II. Commonwealth.

Introductory.

Plus ça change, plus c'est la même chose; and, in any event, in the 1958 general election the Menzies Liberal-Country Party Government was confirmed in office. It would not therefore have been altogether surprising if the legislation of 1959 had been the mixture as before, and in fact the twenty-third Parliament of the Commonwealth in its first session passed some 104 Acts most of which were concerned with purely administrative matters and which followed what is becoming the usual pattern of such legislation. However, there were a number of measures which provoked some controversy. After opening with a consideration of the Government's banking proposals, and proceeding by way of a potentially embarrassing self-appraisal in a review of ministerial and parliamentary salaries and allowances, the session wound to its climax with a finale of principles and polemics on the matrimonial causes *motif*. Apart from these measures, perhaps the most interesting legislation of the session was the Civil Aviation (Carriers' Liability) Act, which gave effect to the Hague Protocol amending the Warsaw Convention on this subject (although with some strange modifications in respect of domestic air carriage), and the Customs Act which, in overhauling many customs' procedures, provides a new form of judicial supervision of administrative discretions, albeit in a restricted sphere.

So far as compliance of the Commonwealth legislation of 1959 with the requirements of "the rule of law" is concerned, it is pleasing to be able to report on the new provisions of the Customs Act relating to the licensing of customs agents. The procedure there introduced might well be extended with advantage to the control of other administrative discretions, *e.g.,* under the Migration Act 1958. Also, a welcome amendment to the Fisheries Act modifies the provision that an averment by the prosecutor in a prosecution under the Act is *prima facie* evidence of the matters averred, so that in effect the Court must now consider whether there is evidence that the averment is reasonably made. On the other hand the provision appears in its old form in connexion with proceedings to recover the charge imposed by the Canning Fruit Industry legislation, with apparently little justification other than it has become a common form provision. If the Government is truly interested in maintaining the "rule of law"[1] there is

[1] While this is being written the Crimes Bill 1960 is before Parliament. It could be that different people understand different things by the expression "the rule of law."

surely a need for the appointment of a committee to scrutinize the whole field of Commonwealth legislation and to consider what modification can be made in provisions such as this.

I CONSTITUTIONAL.

Ministerial salaries; parliamentary allowances and superannuation.

The adoption of the major recommendations of the Richardson report, by providing for increases in the salaries, allowances, and superannuation benefits of ministers and members of parliament, was intended to implement the proposal that parliamentary salaries and allowances should be dealt with every three years at the beginning of each Parliament and that normally the decision then reached should endure for the whole period of three years.[2] Accordingly the Ministers of State Act[3] provided firstly for an increase in the salaries of ministers by making available an annual sum for this purpose of £66,600 instead of £46,500 which had been provided by the Ministers of State Act 1956.[4] Secondly, it repealed section 7 of the principal Act, which gave an additional allowance of £1,000 per annum to each minister (excluding the Prime Minister), and provided instead an additional allowance of £1,500 to each of such ministers (other than the Prime Minister) as the Prime Minister should determine (but not exceeding 11 in number), and an allowance of £1,250 per annum to each other Minister.

Parliamentary allowances were increased, by the Parliamentary Allowances Act 1959,[5] by £400, in accordance with the recommendations of the Richardson Committee, to bring the ordinary allowances of members up to £2,750 per annum. The allowances in respect of expenses were also increased. Increases of various amounts were also made in the allowances and expense allowances of the President of the Senate, the Speaker of the House of Representatives, Chairmen of Committees, the Leader and Deputy Leader of the Opposition in the Senate and the House of Representatives, the Leader of the third party

2 In fact the timing of the Bill was the subject of criticism both in Parliament and the press on the ground that it set a bad example to the general public at a time when restraint in wage demands was essential to resist inflation. The Prime Minister, moving the second reading of the Bills in the House, went to considerable lengths to meet and refute such criticisms, both actual and anticipated: (1959) 23 COMMONWEALTH PARLIAMENTARY DEBATES (hereafter referred to as COMMONWEALTH PARL. DEB.) (H. of R.) 1166-1174.

3 No. 18 of 1959.

4 No. 1 of 1956.

5 No. 19 of 1959.

in the House of Representatives, and the various Whips. The Opposition sought to amend this Bill in committee in both the Senate[6] and the House of Representatives[7] to secure that the allowances of all except ordinary senators and members should not be at fixed rates, but at rates to be determined by the Governor-General subject to a prescribed maximum. Fortunately, this altruistic attempt at political suicide on the part of the Opposition was not successful. Similarly a proposal by Senator Marriott,[8] that the changes should not be effective until after the next general election, was defeated.

The Parliamentary Retiring Allowances Act 1959[9] provided for increased rates of contribution by members of parliament towards their pensions, and also for increases in the various rates of benefits payable. Further, it reduced from 70 to 60 the age at which a member shall not be deemed to have retired voluntarily. The increased rates of pensions, despite objection from the Opposition, are not payable in respect of persons who ceased to be entitled to a parliamentary allowance bofer 1st March 1959. The additional benefit payable to ex-Prime Ministers will now be payable to anyone who has held the office of Prime Minister for a continuous period of two years or for periods totalling in the aggregate not less than two years,[10] and the rate of benefit will no longer be £1,200 per annum for life, but on a scale related to length of tenure of office and ranging from £2,000 per annum for two years' tenure to £3,000 per annum for six years' tenure. The widow of an ex-Prime Minister will receive half the pension that her husband was entitled to instead of £750 per annum as under the previous legislation.[11]

A proposal of the Richardson Committee, that the principle of non-contributory pensions should be extended to other ministers with a minimum service of six years, was not accepted by the Government. Likewise the Government decided not to proceed with a proposal that official cars should be made available for three years to any person who had been Prime Minister, Deputy Prime Minister, Leader or Deputy Leader of the Opposition for five years.

6 (1959) 14 COMMONWEALTH PARL. DEB. (Senate) 941.
7 (1959) 23 COMMONWEALTH PARL. DEB. (H. of R.) 1313.
8 (1959) 14 COMMONWEALTH PARL. DEB. (Senate) 936.
9 No. 20 of 1959.
10 Previously three years: Parliamentary Retiring Allowances Act 1948-1955, sec. 19A.
11 An Opposition amendment, seeking to prevent these new provisions from applying in the case of any person who on 1st March 1960 would have ceased to occupy the office of Prime Minister for 25 years or more, was unsuccessful: (1959) 14 COMMONWEALTH PARL. DEB. (Senate) 996.

Seat of Government.

The procedure in connexion with the making or disallowing of ordinances of the Australian Capital Territory has been revised by the Seat of Government (Administration) Act 1959[12] to bring it into line with the procedures in other Commonwealth Territories. Ordinances must now be tabled before each House within 15 sitting days of the making thereof (instead of 30 days under the earlier Acts) and, for the removal of doubt, are declared to be void and of no effect if not tabled within that time. Either House may now disallow part of an ordinance instead of the whole ordinance, and if notice of a motion to disallow is given and not dealt with within 15 sitting days of the House, the ordinance or the part of the ordinance affected is deemed to have been disallowed. A resolution of disallowance has the same effect as a repeal of the ordinance, except that any law repealed by the disallowed ordinance is revived as from the date of disallowance. If an ordinance is disallowed, no further ordinance similar in substance may be made within six months except with the approval of the House concerned. These provisions in respect of ordinances are also applied by the Act to regulations made under ordinances.[13]

The Act also prescribed the procedure by which the plan of the layout of the City of Canberra might be modified or varied from time to time. The former procedure was considered to be too protracted and accordingly a shorter and more simple procedure is now provided.[14]

II. JUDICIAL AND ADMINISTRATIVE.

The Judiciary Act.

An amendment to section 56 of the Judiciary Act 1903-1955[15] now renders the Commonwealth liable to be sued in the Supreme Court of a Territory in respect of a claim in contract or in tort, in the same way that it can be sued in the Supreme Court of a State in respect of a claim arising in that State. Previously all claims arising in a Territory had to be brought in the High Court. Further amendments permit proceedings for the recovery of penalties and taxes under

12 No. 90 of 1959.

13 This had previously been effected by the Interpretation Ordinance 1937-1955, but it was considered doubtful whether such an ordinance could confer powers on the Houses of Parliament.

14 Consequential amendments were made to the Australian Capital Territory Representation Act concerning the voting rights of the member for the Australian Capital Territory: See 206, *infra*.

15 By the Judiciary Act 1959 (No. 50 of 1959).

Commonwealth laws to be brought in the Territories as well as in the States.

Bankruptcy.

Two amendments to the Bankruptcy Act 1924-1958 are made by the Bankruptcy Act 1959.[16] Firstly, provision is made for a formal seal for the Federal Court of Bankruptcy and for a stamp embodying the features of the seal to be used in the everyday business of the Court in the registries of the various bankruptcy districts. A document stamped with a registry stamp is to be as valid and effective as if it were sealed with the seal of the court and all courts are to take judicial notice of the stamp. To remove doubts in respect of the validity of seals or stamps which from time to time have been used in the Federal Court and the registries, and to avoid the possibility of proceedings already heard and determined being impugned, it is enacted that any seal or stamp used at any time before the commencement of these sections on documents in proceedings in bankruptcy shall be deemed to be a valid seal or stamp.

Secondly, it has been found necessary in this Act to extend the validating provisions of the Bankruptcy Act 1958. In 1957 the High Court held invalid on the ground that this was a judicial function the practice of registrars in bankruptcy of extending requirements as to time. Accordingly the Bankruptcy Act 1958 validated all things done within such extended time.[17] However, on occasions a registrar had extended the time within which certain things could be done, and those things had not been done within the extended time. This Act therefore validates the extension of time itself rather than things done within the extended time, so that people whose rights depend on the failure of someone to do an act within extended time are protected.[18] The Act also validates those occasions on which a registrar had purported to "fix" as distinct from "extend" a time for the doing of any act.

Statutory declarations.

The Statutory Declarations Acts of 1911, 1922, and 1944 have been repealed and re-enacted with some amendments by the Statutory

16 No. 49 of 1959.

17 See 4 U. WEST. AUST. ANN. L. REV. 498.

18 One wonders whether this was ever really necessary at all. If things had not been done during the extended time, then they were not done during the original time allowed either, and any rights which flowed from the failure to do them must therefore be valid.

Declarations Act 1959[19] which came into operation on 1st September 1959. The repealed Acts applied only within the mainland of Australia and in Norfolk Island, but it was considered desirable that persons outside Australia should be able to make statutory declarations under the Australian Act. Accordingly the new Act is given extraterritorial effect by section 5, although it is appreciated that criminal proceedings in respect of a false declaration made outside Australia can be brought only if the maker subsequently comes to Australia. Section 8 of the Act extends the classes of persons, before whom statutory declarations may be made, to include Australian consular and diplomatic officers.

Under the earlier legislation the only penalty for making a false declaration was four years' imprisonment on conviction on indictment, without the alternative of a fine. Section 11 of the new Act now enables proceedings to be brought in a court of summary jurisdiction as an alternative to on indictment, and in such case the penalty is a fine not exceeding £100 or imprisonment for a term not exceeding six months or both. A form of statutory declaration is prescribed in the schedule to the Act, and now contains a warning of the penalty in the body of the form, instead of in a footnote as in the past.

Australian National Airlines.

The purpose of the Australian National Airlines Act 1959[20] is "to make certain changes in the constitution and responsibilities of the Commission which recognize its role as a commercial undertaking in direct competition with private enterprise."[21] Accordingly a number of amendments to the principal Act revise the constitution and functions of the Australian National Airlines Commission in the light of current practice in respect of other Commonwealth authorities.[22] The

19 No. 52 of 1959.

20 No. 3 of 1959.

21 *Per* the Minister for Civil Aviation: (1959) 14 COMMONWEALTH PARL. DEB. (Senate) 191.

22 Unfortunately the new sections are not too happily or clearly drafted. Presumably the new section 9 authorizes the Governor-General to prescribe different rates of remuneration for different commissioners, although this is not clearly stated. Logically section 11, which deals with the granting of leave of absence to a commissioner, should precede section 10, which deals with the appointment of acting commissioners during the absence of a commissioner. Section 13 provides that a commisisoner or acting commissioner may resign "by writing under his hand addressed to the Governor-General or the Minister, as the case may be . . .", and one is tempted to ask, "As what case may be?" Presumably the intention is that commissioners address their resignations to the Governor-General (by whom they are appointed) but that acting commissioners address their resignations to the Minister. But this is by no means as clear from the wording as it should be.

number of commissioners is increased from five to six, and their appointments are now to be for a period of five years, instead of three, in order to secure greater continuity of administration. The remuneration of commissioners is no longer to be prescribed in the Act; they are to receive such remuneration and allowances as the Governor-General determines. The commissioners are given a greater discretion in recruiting staff and may now appoint without entrance examination persons who have attained certain prescribed standards of education. Ministerial approval will be required for appointments on salaries exceeding £2,500 per annum instead of £1,500 as in the past. Likewise, in view of changes in currency values and the growth of operation of the Commission since 1945, the Commission is given enlarged powers in respect of the purchase and disposal of assets and of entering into leases. The arrangements for annual reports and audit are now prescribed in more detail in accordance with latest practice.

Section 19A of the principal Act is amended to remove any doubts as to the capacity of the Commission to operate intra-State services in Queensland and Tasmania, those States having passed legislation referring intra-State services to the Commonwealth.[23]

Parts III, IV,[24] and V of the principal Act were part of a scheme intended to establish a Government monopoly over certain classes of inter-State air services. These provisions are now repealed as being inconsistent with the idea behind the two civil aviation agreements establishing equality between the Commission and the major private operator.

It was decided by the Government that the Commission should be subject to the provisions of the Civil Aviation (Carriers' Liability) Act 1959[25] so far as liability to passengers in respect of domestic air carriage is concerned. Section 24 of the principal Act provided that

Section 14 authorizes the Governor-General in certain circumstances to declare the office of a commissioner vacant; but is there any point in "deeming" that the office thereupon becomes vacant?

23 The Government would not accede to Opposition requests to amend sec. 19A to include intra-State services on any future reference by other States, on the ground that it might be unconstitutional to legislate in anticipation of future references.

24 Parts of sections 46 and 47 of the principal Act had been held invalid, as contravening sec. 92 of the Constitution, by the High Court in Australian National Airways Pty. Ltd. v. The Commonwealth, (1945) 71 Commonwealth L.R. 29. Act No. 90 of 1947 had therefore deleted the invalid parts of these sections, but had strengthened the monopoly provisions that remained.

25 No. 2 of 1959: See 202-203, *infra*.

the Commission should be "deemed to be" a common carrier. However, as the liability imposed by the Civil Aviation (Carriers' Liability) Act 1959 is stricter than that of common carriers, and as the right to contract out of liability for negligence is abolished, this section is now repealed. Similarly the time limit for actions against the Commission is increased from six months to two years, subject to any other period of limitation applicable under the Civil Aviation (Damage by Aircraft) Act 1958[26] or the Civil Aviation (Carriers' Liability) Act 1959. Likewise section 64, relating to notices of intended actions, has been repealed. The limitation of the Commission's liability in respect of death or injury to £2,000[27] has been increased to £7,500, similarly subject to any other provision applicable under the two Civil Aviation Acts.[28]

Education.

The Australian Universities Commission Act 1959[29] establishes a permanent body to advise on University development and on ways in which the Commonwealth Government might assist in such development. The aim of the legislation is to enable the Commonwealth to make finance available to the States for the promotion of the balanced development of the Universities, without exposing the Commonwealth Government to a charge of interfering in education.[30]

The Australian Universities Commission established by the Act consists of a full-time chairman and not less than two nor more than four part-time members. Appointments are made by the Governor-General, in the case of the Chairman for a term not exceeding seven years, and in the case of other members for terms not exceeding three years. The function of the Commission is to furnish information and advice to the Minister on matters in connexion with the granting of Commonwealth assistance to Universities established by the Commonwealth or to the States in relation to their Universities, including information and advice as to the necessity for financial assistance and

26 No. 81 of 1958: See 4 U. WEST. AUST. ANN. L. REV. 527-531.

27 Section 66 of the principal Act.

28 One further important restriction on the Commission's powers should not pass without mention. Section 60 of the principal Act provided that ". . . the Commission (a) may detain and sell all or any of the goods of the person [who fails to pay fares or charges due to the Commission] which are in his possession . . ." This has now been suitably amended by deleting the word "his" and substituting "its."

29 No. 30 of 1959.

30 *Per* Mr. Holt, (1959) 23 COMMONWEALTH PARL. DEB. (H. of R.) 1371. Worthy as this aspiration may be, there are already indications that it may be difficult to achieve in practice.

the conditions on which it should be granted and as to the amounts and allocation of such assistance. It will not advise on matters on which the Commonwealth Office of Education is empowered to advise the Minister.[31] Section 14 directs the Commission to perform its functions with the object of promoting the balanced development of the Universities so that their resources can be used to the greatest possible advantage of Australia, and in performing its functions to consult with the Universities and the States on matters on which it is empowered to furnish information and advice. Section 17 authorizes the Minister to appoint, at the request of the Commission, committees to assist the Commission in connexion with specific matters when advice based upon detailed examination by persons competent in a particular field may be of value.

Consequential amendments to the Education Act 1945[32] change the name of the existing Universities Commission, in keeping with its functions, to the Commonwealth Scholarships Board, and place upon the Minister the duty of co-ordinating the activities of the new Universities Commission and the Commonwealth Office of Education in order to prevent any overlapping of functions.

Customs.

Many important amendments to the Customs Act 1901-1957 have been made by the Customs Act 1959.[33] "Its main provisions are in the interests of work simplification"[34] particularly in respect of the movement of dutiable goods within Australia. The provisions of the previous legislation were based on a presumed movement of these goods between ports by ship, and therefore one purpose of the new provisions is to facilitate the control of the movement of goods by road, rail, and air. There has accordingly been a review and simplification of the methods of exercising such control, which has led to a considerable reduction in documentation and the authorizing of additional places, such as the central depots of inter-State or intra-State road transport organi-

31 Education Act 1945-1959, sec. 5 (3): "In relation to university education, the Commonwealth Office of Education shall advise the Minister with respect to such matters only as the Minister directs." This could enable the Minister to stultify the entire working of the Universities Commission.

32 By the Education Act 1959 (No. 29 of 1959).

33 No. 54 of 1959.

34 *Per* the Minister for Customs and Excise, (1959) 14 COMMONWEALTH PARL. DEB. (Senate) 1144. Of necessity, however, the provisions of the Act itself are many and are extremely complex and technical, and it is therefore unfortunate that the Minister was not able to devote more than nine minutes to explaining its effect to the Senate.

sations, to which dutiable goods may be dispatched. There has also been a simplification of the procedures and a reduction of the documentation in respect of the allowance of drawback of duty. Further, the sections requiring declarations to be made as to the correctness of details shown on certain customs entries in respect of goods upon which duty is imposed according to value have now been repealed.

Section 15 of the principal Act authorized the Governor-General to appoint wharfs *within ports* and to fix their limits. However, the extensions of wharfs on to land have meant that the appointment of a new wharf has frequently made it necessary to re-proclaim the limits of the port. Accordingly this section is now amended to remove the necessity for such wharfs being within the limits of the port. Section 20, which required carriages, boats, and lighters used in the carriage of "under bond" goods to be licensed, and the complementary regulations which required each vehicle to bear a licensed customs number plate, have been replaced by a requirement that the carriers themselves, rather than the vehicles used, should be licensed. All vehicles owned by a licensed carrier will be deemed to be licensed vehicles and separate number plates will no longer be required.

The requirement of section 14, that ships should be entered outwards before cargo can be taken on board for export, was found to serve no useful purpose, and therefore in future there will be no need for the ship to be entered outwards but the onus will be on the owner of the goods to enter the goods for export.

Sections 210 and 211, relating to the powers of arrest of customs or police officers, have been amended to bring them into line with the practice in other Commonwealth and State legislation.

The most welcome part of the new legislation, from the point of view of anyone interested in the observance of the "rule of law", is the amendment of the sections concerning the licensing of customs agents. The conditions governing the licensing of customs agents have previously been laid down in regulations, which provided for the cancellation of a licence by a Collector of Customs and for an appeal to the Minister, whose decision was final, by any agent whose licence had been cancelled. The regulations did not specify the grounds on which a licence might be cancelled. The 1959 Act, however, contains detailed provisions relating to the licensing of customs agents[35] and in particular specifies the grounds for cancellation of the

[35] Unfortunately, though, in new sections 183A-183U; See also note 51.

licence, instead of leaving the question of grounds to the unfettered discretion of an administrative officer. The agent is given a right of appeal to a Supreme Court against the cancellation or suspension of his licence. Moreover, the cancellation is no longer made by a Collector of Customs, but instead the Comptroller is directed to refer the matter to a Committee of Inquiry established by section 183D. A Committee of Inquiry is required to inquire into and report to the Minister on any matter which might involve suspension or cancellation of a licence, and the Minister may not revoke the licence unless the Committee reports that a prescribed ground has been established and recommends the revocation of the licence. The Collectors retain a restricted power to suspend licences pending a hearing by the Committee. A Committee of Inquiry is appointed by the Comptroller and is composed of a chairman, a person employed in the service of Customs, and a person nominated by an organization representing customs agents. The chairman must be a person who is or has been a stipendiary, police, special or resident magistrate of a State or Territory of the Commonwealth. A Committee is not bound by the rules of evidence, its proceedings are to be held in private, and its decisions may be made by a majority. The customs agent to whom the inquiry relates and the Minister are each entitled to be legally represented.[36]

III. FISCAL (I).

Bounties.

The sulphuric acid bounty, which is payable to encourage the use of indigenous materials in the production of acid in place of imported brimstone, and which was due to expire on 30th June 1959, has been extended for a further year[37] pending a report by the Tariff Board.

Similarly the cellulose acetate flake bounty, payable at 10d. per lb. on flake produced in Australia and sold for the manufacture in Australia of cellulose acetate rayon yarn, has been extended[38] for a further two years until 30th June 1961, in accordance with the recommendations of the Tariff Board.

[36] These provisions, which avoid many of the undesirable features of other legislation (see 4 U. WEST. AUST. ANN. L. REV. 540), cannot be too warmly applauded, and it is to be hoped that the principle which they embody will be extended to other Acts. Suffice, for the present, to say that these provisions met with the approval of Senator Wright ((1959) 14 COMMONWEALTH PARL. DEB. (Senate) 1246), and the Minister in fact acknowledged that some of the inspiration for the changes had resulted from Senator Wright's strictures on earlier Bills (*ibid.*, 1250).

[37] By the Sulphuric Acid Bounty Act 1959 (No. 38 of 1959).

[38] By the Cellulose Acetate Flake Bounty Act 1959 (No. 43 of 1959).

The Rayon Yarn Bounty Act 1959[39] enabled the rayon yarn bounty to be extended by proclamation to a date not later than 31st December 1959, while the question of further assistance was considered by the Tariff Board. After receipt of the recommendations of the Tariff Board, the principal Act was further amended[40] to extend the operation of the bounty to 30th June 1962. There was no change in the rate of 6d. per lb. of yarn sold or in the provisions relating to payment of the bounty.[41]

In accordance with the recommendations of the Tariff Board, the bounty on tractors has been extended for a further period of seven years from 30th June 1959, and the rates of bounty have been increased.[42] The Tariff Board also recommended the removal of the profit limitation provision from the Act on the ground that such a limitation could frustrate the purpose of the bounty. However, the Government was unwilling to be committed to a considerable expenditure of public funds without regard to the profit levels achieved in the industry.[43] Nevertheless the limitation of profits has been raised from a level of 5% to 10% before tax, with a discretion in the Minister to disallow any interest paid by the producer as a deduction. The concession in the principal Act, in favour of a manufacturer who had designed a tractor with the intention of using Australian-made parts but who could not obtain such parts, has now been withdrawn as there is no longer any scarcity of parts.

As a result of representations from the Chambers of Mines of Western Australia, Queensland, Victoria, and the Northern Territory, Commonwealth assistance to the gold mining industry has been extended for a further three years until 30th June 1962.[44] There have also been increases in the rates of subsidy payable. The maximum rate to large producers (*i.e.*, those whose yearly output of gold exceeds 500 ozs.) has been increased from £2. 15s. per ounce payable at a

39 No. 44 of 1959.

40 By the Rayon Yarn Bounty Act [No. 2] (No. 80 of 1959).

41 The only applicant for this bounty up to the date of this Act had been Courtaulds (Australia) Ltd. The Opposition expressed some doubts whether big industries should receive subsidies in order to enable them to carry on their business in a competitive economy and at the same time make profits, but supported this measure on the ground that, in coming to Australia, Courtaulds Ltd. rendered the country a national service and should therefore be given assistance to enable it to trade profitably and establish itself here.

42 By the Tractor Bounty Act 1959 (No. 45 of 1959).

43 *Per* Senator Henty, (1959) 14 COMMONWEALTH PARL. DEB. (Senate) 1400.

44 By the Gold-Mining Industry Assistance Act 1959 (No. 42 of 1959).

cost of production of £13. 10s. per ounce, to £3. 5s. per ounce payable at a cost of production of £17. 16. 8d. per ounce.[45] The flat-rate subsidy to small producers has been increased by eight shillings to £2. 8s. per ounce. The industry's plea for special financial assistance for expansion was refused, pending further consideration.

Income tax.

The Loans Securities Act 1959[46] clarifies the position of non-resident holders of Australian securities issued overseas in respect of liability for Australian taxes. In the case of all loans raised abroad since 1921, the Commonwealth has assured non-resident bond-holders that the principal of, and interest on, Commonwealth bonds would be free of Australian taxes, including Commonwealth and State income taxes, estate duties, and gift duties. The purpose of these assurances has been to avoid the double taxation of such holders, and they have generally been given under the authority of the Loans Securities Act 1919-1956. However, certain provisions in the Estates and Gift Duty Conventions concluded between the Commonwealth and United States Governments in 1953 have created a situation which has emphasised the insufficiency of the promise in the bond to override statutory provisions imposing taxes and duties. As these assurances apply to securities issued in many countries, it was thought desirable to obtain Parliamentary authority to make them effective and to ensure exemption from all Australian taxes of all holdings by non-residents of Australian bonds issued overseas whenever such exemptions are promised by the loan agreements. This has been achieved by adding a new section 6B to the principal Act which applies both to undertakings already given and to those to be given in the future. This will have no effect on the liability for tax on holdings of Australian overseas securities by a resident of Australia.[47]

The Income Tax and Social Services Contribution Act 1959[48] made a reduction of 5% in the tax payable by individual taxpayers,

45 This is not as great as was sought and does not include anything to cover anticipated cost increases during the next three years. The Government view was that it would be wrong to authorize a subsidy, the need for which had not yet arisen.

46 No. 55 of 1959.

47 Opposition amendments, which would have prevented the issue of any stock or security by or on behalf of the Commonwealth outside Australia without Parliamentary approval, were defeated in both Houses: (1959) 15 COMMONWEALTH PARL. DEB. (Senate) 513: (1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 900.

48 No. 71 of 1959.

in the form of a rebate of one shilling in the pound, based on the amount of tax before deduction of any other rebate or credit. It also increased the exemption levels for aged persons. Previously no tax was payable by such persons in receipt of an annual income of £410, or £819 in the case of married couples. These amounts corresponded with the total of the annual rate of age pension plus the maximum permissible income for age pension purposes. In view of the increase in age pensions, these levels were increased to £429 and £858 respectively.

A number of changes in income tax assessment were made by the Income Tax and Social Services Contribution Assessment Act (No. 2) 1959.[49] The major alteration was an extension of the scope of deductions for capital contributed to companies for oil exploration purposes. Under the 1958 Act such contributions were available as taxation deductions for the full amount, provided that the capital was contributed after 30th June 1958 on shares allotted after that date. Now the deductions are to be allowed for amounts contributed after that date without regard to the date of allotment of the shares. Also under the 1958 provisions no deduction could be made for capital expended on oil exploration by a company which was incorporated in Australia but in which non-residents held a controlling interest or owned more than half the subscribed capital. However, these companies will now be entitled to deductions except in respect of capital contributed by non-residents. Where capital is contributed by a company which is not engaged in oil exploration to a company which is so engaged, the shareholders in the former company are entitled to claim deductions after the money has been paid to the second company. However, difficulties arise where capital, which is subscribed to the former company in one financial year, is not re-invested until the next financial year. New procedures have therefore been adopted to facilitate the allowance of deductions in the year in which the capital is first contributed to the former company. There are also new provisions to secure that the benefit of these deductions is preserved in the case of dealers in shares, by permitting such persons to set off expenditure incurred in connexion with such shares in ascertaining the taxation profit or loss arising on a sale of the shares.

Other provisions of the Act increase the retention allowance to which private companies are entitled for the purposes of undistributed income tax, in order to assist private companies to re-invest in their

[49] No. 70 of 1959.

businesses a larger proportion of the profits. The minimum rate of the allowance on trading profits is increased from 25% to 35%. The 10% allowance, in respect of income derived from property, remains unaltered. Capital expended by mining enterprises in providing housing and welfare in the vicinity of mines for employees and their dependants could previously be recouped over the life of the mine; under the 1959 Act mine-owners are given the option to deduct such expenditure in five equal annual instalments.

Further alterations include the removal of the limit of £150 on deductions for medical expenses in the case of expenses incurred by a person over the age of 65 in respect of himself or his spouse. The maximum deduction for life assurance premiums and superannuation contributions has been increased from £300 to £400. The list of funds and organizations to which gifts, subject to income tax allowances, may be made has been extended. Allowances received on or after 1st July 1959 from the West German Government as compensation for injuries and losses suffered as a result of Nazi persecution will be exempt from income tax.

The main purpose of the Income Tax and Social Services Contribution Assessment Act (No. 3) 1959[50] is to include in the income tax laws provisions enabling non-resident investors to meet their liabilities for Australian tax on dividends by means of a withholding tax.[51] Previously, non-residents had been required to make annual returns and receive formal assessments as in the case of residents, and it was feared that this was a barrier to the flow of portfolio investment into Australia. The attention of the Government was therefore drawn to the practice in other countries of imposing a flat rate withholding tax on dividends flowing from one country to another, so that the tax is withheld from the dividend at the time the dividend is payable and there is no need for annual returns. Accordingly this Act imposes a withholding tax of six shillings in the pound on dividends paid by Australian Companies to non-residents on or after 1st July 1960, and provides the necessary machinery for collecting the tax. To meet the case in which the withholding tax exceeds the tax assessed under the

50 No. 85 of 1959; see also, Income Tax and Social Services Contribution (Non-Resident Dividends) Act (No. 86 of 1959); Income Tax and Social Services Contribution Act (No. 2) (No. 87 of 1959); Income Tax (International Agreements) Act (No. 88 of 1959).

51 Alas, part of the machinery for achieving this object is the addition to the already overburdened section 221 of new sections ranging from section 221YAB to section 221YY.

present system, non-residents may elect in any year to have the assessment basis applied, and will accordingly receive a refund of any excess of the withholding tax over the assessment. Dividends paid by bodies exempt from tax will not be subject to the withholding tax. In the case of residents of countries with which Australia has reciprocal taxation agreements, the rate of tax will be three shillings in the pound where this is appropriate under the agreement.[52]

The Act also provides that the profits on the sale or redemption of the new Commonwealth short-term seasonal securities, which carry no interest as such, are to be subject to income tax. This will apply to such earnings whether the securities are taken up at the time of issue or are subsequently acquired during their currency, and it will be subject to the usual taxation rebate of two shillings in the pound. However, premiums payable on the redemption of Special Bonds which are held until the redemption dates specified are not to be treated as income for the purposes of income tax, except where the bonds are redeemed by a person whose business extends to trading or dealing in the bonds.

[52] An article in "The Times" of 17th August 1959 (quoted in the House by Mr. Crean, (1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 2998) pointed out that the United Kingdom investor would be required to pay three shillings in the pound (*i.e.* 15 per cent.); but as most Australian companies pay company income tax at about seven shillings and sixpence in the pound, and as the ordinary shareholder in the United Kingdom is credited with having paid that tax as well as the 15 per cent., the United Kingdom investor would pay £A750 withholding tax for every £A5000 ordinary dividend and would receive credit against United Kingdom tax of £A750 plus £A3000 company tax paid. Accordingly his yield on Australian shares would be raised in effect by £A3000, provided his United Kingdom tax on the £8000 gross income amounted to at least £A3750. It would therefore be more attractive for the United Kingdom investor to put his money, not into new investment in Australia, but into old well-established companies.

Another writer (Alun G. Davies: *Australia: The Tax Code of a Developing Economy,* [1960] BRITISH TAX REVIEW 198) was more concerned with the incidence of this tax on individual investors: "The new tax may be of advantage to corporate bodies, but is at best a vexatious imposition on individuals. It will be rare for non-resident individuals to have an average rate of tax in their own countries which exceeds the Australian company rate (7/6), and the withholding tax will not normally be available for double taxation relief for this reason. Accordingly, if they wish to elect not to be liable to withholding tax, non-residents will be required to submit an Australian tax return to demonstrate that their individual rate is below the withholding rate. They must wait for their repayment and must go through the process of filing a return. Most U.K. individual investors in Australia have not yet realised what is coming to them: the new tax will come into effect as from July 1, 1960, and it will be interesting to hear how loud the cries of distress will be from individuals in the U.K."

Loans.

As part of a policy to reduce the large seasonal fluctuations which occur each year in the liquid assets of the banks and the public, the government has introduced public issues of very short-term Commonwealth securities which will be made available during a period when liquidity is rising seasonally and will be redeemed within the same financial year as liquidity diminishes. The effect of subscriptions for these securities will be to withdraw funds temporarily from the public and hence from the banking system. The issue of the securities, which are to be known as seasonal treasury notes, is authorized by the Loan (Short-term Borrowings) Act 1959.[53] The notes are to be freely negotiable bearer securities, and facilities will be provided for lodging them for safe custody with a trading or savings bank, as with other Commonwealth bonds. Investors will have the choice of taking either the seasonal treasury notes or seasonal inscribed stock which will be issued on the same general terms and conditions. The over-all amount of such notes in any one year is to be determined by the Governor-General in Council, but within this limit the Treasurer will determine the amount, prices, terms, and conditions of each individual issue. All notes so issued must mature before the end of the financial year in which they are issued, and in fact it is expected that the usual term will be approximately three months. The notes will be issued at a discount and will be repayable at par on maturity. They will therefore carry no separate interest as such, although the earnings from any holdings will be taxable.[54]

The Loan (War Service Land Settlement) Act 1959[55] provided for the raising of loan moneys amounting to £7,000,000 for War Service Land Settlement. It was estimated that this would be supplemented by a further £3,860,000 from repayments of advances to settlers, etc., which would give a total of £10,860,000 available. The proposed share of this money for Western Australia was £3,232,000.

The Loan (Housing) Act 1959[56] authorized the raising of £36,080,000 for financial assistance to the States for housing; the allocation to Western Australia was £3,000,000.

The Commonwealth budgeted in the financial year 1959/1960 for an over-all deficiency of £61,000,000. Approval for the borrowing

53 No. 61 of 1959.
54 Income Tax and Social Services Contribution Assessment Act (No. 3) 1959; see *supra* at 170.
55 No. 74 of 1959.
56 No. 75 of 1959.

of this sum from the central bank was given by the Loan Act 1959,[57] which also authorized the expenditure of £37,000,000 on defence services, and of £24,000,000 to finance the redemption of maturing securities issued for war purposes.

*States Grants.**

A new phase in the financial relations of Commonwealth and States began with the enactment of the States Grants Act.[58] The lineal descendant of the States Grants (Tax Reimbursement) Act 1946-1948,[59] it abandons the pretence that there is a direct link between the Commonwealth's grants to the States and the voluntary (?) evacuation by the latter of the income tax field.

The story goes back to 1942 when the Commonwealth, unsuccessful in its efforts to persuade the States to concede to it a monopoly of income tax during the Second World War,[60] used its taxing power[61] to pass four Acts which virtually made it impossible for the States to levy any such tax. The federal rates of tax were increased to such an extent that tax-payers in most income brackets would not be able to afford to pay a second tax to the State in which they lived; even the most long-suffering and conscientious tapayer cannot exist on nothing. A second Act, *inter alia,* made it an offence to pay State income tax in priority to the federal tax; a third took over the State income tax offices and staff.[62] The fourth Act contained the *quid pro quo*; to any State that did not levy its own income tax the Commonwealth would make a grant of the amount set out in the Schedule to the States Grants (Income Tax Reimbursement) Act 1942.[63] Unsuccessfully

[57] No. 100 of 1959.

* The reviewer is indebted to Professor F. R. Beasley for contributing the comments on the States Grants Act and also on the banking legislation *infra*.

[58] No. 76 of 1959.

[59] No. 1 of 1946, as amended by No. 62 of 1947 and No. 43 of 1948.

[60] Its effort followed the report of the Uniform Taxation Committee which it had appointed shortly after the Labour government had been formed in 1941. The Committee consisted of R. C. Mills, Professor of Economics at the University of Sydney, J. H. Scullin, a former (Labour) Prime Minister and Treasurer, and E. S. Spooner, a former (Liberal) Acting Treasurer in New South Wales. See (1942) 170 COMMONWEALTH PARL. DEB. 1286.

[61] Sec. 51 (ii) of the Constitution: "Taxation; but so as not to discriminate between States or parts of States."

[62] In some States there was no question of taking over; there the Commonwealth Taxation Office acted as agent for the State and collected the State tax on behalf of its principal.

[63] No. 20 of 1942. The Hon. J. B. Chifley (Treasurer) stated that the amount to be offered to each State would be the average of its income tax receipts,

challenged in *South Australia v. Commonwealth*,[64] the taxing scheme and the reimbursement scheme were upheld under the taxing powers of the Commonwealth and its power to make grants to the States;[65] the taking over of State income tax offices was held to be a justifiable exercise of the "defence power" in time of war.

Although the original intention had been to limit the scheme to the duration of the war, the Labour government which had introduced it later changed its mind and decided to make it permanent—though the States could at any time have wrecked the post-war scheme merely by declining to accept any grants from the Commonwealth and re-imposing their own income taxes. The States Grants (Tax Reimbursement) Act 1946[66] increased the total of the grants to the six States from the original figure of £33,489,000 to £40,000,000, though no State reecived exactly the same share of the larger grant as it had done of the smaller.[67] The new grants were to be made for two years; then there was to be a change in the method of determining the total sum to be distributed and the share of each State. A *per capita* basic amount was to be ascertained by dividing the sum of £45,000,000 by Australia's population[68] on 1st July 1947; in each later financial year (commencing on 1st July 1948) the *per capita* amount would be multiplied by the actual population at the commencement of each year. The total so calculated would then be increased by the percentage by which average wages had risen in the

under its own taxing Act, during the two previous years—less an amount representing the cost to the State of garnering the tax: See (1942) 170 COMMONWEALTH PARL. DEB. 1286.

64 (1942) 65 Commonwealth L.R. 373. The States of Victoria, Queensland, and Western Australia were joint plaintiffs with South Australia.

65 Sec. 96 of the Constitution: ". . . the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

66 No. 1 of 1946.

67 The shares of the total grants were as follows:—

	1942 Act %	1946 Act %
New South Wales	45.8	41.2
Victoria	19.5	22.2
Queensland	17.4	16.5
South Australia	7.0	8.6
Western Australia	7.6	8.5
Tasmania	2.7	3.0
	100.0	100.0

68 More correctly, the population of the States. The federal Territories have no part in these grants.

previous year in comparison with the wage levels in the year ended 30th June 1946. The intention was twofold; (a.) to increase the total of the grants *pari passu* with the increase of population and (b) to help the States to meet the higher costs of government caused by rising wages.

The new system of allocation was to come into operation for the financial year July 1948-June 1949 and to continue thereafter. An elaborate scheme was set out in the Second Schedule to the Act in order to determine (for distribution purposes only) the "adjusted" population of each State; the effect would be to give a population premium to those States with a low percentage of population to area or a higher percentage of children aged 5-15 years in its actual population. In the first year in which this new scheme operated, ninety per cent. of the ascertained total would be distributed in the proportions set out in the Act,[69] ten per cent. in proportion to the adjusted populations of the States; in the second year, eighty per cent. by the first method and twenty per cent. by the second; and so on, until for the financial year 1st July 1957-30th June 1958 the whole of the distributable amount would be paid out on the "adjusted population" basis. Grants, however, would only be made to States which did not impose their own income taxes in any year; if any State did so impose its own tax, the grants made to the non-taxing States would not be increased.

In every year during the currency of the 1946-1948 Act the States were never satisfied with the total amount ascertained by the population-increase and wage-increase formula; like Oliver Twist, they all came back for more. Every year brought its quota of recrimination and hard bargaining; invariably the States got in the aggregate more than they were entitled to receive under the formula, but less than they originally asked for; the additional sums conceded by the Commonwealth were distributed in the same way as the formulary grant. Fox example, during the last year of the scheme (1958-1959), the amount to which the States would have been entitled under the formula was £174,563,000; the amount which they actually got was £205,000,000.[70] During the whole of the decade the Commonwealth,

[69] See note 67, *supra.*

[70] The percentage distribution was as follows:—

	%
New South Wales	37.22
Victoria	26.62
Queensland	15.51

on the recommendation of its Grants Commission, made special disability grants to three "claimant States";[71] these in 1958-1959, amounted to £5,250,000 to South Australia, £11,100,000 to Western Australia, and £5,250,000 to Tasmania. During the decade there were also intermittent proposals, which to the detached observer seem to have been made rather half-heartedly, for the "restoration" to the States of their income-taxing power; little was said of the fact that any State that wanted to take the power back could do so at any time—if it was prepared to forfeit a grant from the Commonwealth. In a final gesture of despair the State of Victoria tried to persuade the High Court of Australia to overrule its decision in *South Australia v. Commonwealth*[72] the Court declined to do so except on one small point—by four to two it held invalid the provision penalising payment of State income tax in priority to federal income tax.[73]

During the course of the 1958 election campaign the Prime Minister, the Rt. Hon. R. G. Menzies, stated that the Government intended, if returned to power, to invite the State Premiers to a conference to discuss the vexed question of State-imposed income tax and the larger issue of Commonwealth-State financial relations. The government parties easily won the election; the promised conference was summoned for March 1959 but dispersed without reaching agreement. The Commonwealth having undertaken to prepare a new scheme of grants to the States, its proposals were ready for submission to the annual June conference with the State Premiers. These proposals, according to the federal Treasurer, were received "with unani-

South Australia	9.26
Western Australia	7.84
Tasmania	3.55
	100.00

It is instructive to compare these percentages with those given under the heading "1946 Act" in note 67 *supra*. In the decade, population had increased much more rapidly in Victoria and South Australia than in the other States. On the other hand, Western Australia's low percentage of population to area had not offset its relatively low rate of population increase; hence its percentage of the total grant had fallen.

71 Frequently described by the non-claimants as the "mendicant" States.

72 See note 64, *supra*.

73 Victoria v. Commonwealth, (1957) 99 Commonwealth L.R. 575; New South Wales was the only other plaintiff in the case. Note *per* Dixon C.J. at 621: "Whether such a declaration" (of the invalidity of the "priority" section) "is of practical importance in relation to the system of uniform taxation is a matter about which I may be permitted to remain sceptical, but it is part of the relief for which the plaintiffs have asked."

mous and warm approval."[74] The Minister also told the House that all had agreed that the formula for determining the total grants in each year was "inadequate", and that the "adjusted population" basis of distribution was "no longer generally acceptable."[75] His third point was that the practice of making supplementary grants, on the recommendation of the Grants Commission, needed revision; in the opinion of the Commonwealth, not more than two States should normally be "claimants" in the same year. In effect the Treasurer divided the States into three groups: (1) New South Wales and Victoria, both too wealthy ever to have valid claims to additional financial help; (2) Western Australia and Tasmania, both likely to be more or less permanent claimants; and (3) Queensland and South Australia, which would both be given larger grants in the expectation that it would very rarely be necessary for either of them to seek special grants.[76] Moreover, it was desirable that in future the special grants to the two claimant States should be "marginal" only; *i.e.,* financial assistance to these States under the new scheme would be stepped up so as to enable the necessary additional grants to be kept as low as possible.[77]

Under the new Act the total amount payable to the States for 1959-1960 would be £244,500,000, an increase of £39,500,000 over the 1958-1959 allocation. But this would be partly offset by a reduction of £13,500,000 in the special grants to two claimant States.[78] The new grants, like the old, would vary from year to year according to population and wage changes; but the method of determining each State's share would differ from the old. The amount which each State would get for the year 1959-1960 was set out in section 5; for the next financial year (*i.e.,* 1st July 1960 to 30th June 1961)—and later years—separate calculations will be necessary for each State. The "section 5 grant" to each State will be divided by the number of its

74 The Hon. H. Holt, moving the second reading of the States Grants Bill in the House of Representatives on 22nd October 1959: (1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 2199.

75 *Ibid.*

76 In point of fact, South Australia had been for many years the third regular "claimant." Queensland had never previously sought additional assistance but, together with Victoria, announced that it would become a claimant in 1959-1960. It may well be that the dismal prospect of having five out of six States claiming special grants spurred the Commonwealth on to devising quickly an acceptable variant of the 1946-1948 scheme.

77 See generally (1958-59) 49 ROUND TABLE 417-420, 423-425.

78 (1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 2200.

population as at 1st July 1959; the resulting *per caput* figure will then be multiplied by the number of its population as at 1st July 1960.[79] Each of the six amounts so ascertained will then be further increased by the "average-wage rise factor"; but, instead of raising the grants by the percentage increase in average wages as was done under the superseded scheme, the Commonwealth will raise them by 1.1 times that percentage increase.[80]

Apart from the broad general reasons which the Treasurer gave for abandoning the old scheme of distribution, he did not seek to explain or justify the basis of the new. South Australia was undoubtedly offered an inducement to withdraw from the list of claimant States; Queensland, threatening to become a claimant, has had its share of the total increased; Tasmania appears to come off best, and Western Australia to fare worst, from the change to the new method, as the following figures will show:—

Actual increase of grants in 1959-1960, and percentage increase compared with 1958-1959.[81]

	Increase of grant, 1959-1960	Percentage of increase
New South Wales	£7,356,000	9.64
Victoria	6,043,000	11.10
Queensland	4,481,000	14.04
South Australia	3,440,000	14.19
Western Australia	1,687,000	6.18
Tasmania	2,643,000	22.65

State shares of the 1958-1959 and 1959-1960

79 Except in a census year, the population figures used in these calculations must necessarily be estimates only. It is so easy to move from one State to another by road that any allowance for population shifts by that means can be no more than inspired guesswork.

80 This provision, which the federal Treasurer described as a "betterment factor", was introduced at the suggestion of Tasmania: (1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 2200.

81 The figures include the special grants to Western Australia and Tasmania.

grants in percentages of the total.[82]

	1958-1959 (Tax reimbursement formula)	1959-1960 (New formula)	Percentage gain or loss
New South Wales	33.70	33.14	—.56
Victoria	24.18	24.08	—.10
Queensland	14.13	14.45	+.32
South Australia	10.74	11.15	+.41
Western Australia	12.08	11.50	—.58
Tasmania	5.17	5.68	+.51
	100.00	100.00	0.00

The duration of the new scheme depends entirely on the will of the federal Parliament; but section 7 of the Act contemplates a minimum period of unaltered operation. In effect the Commonwealth says to the States, "This scheme is going to operate at least until 30th June 1965; we might consider changes to come into effect after that date, and if any one of you insists we will call a conference; but we alone will decide what changes are justified." In the second half of that section there is a somewhat vague reference to the possibility of changes in the relations between the Commonwealth and any State or States; if those changes have "a major effect" on the finances of those States, "the Government of the Commonwealth may review the provisions of this Act in consultation with the States with a view to submitting to the Parliament legislation to give effect to any changes that *it*[83] considers to be desirable as a result of that review."

As indicated at the beginning of this note, the new Act does not pretend to offer a *solatium* to the States in return for their continued abandonment of the income-tax field; it does not penalise (by withdrawal of the grant) any State that might decide to impose its own income tax. But it may well be assumed that if any State did so decide, the Commonwealth would regard this as having a "major effect" on that State's finances within the meaning of section 7 (2).

[82] The figures for 1958-1959 include the special grants to South Australia, Western Australia, and Tasmania; for 1959-1960, the special grants to Western Australia and Tasmania.

[83] Italics added.

The Western Australia Grant (Northern Development) Act 1958[84] authorized Commonwealth assistance of £2,500,000 for expenditure by the State on development projects in the area north of the 20th parallel of latitude during the five-year period ending on 30th June 1963. Approval had been given by the Commonwealth for the construction of a deep water port at Black Rocks near Derby, for a new berth at the Wyndham jetty, and for investigations to determine the most suitable method of servicing the north-Kimberley area. Consideration was also being given to the building of a diversion dam on the Ord River. However, as the cost of these projects was likely to exceed the £2,500,000 available, this sum was increased to £5,000,000 by the Western Australia Grant (Northern Development) Act 1959.[85]

Post and telegraph rates.

The purpose of the Post and Telegraph Rates Act 1959[86] was somewhat euphemistically expressed by the Postmaster-General[87] as being "to adjust" certain postal charges. In fact the increases in rates of postage effected by the Act and the variation of the charges for other postal, telephone, and telegraphic services effected by amendment of the appropriate regulations, was expected to bring in an extra £17,400,000 revenue in a full year. Many fears were expressed that although the burden of these increases would fall first of all on commerce and industry, it would ultimately be passed on to the public together with the addition of a margin of profit.[88] Telephone rates were increased in spite of the fact that the profit in the Telephone Branch in 1957-58 was £6,200,000.[89] The justification for the increases in telephone charges was the need to plan and provide expanded and additional facilities.

The new charges operated as from 1st October 1959. Since 1st November 1959, letters posted in Australia for delivery in Australia are normally carried by air without surcharge where this will expedite delivery.

FISCAL (II).

Banking.

More than a decade of politico-economic wrangling came to an

84 No. 28 of 1958; see 4 U. WEST. AUST. ANN. L. REV. 513.
85 No. 53 of 1959.
86 No. 56 of 1959.
87 (1959) 24 COMMONWEALTH PARL. DEB. (H. of R.) 759.
88 See *per* Senator McKenna, (1959) 15 COMMONWEALTH PARL. DEB. (Senate) 668.
89 However, losses in other branches reduced the over-all profit to some £4,000,000.

end with the passing of a group of related Acts, *viz.*, the Reserve Bank Act,[90] the Commonwealth Banks Act,[91] and the Banking Act,[92] together with an ancillary measure, the Banking (Transitional Provisions) Act.[93] But the story goes back further than the abortive attempt of the Chifley Government to nationalize banking in Australia by the Banking Act 1947; it is linked in many ways with the establishment of the Commonwealth Bank of Australia in 1911 and its subsequent history.

The Commonwealth Bank was created in 1911 at the instance of a Labour government, as a statutory corporation[94] under the sole control and management of a Governor, to conduct ordinary banking business as well as a savings bank. Its initial capital was £1,000,000, to be raised by the sale of debentures; in addition, the federal Treasurer was authorized to make advances of an unspecified amount to the Bank out of Consolidated Revenue Fund. In 1914, when its authorized capital was increased to ten mililon pounds, it was empowered to take over by agreement the business of any other bank, or any State Savings Bank; the consent of the Treasurer being required for any such acquisition. Its debentures were also made trustee securities. In 1920 it was

90 No. 4 of 1959.

91 No. 5 of 1959.

92 No. 6 of 1959.

93 No. 7 of 1959.

94 But without any corporators. In Heiner v. Scott, (1914) 19 Commonwealth L.R. 381, Griffith C.J. said, "Sec. 5 [of the Commonwealth Bank Act 1911] declares or enacts that "a Commonwealth Bank, to be called the Commonwealth Bank of Australia, is hereby established." Sec. 6 enacts that it shall be a body corporate with perpetual succession and a common seal . . . This is all. There are no corporators. How there can be perpetual succession when there are no persons to succeed one another I do not quite understand. . . . I pass by the question whether in the nature of things it is competent for the Commonwealth Parliament to declare that such an abstraction dissociated from any material persons shall be regarded as a corporation, and will assume that it is, and that the Bank is a real entity cognizable by law" (at 392-393). But Dixon J., in Bank of New South Wales v. Commonwealth, (1948) 76 Commonwealth L.R. 1, had no misgivings on this score; "Although the Commonwealth Bank is declared to be a body corporate there are no corporators", he said. "I see no reason to doubt the constitutional power of the federal parliament, for a purpose within its competence, to create a juristic person without identifying an individual or a group of natural persons with it, as the living constituent or constituents of the corporation. In other legal systems an abstraction or even an inanimate physical thing has been made an artificial person as the object of rights and duties. The legislative powers of the Commonwealth, while limited in point of subject matter, do not confine the legislature to the use of existing or customary legal concepts or devices . . ." (at 361).

empowered to take over the note-issuing functions hitherto exercised by the federal Treasury under the Australian Notes Act 1910-1914; for this purpose a Note Issue Department was set up as a distinct entity within the Bank and was to be managed by a Board of Directors consisting of the Governor of the Bank, an official of the Commonwealth Treasury, and two other persons—the Governor as chairman to have a casting as well as a deliberative vote. In 1924, shortly after the death of Sir Denison Miller who had held the office of Governor since the establishment of the Bank, legislation was introduced to put an end to the system of one-man control; the Commonwealth Bank Act of that year created a Board of Directors consisting of the Governor and seven other persons. Of the seven, one was to be the Secretary to the Commonwealth Treasury, the remainder to be persons then or in the past actively engaged in agriculture, commerce, finance or industry —with directors or officers of other banks debarred from being appointed; all six appointments were to be made by the Governor-General. The Board of Directors controlling the Note Issue Department was abolished and its functions transferred to the Board of Directors of the Bank. For the first time a limited measure of control over the whole of the Australian banking system was introduced; the settlement of balances between the other banks was to be effected by means of cheques drawn on accounts to be kept by them in the Commonwealth Bank, and each of those banks was required to deliver to the federal Treasurer a quarterly abstract of its assets and liabilities, etc., in the form prescribed by the amending Act.

In both Houses the Bill was bitterly opposed by the Labour party, which regarded it as a nefarious plot, organized by the other banks with the connivance and encouragement of the Government, to hamstring the activities of the Commonwealth Bank;[95] but the Government had the numbers on its side, and forced the Bill through with some

[95] It was the Labour Party which, when in office in 1911, had fathered the original Commonwealth Bank Act and which took an especial pride in the growth of its legislative offspring. Typical of Opposition comments on the 1924 Bill are the following:—Mr. Matthew Charlton, Leader of the Opposition—"The Bill is nothing less than an attempt to kill the [Commonwealth] Bank" (107 COMMONWEALTH PARL. DEB. 1506); Mr. Parker Moloney—"I will not say that the Government proposes to wipe out the Bank altogether . . . But the Government does the next best thing it can do from its point of view, and tries to hamstring the Commonwealth Bank on every possible occasion" (*ibid.*, 1915); Mr. J. E. Fenton—"The general managers of the private banks have dictated to the Treasurer the action he has taken" (*ibid.*, 1964); Senator A. Gardiner—". . . with the passing of this Bill there will be a complete transformation in the administration of the Commonwealth Bank" (*ibid.*, 2249); Senator E. Needham—"The title of the bill

use of the "gag" at the second reading and committee stage in the House of Representatives. In the following year a Rural Credits Department was created within the Bank; its function was to make advances, on the security of primary produce as defined in the Act, to (a) any bank, (b) any co-operative association, or (c) any corporation or unincorporate body approved by publication of its name in the *Gazette*. In 1927 a Commonwealth Savings Bank of Australia was set up as a separate statutory corporation to take over the Savings Bank business of the Commonwealth Bank; it was to be controlled by a Chief Commissioner and two other Commissioners, all appointed by the government; but of the two Commissioners one was to be a director of the Commonwealth Bank (other than its Governor or the Secretary to the Treasury) nominated by his fellow directors. The imminence of financial difficulties in 1929 led to the passing of a measure to give the Commonwealth Bank full control of gold coin and bullion held in Australia; the Treasurer could authorize the Bank to require persons not only to give information as to their holdings but to surrender them in exchange for Australian notes, and a proclamation could be issued prohibiting the export of gold either absolutely or only with the Treasurer's permission. In 1931 the Bank was authorized to use up to five millions of its gold holdings to meet Commonwealth Treasury bills shortly to mature in London, but the Bank was entitled to refuse to do so; if it agreed to make the gold available, it was to receive from the Treasurer Commonwealth securities of like value. In 1932 the Bank was authorized to include in its reserves against the note issue not merely gold but "English sterling", defined as currency which was then legal tender in the United Kingdom, three months' bills maturing and payable there, and three months' English Treasury Bills. 1943 saw the creation within the Bank of a Mortgage Bank Department, authorizing long-term loans to be made on the security of land used for primary production; the minimum period of any such mortgage loan to be five years, the maximum forty-one; the maximum amount of such a loan to be five thousand pounds.

In 1930 the Scullin (Labour) Government introduced a Bill to set up a Central Reserve Bank; but although the Bill passed the House of Representatives, the Senate (in which the Government had only seven supporters out of a total of thirty-six) killed the Bill after referring it to a select committee which, after hearing evidence from

should be amended to read "the Commonwealth Bank Burglary Bill." The burglars are the agents in this Parliament of what is termed high finance" (*ibid.*, 2327).

banking experts, reported that while a central Reserve Bank was "a desirable adjunct to the financial system", the time was inopportune to establish it. Later in the year the relative unimportance of the Commonwealth Bank was emphasised when "the senior trading bank, the Bank of New South Wales, initiated on January 5 a series of rapid changes which raised the price of £100 sterling to £115 in Australian money, and finally on January 29 to £130."[96] In the next two years further amendments to the Commonwealth Bank Act showed which way the financial wind was blowing.

From 1932 there was a lull in banking legislation. On 26th November 1941 the Curtin (Labour) Government which had taken office after the successive defeats of the Menzies-Fadden Government on 29th August and of the Fadden-Menzies Government on 7th October, brought into operation the National Security (War-Time Banking Control) Regulations.[97] All the trading banks were required to abide by the policy of the Commonwealth Bank in regard to advances; they were also required to lodge in special accounts in that Bank their "surplus investible funds" as defined in the Regulations, and were prohibited from drawing on those accounts without the consent of the Commonwealth Bank; the latter would pay interest on the credit balances at a rate not to exceed that fixed by the Treasurer from time to time, and in any event designed to secure that the trading profits of any bank would not exceed the average of its annual trading profit for the three years ended 31st August 1939. These Regulations, which undoubtedly brought the banking system of Australia substantially under the joint control of the board of directors of the Commonwealth Bank and the federal Treasurer, were followed in 1943 by an amendment to the Commonwealth Bank Act which authorized the creation of a Mortgage Bank Department empowered to lend money to persons engaged in primary production; loans (for not less than five nor more than forty-one years) to be secured by mortgage of the land used or proposed to be used for primary production.

The system of special accounts was continued by the enactment in 1945 of the Banking Act, described as "An Act to regulate Banking, to make provision for the protection of the Currency and of the Public Credit of the Commonwealth, and for other purposes."[98] Henceforth only corporations could carry on banking business, any person or

96 (1930-1931) 21 ROUND TABLE 661. Necessary and unavoidable as this step was, there was some criticism of the fact that it was made virtually at the dictation of a bank other than the Commonwealth Bank.

97 (1941) COMMONWEALTH STATUTORY RULES 810-812.

98 Long title of Act No. 14 of 1945.

partnership then conducting banking business being given six months in which in effect to dispose of their bank to an authorized corporation; all corporations seeking to enter the banking business required an "authority" from the Governor-General, though all the existing banks were to be granted such "authorities" within seven days. The Commonwealth Bank could require each authorized bank to lodge additional amounts in its special account, up to a total ascertained in accordance with section 20; no withdrawals were to be permitted except with the consent of the Commonwealth Bank, which was to pay interest (at a rate not exceeding 17s. 6d. per cent. per annum) on the daily balances. The Commonwealth Bank could require the other banks to sell to it their "excess receipts of foreign currency" as defined; on the other hand, it had power to sell foreign currency to them. The Commonwealth Bank became the dictator of the lending policy of all the banks—but not so as to interfere in any way in the relations between a particular bank and its individual customers; it would also prescribe overdraft and discount rates, and the interest payable on fixed deposits. To preserve the foreign exchange resources of the Commonwealth, regulations could be made which would, if thought necessary, provide for the mobilisation of those resources and for their control by the Commonwealth Bank. Part VI of the Act required every bank (other than the Commonwealth Bank itself) to prepare an annual balance sheet, and a statement containing the particulars specified in section 40, for delivery to the Commonwealth Bank and the Commonwealth Statistician, each of which was required to extract certain information and to publish it in the *Commonwealth Gazette.* Under section 50 the Commonwealth Bank was given a very wide power to demand from any bank such information as the Commonwealth Bank thought fit to demand; the only restriction upon its demands being, it would seem, that it could not ask for information about any individual customer. Section 51 required the consent of the federal Treasurer, not to be given except after recommendation of the Commonwealth Bank, to any proposed amalgamation of banks or to a bank's carrying on business in partnership with another bank, and to any proposed re-construction of a bank. The most ominous provision was contained in section 48, which authorized the federal Treasurer to deny to the banks the right to act as bankers for any State, for any authority created by State law, or for any local governing authority. Complementary to the Banking Act was a new Commonwealth Bank Act[99] which repealed all the existing legislation but re-enacted it in

[99] No. 13 of 1945.

substance with some very important additions. Section 11 specifically provided that the Commonwealth Bank was to act as a central bank and, if required, as the banker and financial agent of the Commonwealth Government; in its new capacity it was required to publish at least once a week its telegraphic transfer rates of exchange for sterling. A new Division of the Bank was to conduct general banking business, which it was required to develop and expand; it was prohibited from refusing a potential customer's business merely because that would mean robbing another bank of that customer: section 18.[100] Part V restored the system of one-man control, exerciseable by the Governor; the office of Deputy-Governor was continued, but its holder was to perform such duties as the Governor directs. The place of the old board of directors was taken, to some extent, by an Advisory Council consisting of the Secretary and another officer of the federal Treasury, the Deputy Governor, and two Bank officers appointed by the Treasurer on the recommendation of the Governor; the nature of and restrictions upon the functions of this new body are plainly indicated by its name. The Act continued in existence the Note Issue Department, the Rural Credits Department, and the Mortgage Bank Department; it also created an Industrial Finance Department, authorized to provide finance for the establishment and development of industrial undertakings, *particularly small undertakings*;[1] and to provide technical and specialized advice. The General Banking Division was also authorized to lend money to individuals and building societies for the erection or purchase of homes. The Commonwealth Savings Bank of Australia, still under the management of the Governor, was preserved as an independent statutory corporation. Part XIII of the Act dealt with employment by the Bank and covered such matters as entrance examinations, classification and promotion, tenure of office, etc.

No action was taken under section 48 until 1947, when the Melbourne City Corporation received a letter from the federal Treasurer to the effect that notice would shortly be given to prohibit any bank other than the Commonwealth Bank from acting as bankers for a number of entities, including the city of Melbourne. On instructions from his Council the Town Clerk wrote to the Treasurer saying in effect that it was quite satisfied with its existing banking arrangements

[100] For many years previously it had been the deliberate policy of the Commonwealth Bank not to enter into open competition with the other banks by inducing or even agreeing to the latters' customers changing over to the Commonwealth Bank.

[1] Italics supplied.

and asking therefore to be exempted from the operation of the imminent notice; the federal Treasurer replied that, being satified that the Commonwealth Bank could provide full banking facilities for the Council, he could not agree to its request. Thereupon the Council issued a writ against the Commonwealth asking for a declaration of the unconstitutionality of section 48 and a consequential injunction against the Treasurer. On 13th August 1947 a High Court of six judges gave judgment; with one dissenting voice they upheld the contentions of the Melbourne Corporation.[2] On 15th October in the same year the then Prime Minister and federal Treasurer, Mr. J. B. Chifley (Labour) moved for leave to "introduce a bill for an act relating to banking and for other purposes." There then arose a most unusual parliamentary situation; although there was no Bill before the House, although officially no one except the mover knew what was in the Bill, the motion for leave to introduce was opposed by Messrs. R. G. Menzies and A. W. Fadden on the ground that members knew in fact that it was a Bill to nationalize banking in Australia, that the Government had no popular "mandate" for such a Bill, and that the passing of the Bill would create "bitterness and uncertainty."[3] After they had spoken the Government successfully moved that the question be then put, and the motion for leave was approved. On the next day the Bill was read a first time and, Standing Orders having been suspended, the commencement of the second reading stage followed immediately The Bill passed its third reading in the House of Representatives on 19th November and was sent to the Senate, where a motion to suspend Standing Orders to enable the Bill to be considered without delay was at once passed. By 29th November the Bill had passed through both Houses and received the royal assent; but it was immediately challenged. On 9th February 1948 the High Court commenced hearing five consolidated actions brought by a formidable list of plaintiffs— eleven banks and three States—against the Commonwealth for a declaration that the Act, or alternatively various sections of the Act, was unconstitutional, and for consequential relief. So commenced a marathon action the hearing of which occupied the High Court for nearly two months; in the result certain vital parts of the Act were declared invalid, and an injunction issued to prevent the Treasurer and the Commonwealth Bank from doing those acts which were essential to the operation of the Act.[4] The Government took

2 City of Melbourne v. Commonwealth, (1947) 74 Commonwealth L.R. 31.

3 (1947) 193 COMMONWEALTH PARL. DEB. 748-752.

4 Bank of New South Wales and Others v. Commonwealth, (1948) 76 Commonwealth L.R. 1; affirmed on appeal to Judicial Committee, [1950] A.C. 235.

no action to repeal or amend the Act; but at the election held at the end of the following year it was defeated, and was replaced by the Menzies Government which has remained in office ever since. Fulfilment of the new Government's policy, which included proposals for the amendment of the Commonwealth Bank Act, was however hampered by the fact that Labour had the numbers in the Senate. A new Commonwealth Bank Bill was introduced in the House of Representatives on 16th March 1950, went to the Senate and was amended there; the House rejected the Senate amendments, the Senate insisted on them and then postponed further consideration "until the next sitting of the Parliament." In October the Government brought in a replica of the first Bill, having its eye on section 57 of the Constitution, the "deadlock" clause; finally, on 14th March 1951, almost exactly a year after the first introduction of the Bill, the Senate decided to refer it to a select committee and to instruct the committee to report within four weeks. The Prime Minister chose to regard the Senate's action as a "failure to pass" the Bill within the meaning of section 57, asked for and obtained the dissolution of both Houses.[5] At the ensuing election very little was heard of the Commonwealth Bank Bill: But the Government's strategy was successful; though it lost five seats in the House of Representatives it still had a comfortable majority, and in the Senate it won 32 seats to the Opposition's 28. All was now plain sailing for what became the Commonwealth Bank Act 1951.

At long last the Banking Act 1947 was repealed. Much more important was the replacement, for the second time, of one-man control by a Board consisting of the Governor, the Deputy Governor, the Secretary to the Department of the Treasury, and seven others—of whom at least five must not be officers of the Bank or of the Commonwealth Public Service. The seven were to be appointed by the Governor-General; the disqualification of directors or officers of other banks contained in the 1924 Act was continued by section 7. Section 9A introduced a very important innovation: The Bank was to keep the federal Treasurer informed as to its policy; if there were an unresolved disagreement between Bank and Treasurer as to policy, the latter might insist upon the adoption of his views, and, if he did so, the Government had to take full responsibility for the consequences.

The 1951 Act was but the first instalment of the new Government's policy. By the Commonwealth Bank Act 1953 the General Banking Division of the Bank was converted into a separate and quasi-

[5] See (1950-1951) 41 ROUND TABLE 285-288.

independent statutory corporation to be known as the Commonwealth Trading Bank of Australia. It is only semi-independent because its General Manager, appointed by the Governor-General on the recommendation of the Commonwealth Bank Board, was to be subordinate to the Governor of the Commonwealth Bank who in his turn must act in accordance with any directions given by his Board. Certain amendments of the Banking Act 1945 were made by the Banking Act 1953, mainly consequential upon the severance of the Commonwealth Trading Bank from its parent organization; the new Trading Bank was put under the same obligation as other banks (a) to maintain a Special Account in the Commonwealth Bank, (b) to settle its indebtedness to other banks through cheques drawn on the Commonwealth Bank and (c) to prepare an annual statement and balance sheet for lodgment with the Commonwealth Statistician and the Commonwealth Bank. All banks (including the Commonwealth Bank in respect of its Rural Credits, Mortgage Bank, and Industrial Finance Departments) were required to prepare a statement of loans and deposits in the classifications prescribed by section 42 of the new Act.

The Government did not intend the legislation to be its final word on banking and the Commonwealth Bank, since it planned an extensive and fundamental reconstruction; but its plans were momentarily disrupted by the results of the elections held at the end of 1955—though it increased its majority in the House of Representatives it lost control of the Senate, the latter being equally divided into 30 Government supporters and 30 Labour (all varieties). Undaunted, on 24th October 1957 the Government introduced a quartette of Bills on banking into the House of Representatives, where they were duly passed by substantial majorities; all were killed, however, at the second reading stage in the Senate which divided 30 to 30.[6] But, as the split in the Labour Party showed no signs of healing, the Government could look forward optimistically to the 1958 elections. Its confidence was not misplaced; it slightly increased its majority in the House of Representatives and won enough Senate seats to have a total of 32 to the Opposition's 28. The Government lost no time in reintroducing the four Bills,[7] Parliament met for the first time on 17th February 1959, and on 25th of that month the Bills were on the notice paper; the

[6] As the President of the Senate has a deliberative, not a casting vote, when the Senate is equally divided the question before it is lost.

[7] The Federal Treasurer, the Hon. H. E. Holt, stated that the Bills were essentially the same as those which had failed to pass the Senate in 1957: (1959) 22 COMMONWEALTH PARL. DEB. (H. of R.) 375.

secon l readings began the next day, and in less than a month all Bills had passed through all stages in the House and were on their way to the Senate, with one exception which did not arrive until 7th April. On that day the second reading of the four began, and all stages were complete a week later.

The first of the four Acts, the Reserve Bank Act (No. 4 of 1959) converts the Commonwealth Bank first established in 1911 into the Reserve Bank of Australia and restricts it to central bank functions, control of the note issue, and (perhaps somewhat anomalously) the grant of rural credits through a separate department. In essence the new Reserve Bank is the old Commonwealth Bank shorn of all functions other than those just mentioned. It is to be under the control of a Board constituted as provided by the Commonwealth Bank Bill 1951, except that there are additional disqualifications of all members of the Commonwealth Banking Corporation Board and all officers of that Corporation and its subsidiaries. Its head office is to be in Sydney but not in the same building as the head office of the Commonwealth Banking Corporation or any other bank; but it may establish such branches or agencies inside or outside Australia as it thinks fit or appoint persons in or out of the country as its agents, and may itself act as agent for any bank carrying on business within or "beyond" Australia. Its accounts are to be open to inspection and audit by the Auditor-General; its annual report and financial statements, with any comment thereon by the Auditor-General, are to be tabled in both Houses. It is not liable to federal income tax, nor to any State or Territorial taxation to which the Commonwealth itself is not subject. Debts due to it by another bank, in the event of the liquidation of the latter, are to rank in priority second only to debts due to the Commonwealth itself. Finally, the provisions of the Act as to a possible conflict of opinion between the Board and the federal Treasurer as to the policy to be adopted by the former are, with slight modifications, a repetition of those which were contained in section 9A of the 1951 Act;[8] and must, if so required by the Commonwealth, act as banker for the Commonwealth: section 27.[9]

The Commonwealth Banks Act, No. 5 of 1959, sets up a Commonwealth Banking Corporation as a statutory corporation (without corporators) with full powers of control over three subsidiary statutory

[8] See *supra*, at ,

[9] It does now act as banker for the Commonwealth, and for at least one State, i.e., Western Australia.

corporations (also without any corporators), namely, the Commonwealth Trading Bank of Australia as set up by the 1953 legislation, the Commonwealth Savings Bank of Australia as set up in 1927, and the Commonwealth Development Bank, a new statutory corporation which takes over the Mortgage Bank and the Industrial Finance departments of the old, undifferentiated Commonwealth Bank. Each of these three corporations is to have a general manager who is subordinate to the managing director of the Commonwealth Banking Corporation; both must act in acordance with any directions given by the Board of the Corporation or the appropriate Executive Committee of that Board. The Commonwealth Banking Corporation Board consists of the Managing Director and his deputy (both being appointed by the Governor-General for limited periods, though made eligible for re-appointment), the Secretary to the Department of the Treasury, and eight other members appointed by the Governor-General, who will nominate two of them as Chairman and Deputy Chairman of the Board. No specified qualification or experience is required of the nominated members; but certain persons are disqualified from appointment, namely, (a) members of the Reserve Bank Board and all of its officers, (b) all officers of the Corporation itself other than its Managing Director and his deputy, (c) all officers of the Public Service of the Commonwealth other than the Secretary to the Treasury, and (d) directors and officers of a corporation engaged solely or principally in banking. There are to be three Executive Committees, one for each of the subsidiary corporations; each consists of the Managing Director of the Corporation and four other members of its Board, appointed by the federal Treasurer after consultation with the Board. The Chairman of the Board cannot be appointed to any of the Executive Committees though he may attend their meetings; the Secretary to the Treasury is debarred from appointment to the Executive Committees for the Trading Bank and the Development Bank. If the Deputy Managing Director of the Corporation is not appointed to a particular Executive Committee, he may attend its meetings as a full member when the Managing Director is not present. The Commonwealth Banking Corporation is clearly intended to perform much the same functions as any "holding" company—except that there are no shares in the subsidiaries for it to hold; through its Executive Committees it will control and co-ordinate the policies of the three "active" corporations. Each of the latter has a General Manager appointed by the Governor-General on the recommendation of the Board; no provision is made for the appointment of Deputy General Managers. The profits of the Trading Bank, but not of the Savings Bank or the

Development Bank, are subject to income tax;[10] of the net profits of the Trading Bank, that is, after provision has been made for taxation, one-half is to be paid into its Reserve Fund and the other half to the Commonwealth; the Commonwealth also takes one-half of the net profits of the Savings Bank, the other half going into that Bank's Reserve Fund; but all the net profits of the Development Bank go into its Reserve Fund. Both the Trading Bank and the Savings Bank, but not the Development Bank, may lend money to building societies and to individuals for the erection or purchase of homes or for discharging existing mortgages on homes. Loans are to be made "at the lowest practicable rates of interest" (sec. 57), for not less than five nor more than thirty-five years (sec. 65), and may be made up to ninety per cent. of the Bank's valuation of the mortgaged property or up to "the prescribed amount", whichever is the less (sec. 66). Payment of interest and of instalments of principal is to be made monthly unless the lending Bank prefers quarterly payments (sec. 67). Both the Reserve Bank Act and the Commonwealth Banks Act contain statutory provisions in regard to recruitment to their service, but for the most part these matters will be dealt with by regulations.

The Banking Act, No. 6 of 1959, replaces the Banking Acts of 1945 and 1953 but continues for the most part of the system of control and co-operation to be found in the earlier Acts. Each authorized bank—and this term now includes the Commonwealth Trading Bank —must keep with the Reserve Bank a "Statutory Reserve Deposit Account" in which it must lodge an amount ascertained in accordance with Division 3 of the Act, which in effect gives the Reserve Bank considerable control over the lending policy of the authorized banks by enabling it to specify the "statutory reserve deposit ratio" of a particular bank or for that matter of all the banks. The Reserve Bank is required to pay to all its depositor banks a uniform rate of interest on their deposits; it must also promptly refund to a bank any excess over the minimum amount which at a given moment it is required to lodge in its statutory Reserve Deposit Account. The control of the Reserve Bank is further emphasised by the express powers given to it by Division 5 of the Act, which enables the Reserve Bank to dictate the lending policy of all the tradings banks, the savings banks, and the Commonwealth Development Bank; it may specify the purposes for which advances may or may not be made, but it cannot direct that an

[10] Semble, by inference only; sec. 32 begins—"The net profits of the Trading Bank in each year, after provision for income tax, shall be dealt with as follows:—."

advance is or is not to be made to a particular customer of one of those banks. A further measure of control is to be found in Part V of the Act, which enables the Reserve Bank (with the Treasurer's approval) to determine the rates of interest payable to or by banks.

The Reserve Bank Act was not to come into operation until a date to be proclaimed,[11] and the Commonwealth Banks Act and the Banking Act both contain provisions postponing their operation until the Reserve Bank Act comes into effect. Hence the need for legislative provision in the intervening period; this appears in the Banking (Transitional Provisions) Act, No. 7 of 1959, which rounds off the new integrated scheme of Australian banking. Of this last Act certain parts (notably in regard to the Reserve Bank and the Commonwealth Development Bank) await the coming into force of the Reserve Bank Act; others operate at once, namely, Part IV—Preparatory Arrangements, which enables preliminary steps to be taken for the creation of the Commonwealth Banking Corporation and its three subsidiaries, and Part VI—Statutory Reserve Deposits, which enables the Commonwealth Bank as constituted at the time of the passing of the Act to take all necessary action and do all necessary acts in relations to statutory reserve deposits as if it were the Reserve Bank under the latter's Act. With the proclamation of the Reserve Bank Act as from 14th January 1960, the new scheme legislative dealing with the banking system of Australia is now in operation—and on trial.

IV. DEFENCE.

There was no legislation passed under this heading in 1959.

V. INDUSTRIAL RELATIONS.

Conciliation and arbitration.

The Conciliation and Arbitration Act, amended no less than thirty-six times[12] since its original enactment in 1904, was amended yet again by Act No. 40 of 1959. Under section 20 of the principal Act—introduced with the reorganised scheme set up by Act No. 44 of

11 It has been proclaimed to come into operation as from 14th January 1960.
* The reviewer is indebted to Mr. E. J. Edwards for contributing the comments on the Conciliation and Arbitration Act and also on the Commonwealth Employees' Compensation Act.

12 The compilers of the Tables published with the annual volumes seem to have lost count of the amendments, and the draftsman too—or whoever it is who was responsible for the footnote on the first page of this 1959 statute, listing the previous amendments—has overlooked a couple, No. 20 of 1950 and No. 1 of 1951.

1956[13]—the President of the Conciliation and Arbitration Commission is required to furnish to the Minister, for presentation to Parliament, annual reports on the working of the Commission and the extent to which the objects of the Act have been achieved. The recommendations made by the President, the Hon. Mr. Justice R. C. Kirby, in his first report were given statutory effect in 1958.[14] Two suggestions contained in his Honour's second report[15] were partly responsible for this 1959 amendment.

The first was prompted by the considerable increase—from three to twenty-five—in the number of disputes referred by the President to full benches of the Commission either under section 34 of the Act or under the similar provisions of section 15A of the Public Service Arbitration Act 1920-1957. The majority of these disputes—there were nineteen separate claims—arose from applications for increases in salaries for professional and "white collar" workers and were "closely related in regard to their nature or the grounds upon which they were based or in both these respects."[16] However, no two claims could be consolidated even if under the same statute—or so Mr. Justice Kirby thought. "It is unfortunate" he said "that there is no statutory power to consolidate the hearing of any two or more cases coming before the Commission irrespective of the Act pursuant to which the cases come before the Commission."[17] A claim under the one statute could certainly not be consolidated with a claim under the other; the constitution of the Commission under each is different.[18] Consequently the full bench list was overburdened. To help to overcome this, a new section, section 44A, was introduced into the Conciliation and Arbitration Act, and section 15A of the Public Service Arbitration Act[19] was amended. The new provisions enable the President—when full benches of the Commission under either of the Acts are hearing appeals or dealing with matters referred to—to direct the Commission in joint session to take evidence and hear argument (though not, of

13 Reviewed in 4 U. WEST. AUST. ANN. L. REV. 132.

14 No. 30 of 1958, reviewed in 4 U. WEST. AUST. ANN. L. REV. 516.

15 PARLIAMENTARY PAPERS (Commonwealth) No. 13 [Group H]—F3138/59.

16 *Ibid.*, at 6.

17 *Ibid.*, at 7.

18 The Arbitrator is necessarily a member of the Commission constituted under sec. 15A (1) of the Public Service Arbitration Act 1920-1957. He cannot be a member of the Commission under sec. 34 of the Conciliation and Arbitration Act 1904-1958.

19 No. 41 of 1959 makes the necessary amendments to the Public Service Arbitration Act.

course, to make determinations). But the President's power to do this depends on the condition that "the Commission is not constituted by the same persons in relation to each of those matters" (sec. 44A (2) (c)). Since the President had deliberately nominated the same members to each of the benches dealing with the fourteen claims under the Conciliation and Arbitration Act, and as each of the benches dealing with the remaining five claims under the Public Service Arbitration Act had been the same, the new provisions do not completely overcome what the President saw as the difficulty. He will be able to direct joint sessions where similar claims arise under the separate Acts, but there is no more power than there was before enabling consolidation where the bench is constituted of the same members.

The President also considered that in referring disputes to a full bench he should be empowered to direct at what stage of the hearing the matter should be brought to the Commission, thus permitting the continued hearing before the Commissioner concerned and so saving time. To give effect to this recommendation, a new subsection (7)[20] has been added to section 34 of the Act giving the President, before a full bench has been constituted for any particular matter and "after taking account of the views expressed by the parties", the same powers the Commission has under section 43, except that he may authorize only a presidential member of the Commission or a Commissioner to take evidence on behalf of the Commission, and not "any person" as the Commission may do. The opportunity was taken at the same time of ensuring that part only of a dispute may be referred to the Commission and empowering the Commission on a reference to "have regard to any evidence given and any arguments adduced in relation to the dispute or the part . . . before the Commission commenced hearing" (subsec. (4)).[21]

The provisions which deal with offences in relation to the Commission (sec. 182) and contempt by witnesses in relation to the Court or Commission (sec. 184) now apply in relation to persons authorized to take evidence on behalf of the Commission.

Apart from the amendments prompted by the President's report, the Act was also amended to provide for refunds to organizations when they incur additional expenses as the result of officially conducted

[20] A similar amendment is made to sec. 15A of the Public Service Arbitration Act.

[21] The new subsection (10 added to sec. 15A of the Public Service Arbitration Act is in similar terms.

elections. A new subsection (6) added to section 170A empowers the Minister, on the application of the organization concerned, to determine what amount of such excess should be borne by the Commonwealth. This section has also been amended and now empowers the Industrial Registrar to arrange for the completion of elections after a person who had commenced them had died or otherwise become unable or unqualified to continue.

There would appear to be little to object to in what the Government was seeking to achieve, but Mr. Killen's statement during the second reading debate in the lower House, "I should have thought that the legislation would have created hardly a ripple on the political scene",[22] was surely optimistic and ignores the history of the legislation with its deep-rooted party conflict. The Opposition objected stoutly—though to no material effect—to almost every one of the proposals in the amending bill. Their attitude can perhaps best be summed up in the statement of Mr. Clyde Cameron, made with reference to the refund of election expenses but equally applicable to the other objections, ". . . our support would be tacit endorsement of the principle . . ."[23] And so on principle, it would seem, even improvements to a measure which is itself objectionable must be opposed.

Commonwealth employees' compensation.

The benefits payable under the Commonwealth Employees' Compensation Act 1930-1956 were increased considerably by Act No. 98 of 1959, the increases in weekly payment benefits being made applicable from the date of the commencement of the amending Act to those persons already in receipt of compensation. The Opposition conceded that the amending Bill introduced considerable improvements. Mr. G. Whitlam, after analysing the benefit provisions of the several State Acts (which analysis the Minister for Labour and National Service agreed was correct)[24] and indicating their "divergencies and anomalies", commented; "By and large, one can say that this measure will give greater monetary benefits than any act except the New South Wales act or, I believe, the Tasmanian act which was passed this year."[25] This did not however prevent strenuous criticism during the second reading debates and several amendments were proposed during the committee stage, though none succeeded.

22 (1959) 23 COMMONWEALTH PARL. DEB. (H. of R.) 2089.
23 *Ibid.*, at 2120.
24 (1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 3145.
25 *Ibid.*, at 3142.

Mr. Whitlam also referred[26] to the case of *Commonwealth v. Okenden*,[27] suggesting that "as a result of this decision the commissioner will have to refuse compensation under this act in many cases in which, under all the State acts, compensation would be payable."[28] It is true that the decision does not affect a claimant in New South Wales or Victoria, but this is not so in all the States. In Western Australia, in any event, the right to compensation is circumscribed in the same way as it is under the Commonwealth statute. It can hardly be denied, however, that there is a clear case for uniformity in workers' compensation legislation.

The Amending Act also makes good an omission by making express provision limiting the time for taking proceedings in cases of claims arising out of diseases. The notice in such cases is to be served as soon as practicible (1) after the employee became aware of the disease, or (2) after his death as the case may be, and the claim must be made within six months of such awareness or death. The calculation of the time for appeals too has been changed. The thirty days are now to be counted from the receipt of the determination in question by the person affected and not from the making of the determination.

The Seamen's Compensation Act 1911-1954 was amended by Act No. 99 of 1954 mainly for the purpose of making corresponding increases in seamen's compensation payments. At the same time the provisions in the Act relating to the time for taking proceedings were clarified and new and more extensive provisions were substituted for the taking of depositions at overseas ports.

VI. TRADE, COMMERCE AND INDUSTRIAL PROPERTY.

Export Payments Insurance Corporation.

The Export Payments Insurance Corporation was established in 1956[29] to enable Australian exporters to insure against risk of loss arising from non-payment of their overseas accounts. Since that date the volume of business available to the Corporation had reached a level at which the existing liability limitation and capital of the Corporation were inadequate. Accordingly, in order to enable it to meet

[26] *Ibid.*

[27] (1955) 32 A.L.J.R. 235, [1958] Argus L.R. 772. See also Commonwealth v. Butler, (1958) 32 A.L.J.R. 320, and Commonwealth v. Hornsby, (1960) 34 A.L.J.R. 27, [1960] Argus L.R. 456.

[28] (1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 3144.

[29] By the Export Payments Insurance Corporation Act (No. 32 of 1956).

the demands for its services, and taking into consideration future requirements,[30] the Export Payments Insurance Corporation Act 1959[31] increases the maximum liability of the Corporation from £25,000,000 to £50,000,000 and the working capital from £500,000 to £1,000,000.

Under section 16 of the principal Act the maximum cover of 85 per cent., which the Corporation could provide, applied irrespective of the nature of the cause of loss. This has now been amended by the Export Payments Insurance Corporation Act (No. 2) 1959.[32] In the case of ordinary "commercial" risks, such as the insolvency of the buyer or the failure of a solvent buyer to pay through protracted default, the maximum cover remains at 85 per cent., as this is a matter against which the exporter himself can be expected to guard by the exercise of greater prudence. However, in the case of all other "political" risks, such as exchange transfer blockages, new or varied import restrictions, war or revolution, against which the exporter is unable to guard, the maximum cover is increased to 90 per cent. in the pre-shipment period and 95 per cent. in the post-shipment period in respect of contracts relating to the sale or export of goods. All risks associated with Government buyers or Government authorities are to be treated as "political" risks. When the Corporation's policies do not relate to the sale or export of goods[33] the maximum cover is 85 per cent. in the case of "commercial" risks and 95 per cent. in the case of "political" risks.

Canning-Fruit Industry.

Legislation was passed during the year[34] to give effect to a scheme prepared by the canning-fruit industry to promote the sale of Australian canned fruit both overseas and in Australia. A levy, at the maximum rate of ten shillings per ton and payable by the supplier of fruit to a cannery, is imposed on apricots, peaches, and pears accepted by canneries as being of canning quality or for use in the production of canned fruit. The collection of the charge is the responsibility of the Commissioner for Taxation, with whom all persons engaged in the

30 *Cf.* footnote 45 *supra.* It may be that there is a valid distinction.

31 No. 1 of 1959.

32 No. 101 of 1959.

33 For example, where the Corporation issues stockholding, processing, and servicing guarantees.

34 Canning-Fruit Charge Act (No. 81 of 1959); Canning-Fruit Charge (Administration) Act (No. 82 of 1959); Canned Fruit (Sales Promotion) Act (No. 83 of 1959); Canned Fruit Export Control Act (No. 84 of 1959).

production of canned fruit are required to register. The amount of the levy is deducted by the canner from the sums payable to the supplier and is paid to the Commissioner.[35]

An Australian Canned Fruit Sales Promotion Committee, representative of the industry, is established with authority to utilize the funds derived from the levy for the promotion of the sales of canned fruit in Australia and overseas. The constitution of the Australian Canned Fruits Board is amended to include a representative of the growers of canning-fruit, so enabling the fruit-growers to have a direct voice in the affairs of the Board.[36]

Life insurance.

Three minor amendments were made to the Life Insurance Act 1945-1957.[37] The first permits life insurance companies to pay claims without production of probate or letters of administration where the amount insured does not exceed £1000, instead of £500 as in the past. Similarly a special policy may now be issued, in place of one which has been lost, without the expense of advertising the loss, where the sum insured does not exceed £500, instead of £200 as previously. Finally, a small increase is provided in the minimum rates of surrender value as provided by the Act.

Airports.

The purpose of the Airports (Business Concessions) Act 1959[38] is to encourage the provision of facilities at airports to meet the needs

35 Sec. 14 (1) of the Canning-Fruit Charge (Administration) Act provides that amounts payable are debts due to the Commonwealth. Subsec. (2) provides that in any proceedings for the recovery of such amounts, a statement or averment in the complaint, claim or declaration is evidence of the matter so stated or averred. The history of this provision has been traced elsewhere (4 U. WEST. AUST. ANN. L. REV. 524) and it has been explained that it originated perhaps with some justification in the Customs and Excise legislation. However, it has since then been extended first to one Act and then to another on the plea that it introduces nothing new but is a common-form provision in other similar legislation. Now it is extended to the collection of the Canning-Fruit Charge, in which it can have no possible justification. So, a provision which began life as a grudging exception to normal principle, dictated by necessity, has now matured, whether through inadvertance, apathy or sheer irresponsibility, into a broad principle that whenever the Commonwealth as plaintiff seeks to recover moneys which may be due under a statute, the ordinary burden of proof is reversed. Why should the Commonwealth be a privileged litigant?

36 Opposition amendments to add a trade union representative to both the Committee and the Board were defeated: (1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 2975-2982.

37 By the Life Insurance Act (No. 93 of 1959).

38 No. 89 of 1959.

of the travelling public, and to develop the business potential of airports in order to obtain a greater economic return from the buildings and land. Prior to the Act, the difference between the annual cost to the Commonwealth of maintaining and operating airports and the recoupment from air navigation charges, taxes on aviation fuel, and rentals on premises, was approximately £7,000,000. The anticipated annual revenue from business concessions as a result of this Act is £160,000 by the end of 1960 and £500,000 within a few years.

The Act applies to aerodromes owned by the Commonwealth and operated in pursuance of the Air Navigation Act and regulations made thereunder. It will also apply to any part of any military aerodrome which has been made available for civil aviation. Under the Air Navigation Act 1920-1950 the control of aerodromes was vested in the Director-General of Civil Aviation, except that insofar as any business concessions would require the granting of leases or licences the Department of the Interior had the primary statutory responsibility. Under the 1959 Act the control of leases and licences and the granting of business concessions at airports will vest exclusively in the Department of Civil Aviation.

Section 6 of the Act gives the Minister an unfettered discretion to grant leases and licences within airports on such terms and conditions and subject to the payment of such rent or other consideration as the Minister thinks fit. Similarly, section 8 permits the Minister to grant an authority to engage in business activities at airports for such periods, on such terms and conditions, and for such consideration as the Minister thinks fit. Such authority may be included in or granted in relation to leases and licences. Section 7 prohibits the sale or supply of goods or services within an airport or the carrying on of any business except in accordance with the terms of an authority issued under the Act,[39] but this does not apply to business activities connected

[39] The prohibition on the supply of services is probably sufficiently wide to apply to taxi-drivers delivering or collecting people at an airport and even to ordinary private individuals using their own private transport to meet or deliver their friends, unless the phrase "within an airport" can be construed as meaning "exclusively within." Even if this construction is permissible, carrying a passenger's baggage without first obtaining an authority would probably be an offence. The Minister gave an undertaking in the Senate (See (1959) 16 COMMONWEALTH PARL. DEB. (Senate) 1623) that if the point were ever raised he would issue a blanket authority to taxi-drivers and private individuals at all airports. Presumably the point would be raised by a prosecution of some taxi-driver or private individual, so that it is rather late then to consider issuing an authority; and in any event it is extremely doubtful whether section 8 authorizes a blanket authority. Is it

directly with the operation or maintenance of aircraft or the promotion of airline business, such as the supplying of aviation fuel or the catering for meals to be consumed on aircraft. Section 9 provides that the holder of an authority under the Act, and his servants or agents, may act in accordance with that authority without having to obtain any other authority, licence, permit or registration.[40] This in fact entitles the Minister to exempt such persons from the licensing or trading laws of a particular State, although the conditions of the authority may require the holder to obtain any licence or permit required by State law. The Minister may specify in the authority the days and times at which the authority may be exercised and may permit the conduct of a business outside normal trading hours where this is necessary to meet the needs of the travelling public. However, subsection 3 of section 9, inserted as the result of an amendment introduced by Senator Wright,[41] requires that any authority to sell or supply intoxicating liquor shall be subject to conditions (as to the days and times at which such liquor may be sold or supplied) corresponding to those that apply under the law of the State or Territory in which the airport is situated in relation to a licence under that law of the kind that most nearly corresponds with the authority under the Act. Other requirements, prohibitions or restrictions of the law of the State or Territory in respect of such a licence must be complied with "as nearly as possible." Any authority given under the Act must contain terms and conditions necessary for the purpose of preventing the sale or supply of goods or services to persons resorting to the airport solely or principally for the purpose of obtaining such goods or services outside normal trading hours.

The maximum period for a building lease under this Act is 49 years, and for any other lease, licence or authority 21 years, all such periods to include a period for which the lease, licence or authority is renewable under any option to renew.

Section 15 authorizes the Minister to delegate all or any of his powers under the Act to any person or persons, except his power of delegation and the power to authorize the sale or supply of intoxicating liquor.[42]

too much to ask that the Commonwealth might draft its statutes with precision to achieve the desired result and no more, instead of relying on ministerial assurances to limit the vagueness and generality of its legislation?

40 This seems to invite challenge on constitutional grounds.

41 (1959) 16 COMMONWEALTH PARL. DEB. (Senate) 1629.

42 But is it necessary for sec. 15 (2) to provide that the delegate may exercise any power or function so delegated? And even if it were necessary so to

VII. PRIMARY PRODUCTION.

There was no legislation passed under this heading in 1959.

VIII. INTERNATIONAL ENGAGEMENTS, ETC.

International Wheat Agreement.

Parliamentary approval for the acceptance of the International Wheat Agreement 1959 was given by the International Wheat Agreement Act 1959.[43] The new Agreement provides for a further extension for three years of the 1956 Agreement, with some variations in its operation.

The object of the Agreement is to secure that a significant proportion of wheat entering international trade will be bought and sold at prices within a prescribed range. In the past this has operated through a system of guaranteed quotas for both exporters and importers, which has worked well while the demand for wheat was strong. However, due to the depressed state of the wheat market in recent years, an entirely new system of rights and obligations has been devised. Member importing countries will now undertake to buy from member exporters, at prices at or above a prescribed minimum, not less than a stated percentage of their total commercial imports. These percentages vary from country to country and range from 30 to 100 per cent. Each importing country will be entitled to purchase from member exporters, at prices not higher than the maximum, a quantity of wheat up to but not exceeding its average commercial imports from member exporters over a previous five-year period. Exporting countries undertake the obligation to provide these quantities at the maximum price.

Civil aviation.

The Civil Aviation (Carriers' Liability) Act 1959[44] is intended to give effect to the Hague Protocol amending the Warsaw Convention on International Carriage by Air.

The 1929 Warsaw Convention established uniform international rules in respect of the liability of international air carriers to passengers for death or injury and loss of baggage, and to consignors of goods. It applied to all international carriage of persons, baggage or cargo

provide, is it necessary to restrict the manner in which the delegate may exercise the powers by confining it to a manner "in accordance with the instrument of delegation?"

43 No. 69 of 1959, repealing the International Wheat Agreement Act 1956.

44 No. 2 of 1959.

by aircraft for reward, and to gratuitous carriage by air performed by an air transport undertaking. The Hague Protocol was adopted by 44 States in 1955 and comes into force when it has been ratified by 30. Until then Australia remains bound by the Warsaw Convention, and even after that time Australia may wish to remain a party to the unamended Convention in relation to those States which have not ratified the Protocol when it comes into force. Accordingly, while section 4 of the Act repeals the Carriage by Air Act 1935, Part III of the Act in effect continues to apply the Warsaw Convention until a date to be fixed by proclamation.

The Hague Protocol clarifies a number of legal difficulties encountered during 25 years' experience under the Warsaw Convention and simplifies outmoded provisions which no longer accord with current practices in connexion with the issue of passenger tickets, baggage checks, and air waybills.

Article 17 of the Warsaw Convention imposed strict liability on the carrier in respect of the death of or bodily injury to a passenger, and Article 20 provided a defence to the carrier that he and his agents had taken all necessary measures to avoid the damage, or that it was impossible to take such measures. The Hague Protocol does not affect these Articles, but it increases the limit of liability of the carrier in respect of such death or injury from £3,700 to approximately £7,400 per passenger. As before, under Article 25 this limit will not apply where the damage resulted from the wilful misconduct of the carrier or of his servants or agents acting within the scope of their employment. Article 25A, added by the Hague Protocol, provides that if an action is brought against a servant or agent of the carrier, who proves that he was acting within the course of his employment, he shall be entitled to avail himself of the limit of liability, and that the aggregate of amounts recovered from a carrier and his servants and agents shall not exceed £7,400.

Part IV of the Act applies these principles, with certain modifications, to all domestic carriage by air for reward, other than purely intra-State carriage. Previously it had been the practice of all domestic airlines other than Trans-Australia Airlines to contract out of liability in respect of damage suffered by passengers or consignors of goods. Section 32 now renders null and void any agreement tending to exclude such liability of a carrier or to fix a limit of liability lower than that prescribed by the Act. Carriers will therefore now be strictly liable for the death of or injury to a passenger up to a prescribed limit of

£7,500 or such higher sum as is specified in the contract of carriage.[45] Further, in order to remove any uncertainty as to passengers' rights, carriers will not be able to rely on the defence provided by Article 20 of the Convention. The measure was criticised in the Senate[46] on the ground that this limitation of liability will apply even though the death or injury is caused by the carrier's negligence, recklessness or wilful misconduct. It is not easy to understand the Government's objection that to waive the limit of liability when negligence or misconduct was proved would combine two fundamentally different principles of liability, namely, absolute liability with a prescribed limit and unlimited liability based on proof of negligence, and that this would cause confusion and expensive litigation.[47]

This part of the Act also contains detailed provisions concerning the liability of domestic carriers for the loss of or damage to passengers' baggage. Section 29, which imposes strict liability for such loss or damage during carriage by air, draws a distinction between baggage which remains in the passenger's possession and registered baggage. In the former case, the carrier is liable only for damage which occurs between embarkation and disembarkation, and his liability is limited to £10 in respect of the baggage of any one passenger. In the latter case, his liability continues while the baggage remains in the custody of the carrier, but no longer than 12 hours after the baggage is made available for collection by the passenger in accordance with the ticket, and the limit of liability is £100 in respect of the baggage of any one passenger. In respect of all types of baggage, the carrier has the same defence as international operators, that all necessary measures had been taken to avoid the loss or damage or that it was impossible to take such measures. In respect only of baggage remaining in the possession of the passenger, section 29 (4) raises a presumption that any loss or damage was caused by the negligence of the passenger.

Other sections of the Act deal with questions of contributory negligence, the jurisdiction of the High Court, and the dependents[48] who may claim in respect of the death of a passenger. Section 15, in

45 See too Australian National Airlines Act 1945-1959, sec. 66, and *supra*, at 162.

46 By Senator McKenna and Senator Wright: (1959) 14 COMMONWEALTH PARL. DEB. (Senate) 325-327, 398-400, 457-461, 472-489.

47 *Per* Senator Paltridge, *ibid.*, at 400. Nor is it easy to understand the relevance of the Minister's argument that such an amendment would seriously handicap Qantas which flies through 26 different countries; and if the desirability of uniformity is to be stressed, surely uniformity is best achieved by applying the whole of the Convention including Article 25 to domestic air carriage.

48 It is a happy thought that, as a result of section 12 (5), a passenger's children are deemed to be his grandparents, or his wife to be his husband.

respect of international carriage, and section 38, in respect of domestic carriage, provide that in assessing damages under the Act there shall not be taken into account any sums paid or payable under a contract of insurance,[49] or out of superannuation or similar funds. Similarly, no pension or other similar benefit is to be taken into account, nor is any reduction of damages to be made in respect of any insurance premiums which would have become payable but for the death of the insured.[50] Also, in the case of death, there will not be taken into account any acquisition, by a spouse or child of the deceased, of an interest in a dwelling house used at any time as the home of that spouse or child or of the household contents of such a dwelling house.[51]

Sections 12 (8) and 35 (8) provide that, in awarding damages, the court or jury is not limited to the financial loss resulting from the death of the passenger. If this is intended to authorize the award of a *solatium* it would surely have been better to say so; or alternatively, if it is limited to damages in respect of loss of expectation of life, that could and should have been stated.

International Monetary Agreements.

Parliamentary approval was given by the International Monetary Agreements Act 1959[52] for an increase of 50 per cent. in Australia's subscription to the International Monetary Fund and for doubling Australia's subscription to the capital stock of the International Bank for Reconstruction and Development. All 68 member countries of each institution had agreed to make similar increases in their subscriptions.

IV. FEDERAL TERRITORIES.

Northern Territory.

The Northern Territory Representation Act 1922-1949 has been

[49] This still leaves open the problem raised in Green v. Russell, [1959] 2 Q.B. 226.

[50] ". . . if he had lived after the time at which he died." Why not simply ". . . if he had not died." Is there any basis, anyhow, for the suggestion that such premiums would be taken into account by way of reduction of the damages if this section were not included?

[51] This was presumably intended to give effect to the decision of the Court of Appeal in Heatley v. Steel Co. of Wales Ltd., [1953] 1 All E.R. 489. In fact it goes much further than that decision did. The provision was added to the Bill during the Committee stage in the House of Representatives after lengthy debate in both Houses: (1959) 22 COMMONWEALTH PARL. DEB. (H. of R.) 926-927; (1959) 14 COMMONWEALTH PARL. DEB. (Senate) 422-424, 444-451, 489-494.

[52] No. 33 of 1959.

amended[53] to give certain voting rights to the member for the Northern Territory in the House of Representatives. When provision was first made for the election of a member to represent the Northern Territory in 1922, he was given no right to vote in the House. In 1936 he was given a right to vote on any motion for the disallowance of an ordinance of the Territory, but since the establishment of a Legislative Council for the Territory in 1947 the power of disallowance has resided in the Governor-General, so that since 1947 the member has had no voting rights. It was urged on the Government that the member for the Northern Territory should now be given full voting rights. However, the Government took the view that as the number of electors in the Northern Territory at the last election was only 8,000, whereas the number of voters in other electorates ranged from 31,000 to 65,000 with an average of 44,136, it would be unjust to give the same voting power to the representative of the Territory as to the representatives of other States.[54] The 1959 Act therefore provides that the member for the Northern Territory will be entitled to vote on any proposed law that relates solely to that Territory, or any motion for disallowance of regulations made under an ordinance of the Territory.

The Northern Territory (Administration) Act 1959[55] introduces a number of measures of constitutional reform in the Territory. The Legislative Council, which previously consisted of the Administrator, seven official nominated members, and six elected members, will now consist of the Administrator, six official nominated members, three non-official nominated members, and eight elected members. The five electoral districts of the Territory are increased to eight, each returning one member. A Distribution Committee of three is established to determine the boundaries of the electorates. The Governor-General and the Administrator are now empowered, as an alternative to disallowing or withholding assent from an ordinance, to return the ordinance to the Legislative Council with suggested amendments.

53 By the Northern Territory Representation Act (No. 27 of 1959).

54 There may be much truth in the words of the Minister (although the possible applications of the dictum are somewhat startling): "An active, determined and intelligent member, no matter from what part of Australia he comes, can achieve perhaps more by his work as a member in the chamber and out of it than he could achieve as one vote among many. His influence and his power for good are by no means limited to his presence at divisions": (1959) 22 COMMONWEALTH PARL. DEB. (H. of R.) 866. It does, however, appear to the reviewer to be a straight issue whether, through numerical weakness, the electors of the Northern Territory should be over-represented or not represented at all except on matters relating exclusively to the Northern Territory.

55 No. 34 of 1959.

Ordinances from which assent has been withheld or which have been disallowed are to be tabled in both Houses of Parliament as well as ordinances which have received assent.

An Administrator's Council is established to share the functions of the executive within the Territory. It will consist of the Administrator, two official members of the Legislative Council, and three other members of the Legislative Council none of whom shall be official members and of whom at least two shall be elected members. The members will be nominated by the Administrator. They will advise the Administrator on any matter referred to them by the Administrator and on any other matter referred to the Administrator-in-Council by ordinances of the Legislative Council. It is intended that various statutory powers, such as regulation-making powers, will in future be exercisable by the Administrator-in-Council.

Australian Capital Territory.

The Australian Capital Territory Representation Act 1959[56] enables the member for the Australian Capital Territory in the House of Representatives to vote on any proposed law which relates solely to the Australian Capital Territory, on any motion for the disallowance of an ordinance of the Territory, or a regulation made under such an ordinance, and on a motion for the disallowance of a modification or variation of the plan of the lay-out of the City of Canberra. The Australian Capital Territory Representation Act (No. 2) 1959[57] authorized the member to vote also upon a motion to disallow part of an ordinance or regulation of the Territory.

The Housing Loans Guarantees (Australian Capital Territory) Act 1959[58] enables the Commonwealth to guarantee loans raised by co-operative building societies for home building in the Australian Capital Territory. It also makes provision for Commonwealth guaran-

[56] No. 31 of 1959. This is similar in effect to the Northern Territory Representation Act 1959 *supra*. The number of electors in the Australian Capital Territory at the last election was 22,000.

[57] No. 91 of 1959, which was consequential upon the Seat of Government (Administration) Act 1959 (*supra* at 158) which extended the power of either House to disallow part of an ordinance or regulation as well as the whole.

[58] No. 46 of 1959. The Housing Loans Guarantees (Northern Territory) Act (No. 47 of 1959) made similar provisions in respect of the Northern Territory. Section 5 of each Act contains the usual provision authorizing the Treasurer to delegate his powers under the Act "so that the delegated powers and functions may be exercised and performed by the delegate in accordance with the instrument of delegation." Will the draftsman not pause to consider the meaning of the verb "to delegate?"

tees of loans raised by the Housing Commission for the Territory, the validity of the guarantee provision in the existing ordinance of the Territory having been questioned.

X. STATUS AND SOCIAL SERVICES.

Aliens.

The Aliens Act 1959[59] abolishes the issue of certificates of registration to aliens coming into the country. Previously, aliens who entered Australia and who indicated their intention to remain in Australia for more than 60 days were required to register and to be in possession of a certificate of registration. However, it was decided that the application for registration would itself be sufficient documentation and accordingly certificates will no longer be issued. Other requirements of the principal Act remain unaltered.

Nationality and citizenship.

Several amendments to the nationality and citizenship laws are made by the Nationality and Citizenship Act 1959.[60] First of all, as a consequence of the attainment by Singapore of the status of a separate member of the British Commonwealth, recognition is given to the citizens of that State as British subjects for the purpose of Australian nationality laws.[61] Secondly, the Act removes the restriction on the right of certain Australians abroad to have the births of their children registered at Australian consulates in order to enable the children to become Australian citizens by descent. Section 11 (2) of the principal Act, with the object of reducing the possibilities of "dual citizenship", prohibited such registration in cases in which the father was not ordinarily resident in Australia at the time of the birth, and the birth took place in a British Commonwealth country and the child became at birth a citizen of that country and therefore a British subject. This restriction was regarded as unsatisfactory, firstly because it is frequently difficult to determine whether the father is ordinarily resident in Australia, and secondly because it produced the anomaly that children born in foreign countries of Australian parents could readily secure Australian citizenship while those born in British countries could not do so. Accordingly the subsection is now repealed so

59 No. 32 of 1959.

60 No. 79 of 1959.

61 This had in fact already been done by regulation under section 7 of the principal Act (as amended by the Nationality and Citizenship Act 1958) declaring Singapore a country to which the Act applied; but it was thought desirable that Singapore should be named expressly in the Act.

that Australians may register the births of their children wherever they may be born and so secure Australian citizenship for them.

The Act also simplifies the process of naturalization by deleting the requirement of section 15 (5) of the principal Act that as a general rule certificates of naturalization should not be granted until six months after the date of application, irrespective of the length of the applicant's residence. Further, the Act dispenses with the necessity for keeping duplicate copies of certificates of registration and naturalization, and a new section 46A, replacing section 46(3), provides that proof of a certificate in legal proceedings may be made by production of an evidentiary certificate compiled for that purpose by the Department from its own records. Section 42 (c) of the principal Act, which secured the public's right of direct access to departmental records of certificates issued, has been repealed so far as it gave the public this right. It was thought that this right was undesirable on two grounds: Firstly, there was a danger that it might be used for improper purposes particularly in connexion with persons who had come to Australia from totalitarian countries, and secondly, the records of the Department of Immigration could not be kept in proper order if members of the public could handle them at will.[62] However, the new section 46A enables any person to obtain an evidentiary certificate, in respect of any person's acquisition of citizenship, which will show the name, date of acquisition of citizenship, and former nationality of the person concerned. It will not show the address of or give any further information relating to that person. Comprehensive information will be made available if the person seeking the certificate is the person to whom it relates, if the information is required for legal proceedings, or if "the authorized officer is satisfied that . . . there are other special circumstances that justify the inclusion of those particulars."[63]

The annual statistical return, which the Minister is required by section 42 (d) to furnish to Parliament in respect of the granting of certificates of registration or naturalization, will in future indicate, not the number of certificates granted, but the number of persons who have acquired citizenship. A return of the number of certificates

[62] Oh for an Australian Ombudsman! While there may be considerable merit in the first reason, the second appears to be a most dangerous argument to put forward on behalf of bureaucracy. In the House of Representatives the Minister referred only to the first of these grounds ((1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 2211), but in the Senate both grounds were put forward by Senator Henty ((1959) 16 COMMONWEALTH PARL. DEB. (Senate) 1414).

[63] Section 46A (5) (c).

was thought to be misleading, because, in the case of a certificate of naturalization, this is not effective to confer citizenship upon a person over the age of 16 unless and until that person takes the oath of allegiance.

Social Service benefits and pensions.

The Social Services Act 1959[64] provided for an increase of seven shillings and sixpence per week in the maximum rates of age, invalid, and widows' pensions. It also extended the eligibility for these pensions and for maternity allowances to include all aboriginal natives other than those who, in the opinion of the Director-General, are nomadic or primitive. The Director-General may authorize payment of the pension to another person, institution or authority on behalf of the pensioner, where this is desirable.

Section 17 (3) of the Social Services Act, which protects the Department of Social Services from being required to produce the records of the Department in a court, is now expressly extended to include all the documents of the Department, as the result of a decision in New South Wales that the protection of the section extended only to claims and the determination of claims. It was felt that this extension was justified because of the confidential nature of the information collected by the Department.

The Repatriation Act 1959[65] increases various repatriation benefits and provides certain additional benefits and facilities for medical treatment in certain cases. The Seamen's War Pensions and Allowances Act 1959[66] makes corresponding alterations to the Seamen's War Pensions Act.

The Superannuation Act, which provides a contributory scheme of retirement benefits for Commonwealth employees and their dependants, has been amended by the Superannuation Act 1959.[67] As a result of a recent investigation of the fund by the Commonwealth Actuary, which disclosed a surplus, a new table of pension entitlement is provided for contributors to the superannuation fund. In effect, the new table restores the proportion of pensions to salaries that was established in 1954[68] but which had declined since that date due to salary changes. There is no alteration to the basis of financing pensions.

64 No. 57 of 1959.
65 No. 58 of 1959.
66 No. 59 of 1959.
67 No. 102 of 1959.
68 By Act No. 11 of 1954.

A new principle introduced by the Act, in respect of future but not existing contributors, makes full pension entitlement dependent upon 20 years' prospective service. The widow's pension is increased from one-half to five-eighths of the pension payable to the contributor.

A comprehensive revision of retirement benefit for members of the Defence Forces is provided by the Defence Forces Retirement Benefits Act 1959.[69]

National health.

The National Health Act 1959[70] was passed to deal with a number of problems arising out of the growth and development of the National Health scheme.

As from 1st January 1960, as part of a plan agreed with the registered medical benefit funds, medical benefits for many surgical operations and other costly medical services are increased. It is now therefore possible to provide for Commonwealth and fund benefits up to a maximum of £60 for major operations instead of £30 as in the past.

The Act also relieves medical benefit organizations from the obligation to transfer contributors for medical benefits to the special account on attaining the age of 65.[71] Owing to the cover provided by the pensioner medical services, the over-65 contributors had not drawn unduly heavily on medical benefits funds, so that the organizations were prepared to carry this class of contributors in their ordinary accounts. This Act therefore enables them to do so. It does not affect the contributors, who will still receive the full benefits to which they are entitled. The requirement that contributors should be automatically transferred to the special account on attaining the age of 65 is retained for hospital benefits.

Under section 82E (h) of the National Health Act 1958, payment of special account hospital benefit was not extended to patients in convalescent homes, benevolent homes, rest homes or institutions that provided accommodation principally for permanent patients, as such institutions generally did not provide hospital treatment at a standard equivalent to that of public general hospitals. Nevertheless the Commonwealth has always accepted patients in such homes as hospital

69 No. 103 of 1959.

70 No. 72 of 1959.

71 The "special account" procedure was introduced by the National Health Act 1958; see 4 U. WEST. AUST. ANN. L. REV. 537-538.

patients for the purposes of Commonwealth hospital benefit. It was felt that the exclusion of these institutions by the 1958 Act was too restrictive, and accordingly a new formula has been adopted by the 1959 Act which excludes from the plan benevolent homes, convalescent homes, homes for aged persons and rest homes, but not institutions providing accommodation principally for permanent patients. Accordingly, as from 1st January 1960 special account benefit is payable to patients in institutions conforming more closely to the conception of true hospitals, and also to individual patients in homes not recognised as entitled to special account benefits if they can establish that they are suffering from an illness or injury of a type requiring treatment of the kind provided in public hospitals and that the treatment they are in fact receiving is of a standard substantially equivalent to that which they would have received in public hospitals.

A steady increase in prescriptions against the pharmaceutical benefits scheme had rendered the finances of the scheme unstable[72] and made various changes necessary. The pensioner scheme is not affected by these changes and the full range of drugs and medicines will continue to be supplied free of charge to social service pensioners and their dependants. However, a number of alterations have been made in the general scheme. The list of drugs available under the general scheme has been widened to cover practically the same comprehensive range as the pensioner scheme, but a charge of five shillings (or the price of the drug if less than five shillings) will be made to persons other than pensioners for drugs prescribed by doctors from this general list. The range of drugs is now broadly the same as that covered in the British Pharmacopoeia,, with such additions as are recommended by the Pharmaceutical Benefits Advisory Committee. The Act authorizes chemists to make a charge of five shillings on each prescription and provides that it will be a condition of recognition as an approved chemist under the Act that he follow a practice of doing so for all prescriptions except those in respect of the supply of drugs or medicines to a pensioner.[73]

A consequential amendment is made to the Therapeutic Substances Act 1953,[74] which provided that amendments to the British

[72] The cost of the scheme in 1951-1952 was approximately £7,000,000. In 1958-1959 it had risen to £21,000,000 and was soon expected to reach £30,000,000.

[73] This last provision was intended to protect private chemists against any unfair competition from friendly society dispensaries.

[74] By the Therapeutic Substances Act 1959 (No. 73 of 1959).

Pharmacopoeia should come into operation in Australia on the same date as they come into operation in England. However, as every amendment affects the list of pharmaceutical benefits, each change involves considerable administrative and printing work. Therefore, in order to facilitate these arrangements, future amendments to the British Pharmacopoeia are to come into operation on a date to be fixed by notice published in the Gazette. This applies for the purposes of the pharmaceutical benefits provisions of the National Health Act and also for the standards of purity provisions of the Therapeutic Substances Act. It also applies to amendments to the British Pharmaceutical Codex as well as to the Pharmacopoeia.

XA. MATRIMONIAL CAUSES.

Divorce by judicial process was introduced in modern times, in England by the Matrimonial Causes Act of 1857, and during the decade 1860-1870 the Australian Colonies passed legislation substantially following the English model.[75] Accordingly for some time before federation all the Austral.an States had provision for divorce by this method and it was, therefore, not surprising that when deciding what legislative powers were to be given to the new Commonwealth the founders considered it desirable, for the purpose of maintaining uniformity of status of the people of Australia, that the federal Parliament should be given the power to legislate in respect of divorce and matrimonial causes.[76] Although the power has been in existence since 1900 the uses made of it and the attempts to utilize it have been scarce. In 1945[77] and 1955[78] Acts were passed which made useful extensions to the jurisdiction of the State courts, but these Acts in no way purported to be comprehensive pieces of legislation covering the field of divorce and matrimonial causes. The first attempt to do this was in 1901 by a private member's Bill which, however, did not proceed beyond the first reading. The second attempt was made in 1957, when another private member, Mr. P. Joske, introduced a Bill which, after some time had been spent on debating it, was also not proceeded with, for the Government then announced that it would bring down legislation on the subject at the next session. So in 1959 the Attorney-

* The reviewer is indebted to Mr. I. W. P. McCall for contributing the comments under this heading.

75 Partly following a suggestion from the Secretary of State that divorce was a matter for colonial, rather than "imperial", legislation.

76 See Commonwealth of Australia Constitution, sec. 51 (xxii).

77 Matrimonial Causes Act 1945 (No. 22 of 1945).

78 Matrimonial Causes Act 1955 (No. 29 of 1955).

General introduced the Matrimonial Causes Bill, a measure designed to replace all State legislation on the subject of divorce and allied matters,[79] as a Bill supported by the Government but upon which the Government did not require voting to be along party lines.[80]

Although the Commonwealth Parliament had been possessed of the legislative power for nearly sixty years one may wonder why, upon a topic such as this, no serious governmental attempt had been made to utilize this power fully until now. The reason given by the Attorney-General was: "I think the basic reason for the reticence of governments hitherto to attempt a complete federal law for matrimonial causes has been the wise understanding that the people of this wide-spreading continent had not heretofore attained that sense of unity which would enable them to forego the familiar and distinctive features of their State systems of divorce, in favour of a uniform national law resulting probably if not necessarily from some degree of compromise."[81]

When one reflects on the vocal objection to the possibility of uniform divorce at the Federal Convention, the interstate jealousies of two generations ago, and the more recent secession movement in Western Australia, there is much to commend this view.

Although the main purpose of the Act is to unify the divorce laws in Australia, the Government has not been content merely to do this, but has taken the opportunity to take some positive steps concerning the problem of broken marriages, all of which makes the Act an important measure of social reform.

The Act is quite lengthy[82] and no attempt is being made here to deal with all the detail it contains, but simply to comment upon some of its more significant features. The over-all scheme, unlike the 1957 Joske Bill which proposed the creation of a federal court system and the ousting of the States from the field of matrimonial causes completely, is to leave to the States the power to legislate for orders for separation, maintenance, and custody to be made by courts of summary jurisdiction,[83] but to deal with all other matrimonial causes. Accordingly the Act deals with divorce, nullity, restitution of conjugal rights,

79 And which, being federal legislation, must necessarily have the effect of unifying the law on the subject throughout the Commonwealth.

80 The Opposition also treated the Bill as a non-party measure in both Houses.

81 (1959) 23 COMMONWEALTH PARL. DEB. (H. of R.) 2222.

82 It contains 127 sections and three schedules, the third of which contains 41 rules setting out the procedure for obtaining an order for attachment of earnings.

83 Sec. 8 (3).

jactitation, and separation, as well as ancillary matters such as maintenance and custody. To avoid a conflict of jurisdiction—and the existence of concurrent State and federal orders—the jurisdiction of a State court and any order it may have made cease upon an order being made under this Act.[84] Instead of creating federal courts the alternative procedure permitted under the Constitution,[85] namely, investing State courts with federal jurisdiction, has been employed.[86]

In formulating the legislation one of the expressed policy considerations of the Government was to develop reconciliation procedures and this policy has been mainly implemented by Parts II and III. Courts hearing suits under the Act are placed under a duty to consider the possibility of reconciliation and, if there is such a possibility, power is given to adjourn the proceedings, for the judge to interview the parties in chambers, or for a nominated marriage guidance organization or suitable person to see the parties for the purpose of attempting to effect a reconciliation.[87] Complementary to these procedures is the fostering of voluntary marriage guidance organizations which may become "approved" organizations and thus qualify for financial assistance from the Commonwealth.[88] If assistance is given, some control over the organizations is maintained by requiring the annual submission of a report on their activities and an audited financial report. In addition, the policy of saving marriages where possible has been implemented, firstly, by not allowing suits for dissolution to be brought within three years of the marriage except by leave of the Court[89] (But this does not apply if the ground is adultery, refusal to consummate, rape or one of the unnatural offences)[90] and secondly, by retaining the procedure of obtaining an order for restitution of conjugal rights.[91]

The part of the Bill containing the grounds[92] upon which a decree for dissolution could be made aroused the most lively discus-

84 Sec. 8 (4) and (5).
85 Commonwealth of Australia Constitution, sec. 77 (iii).
86 Sec. 23 (1) and (2).
87 Secs. 14 *et seq.*
88 Secs. 10 and 11.
89 Sec. 43.
90 In view of the exceptions the practical effect of the sections may not be very very great. Most of the grounds that remain accrue over a period of time, the commonest being two years, so that unless the ground begins to accrue in the first year of marriage the section will be inapplicable.
91 Refusal to obey the decree of restitution has no penal consequences but failure to comply for a period of one year is a ground for dissolution: see sec. 28 (4).
92 Sec. 28.

sion. In the 1957 Bill the policy was generally to restrict the grounds to those common to all States. This Bill reflected a more liberal outlook and included all the grounds recognised by State law, resulting in a total of 14. The justification for this approach was that the principle underlying each ground had been accepted in some part of Australia and " the Bill in this respect does not go beyond already tried experience in the field of social legislation."[93] The grounds range from those based on fault and almost universally accepted in the States, such as adultery, desertion, and cruelty, to those based on the principle of marriage breakdown, such as incurable insanity and five years' separation,[94] and not previously universally accepted. No attempt was made to create a new ground relating to artificial insemination as the Government was not prepared to pioneer legislation dealing with this question.[95] Associated with the grounds are a number of interesting provisions[96] affecting and clarifying the interpretation of some of them and overcoming decisions of the Courts which were unacceptable.[97] The principle of absolute[98] and discretionary bars[99] is retained, the one notable omission from the latter being the bar of unreasonable delay.

Part IV of the Act contains provisions detailing the circumstances when a marriage is void or voidable and contains no radical departure from pre-existing State law.[1] Some of thes provisions, the Attorney-General acknowledged, would be more appropriately found in a Marriage Act but as the Commonwealth had not yet legislated for marriages generally, they were included in this Bill.[2] It was announced, however, that it was the Government's intention to introduce in the near future a comprehensive marriage Bill.[3]

93 *Per* the Attorney-General (Sir Garfield Barwick): (1959) 23 COMMONWEALTH PARL. DEB. (H. of R.) 2224.

94 It was the sub-clause containing this ground that was subjected to the strongest attack of any part of the Bill, but nevertheless it survived. For a detailed account of this provision see *supra*, at 51.

95 See (1959) 23 COMMONWEALTH PARL. DEB. (H. of R.) 2234.

96 See secs. 29 to 38.

97 For example, compare sec. 29 and Lang v. Lang, [1955] A.C. 402; sec. 30 and Bosely v. Bosely, [1958] 1 W.L.R. 645; sec. 31 and Crowther v. Crowther, [1951] A.C. 723; sec. 33 and Budge v. Budge, [1940] Victorian L.R. 405.

98 Secs. 39, 40.

99 Sec. 41.

1 Except for the State of Western Australia which disposed of the concept of a voidable marriage by the Matrimonial Causes and Personal Status Code in 1948.

2 In particular see sec. 19 which together with the Second Schedule to the Act sets out the prohibited degrees of consanguinity and affinity.

3 See (1959) 23 COMMONWEALTH PARL. DEB. (H. of R.) 2234.

Part VIII of the Act gives to the Courts the usual wide powers to make custody and maintenance orders, the latter both in respect of children, and of parties to the suit, on the same principles as governed these matters before.[4] However, where there are children of the marriage under the age of 16 years, there is a new procedural safeguard to ensure that the interests of the children are not subordinated to the interests of the parents; (if the court so directs, the interests of children over 16 may likewise be ensured). In such cases the decree *nisi* will not automatically become absolute at the expiration of three months, as it does in most other cases,[5] but only subsequent to a declaration by the Court that it is satisfied that proper arrangements have been made for the welfare, and the education and advancement if appropriate, of such children.[6]

Federal legislation in this branch of the law, apart from achieving uniformity, has other advantages. Firstly, State domicile is replaced by a domicile in Australia, and thus the difficulty of ascertaining the domicile of the nomadic individual who has settled in the Commonwealth but in no particular State is overcome; and secondly, the Court's decrees being federal, and so running throughout the Commonwealth, problems of interstate recognition of decrees disappear. Accordingly to the conflicts lawyer perhaps the most interesting parts of the Act are those containing the provisions relating to the courts' jurisdiction, and the recognition of foreign decrees. Jurisdiction to grant decrees of dissolution and nullity of a voidable marriage is based on domicile;[7] and to grant decrees of nullity of a void marriage, judicial separation, jactitation and restitution of conjugal rights, jurisdiction is based on domicile or residence.[8] The concept of domicile, however, is extended to include a deserted wife domiciled in Australia immediately before the desertion or marriage, and also a wife who has been resident in Australia for three years immediately preceding the date of the institution of the proceedings.[9] The recognition provisions[10] relating to decrees of foreign countries, generally speaking, incorporate the present common law rules,[11] but these statutory rules are not exhaustive. The way is left open to accord recognition to a

4 See secs. 84 (1) and 85 (1).
5 For the other exceptions see sec. 72.
6 See sec. 71.
7 Sec. 23 (4).
8 Sec. 23 (5).
9 Sec. 24.
10 Contained in sec. 95.
11 Including in the case of foreign dissolution decrees a "practical application" of the rule in Travers v. Holley, [1953] P. 246: see secs. 95 (2) (b) and 24 (2).

foreign decree if it would be recognized by the common law rules of private international law even though it would not be recognized pursuant to one of the statutory rules set out in the section.[12]

In the remainder of the Act there are many matters deserving of comment, but considerations of space must necessarily restrict such comment to a few of the more significant provisions. Under the heading of evidence[13] the standard of proof is determined as proof "to the reasonable satisfaction of the Court"; the rule in *Russell v. Russell*[14] is abolished; and a witness is bound to answer a question the answer to which may show adultery has been committed by or with that witness if the adultery is material to the case.

Attachment of earnings is provided as a new[15] method of enforcing maintenance orders. This is a method which cannot, however, be used in the first instance, but only when the defendant is shown to be in arrears or has wilfully and persistently failed to comply with the order. Trials are before single judges and appeals lie to the Full Courts of the Supreme Courts of the States. They cannot be taken to the High Court except by special leave of the High Court itself. The object of this restriction is to retain the High Court as the final arbiter on matters of law of general significance and so ensure uniform interpretation and development of practice and procedure throughout the States; but on the other hand, bearing in mind the increasing constitutional business of the Court, it was felt undesirable to allow access to it to be completely unrestricted with the possibility of that Court's becoming overburdened by a spate of matrimonial appeals.[16]

Publication of proceedings, except in Court documents, law reports and technical journals is severely restricted; contravention of the Act in this respect will result in heavy penalties.[17]

Finally, power is given to make rules regulating such matters as the practice and procedure of courts exercising jurisdiction under the Act, and costs, and fees.[18] The Act has not yet come into operation,

12 See sec. 95 (5).
13 Part XI.
14 [1924] A.C. 687.
15 A new procedure for all States except Tasmania where it has apparently been available for 35 years: See Senator Wright in (1959) 16 COMMONWEALTH PARL. DEB. (Senate) 1779.
16 See the Attorney-General in (1959) 23 COMMONWEALTH PARL. DEB. (H. of R.) 2236.
17 A fine of £500 or six months' imprisonment for a first offence and double this penalty for a second or subsequent offence: See sec. 123 (3).
18 Sec. 127.

and will not until the rules governing procedure have been published; at present this is estimated to be in January 1961.

XI. NATIONAL DEVELOPMENT.

Roads.

The Commonwealth Aid Roads Act 1959[19] replaces the Acts of 1954, 1955, and 1956 which expired on 30th June 1959 and provides a new five-year plan for financial assistance to the States in respect of roads and other works connected with transport. During the five years beginning on 1st July 1959 the Commonwealth will make available to the States a total of £250 million[20] for the construction, reconstruction, maintenance, and repair of roads. Of this sum, £220 million will be paid as a direct grant to the States, and the balance of £30 million will be available over the five years, subject to annual limits, on a basis of £1 for every £1 allocated by the State Governments from their own resources for expenditure on roads over and above the amounts so allocated by them during 1958-1959. No part of this money is reserved for expenditure on roads serving Commonwealth purposes or for road safety, as the Commonwealth intends to make separate provision for these. The States are required to ensure that not less than 40 per cent. of the funds made available in each year will be spent during that year on roads in rural areas other than highways, main roads or trunk roads. The amounts available in each year are to be distributed in the proportions of 5 per cent. to Tasmania, and the balance between the other five States on a basis of one-third according to population, one-third according to area, and one-third according to the number of vehicles registered.[21]

Petroleum.

The Petroleum Search Subsidy Act 1957-1958 has been amended by the Petroleum Search Subsidy Act 1959[22] in order to extend the search for petroleum by further subsidizing stratigraphic drilling.[23] During the 18 months of 1957-1958, prior to the passing of the 1959 Act, £800,000 had been made available for this purpose. The Com-

19 No. 39 of 1959.

20 This is £100 million more than in the previous five years.

21 This last provision is new in this type of legislation, and is introduced to deal with the problem of exceptionally heavy use of roads in New South Wales and Victoria.

22 No. 60 of 1959.

23 *I.e.,* drilling aimed at obtaining information concerning the geological sequence at depths in respect of which reliable deductions cannot be made from surface investigations.

monwealth intended to make a further £1,000,000 a year available to assist such work, partly in the form of increased subsidies and partly by expanding the direct operations of the Department for National Development. The Act avoids laying down any specific programme for subsidized drilling and provides that the subsidy will be paid in accordance with agreements negotiated between the Minister and the operators. The form that the increase takes is an extension of the subsidy provisions of the 1957 and 1958 Acts, so that additional phases of oil exploration will attract subsidies at different rates. Accordingly the Commonwealth will pay half the cost of approved drilling operations which will yield stratigraphic information likely to increase geological knowledge,[24] one-third of the cost of "off-structure" drilling, half the cost of approved geophysical surveys, and half the cost of bore-hole surveys of bores other than water-bores. In the case of bore-hole surveys of water-bores, the proportion is to be fixed in the agreement.

Science and industry.

The Science and Industry Research Act 1949 vested the control of the C.S.I.R.O. in an executive of five persons, three of whom were full-time members, and three of whom had to be scientists. With the increase in the activities of the C.S.I.R.O. it was apparent that an executive of five was too small, and accordingly the Science and Industry Research Act 1959[25] increases the number of members of the executive to nine, of whom five will be full-time members, and at least five must possess scientific qualifications.

Fisheries.

A number of amendments have been made to the Fisheries Act 1952-1956 by the Fisheries Act 1959.[26] While the responsibility for fisheries within territorial waters rests with the State governments or the Territories' administration, the Commonwealth is responsible for fisheries in proclaimed Australian waters beyond territorial limits. The main purpose of the Commonwealth Fisheries Act is to provide for the conservation of fisheries resources and the proper management of fisheries in these waters, and its provisions are largely the result of collaboration between the Commonwealth and the States to secure uniformity in the management of contiguous fisheries. Recently some

24 This will add approximately £225,000 per annum to the previous allocation of £500,000.

25 No. 78 of 1959.

26 No. 48 of 1959.

joint measures had been agreed which were designed to protect crayfish stocks off the South-East and West coasts of Australia and which would involve a closed season for female crayfish and complete protection for female crayfish carrying eggs. In the course of the preparation of *Gazette* notices to give effect to these controls, it was discovered that the Fisheries Act did not permit the prohibition of the taking of fish of a specified sex only, nor of the taking of crayfish carrying eggs. Accordingly, in order to enable the Commonwealth to apply similar regulations in extra-territorial waters to those applied by the States in territorial waters, the Act is amended to permit such prohibitions and to make it an offence to be in possession or control of fish taken in contravention of the statutory requirements.[27]

Other amendments to the Fisheries Act are designed to prevent fishermen defeating the minimum size regulations by cutting up or dismembering fish at sea, and to make it clear that action can be taken against "fish pirates" outside the three-mile limit for removing fish from nets or traps.

Section 16 of the principal Act, which provided that in any prosecution under the Act or Regulations an averment by the prosecutor that an act was done for trading or manufacturing purposes was prima facie evidence of the matter so averred, has been repealed. A new section 16 provides that if an officer gives evidence that he suspects that fish to which the charge relates were taken in proclaimed waters or for trading or manufacturing purposes, together with the

[27] The problem arose through the acquittal in June 1958 of fishermen in Tasmania who had been charged with having taken female crayfish during the closed season. The charges were dismissed on the ground that the crayfish had been legally caught in extra-territorial waters where it had not been possible to declare a closed season. The prohibition has now been included in the Commonwealth Act by a somewhat inelegant amendment to section 8, which now reads "The Minister may . . . prohibit . . . the taking . . . of fish or of fish included in a class of fish." What is a class of fish? Why could not the draftsman have stated simply what he meant? Under the Western Australian Fisheries Act, section 24 (3) makes it an offence for anyone to have female crayfish, with eggs or spawn attached beneath its body, in his possession or control "for purposes of sale." At the time of writing (November 1960) there was before the Legislative Assembly of Western Australia a Bill to amend the Fisheries Act which sought to substitute a new section 24 (3) which would make it an offence to have such fish in one's possession or control *or* to sell or cause to be sold, or offer or expose for sale, or give or consign such fish. However, under a new section 13 (2) of the Commonwealth Fisheries Act, it is a defence to a prosecution under section 13 (1) (ba), for having a fish in one's possession or control in a boat in proclaimed waters when the taking of the fish in that area is prohibited, to show that it was not taken for trading or manufacturing purposes.

evidence of the grounds on which he so suspects, and if the Court considers that the suspicion is reasonable, then in the absence of proof to the contrary the fish shall be deemed to have been so taken.[28]

XII. MISCELLANEOUS.

Commonwealth motor vehicles.

The object of the Commonwealth Motor Vehicles (Liability) Act 1959[29] is to impose on the Commonwealth the same liability for personal injuries caused by persons driving Commonwealth vehicles without proper authority as the Commonwealth has accepted since 1903 under Part IX of the Judiciary Act in respect of injuries caused by drivers properly authorized and driving in the course of their duty.

At common law, of course, the Crown was not liable for damage caused by the negligence of its employees, but in 1903 the Commonwealth made itself liable to suit in contract or tort by section 56 of the Judiciary Act; and section 64 provided that the rights of the parties in any such suits should be as nearly as possible the same as those in suits between subjects. Hence the Commonwealth was not liable for damage caused by the negligence of its drivers who were not acting within their authority at the time of the accident. The purpose of this Act, therefore, is to make the Commonwealth liable for the death of or personal injury caused to any person by a Commonwealth vehicle whether or not the driver was properly authorized. The Commonwealth was not willing to bring its vehicles within the third-party insurance schemes operating in the States, but it achieves the same result by accepting, in this Act, the obligations of an authorized insurer in respect of its vehicles. Like the third-party insurance provisions in the States, the Act applies only in respect of death and personal injury and does not alter the common law position in respect of claims for damage to property.

Section 5 of the Act provides that in any proceedings against the Commonwealth for damages in respect of death or personal injury caused by a Commonwealth vehicle, the driver of the vehicle, whatever the circumstances under which he comes to be driving it, is to be conclusively presumed to have been, with respect to the driving of the vehicle, the authorized agent of the Commonwealth acting within the scope of his authority. This provision applies to Commonwealth authorities and their vehicles in the same way as it applies to the

[28] A welcome relaxation of an unreasonable provision.
[29] No. 94 of 1959.

Commonwealth and its vehicles, so that in any case in which a Commonwealth authority is not covered by State compulsory third-party insurance, it will be covered by the Act.[30]

Section 5 (1) (b) applies similarly to claims by or against the Commonwealth or a Commonwealth authority for contribution.[31]

D.E.A.

[30] Section 5 applies only in respect of uninsured vehicles. Therefore, if the Commonwealth or an authority insures its vehicles and if such insurance covers unauthorized use, then the plaintiff can recover only the limited amount of insurance, with no recourse for any balance against the Commonwealth or the authority. However, if the vehicle is not insured, the plaintiff will recover full damages under the Act.

[31] This was intended, incidentally, to enable the Commonwealth to recover from the unauthorized driver any damages it might have to pay under section 5 (1) (a): ((1959) 25 COMMONWEALTH PARL. DEB. (H. of R.) 2898, *per* the Attorney-General). However, as it could be contended that the section deems the driver to be authorized in respect of the driving of the vehicle, rather than in respect of the fact of his driving, there might be some nice argument produced by this provision. In any event, if the Commonwealth wishes to be sure of recovering 100 per cent. contribution from the uninsured driver, it is necessary to base the claim on Lister v. Romford Ice & Cold Storage Co. Ltd., [1956] 2 K.B. 780, rather than on contribution between joint tortfeasers, so that the section should deem the driver not merely to be an authorized driver, but authorized under a contract. Surely, all these difficulties might have been avoided if the Act had said separately and directly that the Commonwealth might recover from an unauthorized driver any damages it had to pay as a result of that person's driving.