow the Australian Communications Authority (ACA) to regulate communications with space objects;
- enable the ACA to regulate reflectors as radiocommunications transmitters or radiocommunications receivers;
- enable the ACA and the Australian Broadcasting Authority to make an agreement allowing the ACA to issue radiocommunications licences in the broadcasting services bands;
- allow the Minister to direct the ACA to limit to zero the amount of spectrum that a specified person may acquire;
- require the ACA to include a condition in spectrum licences which ensures that Australian tax applies to income, profits or gains which are attributable to a spectrum licence;
- require that a frequency assignment certificate states that correct frequency coordination procedures have been followed before the issue of apparatus licenses;
- enable the ACA to delegate the power to issue certificates of proficiency to persons who have become qualified operators of transmitters;
- ensure that when a licence is renewed it commences from the time of expiry;
- enable the ACA to make conditions relating to matters existing or arising at, before or after the time of accreditation;
- require that all relevant documents relating to products' standards are inspected when the ACA audits compliance documentation assembled by manufacturers or importers;

- enable the ACA to determine that bodies conducting approved examinations, issuing certificates of proficiency, and performing accreditation and approving functions under the Act may charge for the services they provide to users of radiocommunications services;

- simplify and reduce the penalties payable in lieu of prosecution for offences committed under the Act and allow a penalty in lieu of prosecution to be imposed on a manufacturer or importer who fails to meet requirements including retaining appropriate records concerning a device covered by mandatory ACA standards; and

- ensure that apparatus licence tax imposed on the anniversary of the day on which the instrument came into force is payable on that anniversary.

Delegation of power to "a body"
Proposed new subsection 122A(1)

Item 13 of Schedule 2 to this bill proposes to insert a new subsection 122A(1) in the *Radiocommunications Act 1992*. This provision will allow the Australian Communications Authority (ACA) to delegate the power to issue a certificate of proficiency in the operation of a specified class of transmitters to "a body or organisation". Neither the proposed new section, nor the existing subsection 122(2) to which it refers, specifies any qualifications or attributes that such a body or organisation should possess, other than that it be approved by the ACA.

The Explanatory Memorandum observes that this new power to delegate "significantly reduces the administrative burden on the ACA". It also notes that, under proposed new subsection 122A(2), the delegate "is not entitled to make a final decision in refusing to issue a certificate of proficiency" – where the delegate decides not to issue a certificate, he or she must refer the application to the ACA for decision. This is intended to ensure that "any person who is refused a certificate can avail themselves of the review rights in Part 5.6 of the Act".

The Committee has frequently drawn attention to provisions which delegate powers to "a person", with no further limit on the categories of potential delegates. Similar considerations apply where powers are delegated to "a body or organisation". In this regard, the Committee draws attention to the fact that this delegated body may also be permitted, by virtue of proposed new section 298A (to be inserted by item 21), to charge fees for conducting approved examinations and issuing certificates of proficiency.

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

There are a number of possible approaches to limiting administrative powers of such apparent width. One approach that the Committee has noted in the past has been to make approval of the delegated body or organisation subject to Parliamentary scrutiny – for example, by including it in a disallowable instrument to be tabled in each House of the Parliament. The Committee, therefore, **seeks the Minister's advice** as to why the appointment of a body delegated to issue certificates of proficiency under section 122A is not further defined or qualified in some way, and whether such an appointment should be subject to Parliamentary scrutiny.

> *Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it may be considered to make rights and liberties unduly dependent on insufficiently defined administrative powers in breach of principle 1(a)(ii) of the Committee's terms of reference.*

Legislation by press release
Schedule 3, item 1

By virtue of item 1 of Schedule 3 to the bill, the amendments to be made by items 8 and 9 of Schedule 2 are to apply from 11 March 1998. This is the date the Treasurer issued a press release setting out measures to ensure that Australia was able to assert its taxing rights over income from the use of spectrum licences owned by non-residents.

These amendments will obviously widen the scope of persons who may be liable to Australian tax. As such, they are examples of 'legislation by press release' which fall within the resolution of the Senate of 8 November 1988. This resolution, which deals specifically with tax legislation states 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 the 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".

As more than 6 months have elapsed between the date of the announcement and the introduction of the bill, and as the Committee is not aware of any publication of a draft bill within that period, the Committee draws these provisions to the attention of Senators and **seeks the Minister's advice** on the matter.

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

Retrospective effect
Schedule 3, item 3

The amendments referred to in item 3 of Schedule 3 will, by virtue of that item, have some retrospective effect. However, the effect of these amendments is to reduce the level of various penalties.

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

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

Radiocommunications (Receiver Licence Tax) Amendment Bill 1999

This bill was introduced into the House of Representatives on 18 February 1999 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the *Radiocommunications (Receiver Licence Tax) Act 1983* to provide that licence tax instalments are due on the date the licence commenced, rather than the anniversary of the date of issue of the licence.

The Committee has no comment on this bill.

Radiocommunications (Transmitter Licence Tax) Amendment Bill 1999

This bill was introduced into the House of Representatives on 18 February 1999 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the *Radiocommunications (Transmitter Licence Tax) Act 1983* to provide that licence tax instalments are due on the date the licence commenced, rather than the anniversary of the date of issue of the licence.

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.

Therapeutic Goods Legislation Amendment Bill 1999

This bill was introduced into the Senate on 17 February 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Health and Aged Care]

The bill proposes to provide a new framework for the regulation and management of complementary medicines by amending the *Therapeutic Goods Act 1989* and the *Therapeutic Goods Amendment Act 1997* to:

- amend key definitions to delineate between foods, complementary medicines and other medicines such as over the counter and prescription medicines;
- establish the existing Complementary Medicines Evaluation Committee as a statutory committee;
- enable sponsors of relatively low-risk products to market those products without delay by enabling the efficient listing of the products on the Register;
- ensure that all sponsors of listable goods must hold evidence to substantiate therapeutic claims made in the market place;
- describe offences and penalties in relation to the publication of certain advertisements in print media; and
- establish a statutory body, the National Drugs and Poisons Schedule Committee.

Retrospective effect
Subclauses 2(3)

By virtue of subclause 2(3), the amendment proposed by Schedule 2 will commence retrospectively, immediately after the commencement of some earlier amending legislation. However, this amendment is technical in nature, its purpose being simply to correct a drafting error.

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

Insufficient Parliamentary scrutiny
Proposed new subsections 17(5) and (6)

Item 10 of Schedule 1 to the bill proposes to insert a new subsection 17(5) in the *Therapeutic Goods Act 1989*. This subsection enables the Minister, by publishing a *Gazette* notice, to add to the Register of listed goods. Proposed new subsection 17(6) then provides for such a notice to cease to have effect if the regulations are amended to include those goods as either listed or registered goods. The Explanatory Memorandum notes that these amendments should "reduce delays in the marketing of low-risk products by allowing these to be included in the Register as listed goods, rather than registered goods".

However, it appears that one effect of proposed new subsection 17(5) is that it may enable additions to the Register of listed goods to be made without the need to include them in regulations. If so, this may avoid Parliamentary scrutiny of such additions. The Committee, therefore, **seeks the Minister's advice** on whether additions to the Register for listed therapeutic goods under proposed subclause 17(5) will be subject to parliamentary scrutiny.

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

Definitions and interpretation
Proposed new Part 4A

Item 12 of Schedule 1 to the bill proposes to insert a new Part 4A in the *Therapeutic Goods Act 1989*. This new Part, which previously resided in the Therapeutic Goods Regulations, deals with the advertising of designated therapeutic goods.

As a general observation, the Committee notes that it is difficult to understand the meaning of many of these provisions unless the reader has a set of the Therapeutic Goods Regulations close at hand.

Secondly, proposed new section 42B, which contains relevant definitions, defines ***mainstream media*** as "any magazine or newspaper for consumers containing a range of news, public interest items, advertorials, advertisements or competitions". The Committee notes that, in some respects, this definition is broad – possibly extending to magazines containing a range of competitions – and yet does not refer to other common means of advertising therapeutic goods, such as on the Internet.

The definition also refers to "consumers" with no further indication of the products or services likely to be consumed. The definition also includes the word "advertorial", with no further explanation of its meaning. While this term is apparently referred to in guidelines for *Advertising Therapeutic Goods to the Public*, it is appropriate that it should be more formally defined or referred to in the legislation itself.

The Committee is aware of some previous correspondence on these issues between the Senate Standing Committee on Regulations and Ordinances and the Parliamentary Secretary to the Minister for Health and Family Services as incorporated in the Senate *Hansard* on 13 May 1998. However, the Committee **seeks the Minister's advice** on why these drafting issues have not been clarified in introducing this legislation.

Strict liability and other offences
Proposed new sections 42C and 42D

Proposed new section 42C deals with offences relating to the publication of non-approved advertisements for therapeutic goods. Proposed subsection 42C(7) provides that these are strict liability offences. However, the Explanatory Memorandum provides no guidance as to the need for imposing strict liability in these circumstances.

Proposed subsection 42C(1) states that section 42C "does not apply to a publisher in respect of an advertisement received by the publisher for publication or insertion in the ordinary course of business". Publishers are instead subject to proposed new section 42D, which creates an offence of 'knowingly or recklessly publishing or inserting a non-approved advertisement'. A ***publisher*** is defined as "a person whose business it is to publish or insert, or to arrange for the publication or insertion of, advertisements in any publication".

Given that publishers are not subject to section 42C, it is not entirely clear to whom that section is intended to apply. For example, an advertising agency is, arguably, within the definition of a publisher (being in the business of arranging for the publication of advertisements) and so outside the scope of section 42C. Individuals may publish advertisements, but these are likely to be classified advertisements only.

The Committee therefore, **seeks the Minister's advice** on why proposed section 42C creates offences of strict liability, and on those persons who are likely to be subject to those offences.

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

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

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 4 of 1999

24 March 1999

ISSN 1329-668X

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

(i) trespass unduly on personal rights and liberties;

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(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

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Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999

This bill was introduced into the Senate on 10 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

The bill proposes to give effect to the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions by amending the *Criminal Code Act 1995* to:

- prohibit providing or offering a benefit which is not legitimately due to another person with the intention of influencing a foreign public official in the exercise of their duties in order to obtain or retain business or business advantage that is not legitimately due to the recipient or intended recipient;

- apply the prohibition to conduct within and outside Australia and when the conduct occurs wholly outside Australia, the person is an Australian citizen or the company is a company incorporated in Australia; and

- ensure that the ancillary offences of attempt, complicity, incitement and conspiracy which occur within and outside Australia apply where they relate to conduct involved in the primary offence.

Reversal of the onus of proof
Proposed sections 70.3 and 70.4

This bill proposes to amend the *Criminal Code Act 1995* by inserting Division 70 as part of a new Chapter 4 into the *Criminal Code*. Proposed new section 70.2 sets out the elements of the offence of bribing a foreign public official.

Proposed new sections 70.3 and 70.4 provide relevant defences. Section 70.3 sets out the terms of the defence of conduct lawful in the country of the foreign public official. Section 70.4 provides a defence where a payment is a "facilitation payment made to expedite or secure the performance of a routine government action of a minor nature". Each of these sections imposes an evidential burden on defendants, requiring them to prove certain matters if they wish to avoid a finding of guilt.

Proposed new section 70.5 also sets out various matters akin to a defence. In general terms, this section provides that a person does not commit an offence under section 70.2 unless the conduct constituting the offence occurs in Australia, or (if its occurs outside Australia) the offender is an Australian

citizen or corporation. In this instance, however, the prosecution bears the onus of showing that the terms of this section have been complied with.

The Committee, therefore, **seeks the Minister's advice** as to why proposed sections 70.3 and 70.4 impose an evidential burden on defendants, and whether those sections may be phrased in similar terms to proposed section 70.5, thereby leaving the burden of proof of the matters under those sections on the prosecution.

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

Employee Protection (Wage Guarantee) Bill 1999

This bill was introduced into the House of Representatives on 8 March 1999 by Mrs Crosio as a Private Member's bill.

The bill proposes to protect workers in the event of their employer's insolvency by:

- establishing a scheme of wage protection insurance;
- requiring employers to insure their workforces under the scheme; and
- providing for the determination and enforcement of claims under the scheme.

The Committee has no comment on this bill.

Export Market Development Grants Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 10 March 1999 by the Minister for Trade. [Portfolio responsibility: Trade]

The bill proposes to amend the following Acts:

Export Market Development Grants Act 1997 to:

- extend the Export Market Development Grants scheme for two years to grant year 2000/2001;
- ensure that where previously paid grants are to be disregarded, they are disregarded for all purposes under the Act;
- replace the term "grants entry test" with "grants entry requirements";
- ensure that the requirement that an applicant be "genuinely carrying on business in Australia" is applicable to trusts;
- ensure that trusts have access to "new markets";
- ensure that only 65 per cent of first class airfares are claimable expenses;
- remove certain terms from the application of 46A of the *Acts Interpretation Act 1901*;
- ensure that Austrade is unable to consider an application for grants lodged beyond five months after the end of a grant year;
- provide that an eligible applicant may receive three grants in respect of each "new market"; and
- make technical amendments;

Australian Trade Commission Act 1985 to allow Austrade to publicly provide the addresses of grant recipients and their industry sectors; and

Export Market Development Grants (Repeal and Consequential Provisions) Act 1997 to limit the life of all "approved body" to three years subject to extension upon review by Austrade.

The Committee has no comment on this bill.

Financial Sector Reform (Amendments and Transitional Provisions) Bill (No. 1) 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Australian Prudential Regulation Authority Act 1998 to enable the Australian Prudential Regulation Authority (APRA), as a result of an agreement with a State or Territory, to be contracted to provide prudential regulation and advisory services for trustee companies and housing cooperatives on a fee for service basis;

Banking Act 1959 to:

- apply the Criminal Code to all offences against the Banking Act;
- extend the bank holidays and unclaimed moneys provisions to all authorised deposit-taking institutions;
- extend APRA's powers in relation to standards on prudential matters and direction powers;

Corporations Law to:

- provide for the registration of financial institutions and friendly societies as companies and regulation of those entities under the Corporations Law by the Australian Securities and Investments Commission;
- make amendments consequential on financial institutions and friendly societies becoming companies;
- provide that registration of the transferring financial institutions under their previous governing legislation in the States and Territories is cancelled, and no new registrations under such legislation is permitted;

Life Insurance Act 1995 to establish a prudential regime for financial institutions providing life insurance products and to permit friendly societies to be regulated under such a regime; and

Reserve Bank Act 1959 to:

- apply the Criminal Code to all offences against the Act; and

makes miscellaneous amendments to 12 Acts, consequential amendments to 38 Acts and transitional, saving and application provisions.

Commencement on Proclamation
Subclauses 3(2), 3(6) and 3(16)

By virtue of subclause 3(2), various provisions in this bill are to commence on "the transfer date". This date is defined as the date that is specified by the Governor-General by Proclamation under subclause 3(16). Similarly, subclause 3(6) will permit item 3 of Schedule 6 to commence on Proclamation. In each case, no further date is specified within which the provisions are to commence in any event.

While the Committee consistently draws attention to such provisions in the context of Office of Parliamentary Counsel *Drafting Instruction No 2 of 1989*, it is apparent that the commencement of these provisions depends on the passage of complementary legislation in the States and Territories. Therefore, these provisions are within one of the exceptions provided for in that Drafting Instruction.

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

Retrospective application
Subclauses 3(7), 3(8) and 3(9)

The amendments referred to in subclauses 3(7), 3(8) and 3(9) are to commence retrospectively at various times. However, in each case the Explanatory Memorandum notes that these amendments are for the purpose of correcting drafting errors and misdescribed amendments, and make no substantive change to the law.

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

Financial Sector (Transfers of Business) Bill 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Treasury]

The bill proposes to enable the Australian Prudential Regulation Authority to:

- approve an application for the transfer of part or all of the business of one prudentially regulated entity to another (a voluntary transfer); or
- require, in limited circumstances, a prudentially regulated entity to transfer part or all of its business to another entity (a compulsory transfer).

The Committee has no comment on this bill.

Health Legislation Amendment Bill (No. 3) 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the following Acts:

National Health Act 1953 to:

- transfer responsibility for registration, cancellation of registration and merger approval from the Minister to the Private Health Insurance Administration Council (PHIAC);
- restrict new registrations to companies whose primary purpose is the operation of a health benefits fund;
- require any current registered organisations that are unincorporated associations to become incorporated as a company;
- require registered organisations, when taking any action relating to the application, investment or management of the assets of the health benefits fund conducted by it, to give priority to the interest of the contributors to the fund;
- require payments from the health benefits funds to be used only for health insurance business purposes;
- allow the Court to set aside certain transactions that are manifestly not in the interests of contributors;
- create a new civil penalty regime that makes directors liable for serious contraventions of the Act by registered organisations;
- create a part-time Deputy Commissioner position (to be held by a member of PHIAC);
- repeal the current minimum reserve requirements;
- allow both the Minister and the PHIAC to appoint inspectors to examine the affairs of registered organisations in certain circumstances;
- repeal the Court ordered judicial management, compulsory transfer and winding up of funds provisions;

- allow PHIAC to appoint an administrator to either a fund or organisation in difficulty, have the administrator operate in the interests of contributors, and require the administrator to recommend to the PHIAC the most appropriate options for the fund or organisation;

- require Court approval before a fund or registered organisation in difficulty can be forced to comply with a scheme of arrangement to be wound up;

- give health benefit fund contributors priority over other unsecured creditors in the distribution of fund assets in a winding up;

- make directors liable for any loss to the fund in certain circumstances; and

- allow all funds and all incorporated registered organisations, if solvent, to enter into a voluntary winding up; and

Private Health Insurance Incentives Act 1998, *Health Insurance Commission Act 1973* and *National Health Act 1953* to:

- allow the Health Insurance Commission (HIC) 14 days to either grant or refuse a claim for the incentive payment and provide for internal review by the HIC of a decision refusing to pay a claim;

- enable a person or their employer, having paid premiums, to register for the premiums reduction scheme;

- remove the requirement for annual registration in the premiums reduction scheme for individuals and health funds;

- provide that the Minister may revoked the status of a participating fund;

- require a health fund, when given notice, to produce a certificate in writing by a registered company auditor as to the correctness of its accounts and records in relation to the 30 per cent rebate;

- specify additional categories that are debts due to the Commonwealth and who the money is recoverable from and allow the HIC to set off debts against amounts that are payable;

- require a health fund to provide the HIC, when given notice, information in relation to people who have had a policy issued by the fund or have paid premiums in relation to a policy;

- enable the Minister to make principles relating to personal information which a health fund must comply with; and

- make consequential amendments.

Retrospective application
Subclause 2(5) and Schedule 3

By virtue of subclause 2(5), the amendments proposed in Schedule 3 are to commence retrospectively on 1 January 1999. However, the Explanatory Memorandum notes that these amendments are intended to "relate to the day to day implementation or operation of the [health insurance incentives] scheme", and "are designed to operate retrospectively so as to ensure the smooth operation of the incentives scheme from 1 January 1999". The amendments do not impose any new or additional burden on members of the public.

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

Higher Education Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

The bill proposes to amend the following Acts:

Higher Education Funding Act 1988 to:

- reflect the name change of James Cook University of North Queensland to James Cook University;
- make the University of the Sunshine Coast eligible for Commonwealth funding as an independent institution;
- specify how a notice of decision by the Secretary in relation to an application to remit either a Higher Education Contribution semester debt or an Opening Learning study period debt is to be given;
- implement voluntary student unionism by preventing any institution receiving grants under the Act from making it a condition of enrolment that a student be a member of any association; and
- make a technical amendment; and

Higher Education Funding Act 1988 and *States Grants (General Purposes) Act 1994* to remove the Minister's discretion to approve direct funding of student organisations under the Student Organisation Support Program.

The Committee has no comment on this bill.

Income Tax Rates Amendment (RSAs Provided by Registered Organizations) Bill 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Rates Act 1986* to specify the rates of tax that apply to the retirement savings account business of friendly societies and other registered organisations.

The Committee has no comment on this bill.

Referendum Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Attorney-General. [Portfolio responsibility: Special Minister of State]

The bill proposes to:

- allow expenditure by the Commonwealth on proposed public information activities related to the lead-up to the 1999 constitutional referenda;
- enable the Australian Electoral Commission to arrange wider distribution of the Yes/No case pamphlets, including publication on the Internet;
- provide that when referendums on two or more proposed laws are to be held on the same day and 28 days notice is given before the issue of the writ, the ballot-papers for each of the referendums are to be printed on separate pieces of different coloured paper; and
- make a technical amendment relating to voting outside the polling place.

The Committee has no comment on this bill.

Superannuation Legislation Amendment Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following:

Small Superannuation Accounts Act 1995 to change the arrangements governing the early release of monies from the Superannuation Holding Accounts Reserve to individuals on whose behalf the monies are held;

Income Tax Assessment Act 1936 so that special income of a complying superannuation fund, approved deposit fund (ADF) or pooled superannuation trust (PST) will include:

- distributions from all trusts other than where the superannuation fund, ADF or PST has a fixed entitlement to income from that trust; and

- non arm's length trust distributions of income where the superannuation fund, ADF or PST has a fixed entitlement to income from that trust; and

Superannuation Guarantee (Administration) Regulations to continue from 1 August 1996 an exemption from the Superannuation Guarantee for employers in respect of certain senior foreign executives.

Legislation by press release
Schedule 2

The amendments proposed by Schedule 2 to this bill are to apply from 25 November 1997 (see item 3). The Explanatory Memorandum notes that this is the date of a press release issued by the Treasurer.

This would suggest that the bill was not introduced until some 16 months after the issue of the press release. However, the Explanatory Memorandum goes on to observe that the amendments "were originally introduced on 2 July 1998 in Taxation Laws Amendment Bill (No 5) 1998". That bill lapsed on the announcement of the federal election.

However, even given this explanation, it is apparent that the original bill was introduced more than 7 months after the date of the press release. The

Committee has consistently drawn attention to the Senate Resolution of 8 November 1988, which deals with tax legislation and which provides 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.

The Committee, therefore, **seeks the Minister's advice** as to the effect of this Senate resolution on the proposed commencement date of the bill.

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

Retrospective application
Schedule 3

The amendments proposed in Schedule 3 are intended to continue an exemption from the superannuation guarantee for employers in respect of certain senior foreign executives who meet criteria equivalent to those previously met by the former class 413 overseas executive visa. These amendments are to apply retrospectively from 1 August 1996 (see item 2), which is the date that the exemption was rendered ineffective by the re-numbering of immigration visa classes. Therefore, these amendments are beneficial to taxpayers.

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

Taxation Laws Amendment Bill (No. 4) 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1997 to:

- allow income tax deductions for gifts made to certain funds and organisations;
- ensure grants paid to eligible businesses by the Katherine District Business Re-establishment Fund are exempt from income tax;
- treat all public entities as having had a change in underlying interests at 30 June 1999, unless they can satisfy the Commissioner of Taxation that they have maintained continuity of majority underlying interests;
- ensure that public entities include those that are jointly owned by one or more public entities;
- amend provisions relating to small business retirement exemption rules that exempt a capital gain made by an individual, private company or a trust from a CGT event happening to an asset used in a business; and
- extend the small business retirement exemption rules to land and buildings held by a taxpayer where the land and buildings are used by another entity connected with the taxpayer;
- rewrite the small business roll-over rules;
- rewrite the measure that adjusts the costs bases and reduced costs bases of shares (and loans) where there has been an underlying shift between companies under common ownership;
- make changes relating to how taxpayers keep their records for determining their capital gains tax liability;
- exempt reimbursements or payments of expenses under the M4/M5 Cashback Scheme for tolls paid on the M4 and M5 toll roads; and
- make consequential and technical amendments;

Income Tax Assessment Act 1936 to:

- remove the Commissioner of Taxation's power to disregard the "notional holder" rule which public entities may use to calculate the majority underlying interests in their assets;

- enable participants in the Commonwealth Development Employment Projects (CDEP) Scheme to claim the beneficiary tax rebate in respect of the income support component of their CDEP wages; and

- make consequential and technical amendments; and

Taxation Administration Act 1953 to enable the Commissioner of Taxation to disclose information acquired under a taxation law to the New South Wales Police Integrity Commission and the Queensland Crime Commission.

Retrospective application
Schedules 2 and 4

The amendments proposed in Schedule 2 to this bill will apply only to the 1997-98 income year (see item 6). These amendments concern the tax exempt status of grants paid as part of a business re-establishment package to eligible businesses and primary producers in those parts of the Katherine region devastated by floods in January 1998.

The amendment made by Schedule 4 is to apply to payments made on or after 1 July 1998. As noted above, this amendment is intended to enable participants in the CDEP Scheme to claim the beneficiary tax rebate in respect of the income support component of their CDEP wages.

In each case, the proposed amendments are beneficial to some taxpayers.

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

Retrospective application
Schedule 3, items 1 and 2

By virtue of item 3 of Schedule 3, the amendments proposed in items 1 and 2 of that Schedule are to apply retrospectively to a public entity "if the test time (within the meaning of Division 20 of Part IIA of the *Income Tax Assessment*

Act 1936) was on or after 20 January 1997". These amendments repeal section 160ZZSQ of that Act, and the note to section 160ZZSJ.

The Explanatory Memorandum notes that the financial impact of these amendments will be negligible, but it does not refer to any possible adverse effects on taxpayers, or indicate why 20 January 1997 has been chosen as an effective date. The Committee, therefore, **seeks the Treasurer's advice** as to whether the amendments will adversely affect any taxpayers, and why the date of 20 January 1997 was chosen as the date from which the amendments are to apply.

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

Taxation Laws Amendment Bill (No. 5) 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Sales Tax (Exemptions and Classifications) Act 1992 to ensure that the sales tax exemption for goods incorporated into property owned by, or leased to, always exempt persons (AEPs) or the government of a foreign country is only available where the property is occupied principally by an AEP or the government of a foreign country, or where the property is used principally for the provision of services to an AEP or government of a foreign country; and

Income Tax Assessment Act 1936 and the *Income Tax Assessment Act 1997* to:

- include an amount in the assessable income of a taxpayer where amounts are unpaid on the termination of a hire purchase or limited recourse debt arrangement;

- treat taxpayers who acquire capital assets by hire purchase or instalment sale as the owners of those assets for the purpose of determining eligibility for capital allowance deductions and relevant ant-avoidance provisions; and

- treat hire purchase or instalment sales as though they were loan transactions; and

- make consequential amendments.

Retrospective application
Schedule 1

The amendments proposed by Schedule 1 to this bill are to apply from 2 April 1998. The Explanatory Memorandum indicates that this was the date on which the amendments first appeared in legislative form (in Taxation Laws Amendment Bill (No 4) 1998).

The Committee regularly comments on the uncertainty that is often associated with 'legislation by press release'. On this occasion, the Committee notes with approval that the precise form of these amendments has been available for public examination and comment since 2 April 1998 – the date from which they

are to take effect. As a matter of principle, where an intention to amend the law is announced, the Committee considers that the legislation which gives effect to those amendments should be made available as quickly as possible.

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

Retrospective application
Schedule 2

In general terms, the amendments proposed by Schedule 2 treat hire purchasers as the owners of assets under hire purchase, and hire purchase arrangements as sale, loan and debt transactions. These amendments are to apply retrospectively from 27 February 1998. The Explanatory Memorandum indicates that this was apparently the date on which the Treasurer issued a second press release amending to some extent proposals originally included in the 1997-98 Budget speech.

The Committee has consistently drawn attention to the Senate Resolution of 8 November 1988, which deals with tax legislation and which provides 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.

The Committee, therefore, **seeks the Treasurer's advice** as to the effect of this Senate resolution on the proposed commencement date of the bill.

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

Taxation Laws Amendment (CPI Indexation) Bill 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Fringe Benefits Tax Assessment Act 1986 to:

- ensure that the car parking benefits threshold amount will remain unchanged if the CPI movement in the 12 months before the start of the FBT year is lower than the CPI for the preceding 12 months; and

- make technical amendments;

Income Tax Assessment Act 1936 to ensure that the maximum indexed dependant rebate amount does not fall when there is a decrease in the CPI; and

Sales Tax Assessment Act 1992 to retain the wholesale sales tax quarterly remitter threshold for 1998-99 at the 1997-98 level.

Retrospective application
Subclause 2(2) and Schedule 1, items 3 and 4

By virtue of subclause 2(2), the amendments proposed in items 3 and 4 of Schedule 1 to this bill are to commence retrospectively on the date of Assent to earlier legislation. However, the amendments proposed in those items are technical only, and make no substantive change to the law.

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

Taxation Laws Amendment (Demutualisation of Non-insurance Mutual Entities) Bill 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to introduce a generic framework for the taxation of certain transactions associated with demutualisations of mutual non-insurance organisations.

Retrospective application
Schedule 2H, proposed paragraph 326-5(1)(e)

This bill proposes to insert a new Division 326 in the *Income Tax Assessment Act 1936*. By virtue of proposed new paragraph 326-5(1)(e), the amendments are to apply to demutualisations completed on or after 12 May 1998. The Explanatory Memorandum indicates that these amendments are Budget measures, having been foreshadowed in the 1997-98 Budget, and announced in the 1998-99 Budget speech.

The Committee accepts that, for the Government to fully implement its budgetary strategy, it needs certain fiscal and monetary measures it employs to operate from the date of their announcement rather than from the date of their enactment. This approach also minimises the risk that those measures may be avoided.

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

Taxation Laws Amendment (Political Donations) Bill 1999

This bill was introduced into the House of Representatives on 11 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1997 to allow taxpayers to make tax deductible contributions (including membership subscriptions) of $2 or more to political parties registered under the *Commonwealth Electoral Act 1918* or under corresponding State or Territory legislation up to a maximum level of $1500 annually, and gifts to independent candidates and members, also up to a maximum level of $1500 annually, with effect from 1 July 1998; and

Income Tax Assessment Act 1997 and the *Income Tax Assessment Act 1936* to make technical and consequential amendments.

Retrospective application
Schedule 1, Part 4

By virtue of Part 4 of Schedule 1 to this bill, the amendments proposed in that Schedule are to apply from 1 July 1998. However, these amendments are beneficial to taxpayers.

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

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were "more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties". The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for "administration of justice offences". The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest.* The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	Section/Subsection	Offence	Penalty
Employee Protection (Wage Guarantee) Bill 1999	32(3)	Fail to comply with a notice to provide written answers to questions or copies of documents	150 penalty units
Banking Act 1959	16B(1A)	Fail to comply with requirement from the Australian Prudential Regulation Authority (APRA) to provide information	6 months
Banking Act 1959	16B(2)	Auditor fail to inform APRA of insolvent ADI	6 months
	16B(3)	Auditor fail to inform APRA of insolvent NOHC	6 months
	16B(4)	Auditor fail to inform APRA of insolvent subsidiary	6 months

Senate Standing Committee

for

The Scrutiny of Bills

ALERT DIGEST

No. 5 of 1999

31 March 1999

ISSN 1329-668X

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

MEMBERS OF THE COMMITTEE

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

(1)

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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A New Tax System (Commonwealth-State Financial Arrangements) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to:

- entitle States and Territories to receive GST revenue grants from 1 July 2000;
- provide that the GST rate and base are not to be altered without the unanimous agreement of the Commonwealth, State and Territory governments; and
- make transitional arrangements.

The Committee has no comment on this bill.

A New Tax System (Commonwealth-State Financial Arrangements—Consequential Provisions) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

Consequent on the commencement of the proposed A New Tax System (Commonwealth-State Financial Arrangements) Act 1999 the bill proposes to:

- amend the *Local Government (Financial Assistance) Act 1995* to provide for local government funding transitional payments in 1999-2000 and provides for its repeal; and

- repeals the *States Grants (Local Purposes) Act 1994*.

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.

A New Tax System (Indirect Tax Administration) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Taxation Administration Act 1953* to provide for the administration and collection of the wine equalisation tax and luxury car tax by the Commissioner of Taxation.

Reviewable decisions?
Schedule 1, item 66

Item 66 of Schedule 1 to this bill proposes to insert a new subsection 62(2A) in the *Taxation Administration Act 1953*. This subsection provides for review of a number of decisions under the Wine Tax Act. This Act is defined as the *A New Tax System (Wine Equalisation Tax) Act 1999* (see item 10 of Schedule 1 to the bill).

However, there seems to be no correlation between the decisions listed in proposed subsection 62(2A) and the nominated provisions of the Wine Tax Act. For example, subsection 62(2A) states that refusing to register a person for wine tax under section 79 of the Wine Tax Act is a reviewable decision. There is no section 79 in the A New Tax System (Wine Equalisation Tax) Bill 1999. Similarly, cancelling a person's registration for wine tax under subsection 80(1) is said to be a reviewable decision. There is no subsection 80(1) in the A New Tax System (Wine Equalisation Tax) Bill 1999.

The Committee, therefore, **seeks the Minister's advice** as to which decisions are reviewable under proposed subsection 62(2A).

> *Pending the Minister's advice, the Committee draws Senators' attention to this provision, as it 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.*

A New Tax System (Luxury Car Tax) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to implement a luxury car tax at the rate of 25 per cent on taxable supplies and importations of luxury cars, from 1 July 2000.

Insufficient Parliamentary scrutiny
Subclause 21-1(2)

Proposed subclause 21-1(1) of this bill exempts the Commonwealth and Commonwealth entities from actual liability for the payment of luxury car tax, but imposes on them a notional liability and requires them to notionally have luxury car tax adjustments. Proposed subclause 21-1(2) enables the Minister for Finance to give "such written directions" to give effect to this provision. By virtue of subclause 21-1(3), these directions override "any other Commonwealth law".

Clearly, such directions permit changes to be made to the application of other laws passed by the Parliament. However, it is not apparent from the bill or the Explanatory Memorandum whether these directions are to be given only to entities which are part of the Commonwealth, or may also be given to entities which are separate from the Commonwealth. The Committee has previously accepted that such directions may be given to Commonwealth entities without qualification. However, where they are given to entities which are separate from the Commonwealth, then they should, at the very least, be disallowable.

The Committee, therefore, **seeks the Minister's advice** as to whether these directions may be given to non-Commonwealth entities, and, if so, why they should not be tabled and subject to Parliamentary scrutiny.

> *Pending the Minister's advice, the Committee draws Senators' attention to this 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.*

A New Tax System (Luxury Car Tax Imposition—Customs) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to impose a luxury car tax, to the extent that it is a duty of customs, at the rate of 25 per cent on taxable supplies and importations of luxury cars.

The Committee has no comment on this bill.

A New Tax System (Luxury Car Tax Imposition—Excise) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to impose a luxury car tax, to the extent that it is a duty of excise, at the rate of 25 per cent on taxable supplies and importations of luxury cars.

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.

A New Tax System (Luxury Car Tax Imposition—General) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to impose a luxury car tax, to the extent that it is neither a duty of excise nor a duty of customs, at the rate of 25 per cent on taxable supplies and importations of luxury cars.

The Committee has no comment on this bill.

A New Tax System (Wine Equalisation Tax and Luxury Car Tax Transition) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to provide transitional arrangements for the wine equalisation tax and the luxury car tax, including:

- a GST credit for a portion of the wholesale sales tax paid on stock that becomes subject to wine equalisation tax; and
- that the proposed luxury car tax is not payable on cars sold by retail before 1 July 2000.

The Committee has no comment on this bill.

A New Tax System (Wine Equalisation Tax) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to implement a wine equalisation tax at the rate of 29 per cent on assessable dealings and importations of wine made on or after 1 July 2000.

Insufficient Parliamentary scrutiny
Subclause 27-20(2)

Proposed subclause 27-20(2) of this bill exempts the Commonwealth and Commonwealth entities from actual liability for the payment of wine tax, but imposes on them a notional liability and requires them to notionally have wine tax adjustments. Proposed subclause 27-20(2) enables the Minister for Finance to give "such written directions" to give effect to this provision. By virtue of subclause 27-20(3), these directions override "any other Commonwealth law".

Clearly, such directions permit changes to be made to the application of other laws passed by the Parliament. However, it is not apparent from the bill or the Explanatory Memorandum whether these directions are to be given only to entities which are part of the Commonwealth, or may also be given to entities which are separate from the Commonwealth. The Committee has previously accepted that such directions may be given to Commonwealth entities without qualification. However, where they are given to entities which are separate from the Commonwealth, then they should, at the very least, be disallowable.

The Committee, therefore, **seeks the Minister's advice** as to whether these directions may be given to non-Commonwealth entities, and, if so, why they should not be tabled and subject to Parliamentary scrutiny.

> *Pending the Minister's advice, the Committee draws Senators' attention to this 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.*

A New Tax System (Wine Equalisation Tax Imposition—Customs) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to impose a wine equalisation tax, to the extent that it is a duty of customs, at the rate of 29 per cent on assessable dealings and importations of wine made on or after 1 July 2000.

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.

A New Tax System (Wine Equalisation Tax Imposition—Excise) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to impose a wine equalisation tax, to the extent that it is a duty of excise, at the rate of 29 per cent on assessable dealings and importations of wine made on or after 1 July 2000.

The Committee has no comment on this bill.

A New Tax System (Wine Equalisation Tax Imposition—General) Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to impose a wine equalisation tax, to the extent that it is neither a duty of excise nor a duty of customs, at the rate of 29 per cent on assessable dealings and importations of wine made on or after 1 July 2000.

The Committee has no comment on this bill.

Adelaide Airport Curfew Bill 1999

This bill was introduced into the House of Representatives on 22 March 1999 by Mrs Gallus as a Private Member's bill.

The bill proposes to:

- establish a curfew at Adelaide Airport between 11pm and 6am and impose a penalty for breach of the curfew;
- impose a penalty of up to $22,000 for breach of the curfew;
- provide for certain aircraft movements during the curfew;
- allow the Minister to grant dispensations in certain circumstances;
- empower authorised officers to request certain information and provide for penalties in relation to false information;
- allow the Minister to delegate powers to grant permissions or give dispensations;
- provide for appointment of authorised persons; and
- provide guidance to a court in prosecutions for an offence by a body corporate.

Appointment of "a person" as an authorised officer
Subclause 22(1)

Proposed subclause 22(1) will permit the Secretary to the Department of Transport to appoint "a person" to be an authorised officer for the purposes of the Act. However, the bill gives no indication of the qualifications or attributes that such an appointee should possess.

Since its establishment, the Committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to "a person". Generally the Committee likes to see some limits placed on potential delegates, whether by reference to them as holders of nominated offices, or as members of the Senior Executive Service, or by reference to their possession of special qualifications or attributes. Therefore, the Committee **seeks the advice of the member sponsoring the bill** as to whether subclause 22(1) should provide some limit on the otherwise unfettered discretion of the Secretary in appointing authorised officers.

Pending the member's advice, the Committee draws Senators' attention to this provision, as it may be considered to make 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.

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

Australian Broadcasting Corporation Amendment Bill 1999

This bill was introduced into the Senate on 25 March 1999 by Senator Bourne as a Private Senator's bill.

The bill proposes to amend the *Australian Broadcasting Corporation Act 1983* to establish a Parliamentary Joint Committee on the ABC to:

- examine the Australian Broadcasting Corporation's (ABC) annual report;
- review the ABC's annual appropriations and make recommendations relating to the appropriations; and
- approve or reject ministerial recommendations for Board appointments.

The Committee has no comment on this bill.

Australian Security Intelligence Organisation Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 25 March 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the following Acts:

Australian Security Intelligence Organization Act 1979 to:

- enable the Minister to issue warrants to authorise ASIO to:
    - access data which is relevant to security and stored in a specified computer;
    - use a tracking device to assist in collecting intelligence relevant to security;
    - examine an article being delivered by a delivery service provider;
- authorise ASIO to enter premises for the purpose of removing a listening or tracking device which has been installed under warrant;
- amend provisions relating to search warrants to:
    - simplify the description of the matters about which the Minister must be satisfied before issuing a warrant;
    - clarify ASIO's authority to use a computer found on the premises being searched;
    - extend the maximum period a warrant may remain in force from seven to 28 days;
    - permit the Minister to defer the commencement of a warrant for up to 28 days;
- enable the Minister to authorise ASIO to collect intelligence by means that do not require a warrant, such as human resources;
- extend the authority of the Director-General of Security to issue certain warrants in an emergency;
- allow the Director-General of Security to charge fees to recover the cost of providing advice or services to persons at their request;

- permit ASIO to communicate security assessments in relation to the 2000 Olympics or Paralympics directly to State authorities;

- simplify the communication of criminal intelligence given to ASIO by overseas partner agencies to Australian law enforcement agencies;

- enable regulations to be made to permit review bodies to consider decisions affecting former staff as well as current employees and allow immunity from civil proceedings to be conferred on review bodies; and

- revise penalty provisions so that pecuniary penalties are calculated according to the *Crimes Act 1914* formula;

Financial Transaction Reports Act 1988 to give ASIO access to information held by the Australian Transaction Reports and Analysis Centre;

Inspector-General of Intelligence and Security Act 1986 to:

- make the monitoring role of the Inspector-General Intelligence and Security explicit;

- allow the Inspector-General to remove taxation and identifying financial transaction reports information from his reports to Ministers;

- amend clearance procedures when providing a written response to a complainant; and

- permit disclosure of information by the Inspector-General if the safety of a person may be at risk;

Taxation Administration Act 1953 to allow the Commissioner of Taxation to disclose tax information to the Director-General of Security in certain circumstances; and

Australian Security Intelligence Organization Act 1979 to change "Organization" to "Organisation" and makes consequential amendments to 26 other Acts.

The Committee has no comment on this bill.

Compensation for Non-economic Loss (Social Security and Veterans' Entitlements Legislation Amendment) Bill 1999

This bill was introduced into the House of Representatives on 25 March 1999 by the Minister representing the Minister for Family and Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* to change how payments of compensation for non-economic loss are made by:

- treating lump sum payments exceeding $10,000 as ordinary income (payments to be spread over the next 26 fortnights from receipt); and
- treating periodic payments as ordinary income.

Commencement
Subclause 2(3)

By virtue of subclause 2(3), the amendments proposed in this bill are to commence up to 12 months after assent. This contrasts with the preferred period of 6 months set out in *Drafting Instruction No 2 of 1989* issued by the Office of Parliamentary Counsel. The *Drafting Instruction* goes on to note that, where a period longer than 6 months is chosen, "Departments should explain the reason for this in the Explanatory Memorandum".

While the Explanatory Memorandum accompanying this bill does not clarify the need for a period longer than 6 months, the Minister's Second Reading Speech suggests that, by delaying commencement "there will be sufficient flexibility to allow State and Territory Governments and insurers the opportunity to implement any desirable changes to the way their schemes operate in response to the introduction of this initiative". This explains the need for an extended commencement period in the case of this bill.

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

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

Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999

This bill was introduced into the Senate on 24 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

The bill proposes to:

- amend the *Criminal Code Act 1995* to create offences relating to slavery, sexual servitude and deceptive recruiting for sexual services; and
- repeal 6 Imperial Acts relating to slavery that still apply in Australia.

Penalties, definitions and the reversal of the onus of proof
Proposed new sections 270.1 and 270.3

Item 1 of Schedule 1 to this bill proposes to insert a new Division 270 in the *Criminal Code.* This new Division includes proposed section 270.3, which deals with slavery offences.

Proposed subsection 270.1 defines slavery as "the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person". Proposed subsection 270.3(1) makes it an offence to possess a slave or exercise over a slave any of the other powers attaching to the right of ownership, or to engage in slave trading. The maximum penalty for this offence is imprisonment for 25 years.

Proposed subsection 270.3(3) states that a person who enters into a transaction with the intention of securing the release of a person from slavery is not guilty of an offence against the section. Proposed subsection 270.4(4) states that the defendant bears the legal burden of proving this matter. The Explanatory Memorandum notes that the effect of this provision is that, to establish the defence, the defendant must prove, on the balance of probabilities, that his or her intention was to release the person.

These provisions raise a number of issues. First, it is clear that the penalties to be imposed for slavery offences are significant, as, indeed, are the penalties for all the offences created by this bill. The Committee would appreciate some further advice about where these penalties stand in relation to the general range of penalties for similarly serious offences.

Secondly, the Committee would appreciate some further advice regarding the statutory definition of 'slavery' – in particular, some indication of the range of situations to which it is intended to apply. The Committee notes that the Explanatory Memorandum states that whether a person is a slave "is a matter to be determined by the courts on a case by case basis" and that "slavery is more than merely the exploitation of another… it is where the power a person exercises over another effectively amounts to the power a person would exercise over property he or she owns". For example, given that slavery may arise "from a debt owed or contract entered into by the enslaved person", is the bill intended to apply to situations of forced labour in 'sweatshops'?

Thirdly, the Committee notes that subclause 270.3 provides a defence of entering into a transaction "with the intention of releasing [a] person from slavery". The defendant bears the legal burden of proving this defence. The Committee usually queries such reversals of the onus of proof, and would appreciate some further advice on the reason for its reversal in this instance. In particular, the Committee would appreciate advice on the reason for including this as a specific defence, and for imposing a "legal burden" on the defendant – in these circumstances, is a "legal burden" different from an evidential burden?

The Committee would also appreciate advice on the relationship between the intention to be proved by the prosecution in proving all the elements of the offence, and the intention to be proved by the defendant in proving this defence. For example, the Committee observes that a person charged with murder, where the issue of self-defence arises, cannot be convicted unless the prosecution proves beyond reasonable doubt that he or she did not act in self defence. Similarly, a person charged with rape cannot be convicted unless the prosecution proves beyond reasonable doubt that that person believed that the alleged victim was not consenting. This bill seems to impose a different burden on the prosecution in proving intent.

Therefore, the Committee **seeks the Minister's advice** about these matters.

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

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

Customs Amendment Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 25 March 1999 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Customs Act 1901* to introduce a registration and electronic cargo reporting scheme for owners of ships and aircraft bringing high volume low value consignments into Australia.

Old convictions, continuing consequences
Proposed new paragraph 67EB(3)(b)

This bill proposes to introduce a new registration and electronic cargo reporting scheme for owners of ships or aircraft bringing "high volume low value" cargo into Australia. Under the scheme, owners of ships and aircraft may apply for registration as "special reporters" and, if registered, are permitted to electronically report low value cargo in a less detailed form than is required by the Customs Act for other cargo.

Specifically, Item 12 of Schedule 1 to the bill proposes to insert a new Subdivision in the *Customs Act 1901*. This covers the registration, rights and obligations of 'special reporters'. This new subdivision includes proposed new subsection 67EB(3), which sets out certain matters to which the CEO of Customs must have regard in deciding whether an applicant for registration is a fit and proper person.

Matters to which the CEO must have regard include:

- whether the person has been convicted of an offence against the Customs Act within the previous 10 years;
- whether the person is an insolvent under administration;
- whether the person was, within the previous 2 years, concerned in the management of a company that had been wound up, or had had its registration as a special reporter cancelled; and
- whether any misleading information or document has been furnished in relation to the application, or information or documents that are, to the knowledge of the applicant, false.

Some of these matters are clearly relevant to an applicant's fitness. However, under proposed subparagraph 67EB(3)(b), the CEO must also have regard to whether the person has been convicted of <u>any</u> offence against another law of the

Commonwealth, or of a State or Territory, in the previous 10 years, where that offence is punishable by imprisonment for one year or longer. This provision raises a number of issues.

First, it seems retrospective. An applicant may have been convicted of an offence up to 10 years before the passing of this bill, and not been affected in any way by that conviction, but may now, years later, come to be denied registration as a consequence.

Secondly, the provision seems somewhat arbitrary. An applicant who applies for registration 10 years and 1 day after having committed such an offence is regarded as fully rehabilitated, and the fact of the conviction may not be taken into account. Were he or she to apply for registration 2 days earlier, the fact of the conviction must be taken into account. While any specified period may be seen as arbitrary, the Committee seeks advice as to the relationship of this 10 year period and limitation periods in other legislation.

Thirdly, the provision may be regarded as exposing a person to double punishment for the same offence. The view is commonly expressed that, once a person has completed a sentence of imprisonment for an offence, they have paid their debt to society and should be left to live their life without having to continually face the stigma of the sentence served. This provision, however, permits the fact of a conviction to affect aspects of an applicant's life for a further 9 years after that conviction has been dealt with.

Fourthly, the provision is potentially inequitable in referring to offences "punishable" by imprisonment for one year or longer. In its *Seventh Report of 1998*, in a somewhat different context (the voting rights of prisoners), the Committee referred to the potential unfairness of provisions which exclude rights by reference to the maximum penalty that is provided for, rather than the actual penalty imposed. Under proposed subparagraph 67EB(3)(b), a person who has actually served a sentence of imprisonment of 9 months for an offence which was punishable by imprisonment for 9 months would not have this sentence taken into account. However, a person who was fined $50 for an offence punishable by imprisonment for a year would have this sentence taken into account.

Under the proposed provision, a person's application for registration as a 'special reporter' might be affected if, 10 years ago, they were convicted of using abusive language to a fisheries officer (see section 14(1)(f) of the *Fisheries Act 1952 (Cth)*), or stealing a dog (see section 132 of the *Crimes Act 1900 (NSW)*), or wrongfully delivering a postal article (see section 85N of the *Crimes Act 1914 (Cth)*).

Finally, the bill does not make clear how information about past convictions will come to the attention of the CEO considering an application. Is it intended that inquiries be made of law enforcement authorities around Australia, or will applicants be required to disclose previous convictions? If the latter approach is

adopted, what consequences are envisaged should an applicant fail to disclose an old conviction for a relatively minor offence?

The Committee notes that the bill merely requires that past offences be taken into account in considering an application – such offences do not necessarily preclude registration. However, there is a real possibility that such a provision may lead to the rejection of an application in circumstances of apparent unfairness and, notwithstanding the additional appeal provisions, this situation is unsatisfactory. Therefore, the Committee **seeks the Minister's advice** about these matters.

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

Damage by Aircraft Bill 1999

This bill was introduced into the House of Representatives on 24 March 1999 by the Minister for Transport and Regional Services. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to improve compensation arrangements for members of the public who suffer death, injury or damage as third parties on the ground involving an aircraft that comes within Commonwealth jurisdiction. The bill further proposes to repeal the *Civil Aviation (Damage by Aircraft) Act 1958*.

Commencement on Proclamation
Subclause 2(1)

By virtue of subclause 2(1), this bill is to commence on Proclamation, with no further date fixed by which it must either commence or lapse. The Committee usually draws attention to such provisions in the context of *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel.

However, the Explanatory Memorandum notes that this bill has been introduced to remedy major deficiencies in the *Civil Aviation (Damage by Aircraft) Act 1958*, which gives effect to the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface. The bill's commencement depends on Australia's denunciation of the Rome Convention. Such a circumstance is one of the recognised exceptions to the *Drafting Instruction* noted above.

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

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

Import Processing Charges Amendment Bill 1999

This bill was introduced into the House of Representatives on 25 March 1999 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Justice and Customs]

Complementary to the Customs Amendment Bill (No. 2) 1999, the bill proposes to amend the *Import Processing Charges Act 1997* to impose a lower amount screening charge to apply to those owners of a ship or aircraft who are registered as special reporters under the electronic cargo reporting scheme.

Retrospective application
Subclause 2(2)

By virtue of subclause 2(2) of this bill, item 1 of Schedule 1 is to commence retrospectively on 26 February 1997. This item proposes to amend the definition of the term *line* in section 3 of the *Import Processing Charges Act 1997*. The Explanatory Memorandum states that this amendment implements the original intention of the framers of the legislation. However, the Explanatory Memorandum does not indicate whether this retrospectivity will adversely affect any importers of goods who would now come within the scheme. Therefore, the Committee **seeks the Minister's advice** as to whether this retrospectivity will adversely affect any person.

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

Telecommunications Laws Amendment (Universal Service Cap) Bill 1999

This bill was introduced into the House of Representatives on 25 March 1999 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the *Telecommunications Act 1997* and the proposed *Telecommunications (Consumer Protection and Service Standards) Act 1999* to impose a cap on the net universal service cost for the 1997-98, 1998-99 and 1999-2000 financial years.

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.

Senate Standing Committee

for

the Scrutiny of Bills

Alert Digest No. 6 of 1999

21 April 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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A New Tax System (Family Assistance) Bill 1999

This bill was introduced into the House of Representatives on 31 March 1999 by the Treasurer. [Portfolio responsibility: Family and Community Services]

The bill proposes to simplify the structure and administration of family assistance by replacing twelve existing forms of assistance with three and to move the maternity allowance and maternity immunisation allowance from the Social Security Act to the proposed A New Tax System (Family Assistance) Act.

The Committee has no comment on this bill.

A New Tax System (Family Assistance) (Consequential and Related Measures) Bill (No. 1) 1999

This bill was introduced into the House of Representatives on 31 March 1999 by the Treasurer. [Portfolio responsibility: Family and Community Services]

Consequent on the A New Tax System (Family Assistance) Bill 1999, the bill proposes to:

- repeal the 12 current forms of family assistance;
- repeal provisions in the *Social Security Act 1991* that provide for the maternity allowance and maternity immunisation allowance;
- introduce revised income test tapering arrangements for parenting payment recipients who are members of a couple; and
- ensure that, for the purposes of the parental means test for youth allowance, the non-grossed up value of a person's fringe benefits is used in determining whether youth allowance is payable.

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.

Aboriginal Land Rights (Northern Territory) Amendment Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 30 March 1999 by the Minister representing the Minister for Aboriginal and Torres Strait Islander Affairs. [Portfolio responsibility: Aboriginal and Torres Strait Islander Affairs]

The bill proposes to amend the *Aboriginal Land Rights (Northern Territory) Act 1976* to:

- invalidate the deed of grant in favour of the Gurungu Land Trust made on 5 December 1991 to the extent that it included that area of land described as the Elliott stockyards land;
- dispose of Aboriginal land claims where an Aboriginal Land Commissioner, in his report to the Minister relating to the claim, has stated he is unable to find any traditional Aboriginal owners of the land;
- dispose of Aboriginal land claims over stock routes and stock reserves; and
- dispose of Aboriginal land claims made after 5 June 1997.

Commencement
Subclause 2(3)

By virtue of subclause 2(3), Schedule 1 to the bill will commence up to 12 months after assent. *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel, refers to the desirability of an explanation where a commencement period longer than 6 months after Royal Assent is chosen. The Explanatory Memorandum makes it clear that additional time is required because the amendments proposed in that Schedule depend on the passage of complementary legislation in the Northern Territory.

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

Retrospective application
Clause 3

Clause 3 of this bill is to apply retrospectively from 5 December 1991. However, the Explanatory Memorandum observes that this provision is intended to correct an administrative error which was made in 1991.

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

Retrospective application
Proposed new subparagraph 67A(6)(b)(i)

Item 4 of Schedule 1 to this bill proposes to insert new subparagraph 67A(6)(b)(i) in the *Aboriginal Land Rights (Northern Territory) Act 1976*. This provision will apply retrospectively from 5 June 1997. However, the Minister's Second Reading Speech indicates that this amendment is intended simply to correct some earlier drafting deficiencies, and has no substantive effect on the law.

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

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

Australia New Zealand Food Authority Amendment Bill 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Australia New Zealand Food Authority Act 1991* to:

- create objectives for the Act to clarify the role, functions and regulatory objectives of the Australia New Zealand Food Authority;
- enable the Authority to tailor consultation processes, allocate more resources where there are significant concerns and streamline processes for minor issues;
- allow effective implementation and enforceability of the new food safety standards and permit the restriction of sale and advertising of foods where necessary to protect public health;
- enable the Authority to prioritise and direct resources to its agreed work program and to the food standards matters which are of major public interest; and
- enable the Authority to charge for certain applications which are outside the work program.

Retrospective application
Subclause 2(2) and Schedule 1, item 13

Item 13 of Schedule 1 to the bill inserts a provision which "enables standards to relate to particular brands of food in addition to a type of food generally". By virtue of subclause 2(2), this item is to commence retrospectively on 30 July 1998. The Explanatory Memorandum simply observes that this commencement date has been chosen to ensure that "existing standards are enforceable". This would seem to suggest that there is doubt as to the enforceability of standards made by the Australia New Zealand Food Authority since that date. The Committee, therefore, **seeks the Minister's**

advice on the status and enforceability of standards issued by the Food Authority since 30 July 1998, and on whether the retrospective commencement of this provision will adversely affect any person.

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

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

Commonwealth Grants Commission Amendment Bill 1999

This bill was introduced into the House of Representatives on 30 March 1999 by the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to amend the *Commonwealth Grants Commission Act 1973* to enable the Commission to inquire and report on the distribution of funding for meeting the needs of indigenous people.

The Committee has no comment on this bill.

Customs Amendment Bill (No. 1) 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

The bill proposes to address the possible consequences of the recent decision of the Supreme Court of Queensland in the matter of *Prechelt* by amending the *Customs Act 1901* to:

- make it clear that duty must be paid on imported goods that do not require a formal entry for home consumption before those goods can be delivered into home consumption;
- provide that the rate of duty is to be fixed at the time information in relation to those goods is given to Customs or the time when the goods were imported into Australia, whichever is the later; and
- commence these amendments retrospectively from 1 September 1992.

Retrospective application
Subclause 2(2)

By virtue of subclause 2(2), items 4 and 5 of Schedule 1 to this bill are to commence retrospectively on 1 September 1992. As indicated in the Explanatory Memorandum, the reason for this retrospectivity is to correct a mistake in the drafting of earlier amendments to the *Customs Act 1901*. This mistake came to light in a recent court case in Queensland.

The Committee accepts that a failure to make the amendments retrospective could ultimately jeopardise a significant amount of revenue. However, some aspects of the operation of the bill are not immediately clear. For example, it is not clear whether the bill will affect the rights of the importer or other parties in the *Prechelt* case, and whether any other cases are pending following the decision in that case.

The Committee, therefore, **seeks the Minister's advice** on the implications of the bill's retrospective application for the litigants in the *Prechelt* case, and whether any other litigation is pending following the decision in that case.

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

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

Customs Amendment (Temporary Importation) Bill 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the temporary importation provisions of the *Customs Act 1901* to:

- replace the general 12 months time limit for re-exportation of temporary import goods with an end date of 31 December 2000 for goods temporarily imported for use in the Sydney 2000 Olympic and Paralympic Games and specified related events; and

- introduce a requirement for formal applications for temporary importation of goods that are not accompanied by temporary admission papers issued under an international agreement for temporary importation.

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.

Defence Legislation Amendment Bill (No. 1) 1999

This bill was introduced into the House of Representatives on 30 March 1999 by the Minister assisting the Minister for Defence. [Portfolio responsibility: Defence]

The bill proposes to amend the following Acts:

Defence Act 1903 to introduce a urinalysis drug testing scheme that will apply to members of the Australian Defence Force;

Defence Act 1903 and *Naval Defence Act 1910* to:

- enable the Chief of the Defence Force, the Vice Chief of the Defence Force, the Chief of Army and the Chief of Navy to be transferred to the Reserves on the expiration of fixed term appointments;
- enable officers to be transferred to the Reserves on the expiration of a limited-tenure promotion or relevant management initiated early retirement period;
- enable the Chief of Army and Chief of Navy to delegate their powers to retire officers and terminate officer appointments to an officer not below the rank Brigadier/Commodore;

Defence Force Discipline Act 1982 to extend, from three to five years, the time limitation that applies to most charges under the Act, and to remove an obsolete provision;

Defence Force (Home Loans Assistance) Act 1990 and the *Defence Legislation Amendment Act (No. 1) 1997* to make technical amendments; and

repeals the *Supply and Development Act 1939* and makes consequential amendments to five other Acts.

Retrospective application
Subclause 2(5)

By virtue of subclause 2(5), the amendment proposed in item 2 of Schedule 6 to this bill is to commence retrospectively on 19 February 1997, on the

commencement of earlier amending legislation. However, the amendment proposed is technical in nature, and makes no substantive change to the law.

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

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 1999

This bill was introduced into the House of Representatives on 30 March 1999 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

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

- provide for the abolition of the National Board of Employment, Education and Training, the Australian Language and Literacy Council, the Employment and Skills Council and the Schools Council and the Higher Education Council;
- continue mechanisms for the appointment of committees and counsellors to assist the Australian Research Council;
- include the University of the Sunshine Coast and the University of Notre Dame Australia within the definition of "higher education institution"; and
- make technical and consequential amendments.

The Committee has no comment on this bill.

Employment Security Bill 1999

This bill was introduced into the House of Representatives on 29 March 1999 by Mr Bevis as a Private Member's bill.

The bill proposes to amend the following Acts:

Workplace Relations Act 1996 to:

- enable the Court or Commission, where it has made an order for the reinstatement of an employee by an employer, to order that a "related body corporate" may be deemed to be the employer; and

- hold liable a related body corporate for the payment of legal entitlements of employees; and

Corporations Law to:

- provide that when a company is in receivership, the Court can make an order requiring a related body corporate to pay the company's debts, including debts such as accrued entitlements to employees; and

- enable creditors to bring proceedings for the recovery of debts against directors of companies resulting from contravention of civil penalty provisions.

The Committee has no comment on this bill.

Environment and Heritage Legislation Amendment Bill 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Environment and Heritage]

The bill proposes to amend the following Acts:

Environment Protection (Sea Dumping) Act 1981 to:

- implement the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972;
- clarify that the Commonwealth has responsibility for regulating the construction of artificial reefs, and to limit the potential liability of the Commonwealth and officers exercising a power under the Act in relation to artificial reefs;
- make the Act applicable to the Exclusive Economic Zone;
- revise offence and penalty provisions and apply chapter 2 of the Criminal Code to offences under the Act;
- revise the defence force exemption and the exemption in relation to the naval, military or air forces of a foreign country;
- simplify the rollback provision authorising the Minister to make a declaration regarding the application of the Act to a State or the Northern Territory;
- include officers of the Australian Customs Service as *ex officio* inspectors for the purposes of the Act; and
- make technical and drafting amendments; and

Sea Installations Act 1987 to remove the prohibitions on issuing, or varying, a permit that would authorise a sea installation to be located partly within and partly outside an adjacent area in respect of a State or an affected Territory.

Reversal of the onus of proof
Proposed new section 15

Item 26 of Schedule 1 to this bill proposes to repeal the existing section 15 of the *Environment Protection (Sea Dumping) Act 1981*, which contains defences to a charge of a specified offence under the Act, and to substitute a revised section. This revised section imposes an evidential burden on a person charged with an offence against proposed new sections 10A, 10B, 10C, 10E and 36 to prove one of the exceptions set out in the proposed new section.

For example, under one of the exceptions listed, an accused person must show, on the balance of probabilities, that he or she had been granted a permit to dump waste in non-Australian waters by a foreign country. To obtain a conviction, it would then be up to the prosecution to show, beyond reasonable doubt, that there was (for example) some defect in the permit.

If this evidential burden were not imposed on the person accused, it seems that the prosecution would, in every case, be required to prove that the accused could not establish one of the exceptions listed in the proposed new section.

While reversing the onus of proof in such circumstances may be seen as reasonable, some aspects of the operation of the bill are not immediately clear. For example, proposed section 10A, among other things, makes it an offence to dump controlled material into Australian waters, or into any waters from an Australian vessel. Proposed section 15 provides a 'defence' in relation to dumping into non-Australian waters in accordance with a foreign permit. It is not clear whether this 'defence' is available only to operators of Australian vessels who obtain foreign permits to dump in non-Australian waters, or whether it is to be more widely available. The relationship between the onus of proof under the new provision, and the onus of proof in relation to the existing defences, is also not clear. The Committee, therefore, **seeks the Minister's advice** on these matters.

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

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

Migration Legislation Amendment Bill (No. 2) 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to:

- provide powers to cancel approvals of business sponsorships;
- introduce monitoring provisions in relation to business sponsorships;
- enact regulations which prescribe the criteria and requirements that must be met for a visa application to be valid;
- permit the authorisation of classes of persons as "officers" and "authorised officers" for the purposes of the Act;
- enable the transfer of non-citizens, who are deportees or removees, from prison custody into immigration detention without effecting their release from custody;
- provide for merits review of decisions to refuse an application that was made outside Australia for a permanent visa where the visa can be granted while the visa applicant is either in the migration zone or outside Australia;
- exempt applicants from "capping" in certain circumstances;
- extend the period applications for certain visa categories may remain in the "pool" from 12 months to 24 months;
- remove the age limit affecting the appointment of full-time members to the Refugee Review Tribunal; and
- ensure decisions made by the Migration Review Tribunal are treated in the same way as those made by the Immigration Review Tribunal.

Appointment of 'a person'
Schedule 3

In general terms, section 5(1) of the *Migration Act 1958* defines an "officer" for the purposes of that Act as an officer of the Department, or a customs officer, or a protective service officer, or a police officer, or any other person authorised by the Minister by notice published in the *Gazette*.

The amendments proposed by Schedule 3 to this bill will substitute a new definition. The effect of this change will be to define an officer as "a person who is authorised in writing by the Minister to be an officer" or "any person who is included in a class of persons authorised in writing by the Minister to be officers" for the purposes of the Act. In neither case does the bill refer to any qualifications or attributes which such persons must have as a condition of being authorised.

The Committee often draws attention to provisions which delegate power to anyone who fits the all-embracing description of 'a person'. As a general rule, the Committee prefers to see some limits placed either on the powers which can be delegated or on the class of potential delegates. Similar considerations apply to the appointment of officers authorised for the purposes of an Act of Parliament. As a general rule, the Committee would prefer that potential appointees be required to have some qualifications or attributes before they are eligible for appointment. The Committee, therefore, **seeks the Minister's advice** on why the unfettered discretion to appoint authorised officers ought not be limited in some way, for example, by reference to qualifications or attributes which appointees should possess.

> *Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) 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.

Norfolk Island Amendment Bill 1999

This bill was introduced into the Senate on 31 March 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Regional Services, Territories and Local Government]

The bill proposes to amend the *Norfolk Island Act 1979* to:

- allow Commonwealth oversight of firearms legislation on Norfolk Island;
- provide for Deputy Administrators to be appointed by the Federal Minister responsible for Territories rather than the Governor-General;
- extend the right to vote in Legislative Assembly elections to all Australian citizens ordinarily resident on the Island;
- establish Australian citizenship as a qualification for enrolment and election to the Legislative Assembly; and
- preserve the existing enrolment rights of enrolled non-Australian citizens.

The rights and liberties of electors
Schedule 1, items 5, 7 and 9

Items 5, 7 and 9 of Schedule 1 to this bill propose to insert new paragraphs 38(ba), 39(2)(da) and 39A(1)(b) in the *Norfolk Island Act 1979*. These new paragraphs will require those who wish to stand for election to the Norfolk Island Legislative Assembly (the Assembly), and those who wish to vote in elections for that Assembly, to be Australian citizens.

The Explanatory Memorandum notes that the *Norfolk Island Act 1979* currently provides that a person may stand for election to the Assembly if he or she is at least 18 years of age, is entitled to vote at elections, and has been ordinarily resident on the Island for 5 years immediately preceding the date of nomination. The *Legislative Assembly Act 1979 (Norfolk Island)* provides that a person is qualified to enrol where that person is at least 18 years of age, and has been present on the Island for 900 days during the period of 4 years immediately preceding their application for enrolment.

The Explanatory Memorandum goes on to note that the 900 day qualifying period for enrolment on Norfolk Island far exceeds the one month period that applies to the Commonwealth and in all States and Territories on the mainland (with Tasmania having a qualifying period of 6 months). It also notes that the Assembly is the only Australian legislative body where non-Australian citizens are entitled to enrol and stand for election. Finally, on this issue, the Explanatory Memorandum notes that the enrolment rights of non-Australian citizens currently on the electoral roll will be preserved, but that the proposed amendments will apply to candidates and voters in the future.

This bill will effectively override subsection 6(1) of the *Legislative Assembly Act 1979 (Norfolk Island)*. In *Alert Digest No 7 of 1996*, the Committee outlined a number of concerns raised by the Euthanasia Laws Bill 1996, which similarly proposed to overturn a law duly passed by a Territory Assembly. Specifically, the Committee noted that the Territory Assemblies are all elected democratically on a universal adult franchise. The Euthanasia Laws Bill seemed "to take away from the people living within those democracies an ability they now have to elect an assembly with power to legislate about a matter of great moment".

The Committee has received representations from the Government of Norfolk Island which express similar views about this bill (copy appended to this *Digest*). Specifically, the Island's Chief Minister questions the urgency of the legislation, which is based on proposals first advanced in 1991, and observes that the proposals were rejected in a local referendum in August 1998. He goes on to state that requiring all residents of Norfolk Island to become Australian citizens in order to vote in local elections is "of utmost concern" to the people of the Island, and that "it is not proper for the Commonwealth of Australia to interfere in our local electoral laws".

> Norfolk Island enjoys an unusual status as an External Territory under the authority of Australia and attached to it only by historical accident and geographic proximity. The Commonwealth of Australia finds our status "an anomaly" given that we pay no taxes, are not represented in the Australian parliament, receive no medicare benefits, nor social security. We prefer it that way and regard it as unique. We have our own Parliament and Government. We are self-sufficient, relying largely on tourism for our income and levying local taxes to support social welfare, health, education, and a range of local government functions.
>
> For the past twenty years we have been moving progressively toward full self government. This has been a successful transition and we anticipate a harmonious relationship with Australia during the final phases of transition.

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

> It has, therefore, been both confrontational and provocative for the Commonwealth of Australia to pursue a course of action which few on the Island would support and which, in essence, achieves nothing of consequence for either Australia or Norfolk Island.
>
> Our residency qualifications prior to voting are no more onerous than those of Australia. In Australia you must be resident for 2 of the previous 5 years (including 12 continual months in the past 24 months) in order to become a citizen and vote. On Norfolk you must be resident for 2 years and five months in order to vote. Our immigration laws are similar to Australia's but we have much stricter residency requirements.
>
> We do not think transient Australians have any more real place or interest voting in our local elections than we do if temporarily resident in Australia for the purposes of business or study …
>
> Approximately one-quarter of our residents are not Australian citizens, and do not choose to alter their citizenship status. Non-Australian citizens would no longer be able to be enrolled if the proposed amendments succeed.

The Committee, therefore, **seeks the Minister's advice** on the concerns expressed by the Chief Minister of the Government of Norfolk Island, which address the effect of the bill on the rights and liberties of electors on the Island, and also on the relationship between this bill and Norfolk Island's transition to self-government.

> *Pending the Minister's advice, 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.*

Public Employment (Consequential and Transitional) Amendment Bill 1999

This bill was introduced into the House of Representatives on 30 March 1999 by the Minister Assisting the Prime Minister for the Public Service. [Portfolio responsibility: Prime Minister].

The bill is in the same in all respects as a bill of the same name which was introduced into the House of Representatives on 30 October 1997 and again on 5 March 1998, and on which the Committee commented in *Alert Digest No 2 of 1998*.

The bill proposes to deal with consequential and transitional matters arising from the repeal of the *Public Service Act 1922* and the enactment of replacement legislation, the proposed *Public Service Act 1999*. Primarily, the bill proposes to:

- set in place conversion arrangements for those who work in the Australian Public Service;
- make transitional arrangements for some conditions covered by the *Public Service Act 1922* because they will no longer be regulated in the same way;
- provide for the continuation of processes already in progress, eg. appointments, promotions, suspensions, transfers and advancements, as well as appeals, grievances and other reviews of employment decisions;
- deal with the consequences of devolving the arrangements for setting the salaries of the Senior Executive Service; and
- make consequential amendments to amend or repeal numerous Acts.

Delegation of legislative power
Subclauses 14(4) and (5)

In *Alert Digest No 2 of 1998*, the Committee noted that subclauses 14(4) and 14(5), if enacted, would permit the making of regulations which may prevail over existing legislation or amend existing legislation, but that such

regulations were authorised only for the purpose of providing for the transition from the present Public Service Act to the new one.

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

Regulations with retrospective effect
Subclause 14(7)

In *Alert Digest No 2 of 1998*, the Committee also noted that subclause 14(7), if enacted, would permit the making of regulations which might have retrospective effect, in that it would be possible for the regulations to take effect from a date prior to that on which they were made. Such regulations, however, would be subject to the *Acts Interpretation Act 1901*. As such, any regulations made under this subclause which adversely affected any person (other than the Commonwealth) retrospectively would be invalid.

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

Public Service Bill 1999

This bill was introduced into the House of Representatives on 30 March 1999 by the Minister Assisting the Prime Minister for the Public Service. [Portfolio responsibility: Prime Minister]

The bill proposes to replace the current legislative framework for the establishment and management of the Australian Public Service.

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.

Statute Stocktake Bill 1999

This bill was introduced into the House of Representatives on 30 March 1999 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Attorney-General]

The bill proposes to:

- repeal 1 Imperial Act and 95 Acts that no longer have any operation;
- make amendments to 28 other Acts consequential on the repeals; and
- make transitional and savings amendments.

The Committee has no comment on this bill.

Superannuation Legislation Amendment Bill (No. 3) 1999

This bill was introduced into the House of Representatives on 31 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Superannuation Industry (Supervision) Act 1993* to:

- establish a new category of small superannuation fund with fewer than five members to be called a self managed superannuation fund; and
- provide for the transfer of the regulation of self managed superannuation funds from the Australian Prudential Regulation Authority to the Australian Taxation Office, effective from 1 July 1999; and

make consequential amendments to seven other Acts.

Strict liability offence and penalties
Proposed new subsection 252A(4)

Item 56 of Schedule 1 to this bill proposes to insert a new section 252A in the *Superannuation Industry (Supervision) Act 1993*. This new provision authorises the Australian Prudential Regulation Authority or the Commissioner of Taxation to request certain information from a regulated superannuation fund with fewer than 5 members.

Subsection 252A(3) makes it an offence to fail to provide this information, and subsection (4) makes it an offence of strict liability. Penalties on a conviction are noted in the Table appended to this *Digest*. Imposing strict liability would seem to absolve the prosecution from having to prove any intention, recklessness or lack of care on the part of an accused who failed to provide the information required within the time specified.

The Explanatory Memorandum provides no reason for departing from the normal practice, which requires the prosecution to prove that an accused person intended to act contrary to the law. The Committee, therefore, **seeks the Treasurer's advice** on the reasons for departing from this normal

practice, and on whether the Committee's *Eighth Report of 1998* (*The Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996*) was taken into consideration in developing the penalty provisions in this bill.

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

Taxation Laws Amendment Bill (No. 6) 1999

This bill was introduced into the House of Representatives on 31 March 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1997 to allow certain taxpayers to write off expenditure incurred in acquiring a domestic spectrum licence that is to be used for the purpose of producing assessable income over the effective life of the licence (up to 15 years);

Income Tax Assessment Act 1936, *Income Tax Assessment Act 1997* and *International Tax Agreements Act 1953* to make amendments consequent on the deduction allowed for expenditure incurred in acquiring a spectrum licence;

Income Tax Assessment Act 1936, *Income Tax Assessment Act 1997*, *Airports (Transitional) Act 1996*, *Income Tax (Transitional Provisions) Act 1997* and *Tax Law Improvement Act 1997* to make technical corrections consequent on the rewrite of the income tax laws;

Income Tax Assessment Act 1936 and *Income Tax Assessment Act 1997* to:

- rewrite provisions that exempt certain education and training payments as amended by the *Taxation Laws Amendment Act (No. 1) 1997* and the *Social Security Legislation Amendment (Youth Allowance Consequential and Related Measures) Act 1998*; and

- ensure that both youth allowance and austudy payments to full-time students are included in assessable income but subject to the beneficiary rebate, as intended; and

Income Tax Assessment Act 1936 to enable the provisional tax uplift factor to be calculated by reference to the measure of gross domestic product which is currently calculated and published by the ABS.

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

Retrospective application
Schedules 1, 2, 3 and 4

The amendments proposed by Schedule 1 to this bill are to apply from 11 March 1998. However, these amendments are beneficial to taxpayers. In addition, the amendments proposed in Schedules 2, 3 and 4 are to apply from the 1997-98 year of income, and are therefore, to some extent, also retrospective. However, all of these amendments are technical in nature, and make no change to the substantive law.

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

Tradesmen's Rights Regulation Repeal Bill 1999

This bill was introduced into the House of Representatives on 31 March 1999 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Employment, Workplace Relations and Small Business]

The bill proposes to repeal the *Tradesmen's Rights Regulations Act 1946* following the establishment of the Australian Recognition Framework to provide a national approach to the assessment and recognition of domestic skill competencies. The bill also proposes to make a consequential amendment to the *Sea Installations Act 1987*.

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 International Privatisation Bill 1999

This bill was introduced into the House of Representatives on 30 March 1999 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to provide for the:

- corporatisation and privatisation of Wool International and the change of its name to WoolStock Australia Limited;
- preservation of units of entitlement of registered equity holders;
- removal of the Government from the management of the wool stockpile and the corresponding lifting of restrictions on the manner and timing of sales of stockpile wool; and
- issue of shares to Wool International registered equity holders, with each registered equity holder receiving one share in WoolStock Australia Limited for each unit held by them.

The Committee has no comment on this bill.

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were "more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties". The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for "administration of justice offences". The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest.* The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	**Section/Subsection**	**Offence**	**Penalty**
Superannuation Industry (Supervision) Act 1993	252A(3)	Trustee of superannuation fund with fewer than 5 members failing to provide information requested by APRA or the Tax Commissioner.	50 penalty units

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

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 7 of 1999

28 April 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

TABLE OF CONTENTS

- **The Committee has commented on these bills**

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

Broadcasting Services Amendment (Online Services) Bill 1999

This bill was introduced into the Senate on 21 April 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the *Broadcasting Services Act 1992* to provide for the regulation of online services by:

- establishing a complaints mechanism to enable complaints to be made to the Australian Broadcasting Authority (ABA) about offensive material online;
- defining material that will trigger action by the ABA, on the basis of current National Classification Board guidelines for film, as material Refused Classification and rated X, and material rated R that is not protected by adult verification procedures;
- giving powers to the ABA to issue notices to service providers aimed at preventing access to prohibited material which is subject to a complaint if it is hosted in Australia or, if the material is sourced overseas, to take reasonable steps to prevent access if technically feasible;
- providing indemnities for service providers to protect them from litigation by customers affected by ABA notices;
- providing a graduated scale of sanctions against service providers breaching ABA notices or the legislation;
- providing that the framework will not apply to private or restricted distribution communications such as e-mail (subject to the ability of the Minister to declare that a specified person who supplies, or proposes to supply, a specified Internet carriage service is an Internet service provider) – however, current provisions of the *Crimes Act 1914* (Cth) in relation to offensive or harassing use of a telecommunications service will apply in this context;
- establishing a community advisory body to monitor material, operate a 'hotline' to receive complaints about illegal material and pass relevant information to the ABA and police authorities, and also advise the

public about options such as filtering software that are available to address concerns about online content;

- giving the Commonwealth responsibility for regulating the activities of Internet service providers and Internet content hosts, and providing that the Attorney-General is to encourage the development of uniform State and Territory offence provisions complementing the Commonwealth legislation that creates offences for the publication and transmission of proscribed material by users and content creators; and

makes a consequential amendment to the *Crimes Act 1914*.

Non-disallowable instruments
Clause 3 of Schedule 5

Item 10 of Schedule 1 to this bill proposes to add a new Schedule 5 to the *Broadcasting Services Act 1992*. This Schedule sets up a system for regulating certain aspects of the Internet industry.

Clause 3 of proposed Schedule 5 will permit the ABA to declare that "a specified access-control system is a restricted access system in relation to Internet content". In making such a declaration, the ABA must have regard to the objective of protecting children from exposure to Internet content which is unsuitable for children, and such other matters (if any) as the ABA considers relevant.

Subclause 3(3) states that a copy of any such instrument must be laid before each House of the Parliament within 15 days after the date on which the instrument was made. No provision seems to have been made for the possible disallowance of such instruments. The Committee, therefore, **seeks the Minister's advice** as to whether instruments made under clause 3 of Schedule 5 of the *Broadcasting Services Act 1992* are disallowable, and, if not, why they should be exempt from disallowance.

Pending the Minister's response, 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.

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

Copyright Amendment (Computer Programs) Bill 1999

This bill was introduced into the Senate on 21 April 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Copyright Act 1968* to add a new Division which deals with exceptions to the infringement of copyright in computer programs. As a result, copyright in a computer program is not infringed if a copy is made in the course of:

- running the program for normal use – subject to the conditions of the licence accompanying the program when bought;
- studying the operation of and ideas behind the program while running it;
- periodically backing up the data on a computer system or network for security;
- finding out how the program interoperates with other programs so as to make a new program to interoperate with any or all of those programs;
- correcting an error (including the Y2K bug) in the program; and
- security testing and correcting a security flaw in the program, or a network.

The Committee has no comment on this bill.

Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999

This bill was introduced into the Senate on 21 April 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Immigration and Multicultural Affairs]

Consistent with the Government's commitment to provide temporary safe haven for 4000 persons displaced from their homes in Kosovo, the bill proposes to provide a legislative framework for the Australian Government to provide temporary safe haven in Australia. The bill seeks to ensure that persons to whom temporary safe haven is provided are unable to change their status to remain in Australia after temporary safe haven is no longer necessary.

Rights and non-reviewable decisions
Schedule 1, items 3, 7, 10, 11, 12 and 13

A number of the provisions of this bill seem to come within the Committee's terms of reference. For example, item 3 of Schedule 1 proposes to insert a new section 37A in the Principal Act. This section creates a new visa category of temporary safe haven visas. Under proposed subsection 37A(2), the Minister may extend the period of a temporary safe haven visa. Under proposed subsection 37A(5), the Minister is not obliged to consider whether to exercise this power. Similarly, under proposed subsection 91L(6), the Minister is not obliged to consider whether to exercise his or her power to permit a holder of a temporary safe haven visa to apply for another type of visa.

By virtue of items 10, 11, 12 and 13 of Schedule 1, a number of the Minister's decisions concerning temporary safe haven visas are not reviewable by any Tribunal or court other than the High Court.

Finally, item 14 of Schedule 1 proposes to insert a new section 500A in the Principal Act. This deals with refusals or cancellations of temporary safe haven visas. By virtue of proposed subsection 500A(11), the Minister is not bound by the rules of natural justice should he or she either refuse to grant, or cancel, such a visa. The Second Reading Speech notes that, as temporary safe

haven is to be provided to persons at short notice and in situations where extensive character-checking is not possible, "it is necessary to have effective powers to withdraw temporary safe haven which has been provided to any person who represents a danger to the Australian community, or Australia's security or whose presence in Australia would be harmful to Australia's international relations".

Such provisions are usually of concern to the Committee. However, the Committee notes that they represent aspects of policy in relation to the type of visa provided for in this bill. Such policy matters are best left for resolution by the Senate as a whole.

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, and make rights liberties or obligations unduly dependent on non-reviewable decisions, in breach of principle 1(a)(ii) of the Committee's terms of reference.

28 April 1999

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 1999

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
A New Tax System (Australian Business Number) Bill 1998	1(15.2.99)	2.12.98	10.12.98	Treasurer	16.2.99	10.3.99	4(24.3.99)
A New Tax System (Goods and Services Tax Administration) Bill 1998	1(15.2.99)	2.12.98	10.12.98	Treasurer	16.2.99		
A New Tax System (Goods and Services Tax) Bill 1998	1(15.2.99)	2.12.98	10.12.98	Treasurer	16.2.99		
A New Tax System (Indirect Tax Administration) Bill 1999	5(31.3.99)	24.3.99	31.3.99	Treasurer	1.4.99		
A New Tax System (Luxury Car Tax) Bill 1999	5(31.3.99)	24.3.99	31.3.99	Treasurer	1.4.99		
A New Tax System (Wine Equalisation Tax) Bill 1999	5(31.3.99)	24.3.99	31.3.99	Treasurer	1.4.99		
Adelaide Airport Curfew Bill 1999	5(31.3.99)	22.3.99		Mrs Gallus MP	1.4.99		
Aged Care Amendment (Accreditation Agency) Bill 1998 (39th Parl)	10*(25.11.98)	12.11.98	1.12.98	Aged Care	26.11.98		Act No 122
Australia New Zealand Food Authority Amendment Bill 1999	6(21.4.99)		31.3.99	Health and Aged Care	22.4.99		
Australian Radiation Protection and Nuclear Safety Bill 1998 (39th Parl)	10*(25.11.98)	11.11.98	23.11.98	Health and Aged Care Similar to bill 38th Parl - further response requested	26.11.98		Act No 133

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Australian Radiation Protection and Nuclear Safety (Consequential Amendments) Bill 1998 (39th Parl)	10*(25.11.98)	11.11.98	23.11.98	Health and Aged Care	26.11.98		Act No 135
Child Support Legislation Amendment Bill 1998 (39th Parl)	10*(25.11.98)	11.11.98	23.11.98	Family and Community Services	26.11.98		Act No 120
Corporate Law Economic Reform Program Bill 1998	1(15.2.99)	3.12.98		Treasurer	16.2.99		
Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999	4(24.3.99)		10.3.99	Justice and Customs	25.3.99	31.3.99	6(21.4.99)
Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999	5(31.3.99)		24.3.99	Justice and Customs	1.4.99	27.4.99	7(28.4.99)
Customs Amendment Bill (No. 1) 1999	6(21.4.99)		31.3.99	Justice and Customs	22.4.99		
Customs Amendment Bill (No. 2) 1999	5(31.3.99)	31.3.99		Justice and Customs	1.4.99		
Customs (Anti-dumping Amendments) Bill 1998	1(15.2.99)	3.12.98	25.3.99	Attorney-General	16.2.99	4.3.99	5(31.3.99)
Customs Tariff (Anti-dumping Amendments) Bill 1998	1(15.2.99)	3.12.98	25.3.99	Attorney-General	16.2.99	4.3.98	5(31.3.99)
Electoral and Referendum Amendment Bill (No. 2) 1998 (39th Parl)	11*(2.12.98)	26.11.98	7.12.98	Finance and Administration Minister responded to similar bill 38th Parl further response requested	(Jan 99)	22.2.99	• Digest 11 (2.12.98) 3(10.3.99)
Environment and Heritage Legislation Amendment Bill 1999	6(21.4.99)		31.3.99	Environment and Heritage	22.4.99		

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Environment Protection and Biodiversity Conservation Bill 1998 (39th Parl)	10*(25.11.98)		12.11.98	Environment and Heritage	26.11.98	28.4.99	7(28.4.99)
Health Legislation Amendment Bill (No. 2) 1999 (Previous citation: Health Legislation Amendment Bill (No. 4) 1998)	1(15.2.99)	3.12.98	22.3.99	Health and Aged Care	16.2.99 1.4.99	29.3.99	5(31.3.99)
Import Processing Charges Amendment Bill 1999	5(31.3.99)	25.3.99		Justice and Customs	1.4.99		
Judiciary Amendment Bill 1998	1(15.2.99)	3.12.98	15.2.99	Attorney-General	16.2.99	5.3.99	3(10.3.99)
Migration Legislation Amendment Bill (No. 2) 1998	1(15.2.99)		3.12.98	Immigration and Multicultural Affairs	16.2.99 25.3.99	23.3.99	4(24.3.99)
Migration Legislation Amendment Bill (No. 2) 1999	6(21.4.99)		31.3.99	Immigration and Multicultural Affairs	22.4.99		
Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998 (39th Parl)	10*(25.11.98)	26.11.98	11.11.98	Immigration and Multicultural Affairs Minister responded to similar bill 38th Parl - further response requested	26.11.98	13.1.99	1(15.2.99) Act No 114
National Environment Protection Measures (Implementation) Bill 1998	11*(2.12.98)	8.12.98	25.11.98	Environment and Heritage	3.12.98	30.3.99	5(31.3.99)
Norfolk Island Amendment Bill 1999	6(21.4.99)		31.3.99	Regional Services, Territories and Local Government	22.4.99		
Quarantine Amendment Bill 1998	1(15.2.99)	3.12.98	29.3.99	Agriculture, Fisheries and Forestry	16.2.99	22.3.99	5(31.3.99)
Radiocommunications Legislation Amendment Bill 1999	3(10.3.99)	18.2.99	29.3.99	Communications, Information Technology and the Arts	11.3.99	23.3.99	5(31.3.99)

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Sales Tax Legislation Amendment Bill (No. 1) 1998	1(15.2.99)	3.12.98	17.2.99	Treasurer	16.2.99	10.3.99	4(24.3.99)
Superannuation Legislation Amendment Bill (No. 2) 1999	4(24.3.99)	11.3.99		Treasurer	25.3.99	22.4.99	
Superannuation Legislation Amendment Bill (No. 3) 1999	6(21.4.99)	31.3.99		Treasurer	22.4.99		
Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 1998 (39th Parl)	10*(25.11.98)	12.11.98	17.2.99	Treasurer	26.11.98	12.1.99	3(10.3.99)
Superannuation Legislation Amendment (Resolution of Complaints) Act 1998	11*(2.12.98)	26.11.98	3.12.98	Treasurer	3.12.98	21.1.99	1(15.2.99)
Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 1998 (39th Parl)	10*(25.11.98)	12.11.98	7.12.98	Finance and Administration	26.11.98	29.1.99	1(15.2.99)
Taxation Laws Amendment Bill (No. 2) 1998 (39th Parl)	10*(25.11.98)	12.11.98	30.11.98	Treasurer	26.11.98 12.98	3.12.98 4.2.99	11(9.12.98) 1(15.2.99)
Taxation Laws Amendment Bill (No. 4) 1998 (39th Parl) (new citation: Taxation Laws Amendment Bill (No. 2) 1999)	1(15.2.99)	3.12.98	19.4.99	Treasurer	16.2.99	22.3.99 7.4.99	6(21.4.99)
Taxation Laws Amendment Bill (No. 4) 1999	4(24.3.99)	11.3.99		Treasurer	25.3.99	14.4.99	
Taxation Laws Amendment Bill (No. 5) 1999	4(24.3.99)	11.3.99		Treasurer	25.3.99		
Therapeutic Goods Legislation Amendment Bill 1999	3(10.3.99)	17.2.99	11.3.99	Health and Aged Care	11.3.99	11.3.99	4(24.3.99)

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Workplace Relations Legislation Amendment (Youth Employment) Bill 1998	11*(2.12.98)	26.11.98	15.2.99	Workplace Relations and Small Business	3.12.98	2.2.99	2(17.2.99)
Youth Allowance Consolidation Bill 1998	2(17.2.99)	11.2.99	27.4.99	Family and Community Services	18.2.99	8.3.99	7(28.4.99)

* 1998 Digest

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 8 of 1999

26 May 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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- **The Committee has commented on these bills**

This Digest is circulated to all Honourable Senators.
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A New Tax System (Closely Held Trusts) Bill 1999

This bill was introduced into the House of Representatives on 13 May 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1936 to provide that the trustee of a closely held trust with a trustee beneficiary discloses to the Commissioner of Taxation the identify of the ultimate beneficiaries of certain net income and tax-preferred amounts of the trust within a specified period after the end of the year of income; and

Income Tax Assessment Act 1936, *Income Tax Assessment Act 1997* and *Superannuation Contributions Tax (Assessment and Collection) Act 1997* to make consequential amendments.

The Committee has no comment on this bill.

A New Tax System (Ultimate Beneficiary Non-disclosure Tax) Bill (No. 1) 1999

This bill was introduced into the House of Representatives on 13 May 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

Complementary to the A New Tax System (Closely Held Trusts) Bill 1999, this bill proposes to impose taxation at the highest marginal rate plus Medicare levy where trustees fail to correctly identify ultimate beneficiaries of net income of the closely held trust within the specified period.

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.

A New Tax System (Ultimate Beneficiary Non-disclosure Tax) Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 13 May 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

Complementary to the A New Tax System (Closely Held Trusts) Bill 1999, this bill proposes to impose taxation at the highest marginal rate plus Medicare levy where there are no ultimate beneficiaries of net income of the closely held trust.

The Committee has no comment on this bill.

ACIS Administration Bill 1999

This bill was introduced into the House of Representatives on 13 May 1999 by the Minister representing the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to establish the Automotive Competitiveness and Investment Scheme (ACIS) to commence from 1 January 2001.

Old convictions, continuing consequences
Proposed new paragraphs 29(1)(a) and (2)(b)

Division 5 of this bill deals with the formal requirements for, and procedures for the consideration of, applications for registration under the Automotive Competitiveness and Investment Scheme.

Under proposed section 26(2), the Departmental Secretary must be satisfied that individual and corporate applicants, and the directors of applicant companies, are fit and proper persons. In determining whether such a person is fit and proper, under proposed paragraphs 29(1)(a) and (2)(b), the Secretary must have regard to any conviction for an offence committed within the previous 10 years which was punishable by imprisonment for one year or more.

The Committee has noted previously that such provisions raise a number of issues. First, they invoke an element of retrospectivity. An applicant may have been convicted of an offence up to 10 years before the passing of this bill, and not been affected in any way by that conviction, but may now, years later, come to be denied registration as a consequence.

Secondly, the provision seems somewhat arbitrary. Applicants who apply for registration 10 years and 1 day after having committed such an offence are regarded as fully rehabilitated. Applicants who apply for registration 9 years and 11 months after having committed such an offence are not. While any nominated period may be seen as arbitrary, the Committee seeks advice as to the relationship of this 10 year period and limitation periods in other legislation.

Thirdly, such provisions may be regarded as exposing an applicant to double punishment for the same offence. The view is commonly expressed that, once

a person has completed a sentence of imprisonment for an offence, they have paid their debt to society and should not have to continually face the stigma of the sentence served. This provision, however, permits the fact of a conviction to affect aspects of an applicant's life for a further 9 years after that conviction has been dealt with.

Fourthly, the provision is potentially inequitable in referring to offences "punishable" by imprisonment for one year or longer. In its *Seventh Report of 1998*, in a somewhat different context (the voting rights of prisoners), the Committee referred to the potential unfairness of provisions which exclude rights by reference to the maximum penalty that is provided for, rather than the actual penalty imposed. Under proposed paragraphs 29(1)(a) and (2)(b), a person who was actually fined $50 for an offence punishable by imprisonment for a year must have this conviction taken into account.

Finally, the bill does not make clear how information about past convictions will come to the Secretary's attention. Will inquiries be made of law enforcement authorities around Australia, or will applicants be required to disclose previous convictions? If the latter approach is adopted, what consequences are envisaged should an applicant fail to disclose an old conviction for a relatively minor offence?

The Committee notes that the bill merely requires that past offences be taken into account in considering an application – such offences will not necessarily preclude registration. However, there is a real possibility that such a provision may lead to the rejection of an application in circumstances of apparent unfairness, notwithstanding the review provisions in proposed section 114(d). Therefore, the Committee **seeks the Minister's advice** about these matters.

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

ACIS (Unearned Credit Liability) Bill 1999

This bill was introduced into the House of Representatives on 13 May 1999 by the Minister representing the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to impose a liability for unearned credit in relation to unearned duty credit accrued by ACIS participants.

The Committee has no comment on this bill.

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

Appropriation Bill (No. 1) 1999-2000

This bill was introduced into the House of Representatives on 11 May 1999 by the Treasurer. [Portfolio responsibility: Finance and Administration]

The bill proposes to appropriate money ($36,024 million) out of the Consolidated Revenue Fund to meet payments for the ordinary annual services of the government for the year ending on 30 June 2000.

The Committee has no comment on this bill.

Appropriation Bill (No. 2) 1999-2000

This bill was introduced into the House of Representatives on 11 May 1999 by the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to appropriate money ($5,735 million) out of the Consolidated Revenue Fund to meet payments in relation to grants to the states under section 96 of the Constitution and for payments to the Northern Territory and the Australian Capital Territory; administered expenses on new outcomes and equity injections and loans to agencies, and administered capital funding for the year ending on 30 June 2000.

The Committee has no comment on this bill.

Appropriation (Parliamentary Departments) Bill 1999-2000

This bill was introduced into the House of Representatives on 11 May 1999 by the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to appropriate money ($159 million) out of the Consolidated Revenue Fund to meet recurrent expenditures of the parliamentary departments for the year ending on 30 June 2000.

The Committee has no comment on this bill.

Customs Tariff Amendment (ACIS Implementation) Bill 1999

This bill was introduced into the House of Representatives on 13 May 1999 by the Minister representing the Minister for Industry, Science and Resources. [Portfolio responsibility: Justice and Customs]

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

- a customs duty reduction on passenger motor vehicles (PMV) and certain PMV parts from 15% to 10% on 1 January 2005; and

- that customs duty liabilities on eligible imports can be discharged by duty credit earned under the ACIS Administration Bill 1999; and

- classification clarification of certain components used in the manufacture of a PMV.

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.

Employment Security Bill 1999

This bill was introduced into the Senate on 13 May 1999 by Senator Collins as a Private Senator's bill.

The bill proposes to amend the:

Workplace Relations Act 1996 to:

- enable the Court or Commission, where it has made an order for reinstatement by an employer or employee, and where satisfied that it is just to do so, to make an order with retrospective effect, that a related body corporate shall be deemed to be the employer; and

- hold liable a "related body corporate" for the payment of legal entitlements of employees; and

Corporations Law to:

- provide that when a company is in receivership, the liquidator, a creditor or the ASC can apply to the Court for an order requiring a related body corporate to pay to the liquidator the whole or part of a debt of an insolvent company; and

- enable a corporation, creditor or the ASC to recover, as a due debt either:
  - an amount equal to any profit made by a person or another person; or
  - an amount equal to any loss or damage suffered by the corporation;

  as a result of contravening section 1317HD.

The Committee has no comment on this bill.

Taxation Laws Amendment Bill (No. 7) 1999

This bill was introduced into the House of Representatives on 13 May 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1936 and *Taxation Laws Amendment (Company Law Review) Act 1998* to provide that a share capital account does not become tainted by the merger of tainted share premiums with share capital; and

Income Tax (Transitional Provisions) Act 1997 and *Income Tax Assessment Act 1997* to provide relief from unintended tax consequences arising from a managed investment scheme restructuring to become a registered scheme in accordance with the *Managed Investment Act 1998*.

Retrospective application
Schedules 1 and 2

Schedule 1 to this bill seeks to remedy two unintended consequences of previous amendments made by the *Taxation Laws Amendment (Company Law Review) Act 1998*.

These amendments concern the tax-effects on new share capital accounts where they are merged with 'tainted' share premium accounts (which were abolished on 1 July 1998). By virtue of subclause 2(2), Schedule 1 is to commence retrospectively on 1 July 1998.

The Explanatory Memorandum states that the purpose of these amendments is "to prevent the inappropriate tainting of the share capital account", and that they are designed "to prevent an unintended gain to the revenue". This suggests that these amendments are beneficial to taxpayers.

Similarly, Schedule 2 to the bill seeks to remedy some unintended tax consequences arising from the restructuring of a managed investment scheme. By virtue of new paragraph 906-105 of the *Income Tax (Transitional Provisions) Act 1997*, to be inserted by this Schedule, the amendments made

are to apply retrospectively from 1 July 1998. Again, these amendments are beneficial to taxpayers.

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

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were "more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties". The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for "administration of justice offences". The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest*. The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	**Section/Subsection**	**Offence**	**Penalty**
ACIS Administration Bill 1999	83(3)	Fail or refuse to answer questions or produce documents	6 months

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

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 9 of 1999

23 June 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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A New Tax System (Family Assistance) (Administration) Bill 1999

This bill was introduced into the House of Representatives on 9 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

Complementary to the A New Tax System (Family Assistance) Bill 1999 and the A New Tax System (Family Assistance)(Consequential and Related Measures) Bill (No. 2) 1999, this bill proposes to provide the administrative, procedural and technical rules that will apply to the new family assistance payments: family tax benefit part A, family tax benefit part B and child care benefit. The bill also provides similar provisions for the maternity allowance and the maternity immunisation allowance.

Use of tax file numbers
Proposed new paragraph 7(2)(b) and clause 61

By virtue of proposed paragraph 7(2)(b) and clause 61, persons claiming family tax benefit will be required to provide their tax file numbers and/or that of their partner.

It is the Committee's practice to draw attention to new measures which make the payment of benefits dependent upon the provision of a tax file number. This is because, as its name indicates, the tax file number scheme was originally intended to ensure the integrity of the taxation system.

Under this bill, the 'benefit' consists of a reduction in the beneficiary's liability to income tax. This is clearly within the scope of the scheme as originally envisaged.

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

A New Tax System (Family Assistance) (Consequential and Related Measures) Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 9 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

Complementary to the A New Tax System (Family Assistance) Bill 1999 and the A New Tax System (Family Assistance)(Administration) Bill 1999, this bill proposes to amend 21 Acts to:

- repeal or amend references in relation to the new family assistance regime;
- allow a tax deduction for fees related to family tax benefit claimed through the tax system;
- provide for the appropriate calculation of family tax benefit part A for those recipients in receipt of income support; and
- allow the use or disclosure of information by or between Centrelink, the Australian Taxation Office and the Health Insurance Commission involved in the transition to the new family assistance regime for the purpose of identifying shared customers.

Retrospective application
Subclauses 2(6) and 2(7)

By virtue of subclauses 2(6) and 2(7) of this bill, various provisions are to commence retrospectively. However, in each case the amendments are technical only, and make no substantive change to the law.

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

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

Retrospective application
Subitem 68(2) of Schedule 10

By virtue of subitem 68(2) of Schedule 10 to this bill, the amendment proposed by item 7 of that Schedule is to apply retrospectively from 8 December 1997. However, this amendment is technical in nature, and makes no substantive change to the law.

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

Aged Care Amendment (Omnibus) Bill 1999

This bill was introduced into the House of Representatives on 10 June 1999 by the Minister for Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the following Acts:

Aged Care Act 1997 to:

- make provision for the payment of accommodation charges;
- make consequential changes to some of the rules relating to the payment of accommodation bonds;
- exempt people who were residing in nursing homes when the Act commenced from paying an accommodation charge on moving to another service; and
- amends provisions relating to the revocation of approved provider status and the imposition of sanctions for breaches of provider responsibilities under the previous legislation;

Social Security Act 1991 and the *Veterans' Entitlements Act 1986* to provide:

- that rental income will be excluded from the pension test; and
- that the value of the home will be exempted from the pension assets test where the former home is being rented to pay the accommodation charge;

Veterans' Affairs Legislation Amendment (Budget and Simplification Measures) Act 1997 to make technical amendments; and

Aged Care (Consequential Provisions) Act 1997 to make technical amendments relating to:

- non-compliance by providers of nursing homes and hostels; and
- transitional provisions concerning additional recurrent funding for new and rebuilt and upgraded nursing homes.

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

Retrospective application
Subclause 2(3)

By virtue of subclause 2(3) of this bill, the amendments proposed in Schedule 4 are to commence retrospectively. However, these amendments are technical in nature, and make no substantive change to the law.

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

Retrospective application
Subclause 2(4)

By virtue of subclause 2(4) of this bill, the amendments proposed by items 3 and 4 of Schedule 5 are to commence retrospectively. However, these amendments correct the unintended, and potentially harmful, consequences of earlier amendments to the Principal Act.

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

Retrospective application
Schedule 2, item 13 and Schedule 3, item 21.

The amendments proposed to be made by item 13 of Schedule 2 and item 21 of Schedule 3 to this bill are to apply retrospectively to transactions entered into prior to 6 November 1997. However, these amendments are beneficial to those who entered into these transactions.

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

Australian Sports Commission Amendment Bill 1999

This bill was introduced into the House of Representatives on 2 June 1999 by the Minister for Sport and Tourism. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to amend the *Australian Sports Commission Act 1989* to provide for an exchange of information between the Australian Sports Commission and the Australian Customs Service in relation to the importation into Australia of substances that enhance sporting performance or substances that can be used to conceal the use of performance enhancing drugs.

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.

Aviation Fuel Revenues (Special Appropriation) Amendment Bill 1999

This bill was introduced into the House of Representatives on 2 June 1999 by the Minister for Transport and Regional Services. [Portfolio responsibility: Transport and Regional Services]

Complementary to the Customs Tariff Amendment (Aviation Fuel Revenues) Bill 1999 and the Excise Tariff Amendment (Aviation Fuel Revenues) Bill 1999, this bill proposes to enable customs and excise duties on aviation kerosene (aviation turbine fuel or avtur) and aviation gasoline (avgas) to be appropriated to the Civil Aviation Safety Authority and Airservices Australia (Airservices). The bill further proposes that the Minister should determine the amount appropriated per litre of avgas and avtur.

Retrospective application
Schedule 1 item 6

The effect of item 6 of Schedule 1 to this bill is to apply its substantive provisions retrospectively from 12 May 1999. However, the purpose of the bill is to allow for the payment of money from Consolidated Revenue to the Civil Aviation Safety Authority. The retrospective effect of the bill will not, therefore, adversely affect any member of the public.

In addition, this bill represents a Budget measure. In general terms, the Committee is less concerned by retrospectivity in the case of Budget measures.

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

Constitution Alteration (Establishment of Republic) 1999

This bill was introduced into the House of Representatives on 10 June 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

Complementary to the Presidential Nominations Committee Bill 1999, this bill proposes to amend the Constitution to establish the Commonwealth of Australia as a republic with a President chosen by a two-thirds majority of the members of the Commonwealth Parliament. The bill further proposes to make consequential and transitional amendments.

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.

Copyright Amendment (Importation of Sound Recordings) Bill 1999

This bill was introduced into the Senate on 26 May 1999 by the Minister for Justice and Customs. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Copyright Act 1968* to ensure that when ancillary copyright material is included with a sound recording (particularly music compact discs), the material does not prevent parallel importation of the sound recording.

The Committee has no comment on this bill.

Customs Amendment (Warehouses) Bill 1999

This bill was introduced into the House of Representatives on 3 June 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Justice and Customs]

Complementary to the Import Processing Charges Amendment (Warehouses) Bill 1999, this bill proposes to amend the *Customs Act 1901* to remove the requirement for people operating "Manufacturing in Bond" warehouses to pay the warehoused goods entry fee when goods are exported.

Retrospective application
Subclause 2(2)

Subclause 2(2) of this bill provides that most of the amendments proposed in the bill are to commence retrospectively on 29 April 1999. However, the Explanatory Memorandum indicates that these amendments are beneficial to those people who operate "Manufacturing in Bond" warehouses.

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

Customs Tariff Amendment (Aviation Fuel Revenues) Bill 1999

This bill was introduced into the House of Representatives on 2 June 1999 by the Minister for Transport and Regional Services. [Portfolio responsibility: Justice and Customs]

Complementary to the Aviation Fuel Revenues (Special Appropriation) Amendment Bill 1999 and the Excise Tariff Amendment (Aviation Fuel Revenues) Bill 1999, this bill proposes to amend the *Customs Tariff Act 1995* to increase the rate of customs duty on aviation kerosene (aviation turbine fuel or avtur) and aviation gasoline (avgas) to $0.0271/L from 12 May 1999.

Retrospective application
Subclause 2(2)

By virtue of subclause 2(2), the amendments proposed in this bill are to commence retrospectively on 12 May 1999. However, the Explanatory Memorandum states that these amendments are intended to implement a Budget decision to increase the duty payable on aviation fuels.

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

Excise Tariff Amendment (Aviation Fuel Revenues) Bill 1999

This bill was introduced into the House of Representatives on 2 June 1999 by the Minister for Transport and Regional Services. [Portfolio responsibility: Treasury]

Complementary to the Aviation Fuel Revenues (Special Appropriation) Amendment Bill 1999 and the Customs Tariff Amendment (Aviation Fuel Revenues) Bill 1999, this bill proposes to amend the *Excise Tariff Act 1921* to increase the rate of excise duty on aviation kerosene (aviation turbine fuel or avtur) and aviation gasoline (avgas) to $0.0271/L from 12 May 1999.

Retrospective application
Subclause 2(2)

By virtue of subclause 2(2), the amendments proposed in this bill are to commence retrospectively on 12 May 1999. However, the Explanatory Memorandum states that these amendments are intended to implement a Budget decision to increase the duty payable on aviation fuels.

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

Health Insurance Amendment (Professional Services Review) Bill 1999

This bill was introduced into the House of Representatives on 2 June 1999 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Health Insurance Act 1973* to implement changes to the Professional Services Review (PSR) Scheme as a result of a review of the Scheme. The PSR Scheme provides for a system of peer review to determine whether a practitioner has inappropriately rendered or initiated services which attract a Medicare benefit, or has inappropriately prescribed under the Pharmaceutical Benefits Scheme, and to apply sanctions to those who practise inappropriately.

Abrogating the right to silence and patient privacy
Proposed new section 106ZPQ

Among other things, this bill proposes to insert a new section 106ZPQ in the *Health Insurance Act 1973*. This provision states that a person must produce documents for inspection even though those documents may tend to incriminate that person. The Explanatory Memorandum states that this section "mirrors subsection 105A(6) of the current Act".

Under proposed section 89B and 105A, the documents to be produced may include clinical or practice records of services rendered not only by the person under review, but also by practitioners employed by that person, or by practitioners employed by a body corporate of which the person under review is an officer. These documents must be produced to a Committee member or his or her nominee (mirroring the existing legislation) and also to the Director or his or her nominee.

Proposed new section 106ZPQ goes on to limit the use that may be made of any documents or information produced. Under proposed subsection 106ZPQ(2) such documents or information are not admissible against the person producing them in civil or criminal proceedings (other than proceedings for providing false or misleading information, or proceedings before a Committee or the Determining Authority).

The Committee notes that proposed new section 106ZPQ attempts to strike a balance between the need to obtain information and the need to protect rights. However, some aspects of its operation remain unclear. Therefore, the Committee **seeks the Minister's advice** on the following matters:

- how any incriminating documents or information might be used against a person under investigation in proceedings before a Committee or Determining Authority;
- whether "a person" nominated by a Committee member or the Director to receive confidential documents will be required to hold any particular position or possess any special qualifications;
- in requiring the production of patient records, how the bill proposes to protect the doctor/patient relationship, which is founded on confidence and is necessary for appropriate treatment; and
- in requiring the production of patient records, how the bill proposes to protect the privacy of patients.

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

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

Import Processing Charges Amendment (Warehouses) Bill 1999

This bill was introduced into the House of Representatives on 3 June 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Justice and Customs]

Complementary to the Customs Amendment (Warehouses) Bill 1999, this bill proposes to amend the *Import Processing Charges Act 1997* to remove the requirement for people operating "Manufacturing in Bond" warehouses to pay the import processing charge when goods are exported.

Retrospective application
Subclause 2(2)

Subclause 2(2) of this bill provides that most of the amendments proposed in the bill are to commence retrospectively on 29 April 1999. However, the Explanatory Memorandum indicates that these amendments are beneficial to those people who operate "Manufacturing in Bond" warehouses.

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

National Health Amendment (Lifetime Health Cover) Bill 1999

This bill was introduced into the House of Representatives on 2 June 1999 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *National Health Act 1953* to require private health insurance funds to introduce Lifetime Health Cover by setting different premiums for members dependent on the age at which a member first takes hospital cover with a fund.

The Committee has no comment on this bill.

Presidential Nominations Committee Bill 1999

This bill was introduced into the House of Representatives on 10 June 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

Complementary to the Constitution Alteration (Establishment of Republic) 1999, this bill proposes to establish a Presidential Nominations Committee to invite and consider nominations for appointment as President of the Commonwealth of Australia and report on the nominations to the Prime Minister.

The Committee has no comment on this bill.

Protection of Movable Cultural Heritage Amendment Bill 1999

This bill was introduced into the House of Representatives on 3 June 1999 by the Minister for the Arts and the Centenary of Federation. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the *Protection of Movable Cultural Heritage Act 1986* to replace the National Cultural Heritage Fund with the National Cultural Heritage Account, a Special Account which will be subject to the accounting and reporting requirements of the *Financial Management and Accountability Act 1997* and to make minor consequential amendments.

The Committee has no comment on this bill.

Social Security (Administration and International Agreements)(Consequential Amendments) Bill 1999

This bill was introduced into the House of Representatives on 3 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

Complementary to the Social Security (Administration) Bill 1999 and the Social Security (International Agreements) Bill 1999, this bill proposes to:

- amend the repeal provisions of the *Social Security Act 1991* consequential on the proposed Social Security (Administration) Act 1999 and the Social Security (International Agreements) Act 1999; and

- repeal Part 9 of the proposed Social Security (Administration) Act 1999 as a consequence of the commencement of the provision of that Act which contains a single rounding provision that applies to all social security payments.

Drafting note
Subclauses 2(1), 2(2) and 2(3)

Schedule 1 to this bill contains amendments consequent on the enactment of the Social Security (Administration) Act 1999. Subclause 2(2) states that these amendments are to commence on 20 March 2000 – the date on which the Administration Act is to commence.

Schedule 2 to this bill contains amendments consequent on the enactment of the Social Security (International Agreements) Act 1999. Subclause 2(3) states that these amendments are to commence on 1 July 2000. However proposed section 2 of the International Agreements Act states that it is to commence on 20 March 2000.

Schedule 3 to this bill repeals Part 9 of the Administration Act. Subclause 2(1) would have this commencing on Royal Assent. However, proposed subsection 2(3) of the Administration Act indicates that Part 9 should cease to have effect on 1 July 2000.

It would seem more appropriate that subclause 2(2) of the Consequential Provisions Bill refer to both Schedules 1 and 2, while subclause 2(3) of that bill should refer to Schedule 3.

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

Social Security (Administration) Bill 1999

This bill was introduced into the House of Representatives on 3 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

Complementary to the Social Security (International Agreements) Bill 1999 and the Social Security (Administration and International Agreements)(Consequential Amendments) Bill 1999, this bill proposes to consolidate all the machinery and most of the administrative provisions relating to social security.

Use of tax file numbers
Clauses 74, 75 and 76

Proposed clause 74 of this bill provides that the Secretary may request, but not compel, a claimant for, or a recipient of, social security payments to provide his or her tax file number or that of their partner. Proposed clauses 75 and 76 set out the effect of a failure to satisfy such a request.

The Committee has previously drawn attention to the statements that accompanied the proposed introduction of the tax file number scheme in May 1988 (see, for example, pages 16 and 17 of *Alert Digest No 2 of 1999*). The scheme was originally intended for "the exclusive and limited use of the Tax Office". However, since its inception it has gradually been extended to many other areas of Commonwealth activity, including in relation to payments made under the social security legislation.

The Committee recognises that clauses 74 to 76 of this bill are not new, and have been included to minimise the opportunity for fraud against the Commonwealth. Nevertheless, the Committee remains mindful of the constant expansion of the tax file number scheme, and draws Senators' attention to the comments of the Senate Standing Committee on Legal and Constitutional Affairs in December 1990, in its Report on *The Proposed Tax File Number Provisions and Data-Matching Program*, that any extension of the scheme "should only proceed for the most compelling of reasons".

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

Non reviewable decisions
Clause 144

Proposed clause 144 of this bill lists a number of decisions which are not reviewable by the Social Security Appeals Tribunal. This clause appears to be unexceptionable in that the decisions referred to are either currently listed in section 1250 of the *Social Security Act 1991*, or are otherwise inappropriate for such review. However, in setting out the intended effect of clause 144, the Explanatory Memorandum simply states that "this clause provides that the SSAT may not review certain decisions. The clause sets out what those decisions are".

Accordingly, the Committee **seeks the Minister's confirmation** that this clause does not change the existing law.

> *Pending the Minister's confirmation, the Committee draws Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.*

Social Security (Family Allowance and Related Matters) Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 9 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the following Acts:

Social Security Act 1991 to:

- extend the qualification for family allowance so that it covers both job seekers and students who have turned 16, and continues until age 21 for job seekers, and until age 25 for full-time students; and
- increase the fortnightly rate of family allowance to $50, payable to a person who is aged 18 to under-21, or who is undertaking full-time study and is aged 21 to under-25; and

Health Insurance Act 1973 to make consequential amendments in relation to provision of a health care card to certain young persons.

The Committee has no comment on this bill.

Social Security (International Agreements) Bill 1999

This bill was introduced into the House of Representatives on 3 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

Complementary to the Social Security (Administration) Bill 1999 and the Social Security (Administration and International Agreements)(Consequential Amendments) Bill 1999, this bill proposes to provide for:

- the consolidation of existing social security international agreements;
- new social security international agreements to be added by regulation; and
- existing social security international agreements to be varied by way of regulation.

Henry VIII clauses
Clauses 7, 8 and 9

As noted above, this bill provides for the consolidation of existing international social security agreements into a separate Act. These agreements, which are set out in 11 Schedules to the bill, provide for international reciprocity in the provision of social security benefits.

Proposed clause 7 of the bill authorises the text of these Schedules to be amended by regulation. Proposed clause 8 authorises the addition of new scheduled international agreements by regulation, and proposed clause 9 authorises the repeal of a Schedule by regulation.

While this is clearly a delegation of legislative power, the Committee has no means of ascertaining whether or not it is appropriate. Neither the Explanatory Memorandum nor the Second Reading Speech clarifies the need for authorising amendment by regulation in these circumstances. The Committee therefore **seeks the Minister's advice** as to why it is appropriate that the provisions of the bill be amended by regulation, and whether these regulations are to be disallowable.

Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

States Grants (General Purposes) Amendment Bill 1999

This bill was introduced into the House of Representatives on 10 June 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the *States Grants (General Purposes) Act 1994* to:

- provide for general revenue assistance (including financial assistance grants and competition payments) to the States and Territories in 1999-2000;
- enable the Commonwealth to make payments under the safety net arrangements relating to business franchise fees to the States and Territories in 1999-2000; and
- enable windfall tax reimbursements received by the Commonwealth to be paid to the States (equal to the amount collected by the tax in that State).

The Committee has no comment on this bill.

Stevedoring Levy (Collection) Amendment Bill 1999

This bill was introduced into the House of Representatives on 2 June 1999 by the Minister for Transport and Regional Services. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to amend the *Stevedoring Levy (Collection) Act 1998* to increase the amount that may be authorised by the Minister in connection with Stevedoring industry reform from $250 million to $350 million. Complementary to the Social Security (International Agreements) Bill 1999 and the Social Security (Administration and International Agreements)(Consequential Amendments) Bill 1999, this bill proposes to consolidate all the machinery and most of the administrative provisions relating to social security.

The Committee has no comment on this bill.

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were "more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties". The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for "administration of justice offences". The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest.* The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	**Section/Subsection**	**Offence**	**Penalty**
Health Insurance Amendment (Professional Services Review) Bill 1999	106ZPN	Person not under review fail to produce documents or give information	20 penalty units
Health Insurance Amendment (Professional Services Review) Bill 1999	106ZPO and 106ZPP	Provide false or misleading answers or documents	12 months
Social Security (Administration) Bill 1999	198	Fail to comply with requirement to provide information or documents	12 months
A New Tax System (Family Assistance)(Administration) Bill 1999	64 65 160	Fail to provide relevant child care statement Fail to provide relevant child care statement Fail to provide information or produce document	60 penalty units 20 penalty units 12 months

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

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 10 of 1999

30 June 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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Australian Tourist Commission Amendment Bill 1999

This bill was introduced into the House of Representatives on 23 June 1999 by the Minister for Sport and Tourism. [Portfolio responsibility: Sport and Tourism]

The bill proposes to amend the *Australian Tourist Commission Act 1987* to enable the Commission's principal object to reflect its powers in the area of protecting Australia from adverse environmental and social impacts of international tourism.

The Committee has no comment on this bill.

Customs and Excise Amendment (Diesel Fuel Rebate Scheme) Bill 1999

This bill was introduced into the House of Representatives on 22 June 1999 by the Minister for Transport and Regional Services. [Portfolio responsibility: Treasury]

Complementary to the Diesel and Alternative Fuels Grants Scheme Bill 1999, this bill proposes to amend the *Customs Act 1901* and the *Excise Act 1901* to:

- extend the Diesel Fuel Rebate Scheme to provide a diesel fuel rebate for purchases of diesel and like fuels where the fuel is used in rail transport or for marine use in the course of carrying on an enterprise; and
- extend the scheme from 1 July 2000 until 30 June 2002.

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.

Customs Tariff Amendment Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 24 June 1999 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Justice and Customs]

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

- reduce the customs duty on aviation gasoline by 2.6 cents per litre (from 25 May 1998) and a further reduction of 13.092 cents per litre (from 1 July 1998);
- remove customs duty from inputs to the manufacture of information industry equipment and create a free rate of duty for certain inputs to the manufacture of information industry equipment;
- create a free rate of duty for certain medical and scientific equipment currently subject to a tariff of five per cent;
- create a free rate of duty for certain parts of machine tools and robots; and
- make technical amendments.

Retrospective application
Subclauses 2(6) and 2(7)

By virtue of subclauses 2(2) to 2(7) of this bill, many of the amendments proposed are to commence retrospectively. However, the Explanatory Memorandum observes that the most significant of these amendments have been contained in Tariff Proposals which have been tabled in the Parliament prior to their coming into effect. In these circumstances, as measures involving taxation, the Committee is usually prepared to accept some retrospectivity in their application. In addition, all of these amendments seem to be either technical in nature, making no substantive change to the law, or are beneficial to those liable to pay customs duties.

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

Customs Tariff Amendment (Tradex) Bill 1999

This bill was introduced into the House of Representatives on 24 June 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Justice and Customs]

One of a package of three bills to implement the Tradex Scheme, this bill proposes to amend the *Customs Tariff Act 1995* to allow for the importation, without payment of customs duty, goods included in a "tradex order", where those goods are imported by the holder of the order.

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.

Customs (Tariff Concession System Validations) Bill 1999

This bill was introduced into the Senate on 23 June 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Justice and Customs]

The bill proposes to validate decisions made by Customs officers between 15 July 1996 and 31 May 1999 purporting to exercise powers delegated by the Chief Executive Officer of Customs for the purposes of the Tariff Concession System.

Retrospective validation
Clauses 5 and 6

This bill retrospectively validates certain instruments of delegation and certain decisions made under those instruments. The Explanatory Memorandum states that the purpose of the bill "is to remove any doubt about the validity of decisions made by officers of Customs between 15 July 1996 and 31 May 1999 purporting to exercise powers delegated by the Chief Executive Officer of Customs ("the CEO") for the purposes of the Tariff Concession System ("the TCS")".

The Explanatory Memorandum states that doubts about the validity of an existing delegation were raised during an AAT matter in Melbourne. The sufficiency of the delegation was questioned on the basis that new powers had been subsequently added to those delegated, but no new delegation had been issued covering those additional powers.

While such a retrospective validation would ordinarily be of concern to the Committee, clause 6 of the bill states that any person who has already taken the point that the validations were not valid – either before the AAT or in applying to Customs for a refund of duty – will not be affected by this retrospectivity.

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

Diesel and Alternative Fuels Grants Scheme Bill 1999

This bill was introduced into the House of Representatives on 22 June 1999 by the Minister for Transport and Regional Services. [Portfolio responsibility: Treasury]

Complementary to the Customs and Excise Amendment (Diesel Fuel Rebate Scheme) Bill 1999, this bill introduces a grant which will be available from 1 July 2000 to 30 June 2002. The grant will be available for the use of diesel fuel for certain road transport, and for the use of other fuels as alternatives to diesel fuel.

Commencement
Clause 2

Clause 2 of this bill provides that, subject to subsections (2) and (5), the bill is to commence on 1 July 2000, unless the *Diesel and Alternative Fuels Grants Scheme (Administration and Compliance) Act 1999* commences after 1 July 2000, in which case it is to commence on the commencement of the Administration Act.

However, proposed subclause 2(2) states that the bill is not to commence until certain specified motor vehicle emission standards are determined and come into effect in relation to certain specified technical requirements.

Proposed subclause 2(5) states that the bill is not to commence until the day on which one or more Acts have appropriated specified amounts of money for certain specified programs.

Such contingent commencement runs similar risks to provisions which permit legislation to commence on proclamation – a matter about which the Committee often comments. Where the commencement of legislation is indeterminate, the Committee usually refers to *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel. This requires that an explanation for such commencement provisions be included in the Explanatory Memorandum. The Explanatory Memorandum for this bill does not indicate why the bill's commencement should be contingent on the

development of emission standards and the appropriation of moneys. The Committee, therefore, **seeks the Minister advice** on these matters.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.

Electoral Amendment (Senate Elections) Bill 1999

This bill was introduced into the Senate on 22 June 1999 by Senator Colston as a Private Senator's bill.

The bill proposes to amend the *Commonwealth Electoral Act 1918* to provide for the division of States into Wards for the purpose of choosing senators and makes consequential amendments and transitional arrangements.

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.

Federal Magistrates Bill 1999

This bill was introduced into the House of Representatives on 24 June 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to establish the Federal Magistrates Court, also to be known as the Federal Magistrates Service, as a court under Chapter III of the Constitution.

The Committee has no comment on this bill.

Federal Magistrates (Consequential Amendments) Bill 1999

This bill was introduced into the House of Representatives on 24 June 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

Consequent upon the Federal Magistrates Bill 1999, this bill proposes to amend various Acts to:

- make consequential amendments to give the Federal Magistrates Court concurrent jurisdiction with either the Federal Court of Australia or the Family Court of Australia; and
- make consequential amendments.

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.

Ministers of State Amendment Bill 1999

This bill was introduced into the House of Representatives on 23 June 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Special Minister of State]

The bill proposes to amend the *Ministers of State Act 1952* to increase from $1.64 million to $1.78 million the limit on the sum appropriated from the Commonwealth Consolidated Revenue Fund for Ministers' salaries.

The Committee has no comment on this bill.

Petroleum (Submerged Lands) Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 24 June 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to amend the *Petroleum (Submerged Lands) Act 1967* principally to:

- introduce infrastructure licences to cater for at-sea operations that do not strictly fall within the ambit of current protection or pipeline licences;
- introduce an option for the use of supplementary bids to decide between exploration permit bids that are ranked equal;
- introduce a right by submitters of information under the Act to make a declaration which, unless challenged by the Designated Authority, will determine whether and when the information may be publicly released;
- create an offence relating to deliberately interfering with offshore petroleum operations or installations;
- repeal provisions relating to:
    - the Joint Authority's discretion to fix the number of blocks for renewals of exploration permits at 16;
    - the fragmentation constraints on areas covered by permits being renewed; and
    - the 21 year term of pipeline licences;
- modify the halving rule for permit renewals when consideration is given to renewing an expiring permit covering six blocks or less;
- ensure that the withdrawal of an applicant before the awarding of an exploration permit creates fewer complications for the process;
- make minor machinery amendments; and

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

- make a consequential amendment to the *Petroleum (Submerged Lands) Fees Act 1994*.

The Committee has no comment on this bill.

Tradex Duty Imposition Bill 1999

This bill was introduced into the House of Representatives on 24 June 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

One of a package of three bills to implement the Tradex Scheme, this bill proposes to provide for the imposition of Tradex Duty which is an amount equal to the customs duty that would have been payable if goods are not imported under the provisions of the Tradex Scheme.

The Committee has no comment on this bill.

Tradex Scheme Bill 1999

This bill was introduced into the House of Representatives on 24 June 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

One of a package of three bills to implement the Tradex Scheme, this bill proposes to establish the Tradex Scheme and provide for the administration of the scheme. The objective of the Tradex Scheme is to allow for the importation of goods, without payment of customs duty or other taxes, provided the goods are subsequently exported or incorporated in other goods that are exported.

Strict liability offence
Subclause 28(2)

Subclause 28(1) of this bill creates an offence of a failure to pay tradex duty. Subclause 28(2) states that this is to be an offence of strict liability. Under such a provision, a person might be convicted of the offence even though he or she did not intend to commit it. The Explanatory Memorandum does not indicate why this offence should involve strict liability. The Committee, therefore, **seeks the Minister advice** on the reasons for making this a strict liability offence.

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

Abrogation of the privilege against self-incrimination
Subclauses 30(2) and (3)

Subclause 30(1) of this bill creates an offence of failure to comply with a requirement (relating to documents or record keeping) made by an authorised officer. Subclause 30(2) states that self-incrimination is not a ground for refusing to answer a question or produce documents. However, subclause 30(3) states that any document or information directly or indirectly produced

under compulsion is inadmissible except in proceedings for making a false and misleading statement. This Committee has accepted that such a provision strikes a reasonable balance between the competing interests of obtaining information and protecting rights.

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

Appointment of 'a person'
Subclause 45(1)

Subclause 45(1) of this bill enables the Secretary, by writing, to "appoint persons to be authorised officers for the purposes of this Act". The bill makes no reference to any qualifications or attributes which such persons must have as a condition of being authorised.

The Committee often draws attention to provisions which delegate power to anyone who fits the all-embracing description of 'a person'. As a general rule, the Committee prefers to see some limits placed either on the powers which can be delegated or on the class of potential delegates. Similar considerations apply to the appointment of officers authorised for the purposes of an Act of Parliament. As a general rule, the Committee would prefer that potential appointees be required to have some qualifications or attributes before they are eligible for appointment. The Committee, therefore, **seeks the Minister's advice** on why the unfettered discretion to appoint authorised officers ought not be limited in some way, for example, by reference to qualifications or attributes which appointees should possess.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) 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.

Excessively wide delegation
Clause 48

Clause 48 of this bill permits the Secretary, by writing, to "delegate to an officer of, or a person employed in, the Department all or any of the Secretary's functions and powers under this Act".

The Act authorises the Secretary to exercise functions and powers that are wide in scope. These include suspending a tradex order, causing infringement notices to be served, reconsidering various decisions made under the legislation, extending certain time periods and providing certificates which have evidentiary force.

Given the scope and variety of these powers, the Committee **seeks the Minister's advice** on why some limit should not be placed on potential delegates – for example, by limiting the class of potential delegates to officers in the Senior Executive Service.

> *Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.*

War Crimes Amendment Bill 1999

This bill was introduced into the Senate on 23 June 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *War Crimes Act 1945* to facilitate extradition proceedings with former Soviet Bloc countries, particularly the Baltic States.

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.

Workplace Relations Amendment (Defence purposes leave) Bill 1999

This bill was introduced into the House of Representatives on 21 June 1999 by Mr Bevis as a Private Member's bill.

The bill proposes to amend the *Workplace Relations Act 1996* to enable the Australian Industrial Relations Commission to include in industrial awards leave for workers to participate in activities as members of the Australian Defence Force.

The Committee has no comment on this bill.

Workplace Relations Legislation Amendment (Youth Employment) Bill 1998 [No. 2]

This bill was introduced into the House of Representatives on 24 June 1999 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Employment, Workplace Relations and Small Business].

The bill proposes to amend the following Acts:

Workplace Relations Act 1996 to:

- include in the principal object of the Act and the objects of Part VI of the Act the protection of the competitive position of young people in the labour market, the promotion of youth employment and the reduction of youth unemployment;

- permanently exempt junior rates of pay from the provisions of the Act intended to prevent and eliminate age discrimination in awards and agreements; and

- promote the inclusion of junior rates of pay in awards and agreements; and

Workplace Relations and Other Legislation Amendment Act 1996 to:

- permanently exempt junior rates of pay from the provisions of the Act intended to prevent and eliminate age discrimination in awards; and

- promote the inclusion of junior rates of pay in awards.

General comment
Schedule 1, item 4

Item 4 of Schedule 1 to this bill provides, in part, that "junior wage provisions are not to be treated as constituting discrimination by reason of age". This provision is in the same form as a provision in a bill of the same name which was introduced in the House of Representatives on 26 November 1998, and on which the Committee commented in its *Second Report of 1999*.

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

In that *Report*, the Committee accepted advice from the Minister that this provision did "not seek to exempt junior wage provisions in awards from anti-discrimination law generally, or to prevent a party from seeking a remedy under such laws".

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

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were "more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties". The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for "administration of justice offences". The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest*. The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	**Section/Subsection**	**Offence**	**Penalty**
Tradex Scheme Bill 1999	26	Fail to notify of change in registered particulars	30 penalty units
	30(1)	Fail to make available documents or demonstrate record keeping system	60 penalty units
	32	Knowingly provide false or misleading information	12 months

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

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 11 of 1999

11 August 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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

A New Tax System (Taxation Laws Amendment) Bill (No. 1) 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Taxation Administration Act 1953* to:

- introduce pay as you go arrangements (PAYG) to enable 11 existing payment and reporting systems (pay as you earn (PAYE), prescribed payments system (PPS), reportable payments system (RPS) and other withholding systems) as well as the provisional tax and company instalments to be abolished or replaced;

- effect the aligned business tax obligations of one return and one payment by:

    - extending the application of current running balance account arrangements;

    - aligning the payment dates for fringe benefits tax instalments with the quarterly remittance dates of other business taxes;

    - facilitating the lodgment of a single compliance statement and corresponding net payment or refund claim;

    - enabling the Commissioner to accept voluntary payments from taxpayers on account of future taxation debts; and

    - making technical amendments to the existing running balance accounts and general interest charge measures; and

- make transitional amendments; and

make consequential and transitional amendments to nine Acts.

The Committee has no comment on this bill.

Agriculture, Fisheries and Forestry Legislation Amendment Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the following Acts:

Australian Wine and Brandy Corporation Act 1980 to:

- ensure that all relevant details of the transformation of wine from grape to retail sale are duly recorded;
- ensure that all documents and records relevant to the claims made on wine labels can be inspected; and
- make technical amendments;

Natural Resources Management (Financial Assistance) Act 1992 to rename the National Landcare Advisory Committee as the Australian Landcare Council;

Plant Breeder's Rights Act 1994 to:

- provide relief to applicants affected by a reduction of the allowable period for "prior sale" during the transition from the *Plant Variety Rights Act 1987* to the current Act;
- remove the requirement to maintain a copy of the Register of Plant Varieties in each State and Territory;
- attribute costs associated with a request for a test growing;
- extend public access to information;
- clarify the payment of prescribed fees; and
- make minor technical amendments;

Primary Industry Councils Act 1991 to repeal the Schedule establishing the Grains Industry Council (which is no longer relevant following privatisation of the Australian Wheat Board and other changes to grain marketing arrangements);

Primary Industries Levies and Charges Collection Act 1991 to:

- clarify and update levy and export charge collection techniques used in rural industries, including the association between producers and intermediaries; and
- upgrade powers for authorised persons to align them with those used by inspectors under the *Export Control Act 1982*;

Rural Adjustment Act 1992 to rename the Rural Adjustment Scheme Advisory Council as the National Rural Advisory Council and to change the role and functions of the Council; and

Australian Horticultural Corporation Act 1987, the *Farm Household Support Act 1992* and the *Primary Industries and Energy Legislation Amendment Act (No. 1) 1996* to make technical amendments.

Retrospective application
Subclause 2(3)

By virtue of subclause 2(3), the amendments proposed by items 2 and 3 of Schedule 3 to the bill are to commence retrospectively on 28 June 1996. However, the Explanatory Memorandum observes that this Schedule provides for technical amendments to correct errors in certain Acts.

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

Retrospective application
Subclause 2(4)

By virtue of subclause 2(4), the amendments proposed by Schedule 6 to the bill are to commence retrospectively on 1 April 1999. Schedule 6 deals with amendments to the *Rural Adjustment Act 1992*. The Explanatory Memorandum (at page 4) states that the amendments proposed "are relatively minor", aimed at redefining the roles and functions of the Rural Adjustment Scheme Advisory Council in the light of the winding-down of the Rural Adjustment Scheme.

However, the Explanatory Memorandum (at pages 20-21) offers a more detailed explanation of the various provisions in Schedule 6. This suggests that the changes proposed in Schedule 6 may have already taken place in anticipation of the passage of this legislation, and that these changes now require retrospective validation – a matter on which the Committee usually comments. The Committee, therefore, **seeks the Minister advice** on the need for making these relatively minor amendments retrospective.

> *Pending the Minister's advice, 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.*

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

Authorised Non-operating Holding Companies Supervisory Levy Determination Validation Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

One of a package of five bills, this bill proposes to validate the Authorised Non-operating Holding Companies Supervisory Levy Imposition Determination 1998. The determination was to take effect from 1 July 1998, but did not appear in the *Gazette* until 13 August 1998.

Retrospective application
Clause 4

Clause 4 of this bill proposes to retrospectively validate a determination purportedly made on 11 August 1998, notified in the *Gazette* on 13 August 1998, but taking effect from 1 July 1998. Section 48(2) of the *Acts Interpretation Act 1901* provides that determinations have no effect if they are due to take effect before the date of notification.

Retrospective validation is a matter about which the Committee often seeks advice. In this instance, the Minister's Second Reading Speech indicates that, while this determination was expressed to take effect from 1 July 1998, levies were not actually payable until 1 October 1998. Therefore, whether the determination was truly retrospective is unclear. However, the Minister goes on to observe that "there is sufficient uncertainty to warrant legislation to ensure that these determinations are valid".

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

Broadcasting Services Amendment Bill (No. 1) 1999

This bill was introduced into the House of Representatives on 28 June 1999 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

The bill proposes to amend the following Acts:

Broadcasting Services Act 1992 to:

- impose a new licence condition on commercial television broadcasting licensees, and impose an obligation on licensees' program suppliers and on national broadcasters, to ensure rights acquired by them to live television coverage of full and live free-to-air coverage of major events (particularly sporting events) are not "hoarded";

- impose restrictions on the provision of certain television broadcasting services in regional areas by subscription television broadcasting licensees or their related bodies corporate;

- increase the period allowed for the broadcast of sponsorship announcements from four to five minutes per hour;

Broadcasting Services Act 1992, the *Copyright Act 1968*, the *National Transmission Network Sale Act 1998* and the *Telecommunications Act 1997* to:

- establish a new regime for the retransmission of radio and television programs; and

- make transitional and consequential amendments.

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.

Broadcasting Services Amendment Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

Complementary to the Television Licence Fees Amendment Bill 1999, this bill proposes to amend the *Broadcasting Services Act 1992* to ensure that the Australian Broadcasting Authority cannot fix charges for its costs in relation to the commercial television conversion scheme (from analog to digital) over the next three years.

The Committee has no comment on this bill.

Crimes Amendment (Fine Enforcement) Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Crimes Act 1914* to allow State and Territory court officers to impose certain penalties on Commonwealth fine defaulters, subject to the laws of that State and Territory. The penalties include garnishment of a debt, seizure of property and imprisonment of the defaulter.

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.

Customs Legislation Amendment Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Customs Act 1901* to:

- introduce an Electronic Lodgement and Payments system (ELOR) for refunds of customs duty;
- stipulate the time when payment of customs duty is required;
- provide a mechanism for the deferral of payment of customs duty by enabling regulations to prescribe later times for the payment of such duty;
- make changes to the Customs Brokers Licensing System to:
    - extend the length of customs agents and corporate customs agents licences from one to three years;
    - change the time when licences have to be renewed from 31 December to 30 June; and
    - rename “customs agents” as “customs brokers”.

The Committee has no comment on this bill.

Electronic Transactions Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to establish a regulatory framework for the use of electronic communications in transactions (electronic commerce) and removes legal impediments that may prevent a person from using electronic communications to satisfy obligations under Commonwealth law. The bill further proposes to give business and the community the option of using electronic communications when dealing with Government agencies.

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 Finance and Insurance Corporation Amendment Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Foreign Affairs. [Portfolio responsibility: Trade]

The bill proposes to amend the following Acts:

Export Finance and Insurance Corporation Act 1991 to apply a debt neutrality charge, guarantee fee and tax-equivalent payments to EFIC's operations in the short-term insurance contract area; and

Insurance (Agents and Brokers) Act 1984 and the *Insurance Contracts Act 1984* to remove EFIC's current exemptions in relation to such operations.

Retrospective application
Subclause 2(2)

Subclause 2(2) of this bill provides that the amendment proposed by item 4 of Schedule 1 is to commence retrospectively on 1 July 1998. However, the effect of this amendment is to apply an aspect of the Commonwealth's competitive neutrality policy to the Export Finance and Insurance Corporation (EFIC) – a statutory authority. Under the proposed amendment, EFIC is required to pay tax-equivalent amounts to the Commonwealth in lieu of tax that would, but for section 63 of the Principal Act, have been payable. Therefore, the retrospective application of the bill does not affect members of the public.

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

Commencement
Subclauses 2(3) and 2(4)

Subclause 2(3) permits the other amendments proposed in this bill to commence on Proclamation. However, subclause 2(4) provides that these

amendments must commence by 1 July 2000 at the latest. While this is longer than the period of 6 months after assent, which the Committee normally accepts as complying with the requirements of *Drafting Instruction No 2 of 1989* issued by the Office of Parliamentary Counsel, it is nevertheless a fixed end-date. As such, it ensures that these amendments cannot commence at the discretion of the Executive.

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

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

Financial Sector Reform (Amendments and Transitional Provisions) Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Australian Prudential Regulation Authority Act 1998 to:

- exempt the Australian Prudential Regulation Authority (APRA) from paying sales tax on the goods it purchases; and
- make technical amendments to secrecy provisions;

Banking Act 1959 to enable the Treasurer to issue disclosure guidelines to ensure that all authorised deposit-taking institutions (ADIs) seeking to demutualise give proper regard to members' interests and disclose adequate information for members to make an informed decision;

Financial Corporations Act 1974 to:

- enable information to be collected from registered financial corporations to assist the Reserve Bank of Australia (RBA) in formulation of monetary policy;
- lift the threshold to which the Act applies, for corporations where the value of assets of the corporation engaged in the provision of finance, in the course of carrying on retail business of selling goods, exceeds $25 million;
- make the Act inapplicable to a corporation and every related corporation with assets of less than $5 million unless a lesser amount is prescribed by regulations;
- enable the RBA to delegate the majority of its functions under the Act to APRA, the Australian Statistician or staff members of APRA or the Australian Bureau of Statistics;

- enable the RBA to specify, in writing, standards on the information to be provided by corporations registered under the Act and the form that the information should be provided in;

- specify that certain documents are only required to be delivered to the Head Office of the RBA;

- increase the maximum penalty level for a corporation holding itself out in the course of its business as being registered under the Act;

- repeal the provision relating to the appointment of advisory committees by the Treasurer; and

- make technical amendments;

Financial Corporations (Transfer of Assets and Liabilities) Act 1993 to extend until 30 June 2000 the deadline for foreign ADIs operating in Australia since 18 June 1993 to obtain a banking authority;

Financial Institutions Supervisory Levies Collection Act 1998, the *Superannuation (Financial Assistance Funding) Levy Act 1993* and the *Superannuation Industry (Supervision) Act 1993* to clarify the circumstances in which certain superannuation funds, which suffer losses due to fraud or theft, will be eligible for a grant of financial assistance;

Financial Laws Amendment Act 1997:

- to correct an error to the definition of ***newly established foreign bank***; and

- make consequential amendments;

Life Insurance Act 1995 to expand the requirements for the assignment of an interest in an approved benefit fund of a friendly society;

Reserve Bank Act 1959 to disqualify from RBA Board membership any person who is a director, officer or employee of an ADI;

Retirement Savings Accounts Act 1997 to make a technical amendment;

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

Superannuation Industry (Supervision) Act 1993 to:

- extend the range of information required under the Act that may be submitted in electronic form;
- strengthen safeguards against misuse or fraud in relation to electronic lodgement;
- remove the requirement for affixing a common seal to election notices; and
- make consequential and other minor amendments;

and amends three Acts to make various miscellaneous technical amendments, and makes transitional, saving and application provisions.

Retrospective application
Clause 2

Subclauses 2(2) to 2(5) and subclauses 2(9) and 2(10) provide that various amendments proposed in this bill are to be taken to have commenced retrospectively. However, in each case, the amendments are either technical, and make no change to the substantive law, or are beneficial to persons and bodies other than the Commonwealth.

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

General Insurance Supervisory Levy Determination Validation Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

One of a package of five bills, this bill proposes to validate the General Insurance Supervisory Levy Imposition Determination 1998. The determination was to take effect from 1 July 1998, but did not appear in the *Gazette* until 13 August 1998.

Retrospective application
Clause 4

Clause 4 of this bill proposes to retrospectively validate a determination purportedly made on 11 August 1998, notified in the *Gazette* on 13 August 1998, but taking effect from 1 July 1998. Section 48(2) of the *Acts Interpretation Act 1901* provides that determinations have no effect if they are due to take effect before the date of notification.

Retrospective validation is a matter about which the Committee often seeks advice. However, as noted in relation to the Authorised Non-operating Companies Supervisory Levy Determination Validation Bill 1999 (discussed above), with which this bill is complementary, there is doubt about whether the determinations in issue were actually retrospective, but sufficient uncertainty to warrant ensuring that they are valid.

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

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 Amendment (Diagnostic Imaging Services) Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Health Insurance Act 1973* in relation to diagnostic imaging services provided by medical practitioners under either the remote area or pre-existing diagnostic imaging practices' exemptions of the Act to:

- require that these practitioners must be enrolled and participating in an approved continuing medical education and quality assurance program in the field of diagnostic imaging (in order for a Medicare benefit to be paid for their services);
- make provision for the Minister to issue a disallowable instrument prescribing the relevant approved continuing medical education and quality assurance program; and
- establish a register maintained by the Health Insurance Commission to record medical practitioners participating in a continuing medical education and quality assurance program.

The Committee has no comment on this bill.

Higher Education Funding Amendment Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

The bill proposes to amend the *Higher Education Funding Act 1988* to:

- set the maximum grant amount for operating purposes for higher education institutions for the funding years 1999, 2000 and 2001;
- vary the maximum total financial assistance payable to higher education institutions for superannuation expenditure for the funding year 2000 and set the maximum total amount of financial assistance for the funding year 2001;
- vary the maximum aggregate amount of financial assistance which may be granted to open learning organisations for the funding year 2000 and set the maximum aggregate amount of financial assistance for the funding year 2001;
- vary the limit on total funds available for higher education institutions for certain grants under the Act in respect of the funding years 1999 and 2000 and set the limit on total funds for the funding year 2001;
- vary the maximum aggregate amount of financial assistance which may be granted to higher education institutions in respect of their teaching hospitals for the 2000 funding year and set the maximum aggregate amount of financial assistance for the 2001 funding year;
- vary the maximum aggregate amount which may be granted to higher education institutions for approved special capital projects for the 2000 funding year and set the maximum aggregate amount for the 2001 funding year;
- set the maximum funding level for expenditure on the international marketing and promotion of Australian education and training services by Australian Education International for the 2001 funding year;
- provide for the funding of 60 medical places at James Cook University for the 2001 funding year;

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

- provide for an additional $4.9 million in the 2000 funding year and $9.8 million in the 2001 funding year for science lectureships;
- provide for an increase of $36.8 million in each of the 2000 and 2001 funding years for higher education research infrastructure;
- reflect reductions to the Higher Education Innovation Program for projects of national priority in each of the 2000 and 2001 funding years; and
- reflect savings of $7.8 million in the 2000 funding year and $10.4 million in the 2001 funding year resulting from the phasing out of Merit Equity Scholarships.

The Committee has no comment on this bill.

Indigenous Education (Supplementary Assistance) Amendment Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

The bill proposes to amend the following Acts:

Indigenous Education (Supplementary Assistance) Act 1989 to:

- provide for the continuation of the Indigenous Education Strategic Initiatives Program for the period 1 January 2000 to 30 June 2001 including the application of cost supplementation to these new funds; and
- provide for the continuation of the mixed mode delivery away-from-base element of the ABSTUDY scheme; and

Student Assistance Act 1973 to make a consequential amendment transferring the appropriation of the away-from-base element of the ABSTUDY scheme to the *Indigenous Education (Supplementary Assistance) Act 1989*.

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 Determination Validation Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

One of a package of five bills, this bill proposes to validate the Life Insurance Supervisory Levy Imposition Determination 1998. The determination was to take effect from 1 July 1998, but did not appear in the *Gazette* until 13 August 1998.

Retrospective application
Clause 4

Clause 4 of this bill proposes to retrospectively validate a determination purportedly made on 11 August 1998, notified in the *Gazette* on 13 August 1998, but taking effect from 1 July 1998. Section 48(2) of the *Acts Interpretation Act 1901* provides that determinations have no effect if they are due to take effect before the date of notification.

Retrospective validation is a matter about which the Committee often seeks advice. However, as noted in relation to the Authorised Non-operating Companies Supervisory Levy Determination Validation Bill 1999 (discussed above), with which this bill is complementary, there is doubt about whether the determinations in issue were actually retrospective, but sufficient uncertainty to warrant ensuring that they are valid.

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

Parliamentary Service Bill 1999

This bill was introduced into the House of Representatives on 28 June 1999 by the Speaker. This bill is similar to the Parliamentary Service Bill 1997, as amended and passed by the House of Representatives on 30 October 1997. [Portfolio responsibility: Prime Minister]

The bill proposes to provide for the establishment and administration of the Australian Parliamentary Service.

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.

Republic (Consultation on an Elected President) Bill 1999

This bill was introduced into the Senate on 30 June 1999 by Senator Murray as a Private Senator's bill.

The bill proposes to provide that, at the same time as electors vote on the Constitution Alteration (Establishment of Republic) 1999, they may determine whether the president should be directly elected. If there is a preference for an elected president, the bill further provides for an elected convention to consider and report to Parliament on options for an elected president and for Presiding Officers to prepare draft constitutional amendments to effect options canvassed in the convention report, including any option recommended by the convention.

The Committee has no comment on this bill.

Retirement Savings Account Providers Supervisory Levy Determination Validation Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister representing the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

One of a package of five bills, this bill proposes to validate the Retirement Savings Account Providers Supervisory Levy Imposition Determination 1998. The determination was to take effect from 1 July 1998, but did not appear in the *Gazette* until 13 August 1998.

Retrospective application
Clause 4

Clause 4 of this bill proposes to retrospectively validate a determination purportedly made on 11 August 1998, notified in the *Gazette* on 13 August 1998, but taking effect from 1 July 1998. Section 48(2) of the *Acts Interpretation Act 1901* provides that determinations have no effect if they are due to take effect before the date of notification.

Retrospective validation is a matter about which the Committee often seeks advice. However, as noted in relation to the Authorised Non-operating Companies Supervisory Levy Determination Validation Bill 1999 (discussed above), with which this bill is complementary, there is doubt about whether the determinations in issue were actually retrospective, but sufficient uncertainty to warrant ensuring that they are valid.

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

Social Security Amendment (Disposal of Assets) Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the *Social Security Act 1991* to:

- reduce from $10,000 to $5,000 the "free area" that a person or couple may gift before that gift begins to impact on the level of assistance provided to them; and
- change the basis of the concession from "pension year" to "financial year".

Retrospective application
Clause 2

Clause 2 of this bill provides that, to some extent, it is to commence retrospectively, on 1 July 1999. Further, the bill will adversely affect recipients of social security benefits by reducing the value of assets of which they may dispose in any year without affecting their entitlement to those benefits.

However, item 20 of the Schedule proposes to protect social security beneficiaries from those adverse effects where they dispose of assets between 1 July 1999 and the date on which the bill is assented to. The Explanatory Memorandum observes that the effect of this item is that "amounts paid prior to the Royal Assent under the existing disposal rules are protected from recovery insofar as the provisions of this Act are concerned".

While the bill is expressed to apply retrospectively, this item seems to reverse the effect of that retrospectivity. Given this, it is not clear why retrospectivity is thought necessary. It is also not clear whether this protection provided by item 20 will be available to all social security beneficiaries, or only a particular class of beneficiaries. The Committee, therefore, s**eeks the Minister's advice** to clarify why the bill has taken this approach to

retrospectivity, and whether any particular group of social security beneficiaries may be disadvantaged by the approach taken.

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

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

States Grants (Primary and Secondary Education Assistance) Amendment Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

The bill proposes to amend the *States Grants (Primary and Secondary Education Assistance) Act 1996* to:

- provide $36.3 million for 2000 for funding under the Literacy and Numeracy Program to be allocated to the Support for the National Literacy and Numeracy Plan and strategies to improve literacy and numeracy in the middle years of schooling;
- provide $26.4 million for 2000 to fund the National Asian Languages and Studies in Australian Schools (NALSAS) strategy;
- provide an additional $10.1 million for the program years 2000-2003 for the non-government component of the Capital Grants Program;
- provide an additional $1.9 million for Short Term Emergency Assistance (STEA) for 2000 during the transitional period to the new SES funding model for non-government schools; and
- make a minor technical amendment to change the name of the Literacy Program to the Literacy and Numeracy Program.

The Committee has no comment on this bill.

Superannuation Contributions and Termination Payments Taxes Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Superannuation Contributions Tax (Assessment and Collection) Act 1997 to:

- remove the requirement for the Commissioner to determine an advance instalment if superannuation contributions surcharge is payable for a member for a financial year; and

- provide for a system of self assessment for specified superannuation funds;

Superannuation Contributions Tax (Assessment and Collection) Act 1997 and *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* to:

- clarify what surchargeable contributions are and how they are to be calculated;

- clarify the identify of the holder of the surchargeable contributions of a member for a particular financial year who is to pay the surcharge liability;

- provide a means for members of constitutionally protected schemes who transfer benefits to another fund to direct the transferee provider to pay the surcharge liability from the benefits transferred;

- ensure that members of all superannuation funds who commute part of a pension to pay a surcharge liability are treated equitably;

- provide alternative reporting requirements for superannuation providers to reduce administration costs incurred in reporting surcharge information to all members; and

- clarify what is to be reported to the Commissioner in respect of surchargeable contributions and contributed amounts; and

Superannuation Contributions Tax (Assessment and Collection) Act 1997, *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* and *Termination Payments Tax (Assessment and Collection) Act 1997* to:

- distinguish between the making of an assessment and the assessment notice;
- support the making and electronic transmission of assessments;
- provide that the validity of an assessment (and determination of advance instalment where appropriate) is not affected by any non-compliance;
- limit the time in which the Commissioner can amend an assessment; and
- expand the objection provisions and remove current limits on the rights of members and providers to object against surcharge assessments; and

Income Tax Assessment Act 1936, the *Superannuation Industry (Supervision) Act 1993* and the *Taxation Laws Amendment Act (No. 3) 1997* to make technical amendments.

Retrospective application
Subclauses 2(2) and 2(3)

Subclause 2(2) of the bill provides that the substantive provisions in Schedule 1 are taken to have commenced retrospectively on 5 June 1997. Similarly, subclause 2(3) provides that the substantive provisions in Schedule 2 are taken to have commenced retrospectively on 7 December 1997. The Explanatory Memorandum simply notes that "Some of the amendments will apply retrospectively to ensure the surcharge measure applies equitably to both defined benefit fund members and to members of funds other than defined benefit funds".

In addition, item 28 of Schedule 1 to the bill proposes to insert a new subsection 42(2) in the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*. This will allow for the making of regulations with retrospective effect, contrary to subsection 48(2) of the *Acts Interpretation Act*

1901. The Committee **seeks the Treasurer's advice** as to why so many of the provisions proposed by this bill are to operate retrospectively; why the bill is to apply retrospectively for a period as long as 2 years; whether this retrospective application will detrimentally affect anyone; and why the bill authorises the making of regulations with retrospective effect.

Pending the Treasurer's advice, 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.

Retrospective application
Subclause 2(4)

Subclause 2(4) of the bill provides that the amendments proposed by Schedule 6 are to be taken to have commenced retrospectively from 14 October 1997. However, these amendments are technical in nature and make no substantive change to the law.

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

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

Superannuation Supervisory Levy Determination Validation Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

One of a package of five bills, this bill proposes to validate the Superannuation Supervisory Levy Imposition Determination 1998. The determination was to take effect from 1 July 1998, but did not appear in the *Gazette* until 13 August 1998.

Retrospective application
Clause 4

Clause 4 of this bill proposes to retrospectively validate a determination purportedly made on 11 August 1998, notified in the *Gazette* on 13 August 1998, but taking effect from 1 July 1998. Section 48(2) of the *Acts Interpretation Act 1901* provides that determinations have no effect if they are due to take effect before the date of notification.

Retrospective validation is a matter about which the Committee often seeks advice. However, as noted in relation to the Authorised Non-operating Companies Supervisory Levy Determination Validation Bill 1999 (discussed above), with which this bill is complementary, there is doubt about whether the determinations in issue were actually retrospective, but sufficient uncertainty to warrant ensuring that they are valid.

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

Superannuation (Unclaimed Money and Lost Members) Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to establish a scheme to enable superannuation members who have lost contact with their fund to have a comprehensive register to check where their superannuation is held.

Search and entry provisions
Clause 46

Proposed clause 46 of the bill will permit authorised officers, having the written authority of the Commissioner, to enter and search any premises without first obtaining a judicially sanctioned warrant. The Explanatory Memorandum states that the access and entry provisions in the bill are similar to those found in other legislation administered by the Commissioner (for example, section 263 of the *Income Tax Assessment Act 1936*) and are necessary to ensure compliance with the Act.

The Committee is currently inquiring into search and entry provisions in Commonwealth legislation. The inquiry has so far demonstrated that provisions which authorise entry to premises without a judicially sanctioned warrant are common throughout the tax legislation, but are much less common elsewhere. While the Committee has as yet formed no view on the desirability of their inclusion in the tax legislation, it nevertheless **draws the attention of the Senate** to the anomalous nature of these powers.

> *Other than this, the Committee makes no further comment on these provisions at this time.*

Superannuation (Unclaimed Money and Lost Members) Consequential and Transitional Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to make consequential amendments to nine Acts and sets out transitional provisions applicable to the Superannuation (Unclaimed Money and Lost Members) Bill 1999.

Retrospective application
Subclause 2(5)

Subclause 2(5) of the bill provides that the amendments proposed by Part 1 of Schedule 3 are to be taken to have commenced retrospectively. However, the purpose of these amendments is to correct an earlier drafting error, and clause 9 protects from criminal liability any person who relied on the relevant provisions as they originally stood.

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

Taxation Laws Amendment Bill (No. 8) 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1936 to remove anomalies preventing the intended Australian taxation of capital gains arising on deemed disposals of tainted assets of a controlled foreign company (CFC) where that CFC ceases to be a member of a group and has previously benefited from capital gains tax roll-over relief;

Income Tax Assessment Act 1936 and *Income Tax Assessment Act 1997* to:

- exempt from income tax post-judgment interest received in personal injury compensation cases;
- allow an income tax deduction to certain funds, authorities and institutions and to political parties for a gift of property worth more than $5,000, regardless of when or how the property was acquired;
- provide a capital gains tax (CGT) exemption for testamentary gifts of property to certain funds, authorities and institutions and to political parties unless the property is reacquired by the estate, a beneficiary of the estate or an associate;
- provide a CGT exemption for gifts of property made under the Cultural Gifts Program unless the property is reacquired for less than market value by the donor or an associate;
- allow concessional taxation treatment for specified private funds which will not be required to seek donations from the public but will be subject to the other requirements applying to public funds;
- allow the apportionment of deductions for donations made under the Cultural Gifts Program over a period of up to five income years; and
- extend to companies two concessional tracing rules which are available to trusts under trust loss measures;

Income Tax Assessment Act 1936 and the *Taxation Laws Amendment Act (No. 3) 1998* to:

- allow a deduction where franking rebates exceed the ceiling imposed under the benchmark portfolio ceiling method;
- treat shares and interests in shares held by a bare trust as if they were held by the beneficiaries of the trust;
- remove the restrictions on exempting credits for dividends paid by former exempting companies for natural persons where all the shares are owned by natural persons and there has been no change in ownership of the company; and
- extend the scope of a transitional concession for the general anti-avoidance rule and the specific anti-streaming rule;

Income Tax Assessment Act 1997 to:

- disallow a deduction for bribes made to foreign public officials; and
- make technical amendments;

Taxation (Deficit Reduction) Act (No.2) 1993 to maintain the rate of tax imposed on the eligible insurance business of friendly societies and other registered organisations at 33% for the 1999-2000 income year;

Income Tax Assessment Act 1936, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953* to:

- provide machinery provisions to collect untainting tax;
- ensure that distributions from share premium accounts are within the ambit of the capital streaming and dividend substitution rules;
- ensure that bonus shares deemed to be a dividend have a cost base of the dividend amount where the shares are held on revenue account; and
- make minor technical changes;

Income Tax Assessment Act 1936 and the *Taxation Laws Amendment (Trust Loss and Other Deductions) Act 1997* to allow an extended period for making family trust elections and interposed entity elections.

Retrospective application
Subclauses 2(3) to 2(7)

By virtue of subclauses 2(3) to 2(7), the various amendments proposed by Schedule 3 to the bill are to be taken to have commenced retrospectively. However, these amendments do no more than correct earlier drafting errors, and make no substantive change to the law.

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

Retrospective application
Schedule 1, Part 1

The amendments proposed by Part 1 of Schedule 1 are to apply from 13 May 1997 – the date of the 1997 Budget. While the Committee generally accepts the need for Budget announcements to apply from the date of the Budget, on this occasion it seems to have taken more than 2 years for these changes to take legislative form. The Committee, therefore, **seeks the Treasurer's advice** as to the reasons for such retrospectivity in these circumstances, and which taxpayers or categories of taxpayers will be disadvantaged by that retrospectivity.

Pending the Treasurer's advice, 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.

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

Retrospective application
Schedule 2

The amendments proposed by Schedule 2 to the bill are to apply from the 1992-93 year of income. These amendments exempt from income tax any post-judgment interest received as part of an award of compensation in a personal injury case where that interest relates to delays that have occurred while avenues of appeal are being pursued. The amendments are beneficial to taxpayers and, as such, would usually attract no further comment from the Committee.

However, given that the amendments are to apply from the 1992-93 income year the Committee **seeks the Treasurer's advice** on any action proposed to be taken to inform taxpayers of this legislation to enable them to apply for the amendment of assessments going back over 7 years. Without such action, amendments which set out to be beneficial to all taxpayers in a particular category may end up, somewhat capriciously, benefiting only some of those taxpayers.

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

Retrospective application
Schedule 9, Parts 1 and 3

The amendments proposed by Parts 1 and 3 of Schedule 9 to the bill are to apply from the 1996-97 year of income. However, these amendments are beneficial to taxpayers.

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

Television Licence Fees Amendment Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister representing the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Communications, Information Technology and the Arts]

Complementary to the Broadcasting Services Amendment Bill (No. 2) 1999, this bill proposes to amend the *Television Licence Fees Act 1964* to impose a requirement on commercial television broadcasting licensees to pay an additional $3.41 million in annual licence fees over the next three years.

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. 1) 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Veterans' Affairs. [Portfolio responsibility: Veterans' Affairs]

The bill proposes to amend the following Acts:

Veterans' Entitlements Act 1986 to:

- change the eligibility criteria for invalidity service pension and income support supplement, on the grounds of permanent incapacity, and provide for associated administrative processes;
- enable approximately 63,000 persons with limited treatment eligibility (white card holders) to access the Home Front program;
- extend eligibility for the Veterans' Children Education Scheme to certain children of living veterans and members of the Forces and members of a Peacekeeping Force;
- allow the Minister to declare, by gazettal, a Peacekeeping Force as a Peacekeeping Force for the purposes of the Act;

Defence Service Homes Act 1918 to provide a new home support advance of up to $10,000;

Defence Service Homes Act 1918 and the *Veterans' Entitlements Act 1986* to make technical amendments.

Retrospective application
Subclauses 2(3) to 2(6)

Subclauses 2(3) and (4) provide that some of the amendments proposed by this bill are to commence retrospectively. However, these amendments are beneficial to recipients under the Principal Act.

Further, subclauses 2(5) and (6) provide that other proposed amendments are also to commence retrospectively. However these amendments are technical in nature, and make no substantive change to the law.

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

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

Vocational Education and Training Funding Amendment Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Education, Training and Youth Affairs. [Portfolio responsibility: Education, Training and Youth Affairs]

The bill proposes to amend the *Vocational Education and Training Funding Act 1992* to:

- supplement 1999 funding by $14.208 million in line with real price movements reflected in Treasury indices; and
- appropriate $918.352 million for general vocational education and training funding for the Australian National Training Authority for the year 2000.

The Committee has no comment on this bill.

Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999

This bill was introduced into the House of Representatives on 30 June 1999 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Employment, Workplace Relations and Small Business]

The bill proposes to amend the following Acts:

Workplace Relations Act 1996 to:

- amend the object of the Act to emphasise the basic safety net role of awards, choice as to jurisdiction, and the role of the courts and Commission in stopping or preventing unprotected industrial action;
- change the name of the Australian Industrial Relations Commission to the Australian Workplace Relations Commission and revise its structure;
- change the name of the Australian Industrial Registry to the Australian Workplace Relations Registry;
- establish a distinction between compulsory and voluntary conciliation by the Commission;
- provide for the voluntary use of mediation in industrial disputes as an alternative or supplement to the processes of the Commission;
- provide for a national accreditation scheme for workplace relations mediators;
- create the role of Mediation Adviser to oversee and facilitate the use of mediation to resolve workplace disputes;
- provide for further simplification of awards;
- set out new requirements in relation to logs of claims;
- widen the circumstances in which the commission is required to cease dealing with an industrial dispute;

- widen the range of agreements that will displace the operation of a federal award;
- provide for the acceleration of the process of cancelling obsolete awards;
- reinforce disincentives to speculative and unmeritorious unfair dismissal claims;
- expand the Commission's powers in relation to unfair dismissal applications;
- streamline requirements for certification of agreements;
- simplify the processes for the making and approval of AWAs;
- clarify rights and responsibilities relating to industrial action;
- further distinguish between protected and unprotected industrial action and provide mechanisms for dealing with unprotected industrial action;
- introduce new preconditions for the taking or organising of protected industrial action by employees and organisations of employees;
- introduce new requirements for entry to premises by union officials and employees;
- broaden freedom of association provisions;
- preserve aspects of the previous Victorian system and provide for the expanded operation in Victoria of provisions contained in other parts of the Act;
- repeal the provisions that allow the Federal Court to vary or set aside contracts made with independent contractors; and
- make consequential amendments;

and makes consequential amendments to 25 Acts as result of the renaming of the Commission and the Registry.

The Committee has no comment on this bill.

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were "more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties". The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for "administration of justice offences". The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest.* The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	**Section/Subsection**	**Offence**	**Penalty**
Financial Sector Reform (Amendments and Transitional Provisions) Bill (No. 2) 1999	Section 13	Fail to comply with requirements of a standard	200 penalty units
Superannuation Contributions and Termination Payments Taxes legislation Amendment Bill 1999	Subitem 43(2) of Schedule 1	Fail to provide corrective statements	60 penalty units
Superannuation (Unclaimed Money and Lost Members) Bill 1999	Subsection 16(5)	Fail to provide an approved statement of unclaimed money	100 penalty units

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

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 12 of 1999

25 August 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator H Coonan
Senator T Crossin
Senator J Ferris
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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- **The Committee has commented on these bills**

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

Aboriginal and Torres Strait Islander Commission Amendment Bill (No. 1) 1999

This bill was introduced into the Senate on 11 August 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Aboriginal and Torres Strait Islander Affairs]

The bill proposes to amend the *Aboriginal and Torres Strait Islander Commission Act 1989* to:

- provide that when a person elected to be a zone Commissioner is subsequently elected as Commission Chairperson, the person ceases to hold office as zone Commissioner and Regional Councillor;
- clarify that the Minister must appoint as members of the Commission the persons elected to represent the several zones;
- provide that any vacant office of zone Commissioner and Regional Councillor (caused by election to Commission Chairperson) is filled through casual vacancy electoral processes; and
- provide that a Commission Chairperson who resigns is taken to have also resigned as a member of the Commission.

The Committee has no comment on this bill.

Constitution Alteration (Preamble) 1999

This bill was introduced into the House of Representatives on 11 August 1999 by the Prime Minister. [Portfolio responsibility: Prime Minister]

The bill proposes to amend the Constitution to insert a preamble.

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.

Superannuation Legislation Amendment Bill (No. 4) 1999

This bill was introduced into the House of Representatives on 11 August 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Superannuation Industry (Supervision) Act 1993* to:

- provide a definition of a related party of a superannuation fund, a Part 8 associate of a member of a fund, a standard employer-sponsor of a fund, and a Part 8 associate of a standard employer-sponsor of a fund;

- provide definitions of a Part 8 associate and of a related trust;

- amend the coverage of in-house asset rules to include investments in, loans to, and leases and lease arrangements with, a related party of the fund. In-house investments will also include investments in a related trust;

- provide that in-house asset rules do not cover business real property leased by a superannuation fund with less than 5 members, or investments in widely held unit trusts;

- provide transitional arrangements for the changes to the in-house asset provisions;

- amend provisions applicable when an investment is not an in-house asset, but has the effect of achieving an investment in an in-house asset;

- amend provisions relating to the acquisition of assets from members and relatives, so that they apply to acquisitions from all related parties, with specified exceptions; and

- enable superannuation funds with fewer than 5 members to use up to 100 per cent of their assets to purchase business real property.

Retrospective application
Schedule 1, item 45

Item 45 of Schedule 1 to this bill provides that most of the proposed amendments are to apply either from 12 May 1998 (the night of the 1998 Budget) or from the date on which the bill was introduced into the Parliament. The bill, therefore, has a measure of retrospective effect.

However, subitem 45(6) provides that neither the criminal sanctions nor the civil penalty sanctions of the Principal Act are to apply to conduct engaged in before the commencement of the provisions contained in the bill if that conduct would not have constituted an offence or contravention under the law as it stood before those amendments came into force.

Subitem 45(6) provides some protection against the inherent problems when legislation is made to operate retrospectively. However, the period of retrospective application in the case of this bill is approximately 15 months. The Explanatory Memorandum observes that a decision to amend the investment rules was announced in the 1998-99 Budget. A number of representations were then received, but an exposure draft bill was not released until 22 April 1999 (more than 11 months later). Various submissions were then received in response to that exposure draft.

The Committee is aware of the value of consultation in developing legislative proposals. It also notes the mitigating effect of proposed subitem 45(6) on the application of offence and penalty provisions. However a period of 11 months between the announcement of a proposal and the appearance of exposure draft legislation giving effect to that proposal seems somewhat lengthy. The Committee, therefore, **seeks the Treasurer's advice** on whether the consultation process was the sole reason for the delay in introducing this bill, and whether those consultations differed from the process typically followed.

> *Pending the Treasurer's advice, 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.*

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

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 13 of 1999

1 September 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

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Appropriation (Supplementary Measures) Bill (No. 1) 1999

This bill was introduced into the House of Representatives on 26 August 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to appropriate the Consolidated Revenue Fund for the book industry assistance plan and the Supported Accommodation Assistance Program for the years 2000-01 to 2003-2004. The bill also proposes to amend the *A New Tax System (Goods and Services Tax) Act 1999* to repeal a subsection to effect a minor technical amendment.

The Committee has no comment on this bill.

Appropriation (Supplementary Measures) Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 26 August 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to appropriate the Consolidated Revenue Fund for a number of environment initiatives, including:

- supporting conversions to compressed natural gas or liquid petroleum gas for commercial vehicles and buses that have a gross vehicle mass equal to or greater than 3.5 tonnes, trains and ferries;
- developing a product stewardship system for the re-use and recycling of waste oil;
- supporting the utilisation of photovoltaic systems on residential buildings and community-use buildings;
- supporting the development and commercialisation of renewable energy;
- supporting the use of renewable energy for remote power generation;
- supporting the development and implementation of in-service emissions testing capabilities for diesel and petrol vehicles, where the diesel emissions testing is in connection with the making and/or implementation of a Diesel National Environment Protection Measure; and
- greenhouse gas abatement program.

The Committee has no comment on this bill.

Coal Mining Legislation Amendment (Oakdale Collieries) Bill 1999

This bill was introduced into the House of Representatives on 26 August 1999 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Employment, Workplace Relations and Small Business]

The bill proposes to amend the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* and the *Coal Mining Industry (Long Service Leave Funding) Act 1992* to provide for payment to former employees of unpaid entitlements in respect of their employment by Oakdale Collieries Pty Limited.

The Committee has no comment on this bill.

Constitution Alteration (Proportional Representation in the Senate) 1999

This bill was introduced into the Senate on 24 August 1999 by Senator Harris as a Private Senator's bill.

The bill proposes to amend the Constitution to provide that proportional representation is retained as the method of electing senators.

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.

Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999

This bill was introduced into the Senate on 25 August 1999 by Senators Brown, Bolkus and Greig as a Private Senators' bill.

The bill proposes to give effect to certain human rights obligations to children under the *Convention on the Rights of the Child* by providing that a law of the Commonwealth or of a State or Territory must not require a court to sentence a person to imprisonment or detention for an offence committed when that person was a child.

Individual rights and self-government rights
Part 1

Legislation has been enacted in Western Australia and the Northern Territory which relates to the mandatory sentencing of juvenile offenders. This bill, which is based on Australia's obligations under the *Convention on the Rights of the Child*, has been introduced to override that legislation.

In general terms, the bill provides that a law of the Commonwealth or of a State or Territory must not require a court to sentence a person to imprisonment or detention for an offence committed when that person was a child (ie when under 18 years of age). Any child currently imprisoned or detained under an enactment contrary to this provision must have the remainder of their sentence reconsidered within 28 days of the commencement of the bill.

An issue such as the mandatory detention of juvenile offenders raises a number of competing principles. Some of these principles relate to the issue of mandatory detention itself. For example, this Committee might well feel it necessary to draw the Senate's attention to any Commonwealth law which proposed to require courts to imprison or detain children found guilty of certain offences. Such a law might be thought to trespass unduly on the personal rights and liberties of children.

Other principles relate to the right and power to legislate under a federal system of government. Under the Constitution, the Commonwealth Parliament has power to legislate with respect to external affairs. This power is used by

the Executive to enter into international treaties, and by the Executive and the Parliament to prepare legislation which gives effect to various provisions of those treaties. This power means that the Commonwealth Parliament undoubtedly has authority to pass this bill.

However, the existence of such a power in a federation may bring about tensions in policy, practice and in the law itself. Indeed, such tensions appear to be a necessary consequence of a federal system of government.

On the one hand, State and Territory Parliaments may have the authority and power to pass laws with respect to the sentencing of offenders within their boundaries. On the other hand, the Commonwealth Parliament may take the view that particular rights and freedoms contained in international conventions should apply to all Australians. If the Commonwealth Parliament takes this view, it may validly pass laws which may override the law-making function of other democratically elected Parliaments, and so reduce the certainty which should exist for the citizens in affected States or Territories. Unless a principle for overriding those State or Territory laws is provided, there is a danger that such an overriding power may be seen to be exercised arbitrarily or capriciously. As experience shows, in the end, the power of the Commonwealth Parliament to override State or Territory legislation is subject to determination by the High Court on a case-by-case basis.

This bill, therefore, raises the tension between particular individual rights and rights of self-government in a federation.

> *Given this, the Committee draws Senators' attention to the bill, as it raises competing considerations within principle 1(a)(i) of the Committee's terms of reference.*

Intellectual Property Laws Amendment (Border Interception) Bill 1999

This bill was introduced into the House of Representatives on 25 August 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to amend the *Sydney 2000 Games (Indicia and Images) Protection Act 1996* and the *Trade Marks Act 1995* to require the CEO of Customs to seize all imported goods that are subject to a notice of objection and seek to ambush the Sydney 2000 Games marketing, or bear infringing trade marks, whether or not the goods meet certain requirements of the Customs Act.

The Committee has no comment on this bill.

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 14 of 1999

22 September 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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- **The Committee has commented on these bills**

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

A New Tax System (Tax Administration) Bill 1999

This bill was introduced into the House of Representatives on 2 September 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Taxation Administration Act 1953, *Income Tax Assessment Act 1936* and 15 other Acts to clarify the scope of new labour hire withholding arrangements and include rules for PAYG (Pay As You Go) withholding about:

- how much to withhold;
- voluntary declarations of tax file numbers (TFNs) by those receiving payments;
- registration;
- notifying the Commissioner when a declaration stating a TFN is not given;
- annual reporting to the Commissioner; and
- to make consequential amendments;

Taxation Administration Act 1953 and 11 other Acts to introduce standardised rules to enable the Commissioner to collect and recover certain tax-related liabilities;

Taxation Administration Act 1953 and *Income Tax Assessment Act 1936* to:

- introduce an oral rulings regime and provide that an oral ruling is binding upon the Commissioner in much the same way as a written private ruling is; and
- provide for a shorter period of review for taxpayers with simple tax affairs and reduce from four to two years the period during which taxpayers may object to assessments or seek amendments to assessments;

Taxation Administration Act 1953 to establish a transaction reporting, ABN and identification verification system to be used in areas where non-compliance with taxation law is entrenched;

Income Tax Assessment Act 1997 and *A New Tax System (Australian Business Number) Act 1999* to:

- require an entity seeking deductible gift recipient status to obtain an ABN and be endorsed by the Commissioner as gift deductible; and

- require any charity seeking to claim income tax exemption to obtain an ABN and be endorsed by the Commissioner as exempt from income tax;

A New Tax System (Australian Business Number) Act 1999 and four other Acts to strengthen the administration of the aligned business tax obligations of *one return and one payment* outlined in ANTS;

Taxation Administration Act 1953 and six other Acts to implement the next stage of the proposed PAYG income tax instalment system by:

- enabling quarterly instalment payers who choose to calculate their instalments using GDP-adjusted notional tax to vary their instalments; and

- making consequential amendments; and

Income Tax Assessment Act 1936 to ensure that the savings rebate (abolished from the 1999-2000 income year) is not taken into account in the calculation of provisional tax for that income year.

The Committee has no comment on this bill.

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

Convention on Climate Change (Implementation) Bill 1999

This bill was introduced into the Senate on 2 September 1999 by Senator Brown as a Private Senator's bill.

The bill proposes to implement the United Nations Framework Convention on Climate Change and the Kyoto Protocol by establishing the Greenhouse Office and providing for Greenhouse Impact Assessments and Industry Greenhouse Plans.

An uncertain offence
Clause 26

Clause 26 of this bill creates an offence of taking an action which "in the opinion of the Minister" would or might affect the achievement of targets for reducing greenhouse gas emissions. The civil penalty specified for this offence is substantial: 5,000 penalty units for an individual, or 50,000 penalty units for a body corporate.

This provision seems to create an offence that is uncertain in its nature and arbitrary in its scope. For example, under the provision a person may be penalised for doing something which the Minister considers likely to inhibit the achievement of a target. In other words, a person may be penalised for failing to correctly predict the Minister's opinion about a likelihood. The Committee therefore, **seeks the advice of the Senator sponsoring the bill** as to whether the conduct giving rise to this offence might be made more certain.

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

No provision for merits review
Clause 30

Clause 30 of the bill provides the Minister with a discretion to approve certain applications. Specifically, the Minister may approve actions which result in excessive emissions of greenhouse gases, or which are likely to inhibit the achievement of targets for the reduction of such emissions.

While the clause confers a significant discretion on the Minister, and directly affects the interests of applicants, the clause seems to make no provision for external merits review of the exercise of that discretion – for example, by the Administrative Appeals Tribunal.

The Committee notes the recent comment from the Administrative Review Council that, as a matter of principle, administrative decisions which will, or which are likely to, affect the interests of a person should be subject to merits review. The Committee, therefore, **seeks the advice of the Senator sponsoring the bill** as to why the ministerial discretion under clause 30 is not subject to merits review.

> *Pending the Senator's response, the Committee draws Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.*

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

Copyright Amendment (Digital Agenda) Bill 1999

This bill was introduced into the House of Representatives on 2 September 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Copyright Act 1968* to:

- introduce a technology-neutral right of communication to the public to replace the technology-specific broadcasting right (which applies only to "wireless" broadcasts) and the cable diffusion right;
- provide for exceptions to the technology-neutral right of communication;
- extend existing exceptions for libraries and archives to the reproduction and communication of copyright material in electronic form;
- extend existing statutory licences for copying by educational institutions to the reproduction and communication of copyright material in electronic form;
- provide criminal sanctions and civil remedies against:
    - persons who manufacture, deal in, import, distribute or make available online devices, or provide services, for the circumvention of technological protection measures designated to inhibit the infringement of copyright;
    - international tampering or removal of electronic rights management information (RMI); and
    - persons who manufacture, deal in, import, distribute or make available online devices for the unauthorised reception of encoded subscription broadcasts;
- limit and clarify the liability of carriers and Internet Service Providers in relation to both direct and authorisation liability; and
- provide a statutory licence scheme for the payment of equitable remuneration to underlying rights holders whose works are used in retransmitted broadcasts.

Reversal of the onus of proof
Proposed new subsections 116A(6), 116B(3) and 116C(3)

Item 98 of Schedule 1 to this bill proposes to insert a new Division 2A in the *Copyright Act 1968*. This Division provides civil remedies in relation to circumvention devices and electronic rights management information. The Explanatory Memorandum states that these new provisions are intended to "provide appropriate measures for the enforcement of copyright in the digital environment".

Division 2A includes proposed new subsections 116A(6), 116B(3) and 116C(3). Each of these provisions will reverse the onus of proof, and require the defendant to prove that his or her state of knowledge was not that which the subsections otherwise presume it to be.

The Committee usually comments adversely on a bill which reverses the onus of proof in relation to criminal proceedings. However, the reversals of that onus in Division 2A of this bill arise only in civil proceedings by the owner or licensee of copyright when seeking damages against another individual.

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

Reversal of the onus of proof
Proposed new subsections 132(5F), (5G), (5H) and (5K) and 135AS(2) and (3)

Item 100 of Schedule 1 to this bill creates a number of new criminal offences in relation to circumvention services and devices, and electronic rights management information. Proposed new subsections 132(5F), (5G) and (5H) provide some specific exemptions from these offences in certain circumstances (for example, actions lawfully done for the purposes of law enforcement or national security).

Proposed new subsection 132(5K) states that the only burden of proof that a defendant bears under these new subsections is an evidential one – "the burden of adducing or pointing to evidence that suggests a reasonable possibility that the act or matter in question was done or existed".

The Explanatory Memorandum states that the reason for imposing an evidential burden in these circumstances is that "it is believed that the matters referred to in those subsections will be peculiarly within the knowledge of the defendant and will be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish".

Similar reasoning applies to proposed new subsections 135AS(2) and (3), which are concerned with offences involving the manufacture, dealing in or making available of online broadcast decoding devices.

In principle, the growing tendency to reverse the onus of proof in legislation remains a matter of continuing concern. However, the Committee has, on occasion, accepted the imposition of an evidential burden on a defendant to a criminal prosecution in circumstances such as those referred to in the Explanatory Memorandum – where matters are peculiarly within the defendant's knowledge.

To determine whether the imposition of an evidential burden is appropriate in this case, the Committee **seeks the Attorney-General's advice** on why it is believed that the matters referred to in proposed new subsections 132(5F), (5G), (5H) and (5K) and 135AS(2) and (3) are peculiarly within the defendant's knowledge, and would be more difficult and costly for the prosecution to disprove than for the defendant to establish.

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

Fair Prices and Better Access for All (Petroleum) Bill 1999

This bill was introduced into the House of Representatives on 30 August 1999 by Mr Fitzgibbon as a Private Member's bill.

The bill proposes to provide that franchisees in the petroleum sector are able to purchase fuels for re-sale from a variety of sources.

The bill also proposes to make a consequential amendment to the *Trade Practices Act 1974.* This amendment will provide that all fuel supply agreements entered into after the commencement of the Trade Practices (Industry Codes – Oilcode) Regulations will be deemed to substantially lessen competition unless those agreements provide that a franchisee may purchase up to 50% of their fuel from suppliers other than their primary supplier.

Rights and liberties and contracts and compensation
Clauses 5 and 8 and Schedule 1

This bill is intended to secure improved competition in the wholesale petroleum market, and to help create an environment of fairer pricing and better access to fuel supplies in the retail petroleum market. The bill seeks to achieve this by authorising petrol station franchisees to buy up to half of their fuel from suppliers other than those nominated in their franchise agreement.

The bill, therefore, proposes to intervene in legally binding contractual arrangements between franchisors and franchisees. The only circumstance in which provision is made for compensation involves persons who suffer loss or damage through a contravention of the bill – no provision is made for compensation as a result of the operation of the bill and its effect on rights under those existing contractual arrangements.

Finally, by deeming certain conduct to have breached section 47 of the *Trade Practices Act 1974*, and thus be the subject of the penalties provided by the Act, the bill may, in effect, require a defendant to prove certain matters and so reverse the onus of proof in penalty proceedings.

The Committee is concerned that, under the bill, facts may be deemed in such a way that a person is liable to pay a statutory penalty, even though this is a

matter which a court would normally decide. The Committee would appreciate **advice as to whether the member sponsoring the bill** has any concerns that its deeming provision may intrude on the exercise of the judicial function.

In summary, while the bill expressly confers rights on franchisees, it may also affect the rights and liberties of franchisors. Given these considerations, the Committee **seeks the advice of the Member sponsoring the bill** as to the reason for intervening in existing franchise contracts; whether compensation should be made available to those who suffer loss as a result of that intervention; and whether the bill will require a defendant to affirmatively prove certain matters if he or she wishes to avoid a statutory penalty.

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

Family and Community Services Legislation Amendment (1999 Budget and Other Measures) Bill 1999

This bill was introduced into the House of Representatives on 2 September 1999 by the Minister for Community Services. [Portfolio responsibility: Family and Community Services]

The bill proposes to amend the following Acts:

Social Security Act 1991 to:

- provide for income earned from employment in a family business or farm to be excluded for the purposes of the youth allowance Family Actual Means Test (FAMT), up to the existing allowable level;

- amend provisions relating to income support arrangements for people sharing the care of children;

- extend the category of people who can be eligible for a Student Financial Supplement Scheme (SFSS) loan; and

- remove the complex formula currently applied when calculating the concession available for families where a sibling is an isolated boarder or a secondary student boarder;

A New Tax System (Family Assistance) (Consequential and Related Measures) Act (No. 2) 1999 to provide for the sharing of information between the joint venture agencies comprising the Family Assistance Office for the purposes of the transition to, and operation of, the new family assistance arrangements as well as the administration of the Bonuses for Older Australians measure; and

A New Tax System (Bonuses for Older Australians) Act 1999 to:

- provide for the sharing of information between the joint venture agencies comprising the Family Assistance Office for the purposes of establishing the bonus payment scheme for older Australians; and

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

- prevent breaches of the Information Privacy Principles (contained in the *Privacy Act 1988*) when information is shared between the agencies.

The Committee has no comment on this bill.

Fisheries Legislation Amendment Bill (No. 1) 1999

This bill was introduced into the House of Representatives on 1 September 1999 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the following Acts:

Fisheries Management Act 1991 to introduce new forfeiture and enforcement powers to enable more effective fisheries surveillance and enforcement within the Australian fishing zone; and

Fisheries Management Act 1991 and the *Fisheries Administration Act 1991* to provide for the implementation of principles, rights and obligations associated with the *Agreement for the Implementation of the Provisions of the United Nations Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Stocks*.

Strict liability offences
Schedule 1, items 9, 11, 12 and 14

Items 9, 11, 12 and 14 of Schedule 1 to this bill amend the *Fisheries Management Act 1991*. These amendments explicitly provide that particular offences are offences of strict liability.

It appears that these amendments do no more than confirm the effect of the existing provisions. It appears that they have become necessary because the *Criminal Code*, which is to apply to the *Fisheries Management Act 1991* from next year, would otherwise change these offences to fault-based offences, requiring the prosecution to prove the defendant's state of mind before a conviction could be obtained. However the Explanatory Memorandum does not make this clear. The Committee, therefore, **seeks the Minister's confirmation** that these amendments do no more than continue the effect of the existing provisions, and have been prompted by the application of the *Criminal Code*.

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

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

Reversal of the onus of proof
Proposed new subsections 100A(4) and (5), 101A(4) and (5), 103(1B) and (1E), 105B(3) and (4), 105C(3) and (4), and 105F(3) and (4)

Among the amendments to the *Fisheries Management Act 1991* to be made by this bill are a number of provisions which impose an evidential burden of proof on a defendant to criminal proceedings. For example, proposed new section 100A, to be inserted by item 13 of Schedule 1, creates an offence of using a foreign boat for fishing in the Australian fishing zone. Proposed subsections 100A(4) and (5) provide an exemption for boats having a foreign fishing licence or a Treaty licence. The defendant bears an evidential burden in relation to this exemption (ie the burden of "adducing or pointing to evidence that suggests a reasonable possibility that the matter in question existed").

A similar approach is taken in:

- proposed new subsections 101A(4) and (5), which concern the offence of having a foreign boat equipped for fishing;
- proposed new subsections 103(1B) and (1E), which concern the offence of landing or transhipping fish from a foreign boat in Australia;
- proposed new subsections 105B(3) and (4), which concern the offence of possessing an Australian-flagged boat on the high seas equipped for fishing;
- proposed new subsections 105C(3) and (4), which concern the offence of using an Australian-flagged boat for fishing in foreign waters; and
- proposed new subsections 105F(3) and (4), which concern the offence of using an FSA boat for fishing on the high seas without the authority of a flag state.

With regard to these provisions, the Explanatory Memorandum observes either that they create new fault element offences as required by Commonwealth criminal law policy where penalties reach a substantial level,

or that they implement Australia's obligations as a flag-State under the Fish Stocks Agreement. However, it is not clear why it is thought appropriate that an evidential burden be imposed on the defendant in each case (for example, it may be that the matters in issue are peculiarly within the defendant's knowledge, or the prosecution may face evidentiary difficulties in cases of offences involving foreign boats).

The Committee therefore, **seeks the Minister's advice** as to why the defendant bears an evidential burden of proof under these subsections.

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

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

Law Enforcement Committee Bill 1999

This bill was introduced into the House of Representatives on 30 August 1999 by Mr Kerr as a Private Member's bill.

The bill proposes to establish the Parliamentary Joint Committee on Commonwealth Law Enforcement. The bill further proposes to amend the *National Crime Authority Act 1984* to abolish the Parliamentary Joint Committee on the National Crime Authority.

The Committee has no comment on this bill.

Taxation Laws Amendment Bill (No. 9) 1999

This bill was introduced into the House of Representatives on 2 September 1999 by the Minister for Forestry and Conservation. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Customs Act 1901* and the *Excise Act 1901* to align the diesel rebate rate for forestry use with the rebate rate for agriculture.

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 (Interception) Amendment Bill 1999

This bill was introduced into the House of Representatives on 2 September 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Telecommunications (Interception) Act 1979* and the *Telecommunications (Interception) and Listening Device Amendment Act 1997* to permit the Anti-Corruption Commission of Western Australia (ACC) and the Queensland Crime Commission (QCC) to:

- receive intercepted information originally obtained by another agency where that information appears to relate to conduct that the ACC or QCC may investigate;
- use intercepted information for an investigation it is undertaking in relation to its functions;
- obtain warrants to intercept information, provided the Attorney-General first issues a declaration under section 34 of the Interception Act; and
- permit the Minister to continue to nominate specified members of the AAT to issue interception warrants for law enforcement.

General comment

This bill proposes to further increase the number of agencies entitled to receive and use information gained from the interception of tele-communications.

The core provision of the *Telecommunications (Interception) Act 1979* is section 7. This section prohibits the interception of communications passing over a telecommunications system. The balance of the Act as originally passed set out certain specified exceptions to this provision in "special circumstances". These exceptions were intended to achieve the objects of the bill, which was introduced as part of a legislative package to reform the powers of ASIO, and to facilitate the investigation of narcotics offences (see Senate, *Hansard*, 8 March 1979, pp 646-649).

The Act has since been amended to widen the number of exceptions to section 7, and to increase the range of "special circumstances". For example, in 1992 there were four exceptions in the balance of section 7. By 1998, these exceptions had grown to eight.

In *Alert Digest No 7 of 1997*, this Committee considered the Telecommunications (Interception) and Listening Devices Amendment Bill 1997. In discussing that bill, the Committee expressed its concern at the proposed extension to the Police Integrity Commission of access to the telecommunications interception powers. The Committee observed that that bill was "again an extension of an intrusive power and, as such, a fresh example of legislative creep".

This bill now seeks to extend access to the telecommunications interception powers to the Anti-Corruption Commission of Western Australia and the Queensland Crime Commission. It is yet another "fresh example of legislative creep".

While conscious of the need to adequately investigate "corruption by public officials, paedophilia and organised crime", which is the explanation for the latest extensions, and while remaining conscious of the safeguards contained elsewhere in the Act, the Committee **seeks the Attorney-General's advice** as to the reasons for the continuous weakening of the prohibition contained in section 7 of the Principal Act, and the continuous extension of access to the Act's exceptional powers.

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

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

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 15 of 1999

29 September 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

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Aviation Noise Ombudsman Bill 1999

This bill was introduced into the House of Representatives on 20 September 1999 by Mr Albanese as a Private Member's bill.

The bill proposes to establish an Aviation Noise Ombudsman to liaise between Airservices Australia and the public in relation to excessive aircraft noise, breaches of caps and curfews operating at certain airports and incidents of fuel dumping and venting.

The Committee has no comment on this bill.

Border Protection Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 22 September 1999 by the Minister for Immigration and Multicultural Affairs. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the following Acts:

Migration Act 1958 and the *Customs Act 1901* to revise and strengthen existing powers of investigation and enforcement at sea to take account of Australia's rights and obligations under the United Nations Convention on the Law of the Sea and customary international law by providing for:

- the boarding and searching of ships and aircraft, in certain circumstances, in Australia's territorial sea, Australia's contiguous zone, the High Seas, and Australia's exclusive economic zone;
- hot pursuit of ships whose master has not complied with a request to board;
- hot pursuits of motherships in certain circumstances; and
- the moving and/or destroying of ships which are unseaworthy, which pose a serious risk to navigation, quarantine, safety or public health, or which pose a serious risk of damage to property or the environment; and

Customs Act 1901 to enable Customs officers to carry and use approved firearms and other approved items of personal defence equipment in certain circumstances; and

Fisheries Management Act 1991 to:

- authorise Customs officers to be officers for the purposes of the Act;
- enable Customs officers (exercising powers as fisheries officers) to carry and use approved firearms and other approved items of personal defence equipment in certain circumstances; and
- enable an officer to detain and search a person who is in Australia or a Territory but who is not an Australian citizen or resident to determine

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

whether to charge the person with an offence relating to illegal fishing; and

Migration Act 1958 to:

- provide for automatic forfeiture (followed by seizure and possible disposal) of ships and aircraft which have been used to bring to Australia persons who have no authority to come to Australia, or have been involved in the entry or proposed entry into Australia of such persons;
- provide a scheme by which fishermen can be taken to have held a visa immediately upon enforcement action by fisheries officers;
- revise offence provisions relating to bringing unauthorised arrivals into Australia;
- ensure that, where the Commonwealth arranges for or requires a person without a visa to be brought into Australia, those involved in doing so are not exposed to offences under the Act; and
- ensure that refugee claimants who arrive unlawfully in an Australian territory are able to be brought to the mainland promptly to have those claims considered and be detained as unlawful non-citizens.

A penalty provision for a failure to answer questions or produce documents is noted on page 23 of this *Digest*.

Retrospective application
Subclause 2(3)

Subclause 2(3) of this bill provides that the amendment proposed in Part 5 of Schedule 1 is to be taken to have commenced on 1 September 1994. However, the Explanatory Memorandum observes that this provision makes a technical amendment which corrects a grammatical error.

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

Search and entry at sea
Proposed new subsections 245F(3) and 245G(2)

Item 2 of Schedule 1 to this bill proposes to insert a new Division 12A in Part 2 of the *Migration Act 1958*. This new Division, which deals with the chasing and boarding of ships and aircraft, includes proposed new subsections 245F(3) and 245G(2).

Proposed new paragraphs 245F(3)(a) and 245G(2)(a) will permit officers authorised under the Act to board and search a ship or aircraft without obtaining a judicially sanctioned warrant. In addition, proposed new paragraph 245F(3)(f) will permit an authorised officer to arrest without warrant any person whom the officer suspects of having committed an offence against the *Migration Act 1958*.

Provisions in this form are usually regarded with some concern by the Committee. The Committee is mindful of the fact that the amendments proposed by this bill are intended specifically to strengthen Australia's maritime investigatory and enforcement powers, and have been designed to fully utilise the jurisdiction derived from the United Nations Convention on the Law of the Sea. The Committee is also mindful of the fact that these particular search and entry powers are to be exercised at sea, where the opportunity to seek or obtain a warrant may be more difficult. Nevertheless, the Committee notes that warrants are usually required before search and entry powers are exercised and, in practice, may be obtained by modern technology. Whether by telephone or otherwise, modern technology enables applications for warrants to be made without undue difficulty from remote regions and from the oceans.

The Committee, therefore, **seeks the Minister's advice** on how these particular provisions differ from those currently available, how they differ from the usual practice in such situations, and their consistency with Australia's rights and obligations under the United Nations Convention on the Law of the Sea.

Pending the Minister's advice, 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.

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

Rights and liberties and the carrying of firearms
Proposed new section 189A

Item 32 of Schedule 2 to this bill proposes to insert a new section 189A in the *Customs Act 1901*. This new section permits authorised officers to carry firearms and other items of personal defence equipment (such as batons, capsicum sprays and anti-ballistic clothing).

Such a provision has the potential to trespass on the rights and liberties of those in relation to whom such officers may exercise their powers. The right to carry firearms is usually restricted to highly trained and accountable military or police officers. This provision now proposes to extend this right to certain civilians in circumstances where judgement about its use might need to be exercised in a context of considerable tension. There is, therefore, significant risk that a firearm or item of defence equipment might be used inappropriately. This could lead to unwarranted death or injury. (This may have the potential to cause an incident with diplomatic or international ramifications.)

The extent to which this provision departs from current practice is not apparent from the Explanatory Memorandum. It is not apparent whether customs officers to be authorised to carry firearms will receive high quality training such as, for example, police officers. It is not apparent whether there is to be any monitoring of the use of the new powers, and whether any safeguards against inappropriate use are to be put in place. The Committee, therefore, **seeks the Minister's advice** as to these matters.

> *Pending the Minister's advice, 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.*

Detention on suspicion
Proposed new paragraphs 84(1)(ia) and (ic)

Among other things, item 4 of Schedule 3 to this bill proposes to insert new paragraphs 84(1)(ia) and (ic) in the *Fisheries Management Act 1991*. Proposed new paragraph 84(1)(ia) will permit an officer authorised under that

Act to detain a person if the officer has reasonable grounds to believe that the person is not an Australian citizen or resident, and was on a foreign boat when it was used in the commission of a specified offence. Such detention is for the purposes of determining whether or not to charge the person, and, by virtue of proposed new section 84A, is limited to a maximum period of 168 hours.

Proposed new paragraph 84(1)(ic) will permit an authorised officer to search such a detainee without the sanction of a warrant. Such a search is said to be for the purpose of finding out whether the person has any concealed weapons.

The Committee usually views such provisions with some concern. While the Explanatory Memorandum observes that these powers are currently possessed by officers authorised under the Migration Act, the reasons for, and the implications of, extending them to fisheries officers are not clear. Precedence alone is not sufficient reason for pursuing a practice if it is tainted or flawed. The Committee, therefore, **seeks the Minister's advice** on the reasons for extending these particular powers, and whether officers authorised to exercise these powers are to receive any training or be given any guidance as to their exercise.

Pending the Minister's advice, 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.

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

Choice of Superannuation Funds (Consumer Protection) Bill 1999

This bill was introduced into the House of Representatives on 23 September 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to introduce a range of consumer protection initiatives for the life insurance industry:

- life companies will be subject to a general requirement to disclose all material information that a consumer reasonably needs in order to make informed decisions;

- advisers and brokers will be required to disclose the capacity in which they act and any benefit or advantage they receive in giving advice;

- injunctions will be available where a life company or broker is or has contravened requirements of this legislation;

- civil remedies will be available to persons who suffer damage because of misleading and deceptive statements made by a life insurance company, broker or adviser;

- criminal sanctions will be available where a person suffers loss or damage as a result of a misleading statement in information produced pursuant to the life company's obligation to provide information to owners and prospective owners of life policies; and

- instruments which regulate conduct and disclosure within the life insurance industry such as the Code of Practice, Circulars and Policy Statements can be given statutory backing through regulation-making; and

makes consequential technical amendments to the *Australian Securities and Investments Commission Act 1989* and the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999*. A penalty provision for a failure to provide information or produce documents is noted on page 23 of this *Digest*.

Retrospective application
Subclause 2(2)

Subclause 2(2) of this bill provides that items 2 and 3 of Schedule 1 are to be taken to have commenced on 17 June 1999, being the date of assent to the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No 1) 1999*. However, these amendments are merely technical in nature, repealing provisions which the current bill has rendered redundant.

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

Abrogation of the privilege against self-incrimination
Clause 55

Clause 55 of this bill provides that a person is not excused from giving information or producing documents on the grounds that the information or documents might tend to incriminate them. However, clause 55 goes on to state that any information provided or documents produced under compulsion, and anything directly or indirectly obtained as a result, is not admissible in evidence against the person forced to incriminate themselves.

The Committee has previously been prepared to accept that a provision in this form strikes a reasonable balance between the need to obtain information and the protection of an individual's rights.

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

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

Diesel and Alternative Fuels Grants Scheme (Administration and Compliance) Bill 1999

This bill was introduced into the House of Representatives on 23 September 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Diesel and Alternative Fuels Grants Scheme Act 1999* to insert machinery and administrative provisions, including compliance mechanisms, relating to the Act. The bill further proposes to make consequential amendments to the *Taxation Administration Act 1953* and the *A New Tax System (Australian Business Number) Act 1999*. A penalty provision for a failure to provide information or produce documents is noted on page 23 of this *Digest*.

Abrogation of the privilege against self-incrimination
Proposed new sections 42 and 52

Item 40 of Schedule 1 to this Bill proposes to insert new Parts 4 to 13 in the *Diesel and Alternative Fuels Grants Scheme Act 1999*. Proposed new Part 9 (which includes new section 42) deals generally with information gathering powers, and proposed new Part 12 (which includes new section 52) provides a power to stop and search vehicles.

Each of these proposed new sections will abrogate the privilege against self-incrimination. However, in each instance, any information provided or document produced under compulsion, and anything directly or indirectly obtained as a result, is not admissible in evidence against the person forced to incriminate themselves other than in proceedings under the *Taxation Administration Act 1953* for making false and misleading statements.

The Committee has previously been prepared to accept that a provision in this form strikes a reasonable balance between the need to obtain information and the protection of an individual's rights.

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

Search and entry without warrant
Proposed new section 47

Among other things, item 40 of Schedule 1 to this bill proposes to include a new section 47 in the *Diesel and Alternative Fuels Grants Scheme Act 1999*. This section, which provides a right of access to premises, applies where an authorised officer has reason to believe that any documents or goods or other property relevant to the operation of the Act may be found on any premises.

In such circumstances, the authorised officer may at all reasonable times enter and remain on those premises, is entitled to full and free access to all documents, goods or other property, may make copies and take samples, and is entitled to receive "all reasonable facilities and assistance for the effective exercise of powers" under this provision. No provision is made for obtaining a warrant, and the only 'protection' available to an occupier is to request the production of an identity card.

While provisions authorising entry without a warrant are atypical in most legislation, such provisions are common in legislation administered by the Commissioner of Taxation. Their existence is often used as a precedent for the inclusion of similar powers in new legislation which is to be administered by the Commissioner.

The Committee is presently considering the appropriateness of such provisions as part of its general inquiry into entry and search provisions in Commonwealth legislation. During the course of the inquiry, concerns have been expressed about entry powers of such character, and their inclusion in legislation simply on the basis of long-standing precedent. Precedent alone is not sufficient reason for pursuing a practice if it is tainted or flawed.

Seeking access to information is inherently intrusive. The Committee, therefore, **seeks the Treasurer's advice** as to why such powers are now to be included in the *Diesel and Alternative Fuels Grants Scheme Act 1999*, as that Act has effectively changed many of the arrangements relating to the concessional treatment of diesel fuel. In particular, the Committee would appreciate the Treasurer's advice as to:

- the geographical zones or areas in which it will be necessary to apply these search and entry provisions;
- which diesel and alternative fuels these provisions are to apply to; and

- the anticipated circumstances which would require information to be gathered in this way.

The Committee also **seeks the Treasurer's advice** as to whether these entry powers differ from those exercised by the Tax Commissioner under other legislation, particularly in requiring an occupier to assist an officer, and whether officers using these entry powers are to be required to provide occupiers with any written information about their rights and obligations. In particular, the Committee would appreciate the Treasurer's advice as to why, in these circumstances, it is appropriate that an identity card be produced to an occupier, but not appropriate that a warrant be obtained.

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

Equal Opportunity for Women in the Workplace Amendment Bill 1999

This bill was introduced into the House of Representatives on 22 September 1999 by the Minister for Employment, Workplace Relations and Small Business. [Portfolio responsibility: Employment, Workplace Relations and Small Business]

The bill proposes to amend the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* to change the short title to the *Equal Opportunity for Women in the Workplace Act 1999*. The bill further proposes to:

- introduce an objects clause to clarify the objectives of the legislation for relevant employers;
- replace the "eight step" affirmative action program with an emphasis on workplace priorities and achievements;
- change the employer reporting period from an annual to a biennial requirement;
- change the reporting framework to focus less on process and more on outcomes;
- waive an employer's obligation to report for a specified period in certain circumstances;
- enable the Equal Opportunity for Women in the Workplace Agency to request an employer to provide information concerning any aspect of the employer's workplace program, the preparation of the report, or the report itself.

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.

Family Law Amendment Bill 1999

This bill was introduced into the House of Representatives on 22 September 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the following Acts:

Family Law Act 1975 to:

- introduce a three stage parenting compliance regime to provide:
    - preventative measures, to improve communication between separated parents and educate parents about their respective responsibilities in relation to their children;
    - remedial measures, to enable parents to resolve issues of conflict about parenting; and
    - punitive measures, to ensure that (as a last resort) a parent is punished for deliberate disregard of a court order;
- enable binding financial agreements to be made before or during a marriage or on marriage breakdown, setting out how the parties' property is to be divided;
- increase the range of non-judicial dispute resolution services; and
- make miscellaneous amendments relating to the functioning of the court, transfers of proceedings between courts, child maintenance orders, application of the location and recovery provisions to international child abduction cases, limiting the application of the separate representative provisions in international child abduction cases, and providing the court with a broader range of powers to make Rules of Court for enforcing orders about property and money; and

makes consequential amendments to the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988*.

Retrospective application
Subclause 2(2) and Schedule 3, item 41

Item 41 of Schedule 3 to this bill contains a proposed amendment to correct an error in subsection 46(1) of the *Family Law Act 1975*. Subclause 2(2) provides that this amendment is to be taken to have commenced immediately after the commencement of section 26 of the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988*.

The Explanatory Memorandum notes that amendments to subsection 46(1) were made by two different Acts in 1987 and 1988. However, the actual order of the Proclamations which brought about the commencement of these amendments "produced an absurd result" – the current subsection is grammatically incorrect, and fails to provide for the transfer of proceedings to the Family Court or to a Supreme Court in certain cases, as was clearly intended.

The Explanatory Memorandum goes on to note that there appear to have been no repercussions from the error – practitioners are unlikely to have been disadvantaged because the error does not appear to have been picked up by the Family Law Services, and the substance of the provision does not appear to have been the subject of any court proceedings requiring written judgment.

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

International Tax Agreements Amendment Bill 1999

This bill was introduced into the House of Representatives on 23 September 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the *International Tax Agreements Act 1953* to effect Agreements for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income between the Government of Australia and the Governments of the Republic of South Africa, the Slovak Republic and the Argentine Republic. The bill also proposes to effect a Protocol, amending the Agreement between the Government of Australia and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.

The Committee has no comment on this bill.

Migration Legislation Amendment (Migration Agents) Bill 1999

This bill was introduced into the Senate on 23 September 1999 by the Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts. [Portfolio responsibility: Immigration and Multicultural Affairs]

The bill proposes to amend the *Migration Act 1958* to:

- extend the statutory self-regulation framework of the migration advice industry until March 2003;
- change the publication requirements relating to the suspension and cancellation of migration agents;
- expand the powers of the Migration Agents Registration Authority (MARA) to access client files when:
    - the registration of a migration agent is cancelled or suspended;
    - a migration agent becomes incapacitated;
    - a migration agent dies or is voluntarily deregistered;
    - a migration agent's registration expires; and
- provide copies of relevant documents to clients.

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.

National Residue Survey Levies Regulations (Validation and Commencement of Amendments) Bill 1999

This bill was introduced into the House of Representatives on 22 September 1999 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to correct an inconsistency between the starting dates of the Primary Industries Levies and Charges (National Residue Survey Levies) Regulations 1998 and amendments made to the regulations by Statutory Rules 1998 No. 182.

Retrospective validation
Clause 3

Subclause 3(1) of this bill provides that the Primary Industries Levies and Charges (National Residue Survey Levies) Regulations 1998 (Amendment) are to be taken to be valid and, despite regulation 1 of those regulations, are to be taken to have commenced on 1 August 1998.

Subclause 3(2) goes on to provide that other regulations amending the *Primary Industries Levies and Charges (National Residue Survey Levies) Regulations 1998*, whether made before or after the commencement of this bill, have the same effect as they would have had if the regulations to which subclause 3(1) applies had actually commenced on 1 April 1998.

The Explanatory Memorandum observes that the bill is intended to correct an inconsistency between the starting dates of the National Residue Survey Levy Regulations and amendments made to those regulations. As a consequence of this inconsistency, which had been identified by the Regulations and Ordinances Committee, sheep traders liable to pay a 'per head' National Residue Survey levy on sheep transactions were unintentionally liable for a higher levy rate than that collected from 1 August 1998. Lamb traders were technically liable for a lower 'per head' rate.

The Explanatory Memorandum goes on to note that this proposed retrospective validation will have no impact on levy payers as "revenue has

been received at the rate agreed to by industry as being necessary to fund the program".

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

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were "more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties". The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for "administration of justice offences". The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest.* The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	**Section/Subsection**	**Offence**	**Penalty**
Migration Act 1958	Proposed new subsections 245F(3)(d) and (15)	Fail to answer questions and produce documents	100 penalty units
Choice of Superannuation Funds (Consumer Protection) Bill 1999	Clause 53	Fail to provide information or produce documents	30 penalty units
Diesel and Alternative Fuels Grants Scheme Act 1999	Proposed new section 41	Fail to provide information or produce documents or give evidence	Offence under s 8C of the *Taxation Administration Act 1953*

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 16 of 1999

13 October 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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- **The Committee has commented on these bills**

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

A New Tax System (Indirect Tax and Consequential Amendments) Bill 1999

This bill was introduced into the House of Representatives on 30 September 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

A New Tax System (Goods and Services Tax) Act 1999, the *A New Tax System (Luxury Car Tax) Act 1999* and the *A New Tax System (Wine Equalisation Tax) Act 1999* to:

- ensure that exports are GST-free when ownership of goods passes to an overseas purchaser, who is not registered or required to be registered, before the goods are removed from Australia;
- provide special rules to reduce compliance costs for retailers who sell both taxable and GST-free goods;
- confine the GST-free treatment of cow's milk to processed cow's milk;
- increase the 50 per cent market value and cost of supply tests for the non-commercial supplies of charities to 75 per cent for supplies of supported accommodation/community housing;
- double the existing cash accounting threshold to $1 million, and allow the Commissioner of Taxation to make a cash accounting threshold determination for a class of entities so as to reduce the need for entities to apply individually;
- ensure that a return of a luxury car for repair purposes is not an adjustment event;
- align the grouping and joint venture provisions for the luxury car tax (LCT) and wine equalisation tax (WET) with the GST;
- clarify the rules regarding liability for LCT on taxable importations;
- correct minor technical issues to LCT value;
- provide greater certainty as to the types of products covered by WET;

- ensure that private importations of wine are subject to WET; and
- remove wine tax credit related to intended export sales and clarify credit for sales to overseas travellers;

Customs Act 1901 to:

- allow Customs to remove from the COMPILE computer system an import entry that has been lodged, but not acted upon, where the entry covers goods that attract any duty, fee, charge or tax;
- ensure that regulations will allow a security or an undertaking to be given in relation to goods that are imported on a temporary basis, and which would otherwise be subject to GST or LCT;
- ensure that an import entry is deemed to have been withdrawn if, in relation to the goods covered by the import entry, a fee, charge or tax that is payable remains unpaid; and
- make consequential amendments;

Income Tax Assessment Act 1997 to:

- exclude GST from income derived and, to the extent of an entity's input tax credit entitlement, from deductible amounts;
- exclude GST from amounts taken into account in calculating assessable income or deductions, such as disposal proceeds and cost-base elements for capital gains tax purposes; and
- change certain terms used in income tax provisions to ensure consistency of meaning with the GST law;

Trade Practices Act 1974 to bring forward the date of effect of the Australian Competition and Consumer Commissioner's (ACCC) enforcement powers so that the ACCC can exercise those powers immediately with respect to unreasonable price rises made before the GST is introduced;

A New Tax System (Indirect Tax Administration) Act 1999 to:

- remove decisions about registration for wine tax from the list of reviewable wine tax decisions under the WET;

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

- provide that each decision under the WET disallowing the whole or part of a claim for wine tax credit is a reviewable wine tax decision; and

- correct references to GST groups and joint ventures in the table of reviewable GST decisions;

Taxation Administration Act 1953 to allow information relating to alcoholic beverages to be provided to a State or Territory officer for the purpose of any rebate, refund or other credit arrangement provided by a State or Territory in respect of alcoholic beverages;

A New Tax System (Goods and Services Tax Transition) Act 1999 and the *A New Tax System (Wine Equalisation Tax and Luxury Car Tax Transition) Act 1999* to:

- ensure that certain rights associated with warranties, software and options to purchase under hire-purchase agreements are not subject to GST where they relate to payments made prior to 1 July 2000;

- ensure that the grouping provisions cannot be used to circumvent the phasing in of credits for motor vehicles; and

- provide a concession for vehicles purchased before 2 December 1998 and used in operating leases;

Sales Tax Assessment Act 1992 and the *Sales Tax (Exemptions and Classifications) Act 1992* to enable goods imported into Australia under the Tradex scheme to be entered free of WST, GST and WET; and

makes consequential amendments to seven Acts.

Drafting correction
Schedule 5, items 1 and 4

Item 1 of Schedule 5 to this bill proposes to repeal item 66 of Schedule 1 to the *A New Tax System (Indirect Tax Administration) Act 1999.* The repealed item provided for review of a number of decisions under the *A New Tax System (Wine Equalisation Tax) Act 1999*. Some of these decisions referred to events which did not occur under the Wine Equalisation Tax Act.

Item 4 of Schedule 5 to this bill inserts a substitute provision in the *Taxation Administration Act 1953* to clarify which decisions are "reviewable wine tax decisions".

The Committee notes that this matter was dealt with in its *Eighth Report of 1999*, and that these proposed amendments give effect to the undertakings foreshadowed by the Minister in his correspondence as set out in that report.

> *In these circumstances, the Committee makes no further comment on these provisions, and thanks the Minister for introducing the amendments.*

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

Australian Federal Police Legislation Amendment Bill 1999

This bill was introduced into the House of Representatives on 30 September 1999 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Australian Federal Police Act 1979* to:

- abolish the rank based structure of the Australian Federal Police;
- abolish the statutory fixed term appointment regime;
- clarify the Commissioner's command powers as head of a disciplined force; and
- empower the Commissioner to amend or revoke a determination in relation to the Australian Federal Police Adjustment Scheme; and

makes consequential amendments to 24 other Acts.

Non-disallowable instruments
Proposed new section 38

Item 46 of Schedule 1 to this bill proposes to insert a new Part IV in the *Australian Federal Police Act 1979*. This new Part deals with the command powers of the Commissioner and related matters.

Proposed new Part IV includes a new section 38. This authorises the Commissioner to issue written orders with respect to the general administration of, and the control of the operations of, the Australian Federal Police (AFP). Some of these orders would seem to be legislative in character – even though they are to operate only in relation to members of the AFP – but no provision has been made in this bill to make such orders disallowable. The Committee therefore, **seeks the Minister's advice** as to why section 38 orders that are legislative in character should not be scrutinised by the Parliament.

Pending the Minister's advice, the Committee draws Senators' attention to this 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.

Abrogation of the privilege against self-incrimination
Proposed new subsections 40A(1), 40L(5), 40M(3) and 40N(5)

As noted above, Item 46 of Schedule 1 to this bill proposes to insert a new Part IV in the *Australian Federal Police Act 1979*, dealing with the command powers of the AFP Commissioner. The Explanatory Memorandum states that the bill clarifies the Commissioner's command powers as confirmed by the Federal Court in *Anderson v Sullivan* (1997) 148 ALR 633, and specifically retains those command powers to the exclusion of the Workplace Relations Act.

The new Part IV includes proposed subsections 40A(1), 40L(5), 40M(3) and 40N(5). Each of these provisions abrogates the privilege against self-incrimination for employees and special members of the Australian Federal Police in certain circumstances. These circumstances include giving information, answering questions and producing documents; providing information about the employee's financial affairs; and undergoing drug testing.

Provisions which abrogate the privilege against self-incrimination are usually a matter of concern to the Committee and, to some extent, this issue is recognised in the bill. Proposed new subsections 40A(2) and 40L(6), and new section 40Q, limit the circumstances in which information obtained under compulsion may be used in evidence. For example, the results of drug and alcohol tests may be admitted as evidence against an AFP employee or special member only in legal proceedings relating to discipline and probity, or by the Commonwealth as a shield in worker's compensation proceedings. Information obtained by compulsion under other provisions may only be used in disciplinary proceedings.

In one sense these provisions may be seen as simply forming part of the conditions of employment of employees and special members of the Australian Federal Police. They do not apply to members of the public

generally, and represent an attempt to reconcile the competing interests of obtaining information and protecting individual rights.

However, in another sense, the provisions may be seen as creating a system of control which differs markedly from that which applies to other public servants, or to employees generally, or to members of the public. It seems that information and testing may be compelled whether or not there is a reasonable suspicion of misconduct (unlike the guidelines considered in *Anderson*'s case, which was itself concerned with compulsory drug testing rather than compelling officers to provide personal financial information).

Secondly, it seems that any AFP employee may be ordered to provide information, not only officers engaged in active operations. Finally, it is unclear what protections are available to AFP employees who consider that these powers may have been misused, or used inappropriately, by a future Commissioner.

The Committee is conscious of the need to ensure that the highest standards of probity and conduct apply throughout the AFP. Nevertheless the Committee is also conscious of the need not to trespass unduly on the right and liberties of AFP employees. The Committee therefore, **seeks the Minister's advice** on the following matters:

- whether persons should be compelled to incriminate themselves in circumstances where there is no reasonable suspicion of misconduct;
- why the provisions are expressed to apply to any AFP employee, and are not restricted to AFP officers engaged in active operations;
- whether any protections are available to ensure that these powers may not be misused; and
- on what basis the rights to which general members of the public are entitled can be properly restricted in respect of those who are also members of the AFP.

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

No reasons for dismissal
Schedule 2, item 1

Item 1 of Schedule 2 to this bill amends the *Administrative Decisions (Judicial Review) Act 1977*. The effect of this amendment is that, should the AFP Commissioner exercise his or her power to dismiss an employee under new section 28 of the *Australian Federal Police Act 1979*, the Commissioner is not required to give reasons for that dismissal.

As a matter of principle, providing reasons where the employment of an employee is terminated is an issue of natural justice for the person dismissed, and deters capricious action by the person terminating that employment.

Proposed new section 28 concludes with a note that the *Workplace Relations Act 1996* has rules which apply to the termination of employment. However, proposed new section 69B of the *Australian Federal Police Act 1979* (to be inserted by this bill) states that the operation of the Workplace Relations Act is to be limited in certain circumstances, including in relation to the termination of employment of AFP employees.

There seems to be a lack of clarity in the rules governing dismissed AFP employees and their entitlement to be told why they are being dismissed. There would also seem to be no provisions which prevent proposed section 28 from being used capriciously to terminate the employment of an otherwise efficient and effective AFP employee. The Committee, therefore, **seeks the Minister's advice** as to the current rights of AFP employees to receive reasons for their dismissal, and to seek a review of such a decision, and how the proposed amendments will affect those rights.

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

Crimes at Sea Bill 1999

This bill was introduced into the House of Representatives on 30 September 1999 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

The bill proposes to implement a new national, uniform, cooperative scheme to apply Australian criminal law offshore. Under the new scheme:

- the States and Northern Territory will enact uniform Crimes at Sea Acts applying local criminal laws to their respective offshore adjacent areas from the coastal baseline out to 12 nautical miles;
- the criminal law of each jurisdiction applies to respective offshore adjacent areas from 12 to 20 nautical miles (or the outer limit of the continental shelf, which is the greater);
- criminal laws of the Jervis Bay Territory will apply to criminal conduct beyond the area covered, on Australian ships, and in some cases, foreign ships; and
- criminal laws of the Northern Territory will apply to criminal conduct connected with the exploration and exploitation of petroleum resources in Area A of the Zone of Cooperation.

Commencement
Subclause 2(3)

Subclause 2(2) of this bill states that, subject to subclause 2(3), its substantive provisions are to commence on Proclamation. However, subclause 2(3) states that, in any event, these provisions must commence 12 months after Royal Assent.

While the Committee generally prefers that provisions commence within 6 months after Royal Assent, the Explanatory Memorandum states that this bill is part of a cooperative scheme between the Commonwealth and the States and Territories, and cannot commence until the States and Territories have passed complementary legislation. This is one of the circumstances in which a longer commencement period is appropriate.

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

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

Electoral Amendment (Optional Preferential Voting) Bill 1999

This bill was introduced into the Senate on 29 September 1999 by Senator Harris as a Private Senator's bill.

The bill proposes to amend the *Commonwealth Electoral Act 1918* to provide that optional preferential voting is the method for choosing members of the House of Representatives.

The Committee has no comment on this bill.

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 17 of 1999

20 October 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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Administrative Decisions (Effect of International Instruments) Bill 1999

This bill was introduced into the House of Representatives on 13 October 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to respond to the High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh* by providing a statutory indication that, by entering into a treaty, the Australian Government does not give rise to "legitimate expectations" in administrative law.

General comment

In his Second Reading Speech, the Attorney-General notes that the text of this bill is identical to a bill of the same name introduced into the House of Representatives on 26 June 1997, but which did not pass the Senate before the proroguing of the Parliament before the 1998 election.

In relation to the 1997 bill, the Committee raised issues of the parliamentary scrutiny of international instruments generally, and of the need for that bill given the effect of Joint Statements by the Attorney-General and Minister for Foreign Affairs in May 1995.

The Committee reported on the 1997 bill in its *Eleventh Report of 1997*, and thanked the Attorney-General for his advice which clarified the processes put in place to enable the Parliament to scrutinise international treaties, and which dealt with the legal effect of the Joint Ministerial Statements.

> *The Committee draws Senators' attention to its previous discussion of this bill, and makes no further comment on its provisions.*

Anti-Genocide Bill 1999

This bill was introduced into the Senate on 13 October 1999 by Senator Greig as a Private Senator's bill.

The bill proposes to give effect to the Convention for the Prevention and Punishment of the Crime of Genocide to prohibit genocide in Australia.

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.

Australia New Zealand Food Authority Amendment Bill 1999 [No. 2]

This bill was introduced into the House of Representatives on 14 October 1999 by the Minister for Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Australia New Zealand Food Authority Act 1991* to:

- allow the Authority to deal with less significant applications and proposals for draft food standards and variations to standards in certain limited circumstances, with the prior approval of the Australia New Zealand Food Standards Council;
- provide that Codes of Practice developed by the Authority are developed in accordance with the assessment process applicable to food standards;
- enable the Authority to better prioritise its work of reviewing, modifying and developing the Food Standards Code; and
- enable the Authority to charge for the assessment of applications in certain circumstances and to delay application processing if such charges are not paid.

Retrospective application
Subclause 2(2) and Schedule 1, item 13

While not apparent from the Explanatory Memorandum or the Minister's Second Reading Speech, this bill is apparently identical to a bill of the same name introduced into the Senate on 31 March 1999.

In its *Eleventh Report of 1999*, the Committee reported on Item 13 of Schedule 1 to the earlier bill. This item inserted a provision "which enables standards to relate to particular brands of food in addition to a type of food generally". By virtue of subclause 2(2), this item was to commence retrospectively on 30 July 1998. This provision has again been included in the present bill and is to commence retrospectively on the same date.

In its *Eleventh Report of 1999*, the Committee considered the Minister's advice as to the status and enforceability of ANZFA standards issued since 30 July 1998. This advice clarified any Committee concerns to do with the retrospective application of item 13.

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

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

Taxation Laws Amendment Bill (No. 10) 1999

This bill was introduced into the House of Representatives on 14 October 1999 by the Minister for Financial Services and Regulation. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax (Transitional Provisions) Act 1997 to provide taxation relief to certain members of managed investment schemes;

Film Licensed Investment Company Act 1998, the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997* to:

- allow a Film Licensed Investment Company to make returns of concessional capital as frankable dividends; and
- make technical amendments;

Income Tax Assessment Act 1997 to:

- allow income tax deductions for gifts to The Linton Trust;
- extend the period of time within which gifts to The National Nurses' Memorial Trust will be tax deductible; and
- confine the amount of capital expenditure, which is allowable as a deduction when a mining property is disposed of, to that expenditure which is specifically allowable under the mining provisions of the Act;

Petroleum Resource Rent Tax Assessment Act 1987 to clarify that taxpayers who abandon or walk away from a petroleum resource rent tax project take with them their share of any undeducted exploration expenditures; and

amends the income tax law to:

- allow an exemption from tax for non-profit organisations which promote the development of fishing and/or aquacultural resources; and
- exempt from income tax, business recovery grants paid to eligible businesses by the Cyclones Elaine and Vance Trust Account.

Retrospective application
Subclauses 2(2) and (3), and Schedule 4, item 4

By virtue of subclauses 2(2) and (3), and item 4 of Schedule 4, the amendments proposed by Schedules 1, 2 and 4 will either commence or apply to some extent retrospectively. However, the amendments proposed in these Schedules are all beneficial to taxpayers.

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

Legislation by press release
Schedule 5, item 2

By virtue of item 2 of Schedule 5 to this bill, the amendment proposed by Schedule 5 is to apply retrospectively from 4pm on 3 December 1998.

The Minister's Second Reading Speech observes that this provision "gives effect to the Government's announcement in a Press Release of 3 December 1998 that the tax treatment on disposal of mining property is to continue to operate as it previously did prior to the decision of the Full Federal Court in *Esso Australia Resources Ltd v FC of T*."

The Minister goes on to observe that the effect of the Esso decision is that capital expenditure that was not previously deductible under the capital allowance provisions while a mine was operating can now become deductible under the balancing adjustment provisions in the income year in which the mine is disposed of.

Where a bill amending taxation law is introduced to give effect to a proposal previously announced by way of a press release, the Committee often draws attention to the Senate Resolution of 8 November 1988. This resolution states that, where such a bill is not introduced or made available by way of a draft bill within 6 months of the date of the announcement then, subject to any further resolution, the Senate shall amend the bill so that it commences no earlier than the date the bill is introduced into the Parliament, or the date of publication of the draft bill.

This bill has not been introduced within the 6 month period referred to in the above resolution. However, the '6 month rule' is directed at vices such as retrospectivity and uncertainty. The effect of this provision is not retrospectively to impose a further burden of tax on any person or group of people, but simply to ensure the continued operation of an aspect of tax law as it applied prior to a judgment which changed that operation.

In addition, the detail of legislation which gives effect to a press release often differs from what had been indicated in that release, leaving the law and those subject to it in a state of uncertainty. No question of uncertainty arises in the case of this provision.

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

Tradex Duty Imposition (Customs) Bill 1999

This bill was introduced into the House of Representatives on 14 October 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

One of a package of four bills to implement the Tradex Scheme, this bill proposes to impose the liability for tradex duty in so far as the tax is a duty of customs.

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.

Tradex Duty Imposition (Excise) Bill 1999

This bill was introduced into the House of Representatives on 14 October 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

One of a package of four bills to implement the Tradex Scheme, this bill proposes to impose the liability for tradex duty in so far as the tax is a duty of excise.

The Committee has no comment on this bill.

Tradex Duty Imposition (General) Bill 1999

This bill was introduced into the House of Representatives on 14 October 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

One of a package of four bills to implement the Tradex Scheme, this bill proposes to impose the liability for tradex duty in so far as the tax is neither a duty of customs nor a duty of excise.

The Committee has no comment on this bill.

Tradex Scheme Bill 1999 [No. 2]

This bill was introduced into the House of Representatives on 14 October 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

One of a package of four bills to implement the Tradex Scheme, this bill proposes to establish the Tradex Scheme and provide for the administration of the scheme. The objective of the Tradex Scheme is to allow for the importation of goods, without payment of customs duty or other taxes, provided the goods are subsequently exported or incorporated in other goods that are exported. Penalty provisions for a failure to provide information or produce documents are noted on page 22 of this *Digest*.

Background

While not apparent from the Explanatory Memorandum or the Minister's Second Reading Speech, this bill is apparently identical to a bill of the same name introduced into the House of Representatives on 24 June 1999, and on which the Committee commented in *Alert Digest No 10 of 1999*. The Minister responded to the Committee's comments in a letter dated 2 August 1999 (copy attached to this *Digest*).

The earlier Tradex Scheme Bill was not introduced into the Senate, and was subsequently discharged from the House of Representatives Notice Paper on 14 October 1999.

The following discussion in relation to this bill draws on the Committee's previous comments in *Alert Digest No 10 of 1999*, and the Minister's letter in response.

Strict liability offence
Subclause 28(2)

Subclause 28(1) of this bill creates an offence of a failure to pay tradex duty. Subclause 28(2) states that this is an offence of strict liability. Under such a provision, a person might be convicted of the offence even though he or she did not intend to commit it.

However, the Explanatory Memorandum indicates that the penalty for this offence is merely an amount equal to the amount of unpaid duty. In certain circumstances, an offender may be offered the option of paying an administrative penalty, which amounts to only one-fifth of the unpaid duty.

The Explanatory Memorandum also indicates that a sanctions regime of strict liability offences accompanied by relatively low-level 'administrative penalty' provisions is "crucial to the compliance aspect of the scheme", which confers an advantage on holders of tradex orders. These holders no longer have to apply for a concession every time certain goods are imported. Such a sanctions regime is intended to support an approach to compliance based on audits or check-ups after an importation has occurred in which the benefit or duty concession has been realised.

Given this detailed explanation, the Committee makes no further comment on this provision.

Abrogation of the privilege against self-incrimination Subclauses 30(2) and (3)

In a similar manner to the earlier bill, subclause 30(1) of this bill creates an offence of failing to comply with a requirement (relating to documents or record keeping) made by an authorised officer. Subclause 30(2) states that self-incrimination is not a ground for refusing to answer a question or produce documents. However, subclause 30(3) states that any document or information directly or indirectly produced under compulsion is inadmissible except in proceedings for making a false and misleading statement. The Committee has accepted that such a provision strikes a reasonable balance between the competing interests of obtaining information and protecting rights.

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

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

Appointment of 'a person'
Subclause 45(1)

In a similar manner to the earlier Tradex Scheme bill, subclause 45(1) of this bill enables the Secretary, by writing, to "appoint persons to be authorised officers for the purposes of this Act". The bill makes no reference to any qualifications or attributes which such persons must have as a condition of being authorised, and the Explanatory Memorandum does not elaborate further on this provision.

In commenting on this provision in the earlier bill, the Committee observed that it often drew attention to provisions which delegated power to anyone who fitted the all-embracing description of 'a person'. As a general rule, the Committee preferred to see some limit placed either on the powers to be delegated or on the class of potential delegates. Similar considerations applied to the appointment of officers authorised for the purposes of an Act of Parliament. As a general rule, the Committee preferred that potential appointees be required to possess some qualifications or attributes before they were eligible for appointment. The Committee sought the Minister's advice on these matters.

In responding, the Minister agreed that 'authorised officers' should possess specific attributes and qualifications, but suggested that this particular bill was not the appropriate place that these be specified. In the case of public service officials who were appointed as authorised officers under the Act, "their qualities or characteristics are set out in the relevant legislation which deals with their employment status".

In addition, the Minister averred that the provisions as drafted "retain flexibility for this and future Governments to continue to ensure better outcomes in the delivery of Government services".

The Committee thanks the Minister for this response in relation to the earlier bill, which remains relevant to this provision. Given the Minister's agreement that 'authorised officers' should possess specific attributes and qualifications, the question becomes whether this bill is the appropriate place to specify those attributes and qualifications.

While the qualities or characteristics of public servants who are made 'authorised officers' under the bill may be set out in the legislation dealing with their employment status, that legislation does not apply to non-public

servants who may be authorised under the bill. In addition, that legislation deals only with the attributes and qualifications expected of public servants generally, and not with the attributes and qualifications expected of those officials who may be appointed to undertake specific functions under a specific bill.

There seems to be a continuing trend toward authorising 'persons' to exercise powers and functions under specific legislation. Such provisions are usually included in the interests of administrative flexibility. However, the powers exercisable by these authorised persons are often wide in scope, and it is implicitly recognised that such persons will need specialised skills or training before exercising those powers. A bill which provides for appointments of such width should similarly make some explicit reference to these skills, attributes or qualifications.

The Committee, therefore, continues to draw Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Excessively wide delegation
Clause 48

In a similar manner to the earlier Tradex Scheme bill, clause 48 of this bill permits the Secretary, by writing, to "delegate to an officer of, or a person employed in, the Department all or any of the Secretary's functions and powers under this Act".

In commenting on this provision in the earlier bill, the Committee observed that the bill authorised the Secretary to exercise functions and powers that were wide in scope. These included suspending a tradex order, causing infringement notices to be served, reconsidering various decisions made under the legislation, extending certain time periods and providing certificates which had evidentiary force.

Given the scope and variety of these powers, the Committee sought the Minister's advice on why some limit should not be placed on potential

delegates – for example, by limiting the class of potential delegates to officers in the Senior Executive Service.

In responding, the Minister acknowledged that, while no limits were placed on the power to delegate, "it is expected that the Secretary would, in the interests of good administration, exercise due diligence and care in determining that only officers who occupy sufficiently senior positions in the Department would exercise those functions and powers as his delegates".

The Committee thanks the Minister for this response in relation to the earlier bill, which remains relevant to this provision, and notes his expectation that the Secretary's functions and powers will be delegated only to officers with appropriate seniority, expertise and relevant responsibilities.

However, given the apparent width of the functions and powers that are available for delegation, this issue should be more than simply a matter of reasonable expectation – it should be addressed in the provisions of the bill. It is appropriate that the bill itself or a related publicly available document restrict the class of potential delegates to officers of relevant seniority and expertise. The Committee, therefore, **seeks the Minister's further advice** as to why the appropriate delegation of the Secretary's functions and powers should be a matter of "reasonable expectation" with no legislative effect.

Pending the Minister's further advice, the Committee continues to draw Senators' attention to this provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Workplace Relations Amendment (Australian Defence Force Service and Training) Bill 1999

This bill was introduced into the House of Representatives on 11 October 1999 by Mr Beazley as a Private Member's bill.

The bill proposes to amend the *Workplace Relations Act 1996* to ensure that leave for service and training as a member of the Australian Defence Force Reserves is an allowable award matter for the purposes of the Act.

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.

Workplace Relations Amendment (Australian Defence Force Service and Training) Bill 1999 (No. 2)

This bill was introduced into the Senate on 13 October 1999 by Senator Collins as a Private Senator's bill.

The bill proposes to amend the *Workplace Relations Act 1996* to ensure that leave for service and training as a member of the Australian Defence Force Reserves is an allowable award matter for the purposes of the Act.

The Committee has no comment on this bill.

Provisions imposing criminal sanctions for failure to provide information

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were "more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties". The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for "administration of justice offences". The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest*. The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	Section/Subsection	Offence	Penalty
Tradex Scheme Bill 1999 [No. 2]	26	Fail to notify change in registered particulars	30 penalty units
	30(1)	Fail to make available documents or demonstrate record keeping system	60 penalty units
	32	Knowingly provide false or misleading information	12 months

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

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 18 of 1999

24 November 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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- **The Committee has commented on these bills**

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

A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 21 October 1999 by the Parliamentary Secretary to the Minister for Finance and Administration. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

A New Tax System (Goods and Services Tax) Act 1999, the *A New Tax System (Luxury Car Tax) Act 1999* and the *A New Tax System (Wine Equalisation Tax) Act 1999* to:

- make a minor technical amendment in relation to GST-free supplies;
- ensure that payments made to local government bodies that are specifically covered by an appropriation are not subject to GST;
- ensure the obligation to issue an adjustment note arises only if a tax invoice has been issued or requested in relation to the supply that is the subject of the adjustment;
- ensure that a member exiting a GST group will become responsible for adjustments relating to transactions made to entities outside the group during the time the entity was a member of the GST group and that the group's representative member will not be responsible for these adjustments;
- amend the provisions relating to second-hand goods;
- ensure that certain telecommunications services that are used or enjoyed in Australia, are subject to GST;
- provide consistency with other provisions in the GST Act in relation to the transport component of the value of a taxable importation for goods that were exported from Australia for repair or renovation;
- permit, but not require, a government entity to register for GST and allow registered government entities to group with other registered government entities;

- clarify that the adjustment period when disposal, loss or destruction occurs in the same year as that in which the acquisition or importation is made is the period ending 30 June in that year; and

- ensure that certain applications to one's own use of wine are not taxable;

A New Tax System (Goods and Services Tax) Act 1999 and the *A New Tax System (Goods and Services Tax Transition) Act 1999* to:

- ensure that State stamp duties on insurance premiums are not subject to GST;

- allow prescribed statutory compensation schemes to be brought within the operation of Division 78;

- allow certain government insurance schemes to be excluded from Division 78 through regulation;

- amend the workers' compensation and CTP insurance provisions to reduce compliance costs that would otherwise arise; and

- deny input tax credits on premiums paid for CTP insurance that ensure no GST is payable on any related settlements, for the first 3 years of the GST;

A New Tax System (Goods and Services Tax Transition) Act 1999 to:

- ensure that long term leases entered into between 2 December 1998 and 1 July 2000 are not subject to GST;

- ensure that the provisions relating to rights granted for life between 2 December 1998 and 1 July 2000 operate as intended;

- apply a special credit for certain alcoholic beverages held at 1 July 2000 that are not covered by the WET; and

- allow for a credit for certain petroleum products held at 1 July 2000;

A New Tax System (Commonwealth-State Financial Arrangements) Act 1999 to ensure that the calculation of GST revenue to be distributed to the States and Territories will include any general interest charge relating to GST and to ensure that any effect that the WET and LCT laws may have on GST revenue will not be included in the calculation;

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

A New Tax System (Australian Business Number) Act 1999 to ensure that overseas businesses that are required to register for GST purposes are able to obtain an ABN;

Consular Privileges and Immunities Act 1972, the *Diplomatic Privileges and Immunities Act 1967*, the *International Organisations (Privileges and Immunities) Act 1963* and the *Overseas Missions (Privileges and Immunities) Act 1995* to:

- ensure that Australia continues to meet its obligations in respect of taxation concessions for goods imported by diplomatic missions, consular posts, overseas missions, international organisations and their officials;
- provide for an indirect tax concession scheme for these bodies to allow Australia to provide taxation concessions for local purchases on a reciprocal basis; and
- make it clear that international organisations in Australia will not be able to register for GST purposes;

and makes consequential amendments to two Acts.

The Committee has no comment on this bill.

Customs Amendment (Anti-Radioactive Waste Storage Dump) Bill 1999

This bill was introduced into the Senate on 20 October 1999 by Senator Brown as a Private Senator's bill.

The bill proposes to amend the *Customs Act 1901* to prohibit the importation of nuclear waste for disposal in Australia.

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.

Customs Tariff Amendment (Tradex) Bill 1999 [No. 2]

This bill was introduced into the House of Representatives on 21 October 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Justice and Customs]

One of a package of five bills to implement the Tradex Scheme, this bill proposes to amend the *Customs Tariff Act 1995* to allow the importation, without the payment of customs duty, of goods included in a tradex order, where those goods are imported by the holder of the order.

The Committee has no comment on this bill.

Defence (Re-establishment) Amendment Bill 1999

This bill was introduced into the House of Representatives on 18 October 1999 by Mr Beazley as a Private Member's bill.

The bill proposes to amend the *Defence (Re-establishment) Act 1965* to:

- establish an Office of Reserve Forces with a range of specified functions;
- clarify coverage for Australian Defence Force overseas peace-enforcement, peacekeeping and humanitarian relief operations;
- increase penalties;
- clarify procedures for members and a member's employer; and
- prohibit an employer from taking adverse action against a person who acts to enforce a protection afforded to them under the Act.

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.

New Business Tax System (Capital Allowances) Bill 1999

This bill was introduced into the House of Representatives on 21 October 1999 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of bills to implement the New *Business* Tax System, this bill proposes to amend the following Acts:

Income Tax Assessment Act 1997 to:

- remove plant and equipment from the CGT regime;
- include in assessable income the excess of disposal proceeds over the cost base of the plant or equipment, indexed to 30 September 1999;
- remove the balancing charge offset for disposals of plant, other than for small business taxpayers;
- provide for a balancing charge offset for involuntary disposals of plant to replace the current CGT roll-over relief for such disposals;
- to provide a test to determine who is a small business taxpayer for the purposes of working out eligibility for accelerated depreciation, balancing adjustment offsets and immediate deductions for particular advance business expenditure;
- allow depreciation deductions for the cost of an indefeasible right to use capacity in an international telecommunications submarine cable system (IRU) over the effective life of the submarine cable;
- treat the granting of an IRU as a disposal by the grantor of an ownership interest;
- provide for rules allowing taxpayers, other than small business taxpayers, to re-estimate the effective life of plant where market, technological or other factors associated with the use of the plant have impacted on the previous estimate of effective life; and
- make a consequential amendment; and

Income Tax Assessment Act 1997 and the *Income Tax Assessment Act 1936* to:

- remove accelerated depreciation of plant and equipment, other than for small business taxpayers satisfying certain conditions; and
- where accelerated depreciation is removed, replace it with a system under which depreciation rates are determined by reference to the effective life of the plant or equipment.

Legislation by press release
Schedule 1, item 11; Schedule 2 subitem 23(1); Schedule 3, item 14; Schedule 4, item 12 and Schedule 5, item 6

Most of the provisions of this bill are to apply from 21 September 1999 – this being the date of a press release issued by the Treasurer. While the Committee's practice is to draw attention to examples of legislation by press release, on this occasion the time that has elapsed between the date of the announcement and the introduction of a bill to give effect to that announcement is commendably short.

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

Retrospective application
Schedule 2, items 17 and 18

Items 17 and 18 of Schedule 2 to this bill are to apply retrospectively from 27 February 1998. However, the Explanatory Memorandum points out that the amendments proposed by these items are consequential on Royal Assent to the Taxation Laws Amendment Bill (No 5) 1999. The Committee previously reported on restrospectivity in that bill in its *Tenth Report of 1999*.

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

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

New Business Tax System (Former Subsidiary Tax Imposition) Bill 1999

This bill was introduced into the House of Representatives on 21 October 1999 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of bills to implement the New *Business* Tax System, this bill proposes to impose a tax on certain members of a wholly-owned company group.

The Committee has no comment on this bill.

New Business Tax System (Income Tax Rates) Bill (No. 1) 1999

This bill was introduced into the House of Representatives on 21 October 1999 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of bills to implement the New *Business* Tax System, this bill proposes to reduce the company tax rate:

- from 36 per cent to 34 per cent for 2000-2001; and
- from 34 per cent to 30 per cent for 2001-2002 and subsequent years.

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.

New Business Tax System (Integrity and Other Measures) Bill 1999

This bill was introduced into the House of Representatives on 21 October 1999 by the Treasurer. [Portfolio responsibility: Treasury]

One of a package of bills to implement the New *Business* Tax System, this bill proposes to amend the following Acts:

Income Tax Assessment Act 1997 and the *Income Tax (Transitional Provisions) Act 1997* to:

- include an amount in the assessable income of a taxpayer that disposes of an interest in leased plant or a lease of plant;
- trigger a balancing charge for 100% subsidiaries of wholly-owned groups; and
- where the balancing charge is triggered, make the subsidiary and all the companies that were members of the group immediately before the time the subsidiary was transferred, jointly and severally liable if the subsidiary does not pay tax arising from the balancing charge within six months of the due date for payment;

Income Tax Assessment Act 1997 and the *Income Tax Assessment Act 1936* to:

- deal with CGT value shifting that occurs where, broadly, a debt owed by one commonly owned company to another is forgiven; and
- remove deduction limits on exploration and prospecting expenditure and allowable capital expenditure on mine development;

Income Tax Assessment Act 1997 to:

- defer recognition of capital losses or deductions which would otherwise be realised in certain circumstances;
- remedy defects in the continuity of ownership test, currently applying to tax losses, net capital losses and bad debts of a company, and proposed to apply to companies with unrealised net losses;

- limit the extent of unrealised loss duplication by applying the same business test to company losses where there has been a substantial change in a company's ownership or control,

- prevent indexation of the cost base of CGT assets acquired after the start time and freezes the indexation amount of the cost base of CGT assets acquired at or before the start time and disposed of after that time; and

- provide a CGT discount to individuals, complying superannuation entities and trusts;

Income Tax Assessment Act 1997, the *Income Tax (Transitional Provisions) Act 1997*, the *Income Tax Assessment Act 1936* and the *Financial Corporations (Transfers of Assets and Liabilities) Act 1993* to prevent the duplication of a tax loss or a net capital loss which has been transferred between wholly-owned group companies in certain circumstances; and

Income Tax Assessment Act 1936 to remove the "13 month rule" (which allows immediate deductions of prepayments for things to be done within 13 months) and spread the deduction over the period the prepayment occurs.

Legislation by press release
Subclause 2(2) and Schedule 5; Schedule 1, item 18 and Schedule 2, item 5

Some of the amendments proposed by this bill are to commence on 22 February 1999, or will apply from that date. The Explanatory Memorandum notes that this date was chosen because it was the date of the Treasurer's Review of Business Taxation Press Release No 4. The Explanatory Memorandum goes on to note that this was followed by a subsequent press release – No 58 of 21 September 1999.

The Committee has consistently drawn attention to the Senate Resolution of 8 November 1988, which deals with tax legislation and which provides 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.

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

This bill has been introduced more than 6 months after the date of the Treasurer's press release. The Committee, therefore, **seeks the Treasurer's advice** as to the time taken in introducing this bill, and as to the effect of the Senate resolution on the proposed commencement date of the bill.

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

Legislation by press release
Schedule 6, item 16; Schedule 7, Part 3; Schedule 8, item 10 and Schedule 9, items 14, 21, 30 and 32.

Many of the remaining amendments proposed by the bill are to commence on 21 September 1999. As noted above, this date has been chosen as it is the date of a second media release issued by the Treasurer. While it is the Committee's practice to draw attention to instances of legislation by press release, these provisions have been introduced well within the 6 month period required by the Senate Resolution of 8 November 1988.

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

Senate Standing Committee

for

The Scrutiny of Bills

Alert Digest No. 19 of 1999

1 December 1999

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator B Cooney (Chairman)
Senator W Crane (Deputy Chairman)
Senator T Crossin
Senator J Ferris
Senator B Mason
Senator A Murray

Terms of Reference

Extract from **Standing Order 24**

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

(i) trespass unduly on personal rights and liberties;

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

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

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

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- **The Committee has commented on these bills**

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

Albury-Wodonga Development Amendment Bill 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Minister for Community Services. [Portfolio responsibility: Transport and Regional Services]

The bill proposes to amend the *Albury-Wodonga Development Act 1973* to simplify the structure and streamline the functions of the Albury Wodonga Development Corporation in preparation for its future abolition. The bill further proposes to facilitate the winding-up of the joint Commonwealth-State scheme under which the Commonwealth, New South Wales and Victoria agreed that a new integrated urban complex be developed in the Albury-Wodonga region. The bill also proposes to repeal the *Albury-Wodonga Development (Financial Assistance) Act 1973*.

Commencement by Proclamation
Subclause 2(2) and Schedule 1, Part 2

Subclause 2(2) of this bill states that Part 2 of Schedule 1 is to commence on a day to be fixed by Proclamation. In principle, the Committee is wary of provisions which enable legislation to commence in this manner. It is the Parliament, as the elected holder of Federal legislative power (rather than the Executive) which should be responsible for determining when the laws it makes are to come into force.

This view is echoed in *Drafting Instruction No 2 of 1989*, issued by the Office of Parliamentary Counsel. This Drafting Instruction provides that, as a general rule, a restriction should be placed on the time within which an Act should be proclaimed. The commencement clause should fix either a period (preferably 6 months), or a date, after Royal Assent within which the Act is either to commence or be taken to be repealed. Clauses providing for commencement by Proclamation without these restrictions 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 case of this bill, subclauses 2(3) and 2(4), and the accompanying Explanatory Memorandum, make it clear that the application of the amendments proposed by Part 2 depends on the passing of complementary

legislation in New South Wales and Victoria. Specifically, subclause 2(4) provides that if Part 2 of Schedule 1 is not proclaimed to commence within 6 months of the passing of the last of this complementary legislation then it is to commence on the first day after that period.

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

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

Appropriation (East Timor) Bill 1999-2000

This bill was introduced into the House of Representatives on 25 November 1999 by the Minister for Finance and Administration. [Portfolio responsibility: Finance and Administration]

The bill proposes to appropriate money ($920 million) out of the Consolidated Revenue Fund to make provision for special appropriations to the Department of Defence and the Australian Agency for International Development in relation to Australia's involvement in the East Timor region.

The Committee has no comment on this bill.

Child Care Legislation Amendment (High Need Regions) Bill 1999

This bill was introduced into the Senate on 24 November 1999 by Senator Evans as a Private Senator's bill.

The bill proposes to require determinations and guidelines to be made to implement needs-based planning of new child care assistance places in the calendar years 2000 and 2001.

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.

Criminal Code Amendment (Application) Bill 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Attorney-General. [Portfolio responsibility: Attorney-General]

The bill proposes to amend the *Criminal Code Act 1995* to alter the application date of Chapter 2 of the Criminal Code (which contains the general principles of criminal responsibility) to 15 December 2001.

The Committee has no comment on this bill.

Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *Criminal Code Act 1995* to:

- provide for a range of geographical jurisdictional options to apply to all offences;
- implement a scheme of theft, fraud, bribery, forgery and related offences (based on chapter 3 of the Model Criminal Code);
- provide additional protection for Commonwealth public officials from violence and harassment enabling the Commonwealth to prosecute those who seek to cause them harm (based on chapter 5 of the Model Criminal Code);
- provide protection of any part of the national infrastructure about which the Commonwealth has power and believes it is in the national interest to protect regardless of ownership details, including postal and communications services;

and amends 123 Acts and five regulations to repeal more than 250 offences as a consequence of amendments to the *Criminal Code Act 1995*.

Reversal of the onus of proof
Proposed new sections 14.1, 15.1, 15.2 and 15.3

Item 12 of this bill inserts a new set of general principles into Chapter 2 of the Criminal Code which deal with the geographical reach of Commonwealth offences. These are contained in a new Part 2.7, which contains proposed new sections 14.1, 15.1, 15.2 and 15.3. These sections are drafted to specify the geographical jurisdiction of the Criminal Code widely.

Proposed new subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2) then allow for a defence to the liability imposed by the preceding provisions in each section. For example, proposed subsection 14.1(3) states that a person is not guilty of a

relevant offence if the conduct constituting the alleged offence occurs wholly in a foreign country (but not on board an Australian aircraft or ship) and in the foreign country where the conduct took place there is no law that creates a corresponding offence. The defendant bears an evidential burden in relation to these matters, and the other comparable defences contained in subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2).

With regard to proposed subsection 14.1(3), the Explanatory Memorandum states that it "provides the possibility of a defence" and that this defence is "that there was no offence in the place where the conduct occurred … the inquiry is not into whether the particular conduct alleged would have amounted to an offence of some kind or other under the law of [country] X … the inquiry is into whether [country] X has in its law a corresponding offence."

While significant, these words provide no explanation for the adoption of this form of drafting, nor do they seek to justify the imposition of an evidential burden on a defendant to raise issues of the content of foreign law.

Further, the relationship between proposed subsection 14.1(2) and 14.1(3) is not clear. Under subsection 14.1(2) the prosecution would bear the onus of proving that the conduct constituting the offence occurs partly or wholly in Australia. Under proposed subsection 14.1(3) the defendant bears an evidential burden of showing that the conduct constituting the offence occurred wholly in a foreign country. It is not clear how the two burdens are to relate in practice. The Committee, therefore, **seeks the Minister's advice** as to why these provisions have been drafted in this way, and why the defendant should bear an evidential burden in relation to the defences contained in subsections 14.1(3), 15.1(2), 15.2(2) and 15.3(2).

Pending the Minister's advice, 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.

Imposition of absolute liability
Proposed new subsections 131.1(3), 132.4(8), 132.6(2), 134.1(2) and 134.2(2)

A number of provisions to be inserted in the Criminal Code by this bill state that absolute liability is to apply to particular elements of certain offences. This means that the prosecution need not prove any element of fault or knowledge in relation to that element.

One example of such a provision is new section 131.1. This creates an offence of theft where a person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property, and the property belongs to a Commonwealth entity. Proposed subsection 131.1(3) states that absolute liability applies to the element of Commonwealth ownership.

The Explanatory Memorandum observes that the effect of this provision is that "the prosecution is not required to prove the person knew the person/organisation who owned the property was a Commonwealth entity". This simply continues the existing law, but makes it more transparent as the Criminal Code "requires laws that create offences to be very clear about anything that does not need to be proved, otherwise fault must be proved in accordance with section 5.6".

Another example of this approach is new section 132.4, which creates an offence of burglary. One element of this offence involves burglary of "a building owned or occupied by the Commonwealth". Applying absolute liability to this element means that the prosecution need not prove that the offender knew that the building was owned or occupied by the Commonwealth. The Explanatory Memorandum justifies this provision by noting that "many people do not have an appreciation of the differences between Commonwealth, State and Territory functions and legislative responsibilities".

New subsections 132.6(2), 134.1(2) and 134.2(2) make provision in a similar manner.

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

Imposition of absolute liability
Proposed new subsections 135.1(6) and 135.4(6)

Proposed new subsection 135.1(5) of the Criminal Code creates an offence of knowingly and dishonestly causing a loss to a Commonwealth entity. Proposed subsection 135.1(6) excludes the requirement that the prosecution prove that the offender knew that a Commonwealth entity was involved. The Explanatory Memorandum notes this fact but gives no reason for the inclusion of the provision.

Similarly, proposed new subsection 135.4(5) creates an offence of conspiracy to dishonestly cause a loss to a Commonwealth entity. Again, proposed subsection 135.4(6) excludes the requirement that the prosecution prove that the offender knew that a Commonwealth entity was involved. The Explanatory Memorandum makes no reference to the need for this provision.

The Committee, therefore, **seeks the Minister's advice** as to the reasons for applying absolute liability in relation to each of these provisions.

> *Pending the Minister's advice 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.*

Reversal of the onus of proof
Proposed new subsections 136.1(2), (3), (5) and (6); 137.1(2) and (3) and 137.2(2)

Proposed new subsection 136.1(1) creates an offence of making a false and misleading statement in an application for a licence, permit, authority, registration or a claim for benefit. One of the elements of this offence is that the person makes the statement knowing that it is false or misleading, or knowing that the statement omits any matter or thing without which it is misleading.

Proposed new subsection 136.1(2) states that subsection (1) does not apply "if the statement is not false or misleading in a material particular". Proposed new subsection (3) states that subsection (1) does not apply "if the statement

did not omit any matter or thing without which the statement is misleading in a material particular". In each instance, the defendant bears an evidential burden in relation to these matters.

Proposed subsections 136.1(5) and (6) provide that a defendant bears an evidential burden in relation to similar matters where the alleged offence is recklessly making a false or misleading statement. Proposed subsections 137.1(2) and (3) provide that a defendant bears an evidential burden in relation to similar matters where the alleged offence is providing false or misleading information and proposed section 137.2(2) imposes a similar evidential burden on a defendant where the offence is producing a false or misleading document.

The Explanatory Memorandum states that this approach has been chosen because "it would be too onerous to require the prosecution to prove that the defendant knew or was reckless as to materiality". However, including the proposed defence "should ensure that materiality is taken into account".

The Committee has previously accepted that it may be appropriate to impose an evidential burden on a defendant to raise an issue where it would be too onerous to require the prosecution to disprove it (see for example, the discussion of Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999 in the Committee's *Seventh Report of 1999*).

However, it is not clear whether the provisions as drafted require the prosecution to prove materiality and the defendant to raise the issue of lack of knowledge of materiality, or whether materiality will only become an issue if the defendant raises it. In addition, these provisions seem part of a large number of provisions which seek to impose an evidential burden on a defendant. It is not clear whether these provisions simply make explicit the existing law, or whether they are imposing new burdens on defendants. The Committee, therefore, **seeks the Minister's advice** on these issues.

Pending the Minister's advice, 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.

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

Reversal of the onus of proof
Proposed new subsections 141.1(2); 142.1(2); 144.1(2), (4), (6) and (8); 145.1(2), (4), (6) and (8); and 145.2(2), (4), (6) and (8)

The bill inserts a new Part 7.6 in the Criminal Code which deals with bribery and related offences. In a series of provisions in this new Part, it is an element of the offence that the person bribed is a Commonwealth public official, or that the document forged is a Commonwealth public document. However, in each case, it is further provided that the prosecution need not prove that the defendant knew that this was the case.

For example, with regard to proposed subsection 141.1(2), the Explanatory Memorandum observes that some in the community cannot distinguish between the functions of the Commonwealth and State Governments. "It would therefore be too onerous to require the prosecution to prove the defendant knew the person they were bribing was a Commonwealth public official and that it was with the intention of influencing the person in relation to Commonwealth duties." Subsection 141.1(2) makes it clear that it is not necessary to prove that the defendant knew these things. Similar reasoning applies to the other equivalent provisions. The Committee has commented above in relation to similar reasoning concerning proposed subsection 131.1(3).

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

Customs Legislation Amendment (Criminal Sanctions and Other Measures) Bill 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Minister representing the Minister for Justice and Customs. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the following Acts:

Australian Postal Corporation Act 1989 to provide Customs officers with the power to open international postal articles reasonably believed to consist of, or contain, drugs or certain other chemical compounds;

Customs Act 1901 to:

- provide for increased penalties for certain import and export offences;
- enable new technology to be used for personal searches (eg. bodyscan x-ray, particle detectors, thermal imaging and swabbing kits) as alternatives to removing articles of clothing and enable the use of photos and videotapes;
- extend the power of arrest for new offences;
- enable Customs to retain evidential material and/or seized goods for 180 days (currently 60 days); and
- amend provisions relating to the disposal of abandoned goods; and

Customs Administration Act 1985 to allow for the appointment of the Chief Executive Officer of Customs for periods up to five years.

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.

Farm Household Support Amendment Bill 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Minister for Agriculture, Fisheries and Forestry. [Portfolio responsibility: Agriculture, Fisheries and Forestry]

The bill proposes to amend the *Farm Household Support Act 1992* to remove the current 30 November 1999 closing date for the Farm Family Restart Scheme re-establishment grants.

Retrospective application
Subclause 2(2)

Subclause 2(2) states that the substantive provisions of this bill are to commence on 1 December 1999. It is likely, therefore, that the bill's commencement will, at least to some extent, be retrospective. However, the purpose of the bill is to extend the current deadline for the closing date for support to farm households – a purpose that is beneficial to those affected.

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

Gladstone Power Station Agreement (Repeal) Bill 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Parliamentary Secretary to the Minister for Industry, Science and Resources. [Portfolio responsibility: Industry, Science and Resources]

The bill proposes to repeal the *Gladstone Power Station Agreement Act 1970* because all legal obligations under the Act have been extinguished.

The Committee has no comment on this bill.

National Crime Authority Amendment Bill 1999

This bill was introduced into the House of Representatives on 24 November 1999 by the Attorney-General. [Portfolio responsibility: Justice and Customs]

The bill proposes to amend the *National Crime Authority Act 1984* to clarify that States and Territories may confer powers, functions and duties on the National Crime Authority in relation to the Authority's investigation of relevant criminal activity.

Retrospective application
Subclause 2(2)

Subclause 2(2) of this bill states that the amendments proposed in the bill are to have commenced on 1 July 1984. The substantive amendments proposed are to omit the words "being a power, function or duty that is also conferred or imposed by this Act" from subsection 55A(1)(a) of the Principal Act, and to omit the word "similar" from subsection 55A(2) of the Principal Act.

The Explanatory Memorandum simply notes that the bill "clarifies the nature of the State and Commonwealth legislative framework that supports the National Crime Authority" (NCA). The bill does this by making clear "that States and Territories may confer powers, functions and duties on the National Crime Authority in relation to the Authority's investigation of relevant criminal activity".

The Minister's Second Reading Speech provides some additional information. It observes that the States confer powers, duties and functions on the NCA in relation to a variety of State investigative laws including laws for the use of assumed identities, controlled operations and electronic surveillance. "This amendment makes clear that the States can confer such powers, duties and functions without the need for the National Crime Authority Act to specifically contain similar provisions".

It seems that the amendments proposed in the bill are simply declaratory of the intended operation of the Principal Act. However, neither the Explanatory Memorandum nor the Minister's Second Reading Speech fully explains the

effect of the changes being made, or why such changes are necessary, and why those changes should operate retrospectively from 1984.

As indicated by its name, an Explanatory Memorandum should explain what is being proposed. It should enable a reader of legislation to understand the reason for its introduction, the changes it proposes to make and the anticipated effect of those changes.

In the case of this bill, it is unclear whether it is simply attempting to remedy a long-standing drafting error, or addressing a factual situation that has developed, or is seeking to validate something that has taken place. It is unclear whether the bill has been introduced in response to a judgment, or in anticipation of litigation, or is totally unconnected with either. The Committee, therefore, **seeks the Minister's advice** as to the effect of the changes proposed in this bill, why such changes are necessary, and why the changes are to operate retrospectively from 1984.

Pending the Minister's advice, 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.

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

New Business Tax System (Capital Gains Tax) Bill 1999

This bill was introduced into the House of Representatives on 25 November 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to amend the following Acts:

Income Tax Assessment Act 1997 and *Income Tax Assessment Act 1936* to streamline and simplify the current small business CGT concessions and to provide further concessions in relation to retirement from carrying on business by disregarding certain capital gains made by small business entities from the disposal of active assets;

Income Tax Assessment Act 1997 to allow CGT roll-over when original interests in one entity are exchanged for interests in another entity, typically because of a takeover; and

Income Tax Assessment Act 1997 and *Pooled Development Funds Act 1992* to allow certain non-resident, tax exempt pension funds exemption from tax on gains made on the disposal of their Australian venture capital investments.

Legislation by press release
Schedule 1, Part 3

Part 3 of Schedule 1 to this bill provides that the amendments proposed in Parts 1 and 2 are to apply from 21 September 1999 – this being the date of a press release issued by the Treasurer. However, the amendments proposed are beneficial to those operating small businesses, and the changes have been introduced well within the six-months referred to in the Senate Resolution of 8 November 1988.

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

New Business Tax System (Income Tax Rates) Bill (No. 2) 1999

This bill was introduced into the House of Representatives on 25 November 1999 by the Treasurer. [Portfolio responsibility: Treasury]

The bill proposes to amend the *Income Tax Rates Act 1986* to remove the CGT averaging concession from the 1999-2000 income year.

The Committee has no comment on this bill.

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

Superannuation (Entitlements of same sex couples) Bill 1999

This bill was introduced into the House of Representatives on 22 November 1999 by Mr Albanese as a Private Member's bill.

The bill proposes to amend the *Superannuation Industry (Supervision) Act 1993* to enable same sex couples to receive the same superannuation benefits as heterosexual couples.

The Committee has no comment on this bill.

Therapeutic Goods Amendment Bill 1999

This bill was introduced into the House of Representatives on 25 November 1999 by the Minister for Health and Aged Care. [Portfolio responsibility: Health and Aged Care]

The bill proposes to amend the *Therapeutic Goods Act 1989* to extend the regime of the Australia-European Community Mutual Recognition Agreement to incorporate three European Free Trade Association member states: Norway, Liechtenstein and Iceland.

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.