## II. Commonwealth.

*Introductory.*

In its third and final session, the twenty-third Parliament of the Commonwealth in 1961 enacted 98 Acts.[1] The most important of these, from the lawyer's point of view, was undoubtedly the Attorney-General's customary variation on the matrimonial theme, this time the Marriage Act. For political controversy, the prize should probably be awarded to the Stevedoring Industry Act 1961, which granted long-service leave entitlement to waterside workers subject to a loss of entitlement as a consequence of unlawful stoppages. For algebraic ingenuity, the award as usual goes to the various amendments in the field of income tax. For Playing the Game According to the Rules, the prize is won by the Airlines Equipment Act 1961 and the Australian National Airlines Act 1961, which produced the invariable accusations and denials of skulduggery over the "two-airlines policy"; though a close runner-up was a newcomer to the field, the Commonwealth Serum Laboratories Act 1961. Finally, for unspectacular perseverance, the award must go to the Post and Telegraph Act 1961 which, after 60 years of endeavour, has succeeded in removing the ill-conceived section 16 from the principal Act.

### I. CONSTITUTIONAL.

*Electoral.*

A Bill to amend the Commonwealth Electoral Act 1918-1953 had been introduced in the House of Representatives in November 1960 but had not completed the second reading stage before the end of the session. It was re-introduced in 1961 and became law as the Commonwealth Electoral Act 1961.[2] The major criticism of the amendments was that they did not go nearly far enough and the Opposition struggled bravely but in vain in both Houses to broaden the ambit of the reform. The Government view, as stated by Senator Wade,[3] was

1 Rather less than usual. The speeches also, if the number of pages of the Commonwealth Debates is any guide, were mercifully either considerably fewer or shorter. Nevertheless, those annual six blue-backed volumes represent quite a lot of talking, and the yearly chore of reading through them in the preparation of this review is, to use a neutral expression, a "character-building" exercise in citizenship.

2 No. 26 of 1961.

3 (1961) 19 COMMONWEALTH PARL. DEB. (Senate) 773, repeating the remarks of the Minister of the Interior at (1960) 29 COMMONWEALTH PARL. DEB. (H. of R.) 2548-9.

that, although many suggestions for reform of the electoral system had been considered, the Government preferred "stability and certainty" to the "confusion that would be caused by changes which might be of doubtful value;" . . . "If any reform is desirable it is in the direction of educating the individual elector as to the value to him of his right to exercise an intelligent judgment and to vote accordingly, and his national duty to do so."

A number of amendments are made to the principal Act. Section 85 is amended to enable members of enclosed religious orders and others whose religious beliefs preclude them from voting before sunset on Saturday to vote by post. Persons entitled to postal votes are permitted to apply to a registrar for a subdivision which has been declared a remote subdivision, whereas under the principal Act such registrar could issue postal votes only to electors enrolled for that particular subdivision. An electoral officer in Australia is permitted to observe local time for the receipt and issue of postal votes on polling day and on the day preceding polling day, instead of observing standard *or* local time in the State or Territory in which the election is being held. This will remove the anomaly that an elector from Western Australia could vote in New South Wales up to 10 p.m. Eastern Standard Time, whereas an elector from New South Wales in Western Australia could not vote after 6 p.m. Western Australian Time.

Section 39 has been amended to permit British subjects of non-European origin to enrol and vote provided they are not subject to any impediment under the Migration Act which would prevent their remaining in Australia as permanent citizens. Further, the reference to aboriginal natives of Asia, Africa, and the Pacific Islands is removed and also the prohibition on their enrolment. The conditions under which Australian aborigines may be enrolled remain unaltered.

The wartime limitation on the size of electoral posters to 60 square inches has been removed, and posters may now be up to a maximum of 1200 square inches. This permits the standard poster of 40 inches by 30 inches. It should be noted, however, that the maximum election expenditure permitted by section 145 has not been altered. Further amendments give the electoral officer conducting the scrutiny at a polling booth a discretion to determine the number of scrutineers each candidate may appoint. The penalty on conviction for a first offence of failing to enrol or to notify a change of address is to be a fixed fine of ten shillings instead of a fine up to ten shillings. Section 171, which prohibits canvassing within twenty feet of the entrance of a polling booth, is amended to define the entrance when the polling booth is situated within an enclosure.

Finally, a new section 216A is introduced to put an end to the procedure of serving subpoenas on electoral officers to produce claim cards in tenancy, matrimonial, and small debt cases, as it was feared that this practice might result in persons evading their responsibilities to enrol and to notify changes of address. Accordingly, section 216A provides that a person who is, or has been, an officer shall not be required to produce claims or give any evidence concerning claims except for the purpose of the Commonwealth Electoral Act.[4]

## II. JUDICIAL AND ADMINISTRATIVE.

*Airlines.*

Government policy on domestic airlines has changed little in the past decade; and the same is true of the attitude of the Opposition. Nevertheless, debates on this topic still produce strong controversy and disagreement, and the debates on the two Bills relating to airlines in 1961 were no exception.

The financial provisions of the Civil Aviation Agreement 1952, as supplemented by the Airlines Equipment Act 1958, were due to become inoperative on 18th November 1962. As this date would fall within a period during which both of the inter-state airlines wished to place orders for turbo-jet aircraft for delivery in the latter part of 1964, the Government considered the occasion appropriate for a review of the legislation and agreements embodying its "two-airlines policy."

The Airlines Agreement Act 1961[5] gives parliamentary approval to a new agreement between the Commonwealth, the Australian National Airlines Commission, Ansett Transport Industries Limited, and Australian National Airways Proprietary Limited, and it amends the Civil Aviation Agreement Act 1952-1957 accordingly. In the new agreement, the Commonwealth affirms its intention of maintaining the present policy of having two, and only two, operators of trunk airline services, one of which is the Commission, and each of which is capable of effective competition with the other.

The Agreement extends the terms of the Civil Aviation Agreement 1952, which by virtue of clause 16 would expire in 1967, for a further

[4] This wording, insofar as it reserves to the officer a discretion to produce the claims and give evidence if he so wishes or if he considers proper, is unfortunate, for there seems no justification for reserving a matter such as this for administrative discretion. It is hardly a justification to say that similar provisions appear in sec. 17 (3) of the Social Services Act and sec. 16 (3) of the Income Tax and Social Services Contribution Assessment Act—see *per* Senator Gorton at (1961) 19 COMMONWEALTH PARL. DEB. (Sen.) 988.

[5] No. 70 of 1961.

period of 10 years after that date. It makes detailed provision for the selection and introduction of turbo-jet aircraft for the domestic air services and it authorizes the Commonwealth to give a guarantee to Ansett Transport Industries Limited, not exceeding £6,000,000 at any one time, for the purchase of turbo-jet aircraft comparable in size and performance to those authorized for purchase by the Commission.

By clause 8 of the Agreement the Commonwealth undertakes not to increase air navigation charges by more than 10 per cent. in any period of 12 months or to increase aviation fuel tax by a greater amount than the corresponding amount of increase in the tax on motor fuel.[6]

Finally, the Agreement consolidates the existing rationalization procedures under the 1952 and 1957 Civil Aviation Agreements and introduces a number of procedural changes. Section 5 of the Act extends the powers of the Minister under Part IV of the Airlines Equipment Act 1958,[7] relating to the control of aircraft capacity and the acquisition of new aircraft for so long as the Agreements remain in force.

The Australian National Airlines Act 1961[8] introduces important new provisions concerning the financial policy of the Commission and insurance by the Commission against aviation risks. So far as financial policy is concerned, the aim of the Government is to eliminate any differences in the cost structure between the two domestic airlines that could have the effect of preventing effective competition. Accordingly, the Act authorizes the Minister for Civil Aviation, after consultation with the Commission and with the concurrence of the Treasurer, to set the Commission a target of achieving a reasonable return to the Commonwealth, by way of a percentage of its capital, taking into account all relevant factors. In effect, the Minister is authorized to determine the profit that the Commission must achieve. In fact the Commission had since 1957 maintained a steady rate of 5 per cent. On the other hand, Ansett Transport Industries Ltd., in order to meet reasonable private enterprise standards, had to aim to achieve a figure of 10 per cent. after allowing for tax and a reasonable allocation to reserves. One can therefore only assume a sharp

6 By this clause, which must be of doubtful legal effect, the Government attempts to bind itself until 1977 not to exercise its taxing power in a certain manner, come what may. This seemed to the Opposition, which had some expectation of being required to form a government before 1977, a little unreasonable, if not high-handed.

7 Noted in 4 U. WEST. AUST. ANN. L. REV. 511-512.

8 No. 71 of 1961.

increase in the percentage that the Commission will be required to achieve.[9]

So far as insurance was concerned, it had been the practice of the Commission to act as a self-insurer in respect of a wide range of aviation risks, and the Commonwealth had assured the Commission that it would advance special loans to meet any deficiency. However, section 31 of the Act had limited the borrowing powers of the Commission to £3,000,000. The new amendment now gives the Commission a right to elect whether to insure against these risks on the commercial market or to act as a self-insurer. If the Commission chooses to act as its own insurer, it must credit to a prescribed account amounts equivalent to current commercial premiums that would be payable by the Commission for that insurance, and this account must be invested in Commonwealth securities. The Commonwealth is then required by the new provision to advance to the Commission by way of loan the excess, provided it is greater than £50,000, of any claims over the securities in this account. The Minister explained[10] that this insurance provision was necessary because the Australian insurance market was not able to absorb the major aviation risks but was obliged to re-insure on overseas markets at high rates. If the Australian market was ever in a position to undertake this insurance at premiums based on Australian accident experience, there would be a review of this new arrangement.

*Broadcasting and Television.*

The Broadcasting and Television Act 1960[11] has been amended by the Broadcasting and Television Act 1961.[12] The 1960 Act had introduced a number of amendments to the Broadcasting and Television Act 1942-1956.[13] In particular, section 33 of the 1960 Act, in

9 This proposal was very severely criticized by the Opposition. "It is part of the policy to do all that can be done to pull back T.A.A. to Ansett-A.N.A.'s level. I would have much more respect for the Government if it said that it did not believe in having a government airline, and sold it."—(1961) 20 COMMONWEALTH PARL. DEB. (Sen.) 845, *per* Senator Kennelly. "The Government utterly eliminated competition. It negated its own policy."—*ibid.* at 868, *per* Senator McKenna. "The rationalization scheme about which we hear so much completely eliminates competition, and I would say that it contravenes section 92 of the Constitution."—*ibid.* at 869, *per* Senator McKenna. Senator McKenna looked forward to a review of these measures in the light of the anticipated restrictive trade practices legislation.

10 (1961) 20 COMMONWEALTH PARL. DEB. (Sen.) 727.

11 No. 36 of 1960.

12 No. 32 of 1961.

13 Including some extremely interesting and detailed new anti-monopolizing provisions and a requirement for the recording of political broadcasts: See also 5 U. WEST. AUST. L. REV. 409.

adding sections 126A and 126B to the principal Act, made provision for two new types of radio and television licence, namely a hirer's licence and a lodging house licence. Section 126A, which dealt with hirer's licences, required any person who carried on a business which consisted wholly or partly of letting out receivers on hire (otherwise than under a hire-purchase agreement) to obtain and attach to the receiver a current hirer's licence. The currency of the licence was 12 months. However, this provision did not adequately recognize the volume of business in the hiring of television receivers, nor did it take into account that a considerable portion of that business involved short-term hiring. Accordingly the 1961 Act amends the principal Act by substituting a new section 126A which authorizes the granting of licences for any period not exceeding 12 months, and also permits a hirer, instead of obtaining a separate licence for each receiver, to hold one licence in respect of a number of receivers.[14]

*Commonwealth Serum Laboratories.*

The Commonwealth Serum Laboratories Act 1961[15] establishes a statutory commission[16] to administer the Commonwealth Serum Laboratories at Parkville in Victoria. The laboratories since their establishment in 1916 had operated within the public service framework, originally within the Department of Trade and Customs, and since 1921 within the Department of Health. Due, however, to the increasing growth and complexity of the activities of the laboratory,

14 The transmigration (or transmogrification?) section of the 1960 Act has been left undisturbed—*viz.*, sec. 7 which adds a new sec. 13 to the principal Act, "(1) If a member . . . (c) becomes a person who would not be qualified to be appointed as a member;". It is to be hoped that it will be disturbed and rephrased before it becomes a standard form "Dismissal and vacation of office" clause.

15 No. 38 of 1961.

16 The method adopted by sec. 7 to establish the Commission is a delightful example of the draftsman's self-confidence in the efficacy of his own art. Subsection (1) begins, "There shall be a Commission by the name of the Commonwealth Serum Laboratories." Subsection (2) then purports to recognize this "Let there be light" technique by beginning "The Commission— (a) is a body corporate . . ." It is unfortunate that this is wrongly conceived and based on a misuse of the word "shall", which can be either imperative or future. However, in section 7 (1) it is wrongly used as an imperative because no duty or obligation is cast upon anyone; and, as a statute is always speaking, it can not be future. It is clearly not the intention of the draftsman that the Commission should always be something promised for the future (*i.e.*, the "jam tomorrow" type of clause). Surely, it would have been much better to have said—

"(1) There is hereby constituted a Commission . . .
(2) The Commission—
(a) is a body corporate . . ."

it was considered desirable to reorganize under a statutory commission representing business and medicine.[17]

In most respects the Commission resembles statutory bodies created under other recent Acts of the Commonwealth Parliament. However, certain features do call for some comment, and in fact received it not only from the Opposition but also from the then Director of the Laboratories.

The functions of the Commission are declared by section 19 to be—

> "(a) to produce and sell such biological products of a kind used for therapeutic purposes as are prescribed and to undertake research in connexion with any such prescribed product;
>
> (b) if the Minister so determines—
>
> (i) to undertake research towards the production of biological products of a kind used for therapeutic purposes, being products other than products prescribed for the purpose of the last preceding paragraph;[18] and
>
> (ii) to install or maintain plant or equipment capable of being used for the production of biological products, and to produce and hold stocks of biological products, for purposes other than the immediate sale of these products,
>
> in accordance with the determination; and

17 There was some doubt whether this was the only solution that had been proposed. In the House of Representatives, Mr. Pollard accused the Government of "fiddling around with the sale of this outfit."—See (1961) 31 COMMONWEALTH PARL. DEB. (H. or R.) 2044.

18 If at some future date Parliament wishes to add paragraph (aa) after paragraph (a) of this section, it will have to amend paragraph (b). There are ways of avoiding this situation. The whole scheme of paragraphing in this section is incorrect in any event; the section reads—

> "The functions of the commission are—
>
> (a) .....;
>
> (b) .....; and
>
> (c) .....,
>
> and are exercisable for or in relation to any of the following purposes:—
>
> (d) .....;
>
> (e) .....;
>
> (f) .....;
>
> (g) .....;
>
> (h) .....; and
>
> (i) ..... "

These are elementary mistakes.

(c) subject to the last two preceding paragraphs,[19] to carry on the undertaking known as the Commonwealth Serum Laboratories . . ."

This provision was criticized on two main grounds. The first was that it severely restricted the activities of the laboratories so that they could undertake no work purely on the initiative of the Director or staff alone. The laboratories are authorized only to make products prescribed by regulations made by the Governor-General under section 45, and to engage in research which has been similarly prescribed or otherwise approved by the Minister.[20] The second criticism was that the terms "biological products" and "therapeutic purposes" could be construed very narrowly, and in particular so as to exclude preventive and diagnostic purposes. Accordingly, the Opposition sought to introduce definitions of these words in terms similar to those in the Therapeutic Substances Regulations 1956, reg. 20 (3) and the Therapeutic Substances Act 1953, section 4, so that they would be construed broadly.[21] The Government, however, was unwilling to accept these amendments as it was thought to be sufficiently clear that the words bore the meaning that the amendments would have given them in any event.[22]

Further criticism was aimed at section 21 which requires the Commission "to pursue a policy directed towards securing revenue from the sale of those products sufficient to meet all its expenditure (including expenditure in undertaking research) in connexion with those products that is properly chargeable to revenue, and to permit the payment to the Commonwealth of a reasonable return on the capital of the Commission." It must always be a vexed question as to

19 A glance through the volumes of the Commonwealth Statutes should surely convince the draftsman of the probability of a paragraph (ba), not to mention paragraph (bz)!

20 The Opposition strongly criticized these and other provisions which severely limited the control and influence of the Director of the Laboratories. It seems a little naive of the Minister to suggest that "the bill really widens the functions of the laboratories" because it makes provision for the Minister to request the laboratories to conduct research over and above what they already did: See (1961) 31 COMMONWEALTH PARL. DEB. (H. of R.) 2043.

21 (1961) 31 COMMONWEALTH PARL. DEB. (H. of R.) 2025.

22 With the greatest respect to the Minister's advisers, the reviewer considers that the meaning of the words "biological" and "therapeutic" in the Act is anything but clear, and he can see no ground for contending that the definitions in the Therapeutic Substances Act and Regulations would necessarily be automatically imported. One can only wonder why, if the Government accepted the definitions that the Opposition sought to write into the Act, it should so strenuously have resisted the attempt to put the matter beyond doubt.

how the finances of a statutory body should be arranged, but many doubts were expressed as to whether it was necessary to burden the Commission, and to increase the price of its products, by requiring the payment of a "dividend" to the Commonwealth.[23] Similar considerations must also affect the submission of the Commission to liability for Commonwealth taxes.[24]

*Foot and Mouth Disease.*

The Foot and Mouth Disease Act 1961[25] provides the machinery to finance the eradication of foot and mouth disease from the Australian Capital Territory and the Northern Territory should it ever appear in either of those areas.

Australia has so far remained free from the disease due largely to strict quarantine precautions. However, an outbreak would be costly to eradicate and all infected animals, and animals that had been in contact with them, would have to be destroyed immediately. The Commonwealth and the State members of the Australian Agricultural Council had therefore agreed on the action to be taken in the event of an outbreak. Under this agreement the Commonwealth undertook to share the cost of an eradication campaign on a £1 for £1 basis wherever it might break out. It was necessary, however, to have funds ready and available and to prepare to compensate owners of stock and property for their losses.

Accordingly, to provide for a possible campaign in the Australian Capital Territory and the Northern Territory, the Act establishes[26] a trust account with a ceiling of £200,000 to provide compensation payments and other expenses in respect of a campaign in these territories. There will be paid into the account moneys received from the States under the agreement to share the costs of the eradication and also amounts from the Commonwealth Consolidated Revenue Fund. This money will be used both to meet the cost of the eradication

23 The Minister is surely guilty of some exaggeration when he says that the removal of this requirement would mean that the laboratories "could be used to put private enterprise out of business."—(1961) 31 COMMONWEALTH PARL. DEB. (H. of R.) 2045. This is a remarkable contention, particularly when one considers that on a totally different issue the Minister was at pains to assure the House that the laboratories were not equipped to compete with the commercial drug houses—*ibid.* at 2053.

24 Sec. 42.

25 No. 44 of 1961.

26 Not only jam tomorrow, but the day after too! Section 3:—"There shall be a Foot and Mouth Disease Eradication Trust Account, which shall be a Trust Account for the purposes of section sixty-two A of the Audit Act 1901-1960."

campaign and also to pay compensation for animals and property that have to be destroyed and for animals that die from the disease in quarantined areas. Compensation will be assessed at market values. The owner of stock has the right to sue the Commonwealth or to arbitrate for the settlement of any dispute concerning compensation. Compensation may be withheld from an owner who has been convicted of an offence under the laws relating to diseases in stock, if that offence has exposed other stock to risk of infection from foot and mouth disease.

## III. FISCAL.

*Customs and Excise.*

The object of the Customs Tariff (Dumping and Subsidies) Act 1961[27] is to protect Australian industry against various forms of unfair trading. The Act repeals the Customs Tariff (Industries Preservation) Acts 1921-1957, but re-enacts those of their provisions which are still useful to deal with the problems of dumping and subsidies. These provisions have, however, been re-cast in the light of the International General Agreement on Tariffs and Trade (GATT)[28] and various recommendations of the Tariff Board.

Section 7 authorizes the Minister if he is satisfied after enquiry and report by the Tariff Board that goods[29] are being exported to Australia at an export price that is less than the normal value of the goods and that the importing of these goods would otherwise cause or threaten injury to an Australian industry or might hinder the establishment of an Australian industry, to impose a *dumping duty* on those goods. The power to impose the duty where the importing of the goods might hinder the establishment of an Australian industry is new to this type of legislation in Australia. Similarly a new and broader definition is given to the concept of 'normal value' so that, in establishing a fair price, the Minister may take into account, not only the fair market value and cost of production, but also the price of goods sold in the country of export for export to a third country and the fair market value of similar goods produced in a third country where the costs of production are similar to those in the country of export.

Section 7 (4) permits the Minister, by instrument in writing, to exempt goods from the *dumping duty* in certain circumstances.

27 No. 18 of 1961.

28 The relevant provisions are contained in Article VI of the Agreement. Australia is a party to the Agreement.

29 The Minister is required, before the duty can be charged, to publish in the *Gazette* a notice specifying the goods concerned.

Section 8 makes similar provision (although this time without the necessity for a report by the Tariff Board) for the Minister to impose a *dumping duty* for the protection of the trade of third countries in the Australian market against unfair practices.

A *countervailing duty* on imported subsidized goods is authorized by section 9 in terms similar to section 11B of the Customs Tariff (Industries Protection) Act, except that the new provision will extend not merely to subsidies on the production of the goods but also to subsidized freight rates. As with the *dumping duty*, the *countervailing duty* is not to be imposed unless there is a threat of injury to Australian industry or a hindrance to the establishment of an Australian industry.

Section 10 authorizes the imposition of a *countervailing duty* to protect the trade of third countries in Australian markets.

Section 11 provides that "a reference in any of the last four preceding sections to an injury does not include a reference to an insubstantial injury and a reference in section seven or nine of this Act to the hindering of the establishment of an Australian industry does not include a reference to an insubstantial hindrance to the establishment of such an industry."[30]

30 59 words to do what 8 might have done—and it is doubtful even if those 8 were needed! The section is apparently inspired by a disbelief that the Minister is capable of exercising the *discretion* which secs. 7, 8, 9, and 10 confer upon him. Moreover the whole section could have been avoided by prefacing "injury' and 'hindrance' wherever occurring, with the word 'substantial', unless perhaps the draftsman believes that the qualified negative is less strong than the positive.

As sec. 12 speaks of an emergency duty to be paid where *serious* injury is threatened, we now have 3 categories of injury:—

(i) Serious;
(ii) Substantial—or not insubstantial; and
(iii) Insubstantial,

and what all this means is anybody's guess! Senator Henty ventured a brave guess (see (1961) COMMONWEALTH PARL. DEB. 19 (Sen.) 822-823) that is worth reporting in full:

"If goods came into Australia and, on the matter being referred to the Tariff Board, it was found that injury, even infinitesimal (*sic*) injury, was being done to an industry, the board would have to find accordingly. The bill will allow a degree of common sense to be applied in the administration of the legislation. Very often the amount of injury is so small that it is of no real consequence. This bill clearly states the position of the board and the principles on which it is to work . . . Clause 11 reads—(*as in text*). We desired to follow the provisions of Article VI of the General Agreement on Tariffs and Trade, but the draftsman found difficulty, under Australian Law, in using these provisions. So clause 11 has been included to safeguard the position."

It would appear that the Minister was not well advised. The Act is not concerned to state the position of the Tariff Board and the principles on which it is to work. The Act imposes an obligation on the Minister himself,

Section 12 authorizes the imposition of an emergency duty where serious injury is threatened through the importing of goods, in terms similar to section 11A of the Customs Tariff (Industries Protection) Act.

Section 16 makes it clear that the Minister, when publishing a notice under this Act, may specify any goods of a particular class or kind, or any goods from a particular source or particular exporter, or goods contained in a particular shipment, or in any other manner as he thinks fit. Further he may specify goods already entered for home consumption before the date of the notice.

Other legislation passed during the year sought to encourage the export market in coal by exempting export coal from excise duty. The Coal Excise Act 1961[31] permits producers to remove coal intended for export from mines licensed under the Act without payment of duty. Similarly, where coal is exported otherwise than directly from licensed mines, the States Grants (Coal Mining Industry Long Service Leave) Act 1961[32] makes provision for the repayment of excise duty or State contribution. The Excise Tariff 1961[33] reduces the excise rate on coal for local consumption from 5d. to 4d. per ton.

Various other detailed amendments were introduced to the Customs and Excise Tariffs.[34]

*Income Tax.*

A number of changes have been introduced in the field of income tax during the year.

after considering a report of the Board, to satisfy himself as to various matters. It does not matter what the Board finds is the nature and extent of the injury, the Minister has a discretion to impose a duty or not. The dilemma of the draftsman is apparent when one reads Article VI, paragraph 6 of GATT (although it is not fair to blame Australian law for this). Paragraph 6 prohibits anti-dumping or countervailing duties unless the contracting party determines that the effect of the dumping or subsidization (*sic*) causes or threatens *material* injury or retards *materially* the establishment of a domestic industry. The draftsman would appear to be concerned that there might be an inconsistency with this paragraph if the Act gave the Minister a discretion to impose a duty where the injury or hindrance was merely trifling. However, this fear could have been countered in the section concerned by giving the Minister the power to impose duty where the injury or hindrance were "substantial" or "material". Paragraph 1 of Article 6 of GATT in fact speaks of causing or threatening "material injury" or "materially" retarding the establishment of domestic industry. This is all that would have been required, particularly as paragraph 6 itself leaves the determination of what is "material" to the subjective discretion of the contracting party.

31 No. 19 of 1961, amending the Coal Excise Act 1949.

32 No. 20 of 1961.

33 No. 21 of 1961.

34 By Nos. 22, 23, 24, 51, 52, 53, 54, 55, 56, and 97 of 1961.

The Income Tax and Social Services Contribution Assessment Act 1961[35] makes important changes in connexion with the income tax liability of privately managed superannuation and provident funds and of the life assurance companies, as a result of changes that had become apparent in the pattern of investment portfolios of these funds and companies. There had been a substantial increase in the assets of these funds and of the life companies in the previous decade, but the proportion of holdings in public authority securities, and in particular in Commonwealth securities, had fallen sharply. So far as the life companies were concerned, between 1949 and 1959 their assets had increased by £562,000,000, but their holdings of public authority securities had increased by only £81,000,000 and of Commonwealth securities by a mere £4,000,000. In 1939, 50 per cent. of their assets had been invested in public authority securities; by 1949 this had increased to 68 per cent. but by 1959 had fallen to 37 per cent. and was thought to be only 33 per cent. in 1960. Similarly, with privately managed superannuation funds, in 1956 50 per cent. of their assets were invested in public authority securities, but in 1959 only 39 per cent.[36] The result has been that State and Commonwealth capital works have had to be increasingly financed out of Commonwealth taxation revenue.

As the Commonwealth probably lacks the power to direct the investment of a fixed proportion of assets in public and governmental securities, indirect means had to be resorted to. Public authority and Commonwealth securities have had to be made a more attractive investment; and the method chosen has been the provision of income tax concessions for the privately managed superannuation and provident funds and for the life companies, as long as they keep a certain proportion of their assets invested in such securities. The proportions selected have been a minimum of 30 per cent. of the assets to be invested in public authority securities including 20 per cent. of the assets in Commonwealth securities—known, therefore, as "the 30/20 per cent. ratio."[37]

35 No. 17 of 1961.

36 Yet many jurisdictions still maintain the principle that authorized trustee investments should be limited virtually to public authority securities!

37 The Act is odd for several reasons: In the first place, it is hardly the sort of measure that one would have expected from a Liberal/Country Party government. Senator McKenna was unable to resist the temptation to taunt the Government on this score—"It is a strange bill to be introduced by a government that was elected on a pledge that it would abolish all restrictive controls, and that has constantly affirmed its belief that if things were left alone they would sort themselves out . . ."—(1961) 19 COMMONWEALTH PARL. DEB. (Sen.) 775. Secondly, the Act is notable for its complexity—both

The case of privately managed superannuation and provident funds is dealt with by a new Division 9B, containing sections 121B-121E. If these funds continue to comply with the requirements of sections 23 (j) and 23 (ja), then their income will still be fully exempt from income tax provided either that they maintain in their investment portfolios at least 30 per cent. of public authority securities, including 20 per cent. of Commonwealth securities, or that they continue to hold the amounts of Commonwealth and other public authority securities which they held on 1st March 1961, and achieve the 30/20 per cent. ratio in respect of increases in their assets after that date. Funds which retain their holdings as at 1st March 1961, but which do not achieve the 30/20 per cent. ratio on new investments, continue to be eligible for tax exemption on an amount equal to the 1960-1961 level of their investment income, but pay tax on the excess income.[38] Funds which neither maintain the 30/20 per cent. ratio overall, nor maintain the level of investment as at 1st March 1961, will be taxed on the full amount of their income.

Some flexibility is introduced by section 121C (4) which directs the Commissioner to disregard a failure to maintain the 30/20 per cent. ratio if he is satisfied that the trustee of the fund has made a genuine and *bona fide*[39] attempt to achieve the ratio, or if he is satisfied that the failure was by reason only of some temporary delay in investment, and, in either case, that in all the circumstances it would be reasonable to disregard the failure. Similarly, by section 121C (5), if the Commissioner is satisfied that maintenance of the 30/20 per cent. ratio would be likely to endanger the financial stability of the fund and would be unreasonable in the circumstances he may inform the trustee that, notwithstanding a failure to maintain the ratio, he

verbal and algebraic. We must concede that this is probably inevitable in legislation of this nature; but, whilst struggling to unravel its detailed meaning, we derived some consolation on finding that the Federal Treasurer would confess no more than that he thought he got the general drift of it—(1961) 31 COMMONWEALTH PARL. DEB. (H. of R.) 1343.

38 This excess is taxed at the same rate as the income of the mutual life assurance companies, namely at five shillings in the pound on the first £5000, and seven shillings in the pound on the remainder. See Income Tax and Social Services Contribution Act 1961 (No. 95), *infra*.

39 Why both "genuine" and "*bona fide*"? If *bona fide* is intended to mean any more than genuine, should not the draftsman say what it means? We share the perplexity of Jacobs J. who, when recently faced with the necessity of construing the words *bona fide*, remarked after reviewing some of the case law on the subject—"The meaning of the words 'bona fide' depends very much on context and it may almost be said that there are as many meanings as there are statutes in which the words are used."—Walton v. Regent Insurance Ltd., (1962) 79 W.N. (N.S.W.) 644, at 647. In any event, is an attempt that is not genuine properly an attempt at all?

will continue to exempt the fund from income tax for such period as he determines.

Further changes are then made in the provisions relating to life assurance companies. The provisions of Division 8 of Part III, which previously applied only to companies the sole or principal business of which was life assurance, are now extended to all companies which engage in life assurance business.

The amendments to Division 8 make several important concessions to life companies which maintain the 30/20 per cent. ratio in their total Australian life assets, or which give an undertaking to achieve that ratio within an approved period ending not later than June 1971.[40] Limitations are placed on the extent of investments which a company may be required to make in order to fulfil such an undertaking. Hence, unless the company could not otherwise achieve the 30/20 per cent. ratio by 1971, it will be deemed to have complied with its undertaking when not less than 40 per cent. of the increase of the assets of the fund during the relevant year were invested in public securities, including an investment of not less than 25 per cent. of that increase in Commonwealth securities. Further, as in the case of the privately managed superannuation and provident funds, the Commissioner is authorized to disregard a failure to maintain the ratio or to comply in any particular year with an undertaking to achieve the ratio, if he is satisfied that the company has made a "genuine and *bona fide*" attempt to do so or that its failure was due to temporary investment delays.

A company that complies with these requirements of section 110A, is, by section 112A, exempt from tax on that part of its investment income that is referable to policies issued for the purpose of superannuation schemes which are eligible for tax exemption under sections 23 (j) and 23 (ja).

Such a company will also receive a further concession in the form of an increase in the special deduction under section 115 in respect of the company's actuarial liabilities under life policies, proportionate to any excess of the holdings of public securities over the 30/20 per cent. ratio. For those companies which set up separate statutory funds in respect of their Australian ordinary life business and their Australian superannuation business, the section 115 deduction will be increased for the ordinary life business by one per cent. for every one per cent. by which the holding of public securities in the Australian life assurance assets at the end of the year of income exceeds 30 per

40 Sec. 110A.

cent. In addition, the deduction will be increased by one-half per cent. for every one per cent. by which the holding of Commonwealth securities in the Australian life assurance assets exceeds 20 per cent. However, in order to discourage companies from selling their holdings of public securities other than Commonwealth securities and replacing them by Commonwealth securities, the deduction will be reduced by one-half per cent. for every one per cent. by which the holding of public securities other than Commonwealth securities in the Australian ordinary life assets at the end of the year of income is less than 10 per cent. Similarly, if a company permits its holdings of public securities other than Commonwealth securities in its Australian ordinary life assets to fall below the level at 1st March 1961, it will not receive an increased deduction under section 115 by virtue of holdings of Commonwealth securities in excess of 20 per cent.

It should be remembered that these concessions under section 115 are available only to life companies that set up separate statutory funds for their superannuation business so that there are separate identifiable groups of superannuation assets, the income of which is tax-free provided the 30/20 per cent. ratio is maintained in respect of these assets and in respect of other Australian life assets (or an undertaking is given).[41] It has, however, been the practice of the life companies to include superannuation business and overseas life insurance business in one fund together with Australian life insurance business; separate funds for different classes of business were possible only with the approval of the Insurance Commissioner. Accordingly, there has been necessary a consequential amendment of the Life Insurance Act 1945[42] to permit life companies to establish separate statutory funds for their superannuation business or overseas business, or both. The agreement of the Commissioner is required only as to the apportionment of liabilities and assets between the existing and new funds. If a separate superannuation fund is not established, sufficient information must be available concerning the superannuation business to enable the apportionment provisions of the Income Tax and Social Services Contribution Assessment Act to be applied. A further amendment of the Life Insurance Act ensures that any savings of income tax on investment income of the superannuation business will be passed on to the superannuation policy-holders.

41 Presumably, any further investment in Commonwealth or other public securities would be allocated to the ordinary life assets to increase the section 115 deduction, because there could be no further benefit from treating them as superannuation assets.

42 By the Life Insurance Act No. 29 of 1961.

Companies are not required to maintain the 30/20 per cent. ratio in respect of their overseas life assurance business and, accordingly, where separate statutory funds are maintained, the overseas fund is ignored in calculating the investment ratio. However, a company may elect under section 115A, instead of operating separate funds for its Australian and overseas policies, to have an apportionment of its assets in determining its investment ratio by ignoring the proportion of assets of the fund that is referable to policies on ex-Australian registers and owned by non-residents. In such a case, public or Commonwealth securities issued in respect of loans raised outside Australia are also excluded from the calculation.

For life companies that neither maintain the 30/20 per cent. ratio in their investments nor give an undertaking to achieve it, the consequences are as follows. Firstly, the investment income which is referable to their superannuation business remains liable to tax as in the past. Secondly, the deduction under section 115 will be reduced by one per cent. for every one per cent. by which the holding of public securities in the life assurance assets at the end of the year is less than 30 per cent., and by a further one-half per cent. for every one per cent. by which the holding of Commonwealth securities is less than 20 per cent., but subject to a maximum overall deduction of 25 per cent. Thirdly, the tax rebate on dividend income under section 46 will be limited, so far as it relates to the life assurance business, to the amount which would be allowable if the dividend income had not exceeded the dividend income of the year 1960-61.[43]

These amendments affecting life companies have effect for the first time in assessments based on the 1961-1962 income year; and the exemption of superannuation business from tax applies in respect of income derived after 1st July 1961.

The Income Tax and Social Services Contribution Assessment Act (No. 2) 1961[44] introduces a new taxation concession by way of experiment from 1st July 1961 to 30th September 1964, as an incentive to export market development. A special income tax allowance, to be known as the "export market development allowance," is given for certain expenditure on the development of export markets. It is restricted to outgoings which are already deductible under sections 51 or 73 (2), but will be available irrespective of the commodities exported or the countries to which they are exported. "Exports" includes goods re-exported if they were either processed in Australia

43 Sec. 116A.

44 No. 27 of 1961.

or incorporated with other Australian products. The allowance is not dependent on export sales achieved but will cover all promotion expenditure in advance of sales. Moreover, it is not limited to the export of physical goods, but includes also the supply of services and technical assistance, and expenditure to promote the grant or assignment of ex-Australian rights in patents, trade marks, designs, and copyrights. The allowance takes the form of a special deduction to be allowed in addition to existing deductions under sections 51 and 73 (2) in respect of specified classes of expenditure. The special deduction will be equal in amount to the existing deduction so that a total deduction of £2 will be allowable in respect of each £1 expenditure qualifying under the provision. The maximum tax saving from the double deduction is limited to 16s. for each £1 expended.

A complementary concession, with the same object of stimulating exports, is introduced in connexion with pay-roll tax by the Pay-roll Tax Assessment Act 1961.[45] This Act adds a new Division 2 (sections 16A-16R) to Part III of the principal Act and provides for a rebate of tax by reference to exports. It applies both to increases in the value of the actual export of goods and to additional income accrued from the grant or assignment of rights exercisable overseas in respect of patents, trade marks, designs, and copyrights. The amount of the rebate is ascertained according to a formula contained in section 16C.

This ensures that if the value of the firm's exports increases by one per cent. of its gross income from its Australian trade or business, the firm will receive a rebate of 12½ per cent. Accordingly, if the increase of export sales in a financial year is not less than 8 per cent. of the gross receipts from the Australian business, there will be no liability for pay-roll tax. Section 16L makes provision for the benefit of the rebate to be passed back to a person who has supplied components included in the exported goods and to a person who supplied materials included in those components.

Further concessions in income tax were introduced by the Income Tax and Social Services Contribution Assessment Act (No. 3) 1961.[46] An amendment to section 75 enables primary producers to treat the price and cost of laying underground water pipes as a tax deduction in full in the year of income in which the expenditure was incurred. A new section 36AA allows primary producers whose livestock is destroyed in order to control or eradicate disease, or whose livestock dies of a disease in respect of which a law is in force relating to the

[45] No. 28 of 1961.
[46] No. 94 of 1961.

compulsory destruction of livestock, to elect to spread any taxable profit from compensation and proceeds of sale of hides, etc., over five assessment years.

A new section 77B deals with calls paid to companies engaged principally in mining, prospecting or afforestation in Australia or Papua and New Guinea. Previously one-third of such calls could be claimed as a deduction for income tax purposes. However, if a company subscribed capital to another company that in turn paid calls to a mining, prospecting or afforestation company, the deduction was not available to the company subscribing the capital and did not necessarily result in an effective allowance to the interposed company. The new provision enables the interposed company to forgo its deduction in favour of the company that subscribed the capital out of which the calls were paid. This will apply only where the interposed company owns all the shares in the mining, prospecting or afforestation company, and where the shareholder company to which the deduction is transferred owns not less than one-half of the paid up capital of the interposed company.

The Act removes the provision in section 82F (3) (b) of the principal Act limiting the deduction for dental expenses to £30 in respect of the taxpayer and each dependant. The general limit of £150 for the taxpayer and each dependant on the deduction of medical, including dental, expenses remains.

An income tax deduction is authorized for gifts of £1 or more to the Ian Clunies Ross Memorial Foundation.

Finally the Act makes provision for Australian residents, who are not also residents of Papua and New Guinea, to relieve them from the need to lodge Territory income tax returns if their only income in the territory consists of dividends, debenture interest or pensions on account of service with the Territory Administration. In such cases, Territory income tax payable will be determined from information in the Australian income tax return. Similarly, in such cases, the taxpayer will be required to make only a single payment to the Commissioner of Taxation in Australia, part of which will then be used to meet the Territory liability.

The Income Tax and Social Services Contribution Act 1961[47] declared the same rates of income tax and social services contribution for 1961-1962 as in the previous year. It also specified rates to be payable by trustees of superannuation funds deriving investment in-

[47] No. 95 of 1961.

come on which tax is payable.[48] In view of the increases in age pensions, the net income exemption from tax in the case of aged persons residing in Australia was raised from £442 to £455 in the case of single persons, and from £884 to £910 in the case of married couples where both parties were qualified by age.

*States Grants.*

Pursuant to the provisions of the States Grants Act 1959, Commonwealth grants to the States did not require legislation in 1961. However, the States Grants (Special Assistance) Act 1961[49] made provision for special grants during the financial year 1961-1962 to be paid to Western Australia and to Tasmania. The special grant to Western Australia, inclusive of the adjustment for the 1959-1960 grant, was £6,156,000.[50] The Act also authorized the Treasurer to advance half of that amount in the first 6 months of 1962-1963 pending the authorization by Parliament of the special grants for that year.

A comparison of the total general revenue grants to each State in the years 1960-1961 and 1961-1962 appears from the following table put before Parliament by the Treasurer:[51]

| | 1960-1961 | | | 1961-1962 (Estimate) | | |
|---|---|---|---|---|---|---|
| | FINANCIAL ASSISTANCE GRANTS | SPECIAL GRANTS | TOTAL REVENUE GRANTS | FINANCIAL ASSISTANCE GRANTS | SPECIAL GRANTS | TOTAL REVENUE GRANTS |
| | £'000 | £'000 | £'000 | £'000 | £'000 | £'000 |
| New South Wales | 91,988 | — | 91,988 | 99,118 | — | 99,118 |
| Victoria . . . . . | 67,371 | — | 67,371 | 73,049 | — | 73,049 |
| Queensland . . . . | 39,951 | — | 39,951 | 42,746 | — | 42,746 |
| South Australia | 30,737 | — | 30,727[52] | 33,197 | — | 33,197 |
| Western Australia | 27,977 | 4,309 | 32,286 | 30,098 | 6,156 | 36,254 |
| Tasmania . . . . | 11,980 | 4,309 | 16,289 | 12,841 | 5,075 | 17,916 |
| Totals . . . . | 269,994 | 8,618 | 278,612 | 291,049 | 11,231 | 302,280 |

A number of other grants were made to individual States in connexion with particular projects. The Western Australia Grant (Beef Cattle Roads) Act 1961[53] provided for a maximum grant to

48 See note 38 at 682, *supra.*
49 No. 88 of 1961.
50 An increase of £1,747,000 over 1960-1961.
51 (1961) 33 COMMONWEALTH PARL. DEB. (H. of R.) 2100.
52 *Sic.* What happened to the odd £10,000?
53 No. 91 of 1961.

the State of £500,000[54] in connexion with expenditure during the year 1961-1962 on the improvement of the road between Wyndham and Nicholson Station, the improvement of the road between Wyndham and Halls Creek *via* Turkey Creek, the construction of a bridge over the Ord River at the Bandicoot Bar, and the construction of a bridge over the Dunham River near its junction with the Ord River. The State was required to undertake to spend not less than £500,000 from other sources on road works in the northern part of the State during that year, in return for which the Commonwealth would provide half the expenditure on the two bridges and the whole of the expenditure on the two roads.

The Housing Agreement Act 1961[55] authorizes the Commonwealth to enter into a new housing agreement with the States to replace the 1956 agreement which expired on 30th June 1961. The new agreement, which will be for a further five years, introduces no major change. It continues the provision whereby the States are obliged to allocate at least 30 per cent. of their total advances for the provision of finance to home builders, through building societies and other approved institutions. The Commonwealth will continue to advance money to the States at an interest rate of one per cent. less than the current long term bond rate. One new provision is that the allocation in any year of finance to home building institutions other than building societies will require the specific approval of the Commonwealth Minister.[56] An amendment to the 1945-55 housing agreement permits the States to sell houses built under the 1945 agreement on terms which the States may decide. The Loan (Housing) Act 1961[57] authorizes the Treasurer to raise loan moneys totalling £42,900,000 to be advanced to the States in accordance with the Housing Agreement.

## IV. DEFENCE.

*Explosives.*

The Explosives Act 1961[58] repeals the Explosives Act 1952-1960 which was limited in its application to the regulation of explosives for defence purposes and could not be used to provide for the control and

54 The 1961-62 budget provided £350,000 for roads in the Northern Territory; and Queensland was granted £5,000,000 over 5 years for expenditure on approved roadwork, by the Queensland Grant (Beef Cattle Roads) Act, No. 90 of 1961.

55 No. 31 of 1961.

56 Under the 1956 agreement, funds had been allocated to State banking institutions in Western Australia, South Australia, and Tasmania.

57 No. 60 of 1961.

58 No. 65 of 1961.

safe-handling of commercial explosives. The new Act is therefore designed to permit the making of regulations covering the safety of persons and the safe handling of both Commonwealth and commercial explosives in Commonwealth explosives areas.

For the most part the Act follows very closely the provisions of the legislation which it replaces. However, Part III, dealing with the control and operation of prescribed Commonwealth explosives areas, is new. For the present this will apply only to the Point Wilson area near Geelong in Victoria, but there is provision for it to be extended by regulation to other Commonwealth land. Regulations under this Part may provide for such matters as the administration of the area, the transport of both Commonwealth and commercial explosives in the area, the berthing of ships and the manner of handling cargo over the wharf, including any charges that may be levied on private concerns or State governments for the use of Commonwealth facilities and services.[59]

[59] Although it troubled nobody in Parliament (*vide per* Mr. Whitlam at (1961) 33 COMMONWEALTH PARL. DEB. (H. of R.) 2164—"This bill is unexceptionable as far as it goes and as far as we can tell."), the reviewer feels some concern about many of the provisions of this Act on account of the breadth of the regulation-making power that is conferred and the secrecy that could surround regulations and orders made under the Act. Section 14 authorizes the making of regulations (by the Governor-General) for certain purposes relating to explosives in Commonwealth explosive areas. By sec. 5, '"explosives" means—(b) substances or articles prescribed by the regulations to be explosives;' hence the regulations may be made to apply to any substances at all. Similarly, under sec. 13, the regulations may declare any Commonwealth land to be a Commonwealth explosives area. Sections 15 and 16 then largely remove public and Parliamentary supervision of the regulations. Section 15 authorizes a sub-delegation of the regulation-making power —"The regulations may empower a person to provide, by order, for any matter that may be provided for by the regulations." Section 16 then provides that such orders shall not be treated as Statutory Rules within the meaning of the Rules Publication Act 1903-1939 and that, although secs. 48 and 49 of the Acts Interpretation Act 1901-1957 apply to orders, this will not include the obligation to notify the order in the *Gazette* unless so required by the regulation authorizing the order, nor will it include the prohibition in sec. 48 (2) on regulations being expressed to have retrospective effect. For contravention of an order which might have been made by any authorized person with no publicity, sec. 20 provides maximum penalties of £500 or 6 months imprisonment or both; and, in any proceedings, the production of a document purporting to be the order, or purporting to be certified as a true copy of the order, is evidence of the order.

It is true that none of these provisions is new, except sec. 13, and it may also be true that they have never caused trouble. The reviewer is also prepared to concede that this may be a topic calling for some extraordinary powers. He would, however, like to be convinced that powers of such a nature are justified in this instance, and he hopes that they will not be used as a precedent for other legislation. He thinks that the Opposition was perhaps a little complacent about this Act.

*War Service Homes.*

The War Service Homes Act 1961[60] introduces two amendments to the war service homes scheme. The first enables ex-servicemen, who make payments to the War Service Homes Division in excess of their instalments during the term of their loans, to withdraw those excess amounts to meet the cost of outgoings on their property and to carry out repairs or make alterations or additions to their home. This had in fact been the practice of the Division since 1933, but the Attorney-General's Department had advised that the existing section 29 did not authorize the practice.

The second amendment relates to the transfer of a war service home whilst the property is still subject to a security under the Act. Since 1948, the Act had purported to prevent such a transfer except by a personal representative of the purchaser or borrower, or with the consent of the Director. In the case of a transfer by a personal representative, the Director had power to call up the loan if the transfer was to a person who would not have been eligible under the scheme. In the case of a transfer with the consent of the Director, the Act specified the conditions to which the Director should have regard in determining whether to grant or withhold his consent. These conditions did not contain an absolute prohibition on the approval of a transfer to an ineligible transferee, but permitted it only in exceptional circumstances. However, various conveyancing devices had the effect of enabling an ineligible person to buy a war service home. These devices included the purchase by a person, who was not otherwise eligible under the Act, of the purchaser's or borrower's equity in the home, under an agreement which permitted the transferee to occupy the home and pay off the balance of the loan to the Division over the remainder of the term. Another device was an agreement to let the home, coupled with an option to purchase. The Attorney-General's Department had advised that legally these devices were caught by section 35 and were of no force or effect; however, this did not actually prevent purchasers or borrowers disposing of their homes in this way. Accordingly sections 30A, 35, and 36 of the Act are amended to provide that when a transfer is made which, under section 35 (1), is of no force and effect, the Director may take possession of the property and exercise his powers under section 36 to cancel the contract of sale, in the case of a purchaser, or to call up the loan and sell the property, in the case of a borrower. "Transfer" is so defined to include all dealings in relation to a home that is still subject to a

[60] No. 73 of 1961.

contract of sale, mortgage or other security under the Act, except a lease or a mortgage.

## V. INDUSTRIAL RELATIONS.

*Stevedoring Industry.*

The Stevedoring Industry Act 1961[61] introduces a scheme for long-service leave for waterside workers. If this measure was not received with pleasure and gratitude on the waterfront, or in trade union and labour circles generally, the reason perhaps lies in the fact that there were good grounds for suspecting that the main purpose of the Government was to be found in the conditions on which such leave would be granted, and in particular in the penal provisions, resulting in loss of leave entitlement, for unlawful stoppages.[62]

The Act introduces a new Part IIIA into the principal Act, dealing with long service leave. Under these new provisions, men registered at continuous ports,[63] and who are required to attend on a daily basis, are entitled to 3 months' long service leave after 20 years' qualifying service, and to six and one-half weeks for each subsequent 10 years. Service at seasonal ports during the season where daily

61 No. 39 of 1961.

62 The reviewer, who disclaims any special knowledge of industrial relations, is naturally reluctant to scatter his comment in so sensitive an area as this, where vested interests abound and little can be taken at face value. Nevertheless, it does appear to him that this Act represents a serious and courageous attempt to deal with a serious problem. The Minister (Mr. McMahon) showed perhaps a little anxiety and some reluctance to grasp the nettle in his second reading speech. After reviewing the serious loss of man-hours through stoppages at the ports, he said [(1961) 31 COMMONWEALTH PARL. DEB. (H. or R.) 1698]:—

> ". . . this state of affairs—mass stoppages at ports—just cannot be allowed to go on.
>
> It may very well be asked why in these circumstances the Government has decided to grant long-service leave to waterside workers. In the first place, other regular full-time employees now receive long-service leave, and the Government thought that it should extend such leave to what I might describe as "permanent" waterside workers. The Government acted on its own initiative; it was not urged to do this by the federation. Indeed, Mr. Healy, the general secretary of the federation, struck me as being most disturbed about it."

(This last sentence probably qualifies as the understatement of the Session). The Minister gave no other reason for the Bill; and the reason above, taken at its face value, seems to involve a *non sequitur*. Nevertheless, few were in doubt as to the purpose of the Bill, though there was sharp division between applause and condemnation. Again the reviewer ventures his own opinion with some trepidation, but it does appear that those who condemned were committed to the proposition that half a cake was worse than none at all!

63 *I.e.*, ports at which men are required to attend daily throughout the year.

attendance is a requirement will also be counted, as will service dating back to the 1942 war-time scheme. Service after attaining the age of 70 will not be counted. Men who have 8 years' qualifying service as "regulars", and who then transfer to the "irregulars" register on the ground of ill-health or age, will be credited with the days they actually work as "irregulars". *Pro rata* leave may be granted in certain circumstances after 10 years' service. The long-service leave entitlement, however, is subject to important conditions in the new section 52A which are designed to discourage waterside workers from irresponsible and avoidable stoppages. If there is a port stoppage involving more than 250 men or more than one-third of the waterside workers registered at the port,[64] the men involved will lose their entitlement to attendance money for the next four days on which they would have been entitled to receive it in respect of each day of the stoppage,[65] and in addition the service credited toward long-service leave of the waterside workers involved will be reduced by such number of days, not exceeding 30, as the Commonwealth Conciliation and Arbitration Commission, after enquiry, determines.[66] These provisions of section 52A will not apply if the Australian Stevedoring Industry Authority chooses to exercise its disciplinary powers under section 36.

The Act also makes special provision for elderly workers in the industry by building on the existing practice whereby men have elected to go on an "irregulars" roster under which they are entitled to continue working on the waterfront, attending for work when they wish to do so, and sometimes on the basis that they will handle only specified types of work. Accordingly, a new section 31A authorizes the division of the register of waterside workers at each port into Parts A and B. All workers at present on an "irregulars" roster will be registered on Part B. Other workers who are already over 70, or on attaining 70, will be transferred to Part B. Workers may request the

64 Sec. 52A (1): ". . . the Authority is authorized to declare, in writing, that a port stoppage occurred that day at that port *and shall declare accordingly.*" The draftsman appears to have had a change of mind as to whether this should be permissive or mandatory!

65 The reviewer *thinks* this is the correct interpretation of the section, that 4 days' attendance money is forfeited for each day of the stoppage in respect of which the Authority makes a declaration, but he is not sure. It is possible to argue that the forfeiture of attendance money lies for each stoppage, no matter how long its duration. The difficulty arises through a curiously ambiguous expression in section 52A (4) (a) whereby attendance money is "suspended for the next four days that are days in respect of which he could otherwise have become entitled to attendance money." "Next" after what? "Otherwise" but for what?

66 Consequential amendments are made to the Conciliation and Arbitration Act 1904-1960 by the Conciliation and Arbitration Act, No. 40 of 1961.

Authority to transfer them to Part B when they attain the age of 65. There is also provision for the enrolment on Part B of workers whose physical or mental condition makes it desirable in the interests of their own health or of the expeditious, safe, and efficient performance of stevedoring operations that they should not be employed as regulars. Workers who are transferred to Part B may thereafter continue to work in the industry whenever they please if work is available for them. If an irregular worker is requested to attend by the Authority on a particular day, and he does so attend, but there is no work available for him, he will be entitled to receive attendance money.

Men aged 70 at the date of the Act immediately became eligible for payment in lieu of long-service leave, the amount depending on their length of service. Men aged 65 on that date qualified for similar payments if they elected to leave the industry or to transfer to Part B of the register.

The Act, by amending section 36, supplements the power of the Authority to suspend a man for disciplinary reasons, by conferring on the Authority power to suspend his attendance money. Instead of suspending a man for a day, the Authority is authorized to suspend his entitlement to attendance money for the next four occasions on which he would otherwise have been entitled to receive it.

New sections 37 and 37A ensure that where an appeal against suspension is upheld, at the discretion of the Conciliation and Arbitration Commission men may be granted compensation for lost wages.

## VI. TRADE, COMMERCE, AND INDUSTRIAL PROPERTY.

*Export Payments Insurance Corporation.*

Amendments[67] to the Export Payments Insurance Corporation Act 1956-1959 are intended to enable export payments insurance cover to be given for transactions which normally the Corporation could not, or would not, cover. The Corporation is charged, by section 14 of the principal Act, to pursue a policy directed toward securing revenue sufficient to meet all its expenditure properly chargeable to revenue, and this requirement obliges the commissioner to observe orthodox insurance principles in granting cover. Section 11 (4) directs the Corporation not to enter into any particular contract of insurance unless it is in accordance with policies approved or determined by the Minister. Accordingly there may be many proposals which the commissioner could not accept but which nevertheless merit

[67] By the Export Payments Insurance Corporation Act (No. 14 of 1961).

consideration as developing overseas markets or encouraging particular Australian industries.

Under the new section 16A, therefore, the Corporation is authorized to refer any such proposal to the Minister for Trade, who, if he considers that it would be in the national interest for cover to be granted, may direct the Corporation to enter into a contract of insurance in respect of that proposal on such terms as he may specify. The Minister's approval of any proposal must be notified in the Gazette. The Corporation is required to keep a separate account of all receipts and disbursements arising out of "national interest contracts", and this class of business will not be included in the statutory limit of £50,000,000 on the Corporation's outstanding liabilities. The receipts from "national interest contracts", after deduction of the reasonable expenses of the Corporation, must be paid to the Commonwealth, and the Commonwealth in return will pay to the Corporation any amounts required to discharge liabilities of the Corporation under such contracts. In effect, the Corporation acts as agent of the Government in the matter of issuing contracts, collecting premiums, and paying claims.

These amendments were prompted by the successful experience under similar provisions in the United Kingdom and Canada.

*Navigation.*

The Navigation Act 1961[68] contains 35 sections, 33 of which amend various provisions of the Navigation Act 1912-1958. It also contains a schedule which makes 26 further amendments. This is not quite as bad as what happened in 1958,[69] but nevertheless it is becoming extraordinarily difficult to discover what the Navigation Act does provide.

The new amendments deal with various matters, largely of minor importance, which have been found to require attention since 1958. Section 43 is amended to introduce new provisions concerning the manning of ships and the minimum deck and engine-room complements. Section 90, which prevented the attachment of seamen's wages, is repealed, as the Matrimonial Causes Act now establishes the liability of seamen in respect of compliance with maintenance orders.[70] Section

68 No. 96 of 1961.

69 See 4 U. WEST. AUST. ANN. L. REV. 520, note 83.

70 To quote Mr. Opperman (Minister for Shipping and Transport) at (1961) 32 COMMONWEALTH PARL. DEB. (H. of R.) 110:—

> "In principle, the protection afforded to seamen under the present Act is not in accordance with modern practices and is very rarely availed of by seafarers in the present day."

Bang goes another old-fashioned romantic illusion!

105 has been redrafted to ensure that, where a court orders a deserting seaman back on ship instead of imposing a penalty, he will not be subject to a forfeiture of wages, in respect of the ship-owner's expenses caused by his desertion, any heavier than he would have suffered had a penalty been imposed. Various matters which in the past had been prescribed by the Act are now dealt with in Regulations; these include matters to be entered in log-books, signals of distress and urgency, and hospital accommodation. Statutory authority is provided for the practice of having "running" surveys on ships, whereby arrangements are made for various parts of the ships to be surveyed at different times and so avoiding delaying the ships. Maximum penalties under section 219B for offences against the safety provisions in relation to the overloading of ships are increased from £500 to £1000. Section 420, which gave the Minister power to cancel or suspend the certificates of competency of masters, mates or engineers convicted of offences in a Commonwealth country, is replaced by a new section 420 which applies wherever the person was convicted and which gives the Minister the additional powers to re-issue a cancelled certificate or to grant a certificate of a lower grade. The new section also enables the Minister to deal with a certificate which a Court of Marine Inquiry or other tribunal established under the law of a State has cancelled or suspended so far as concerns its validity in the State. In future, appeals from a Commonwealth Court of Marine Inquiry will lie to the Commonwealth Industrial Court.

*Wine Overseas Marketing.*

The Wine Overseas Marketing Act 1929-1954 has been amended by the Wine Overseas Marketing Act 1961[71] to remove doubts as to the legal competence of the Australian Wine Board to acquire and operate an Australian Wine Centre in London in order to promote the sale of Australian Wine and Brandy.

## VII. PRIMARY PRODUCTION.

*Wool.*

Amendments have been made to the existing wool tax legislation[72] to increase the levy paid by wool-growers to finance wool promotion activities. The increase was requested by the industry after agreement had been reached between the Australian Wool Bureau and the wool-growers organizations. The levy is increased from 5s. to 10s. per bale, and will apply to wool sold and exported for sale between

[71] No. 25 of 1961.

[72] By the Wool Tax Act (No. 1), (No. 41 of 1961), the Wool Tax Act (No. 2), (No. 42 of 1961), and the Wool Tax Assessment Act (No. 43 of 1961).

28th August 1961 and 30th June 1962. Thereafter the rates revert to 5s. per bale unless the wool-growers decide to continue the higher rates.

*Cattle.*

Legislation[73] passed in 1960 had imposed a maximum levy of two shillings per beast on all cattle slaughtered for human consumption over 200 lb. dressed weight, in order to establish a Cattle and Beef Research Trust Account. Although the owner of the cattle at the time of slaughter was responsible for payment of the levy, provision was made for the collection of the levy from the proprietor of the abattoir, and it was intended that the levy should ultimately be borne by cattle producers through adjustment of live stock prices. The legislation came into operation on 1st July 1960 and, thereafter, meat operators began to deduct the amount of the levy from the selling agents' invoices in respect of cattle purchased at an auction. However, the agent had no legal authority to make a similar deduction from the account sales of the vendor of the cattle. In many cases, therefore, the levy was being borne by the selling agents themselves, whereas under sale by private treaty the meat operators found no difficulty in deducting the levy from account sales of the producers. Accordingly requests were made to the Government for amending legislation to make the cattle producers directly responsible for financing the research plan, because the producers' organizations had sponsored the plan originally and had indicated the willingness of the cattle producers to finance it.

Meanwhile selling agents started proceedings in the High Court to challenge the validity of the legislation and to recover short payments made by the meat operators in respect of the levy. In these circumstances the Government decided to suspend collection of the levy pending a settlement of the dispute. Accordingly, the Cattle Slaughter Levy (Suspension) Act 1961[74] suspended collection of the levy from 14th October 1960 (the date of the issue of the High Court writ) to 14th October 1961 and made provision for the repayment of any levy paid or deducted during, but not prior to, this period of suspension.

In the meantime, the Government examined various solutions to the problem with the parties concerned, and this led to the passing of

[73] Cattle and Beef Research Act (No. 6 of 1960), Cattle Slaughter Levy Act (No. 7 of 1960), Cattle Slaughter Levy Collection Act (No. 8 of 1960), and the Meat Export Control Act (No. 9 of 1960).—See 5 U. WEST. AUST. L. REV. 439.

[74] No. 49 of 1961.

the Cattle Slaughter Levy Collection Act 1961[75] which extended the scheme as introduced in 1960 so as to give the meat operators and selling agents the legal right to pass back the incidence of the levy to the vendor of the cattle. Accordingly, the levy remains payable by the owner of the stock at the time of the slaughter, but the impact may be transferred, in the form of price deductions, to the vendor.

In view of this settlement, the writ was not proceeded with. Nevertheless, the Government decided to remove any doubts as to the validity of the legislation and accordingly the Cattle and Beef Research Act 1961[76] amends the 1960 Act by describing the research that may be undertaken in terms of Commonwealth powers instead of generally.

*Gold-mining.*

The Gold-Mining Industry Assistance Act 1954-1959 provides for the payment of a subsidy to gold producers. The Act distinguishes between large producers, whose output of gold exceeds 500 ounces a year, and who are entitled to subsidy if their average cost of production exceeds £13. 10s. per ounce at a rate varying with the cost of production and subject to a 10 per cent. profit restriction, and small producers, whose annual output is 500 ounces or less and who receive subsidy at the flat rate of £2. 8s. per ounce. The latter do not have to prove costs of production, nor are they subject to a profit limitation.

However, it was found that the arbitrary dividing line at 500 ounces could produce unfair results in that an output at that figure attracts a flat rate subsidy, whereas an output slightly in excess of that figure may attract little or no subsidy, depending on the costs and profits. Accordingly, the Act has been amended[77] to enable a producer, whose output in a year is between 501 and 1,075 ounces, to elect to be treated as a small producer. If he does so elect, the rate of subsidy payable to him will be determined at the rate of £2. 8s. per ounce, less 1d. for each ounce by which his output exceeds 500 ounces.

## VIII. INTERNATIONAL ENGAGEMENTS.

*International Civil Aviation Organization.*

The Air Navigation Act 1961[78] gives parliamentary approval to the ratification by Australia of the Montreal Protocol to the Chicago

[75] No. 48 of 1961.
[76] No. 50 of 1961.
[77] By the Gold Mining Industry Assistance Act (No. 66 of 1961).
[78] No. 72 of 1961.

Convention on International Civil Aviation. The Protocol makes provision for increasing the membership of the Council of the Organization from 21 to 27.

*International Finance Corporation.*

The International Finance Corporation, which is closely associated with the International Bank and the International Development Association, exists to promote economic development in member countries, particularly by encouraging productive private enterprise. It does this by providing financial assistance for approved enterprises. However, Article III, section 2, of the Agreement of the International Finance Corporation prevented the Corporation from investing in common stock, because such stock normally carries voting rights and it was thought that it would be wrong for the Corporation to become involved in managerial responsibilities in any of the enterprises it was encouraging, except for the purpose of protecting its own interests. However, this restriction had the effect of forcing the Corporation to use complicated and unusual methods of providing financial assistance. Accordingly an amendment to section 2 of Article III adopted by the Governors of the Corporation will now permit the Corporation to "make investments of its funds in such form or forms as it may deem appropriate in the circumstances." A further amendment to subsection (iv) of section 3 of Article III directs the Corporation to assume no responsibility for the management of any enterprise in which it has invested and to refrain from exercising its voting rights for any purpose which, in its opinion, falls within the scope of managerial control. Section 4 of Article III, which permits the Corporation to take whatever action is necessary to protect its own interests, remains unaffected.

These amendments are now incorporated in the International Finance Corporation Act 1955 as the Second Schedule.[79] The effect of statutory recognition of these amendments is that regulations may now be made, under section 6 of the principal Act, exempting the Corporation from taxes and charges in respect of its investments in Australia.

## IX. FEDERAL TERRITORIES.

*Northern Territory Supreme Court.*

The object of the Northern Territory Supreme Court Act[80] is to

79 By the International Finance Corporation Act (No. 69 of 1961).
80 No. 11 of 1961.

set up a new Supreme Court of the Northern Territory of Australia[81] on a statutory basis similar to that in the Australian Capital Territory.[82]

The Court is a superior court of record. The judges, in accordance with the requirements of section 72 of the Constitution,[82a] will be appointed for life. There will be one full-time judge, but he will be assisted from time to time by persons, holding appointments as judges of other Commonwealth courts, who may be appointed additional judges of the Court. An additional judge receives no salary in addition to that in respect of his other appointment. The Act envisages that the full-time judge may himself hold an appointment as an additional judge of some other Commonwealth court. The Government hoped by these arrangements that not only would it be possible to provide relief judges in the event of the illness of a judge of a Commonwealth court, but that in addition a regular system of interchange of such judges might be possible. A necessary consequence of this proposal was that the Northern Territory Judge should have the same salary and pension rights as other judges included in the scheme. This involved

81 The last two words distinguish the new Court from the Supreme Court of the Northern Territory which it replaces. They necessitated some amendment of the Northern Territory (Administration) Act 1910-1959 by the Northern Territory (Administration) Act (No. 68 of 1961), which also provides that the produce of timber cut on reserves in the Territory shall be paid into a trust fund for aborigines.

82 Section 6, which sets up the Court, is another example of the "jam tomorrow" style of drafting mentioned in note 16 *supra*. Hence—

"(1) There shall be a superior court of record . . .
(2) The Court shall consist of the Judge or Judges . . ."

These provisions cannot be imperative, because no duty is cast upon anyone, and they should not be future because the statute always speaks. Sometimes, the draftsman gets it right, *e.g.*—

"Sec. 22—(1) The Supreme Court has power to grant . . ."

This one is interesting, because the section originated in the English Judicature Act 1873 and has been copied in many Acts since then (including the Australian Capital Territory Supreme Court Act), but always in the form "The Supreme Court *shall have* power . . ." Similarly, the correct tense is chosen in sec. 46—

"(1) The High Court has jurisdiction to hear . . ."

However, in sec. 29 (1) ("There shall be a Registry of the Court at Darwin . .") and sec. 30 (1) ("The Supreme Court shall have a Seal of the Court . . ."), the draftsman was apparently in a more acute dilemma. It would appear that really these should be imperative because it was intended that somebody should do something about them, but there was no obvious person on whom the duty could be placed. Could one obtain mandamus against the judge if a Registry were not opened at Darwin?

82a As interpreted by a majority of the High Court in Waterside Workers' Federation of Australia v. J. W. Alexander Ltd., (1918) 25 Commonwealth L.R. 434.

an amendment to the Judges' Pension Act[83] to bring the Northern Territory Judge within the scheme of that Act.[84]

The jurisdiction of the Court is basically the same original jurisdiction in civil and criminal matters as the Supreme Court of South Australia had in respect of that State immediately before the Territory passed to the Commonwealth in 1911. This jurisdiction may be added to by Ordinance of the Legislative Council. The Court has jurisdiction in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, being matters arising in or under the laws in force in the Territory. The Court is also a court of appeal from the judgments of the inferior courts of the Territory.

For the rest, the provisions of the Act follow closely those in all similar legislation. Part VI makes what are the usual provisions for appeal from the Supreme Court to the High Court. Part III provides for the concurrent administration of law and equity in what are the traditional judicature system terms, apart from some improvement of the drafting. Section 55 authorizes the senior judge to make Rules of Court, subject to the right of the Attorney-General to disallow them.

## X. STATUS AND SOCIAL SERVICES.

*National Health.*

The National Health Act 1961[85] introduces a number of minor amendments to the principal Act.[86] "Contributor" is redefined for

83 By the Judges' Pensions Act, No. 13 of 1961.

84 This particular Bill caused Mr. Whitlam to dwell on the variations in the salaries and pensions of judges among the various States—(1961) 30 COMMONWEALTH PARL. DEB. (H. of R.) 937. It may be of interest to Western Australian practitioners to read the following extract from the Attorney-General's reply (*ibid.* at 940):—

> "After all, those who practise the law in Western Australia would not hope to get the same fees for the same work that the Deputy Leader of the Opposition would ask for if he were practising in New South Wales . . . because money standards for the work in the two States are quite different. I am sure that a man who accepted appointment to the Supreme Court of Western Australia would not expect to get the same salary as a man who accepted a post on the Supreme Court of New South Wales. This is not measured by work value. It is measured in relation to the standards of the profession, what they earn and expect and the security they have in the various State professions."

But we are catching up, Mr. Attorney—see (Western Australian) Judges' Salaries and Pensions Act 1962!

85 No. 16 of 1961.

86 Several years of writing this review and reading the Parliamentary Debates are making the reviewer suspicious that the description of a provision as a mere "machinery amendment" is a rather nice way of saying "we don't really know what it is about, and it really doesn't seem to justify the effort needed to find out."

medical benefit purposes, so that all persons becoming contributors to a registered medical benefits organization after 1st July 1961 are eligible for Commonwealth benefits if they contribute for fund benefits equal in range and amount to the benefits specified in the First Schedule to the principal Act, but so that persons who were contributors before that date and who were eligible for Commonwealth benefits will continue to be eligible so long as they continue their membership of the registered fund.

Section 16 of the principal Act, dealing with Commonwealth medical benefit for two or more operations, has been amended. Under the principal Act, where more than two operations were performed on the same person on one occasion[87] and the amounts specified in the First and Second Schedules as benefits were not the same for each of those operations, the Commonwealth benefit in respect of medical expenses was limited to such amount not exceeding £22. 10s. as the Director-General should prescribe. The amendment will retain the limit of £22. 10s. but the Director-General's formula for determining the amount has been written into the section.

Other amendments enable extra charges for theatre fees, drugs, dressings, special nursing, and laundry to be covered by special account hospital benefits (instead of just the gross fees charged by the hospital for accommodation and nursing) as long as the patient's insurance coverage is high enough to meet those extra charges.

Finally, the membership of the Pharmaceutical Benefits Advisory Committee, which advises the Government on what drugs and medicines should be listed as pharmaceutical benefits, has been enlarged by increasing the number of medical practitioners on the Committee to six appointed by the Minister from a list of ten nominated by the

87 Described by Senator Tangney as "a kind of job lot"—see (1961) 19 COMMONWEALTH PARL. DEB. (Sen.) 736. A heresy seemed to get around during the debates on this measure (see *per* Senator Tangney, *ibid.* at 736, and *per* Mr. Allan Fraser in (1961) 30 COMMONWEALTH PARL. DEB. (H. of R.) 996) that sec. 16 limited the amount the doctor could charge for operations to £22. 10s. Senator Anderson seems to have implied (at (1961) 19 COMMONWEALTH PARL. DEB. (Sen.) 749) that, although £22. 10s. was not the limit, it would nevertheless determine the limit of the doctor's fee at 60 guineas. However, sec. 23 provides that Commonwealth benefit is paid to the medical benefits fund which has paid the amount of fund benefit and also Commonwealth benefit either to the doctor direct or to the contributor who has paid the doctor. But doctors remain free to charge whatever fees they consider proper; the Commonwealth benefit is merely a partial refund to the contributor in most cases. Do politicians not pay doctors' bills or avail themselves of the National Health benefits?

Federal Council of the British Medical Association in Australia,[87a] instead of four from a list of six.

*Pensions.*

Various increases were made in age and invalid pensions, widows' pensions, and unemployment and sickness benefits by the Social Services Act 1961.[88] Rates of war and service pensions and allowances under the Repatriation Act were increased by the Repatriation Act 1961,[89] and similar increases were provided for seamen by the Seamen's War Pensions and Allowances Act 1961.[90]

There has been some revision of superannuation benefits payable under the Superannuation Act 1922-1959 to ex-employees of the Commonwealth and their families. Superannuation under the Act is related to the salary of the contributor so that as his salary increases, so does his right to contribute for a greater number of units of pension up to the limit of salary at which the maximum pension is reached. As a result of this system, however, those persons whose pension entitlement is governed by the lower salaries paid in the past have been seriously affected by increases in the cost of living. Some relief has been provided for such pensioners by progressive increases in the value of units of pension from 10s. in 1922 to 17s. 6d. in 1954. However, some anomalies still remained. In 1957 the Government, therefore, introduced a sliding scale of increases for pensioners who retired before 1947, with higher increases for those who retired earlier. Even this has not proved completely effective, and the Superannuation (Pension Increases) Act 1961[91] attempts to solve the problem by providing an individual determination for persons so affected. The object of this measure is to bring the Consolidated Revenue component of the pensions of those who retired before 1954 up to the level which would now apply if the pension had begun in 1954. For each pensioner who retired before 1954, a notional 1954 salary will be determined, having regard to the general increases in salaries that occurred between the date of his retirement and 1954. By reference to the scale of units contained in the 1954 Act, the number of units applicable to that notional salary is then determined. The basic increase will be 12s 6d. per week (the normal Consolidated Revenue component) in respect of each unit of pension by which the number of units applicable to

87a This body has since changed its name to "Australian Medical Association"; will a further amendment of the Act be necessary?

88 No. 45 of 1961.

89 No. 46 of 1961.

90 No. 47 of 1961.

91 No. 86 of 1961.

the notional 1954 salary exceeds the number of units applicable to the retiring salary. Pensioners, who did not avail themselves of all units of pension for which they were entitled according to their salaries, receive only a proportionate part of the increase, as will those in receipt of actuarial equivalent pensions and partial invalidity pensions. A widow will receive five-eighths of the increase to which her husband would have been entitled had he been alive. Increases payable under the 1957 Act are absorbed in the new adjustment. New rates of pensions are provided in respect of certain former members of the Defence Forces who were retired before the Defence Forces Retirement Benefits Act and who were granted special pensions.

The Defence Forces Retirement Benefits (Pension Increases) Act 1961,[92] for reasons similar to those that led to the superannuation increases, increases the rates of pension payable to certain retired members of the defence forces. Other amendments have been made to the Defence Forces Retirement Benefits Act[93] as a result of the Allison Report of 1957 on aspects of pay and allowances for members of the serving forces and some aspects of retirement benefits.

## XA. MARRIAGE.*

In the course of his second reading speech introducing the Bill which subsequently became the Matrimonial Causes Act 1959, the Attorney-General announced that it was his hope to introduce before very long a general bill with respect to marriage, in exercise of the constitutional power given by placitum xxi of section 51 of the Constitution, whose provisions would operate uniformly throughout Australia.[94] In May 1960 such a measure was introduced.[95] The second reading debate, however, was adjourned until August of that year to enable consultation with interested bodies and to enable certain administrative arrangements with the States to be made. When the debate was resumed the Bill did not in fact proceed into the committee stage before the session came to an end, with the result that it became necessary to re-introduce it in March 1961 when it passed through all stages in the House of Representatives in a matter of two days, was passed by the Senate without amendment a month later, and ultimately emerged as the Marriage Act 1961.[96]

92 No. 87 of 1961.

93 By the Defence Forces Retirement Benefits Act (No. 15 of 1961).

* The reviewer is indebted to Mr. I. W. P. McCall for contributing this section of the review.

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

95 See (1960) 27 COMMONWEALTH PARL. DEB. (H. of R.) 2000.

96 No. 12 of 1961. The royal assent was received on 6th May 1961.

The purpose of the Act was to unify throughout Australia the law relating to marriage[97] and to replace the pre-existing nine separate systems of marriage laws which operated previously in the six States, the two territories, and Norfolk Island. Although in the pre-existing separate systems the origin of many of the provisions could be traced back to Lord Hardwicke's Marriage Act of 1753 and the Acts that succeeded it in the United Kingdom, and accordingly were similar in many respects, in recent times there was to be seen a divergent development of some aspects of these marriage laws. Uniformity, simply for uniformity's sake, was not being advocated by the Attorney-General; but on this occasion uniformity throughout the Commonwealth on such a fundamental relationship as marriage was in his view both proper and desirable as was apparently also the view of the framers of the Constitution.

A Marriage Act is largely procedural, setting out the formalities that must be complied with to celebrate a valid marriage and in this respect the Act is not exceptional. However, the Act goes beyond being purely procedural and has been made as comprehensive as possible. It repeals the Marriage (Overseas) Act 1955-1958,[98] which provided for the marriage abroad of Australian citizens before diplomatic and consular officers, and incorporates the provisions of that Act but adds provision for diplomatic or consular representatives of foreign countries to Australia, to marry their nationals in Australia according to the rights and ceremonies of that foreign country—but only if certain requirements are fulfilled, and provided also that the law of that foreign country permits Australian marriages to be solemnised in that country pursuant to Part V, Division 2, of the Act.[99] In addition, it

97 The Act does not apply in its entirety to the territories of Papua and New Guinea, nor does it affect aboriginal tribal marriages. With respect to aboriginal marriages; first, State native welfare laws requiring the consent of an officer or authority to the marriage of an aboriginal over the age of twenty-one years are not excluded (see sec. 6 (b)); and secondly, marriages according to tribal custom are not recognized as marriages requiring registration, but as there is nothing in the Act which excludes from its operation the aboriginal natives of Australia they can in fact marry before an authorized celebrant and the marriage will require to be registered, it will be monogamous, and recognized throughout Australia as a valid marriage. On the other hand, if they do not marry pursuant to the provisions of the Act, then in the Attorney-General's opinion the States can legislate, not for tribal marriages, but for the consequences or effect thereof; for example, the effect on devolution of property and the rights of succession. See the Attorney-General's explanation as to the position of aboriginals in (1961) 30 COMMONWEALTH PARL. DEB. (H. of R.) 489.

98 Reviewed in (1956) 3 U. WEST. AUST. ANN. L. REV. 544-545, and (1959) 4 U. WEST. AUST. ANN. L. REV. 535-536.

99 See secs. 60-64.

establishes a minimum marriageable age and deals with the question of legitimation. The general scheme is to contain in the Act the substantive law relating to marriage and leave the States to provide the machinery for registration of marriages. In fact such machinery was in existence in each of the States and had been for many years, and rather than duplicate such machinery by establishing Commonwealth registries[1] the Attorney-General decided on the alternative course of using the established State registries but stipulated that failure to comply with such registration requirements will not invalidate a marriage.[2]

The Act firstly prohibits marriages in Australia between persons who are within the degrees of consanguinity and affinity set out in the Second Schedule of the Matrimonial Causes Act 1959 but goes further to provide that a relationship traced through or to a person who is an adopted child shall be deemed to be a natural relationship for the purposes of the prohibited degrees of consanguinity. The provision is to some extent alleviated by allowing permission of a judge to be obtained to enable persons who wish to marry, but cannot by reason of this provision, to do so, but not for the purpose of allowing brother and sister or parent and child who are so by virtue of the adoption, to marry.[3]

A minimum marriageable age of eighteen years for a male and sixteen years for a female has been provided, an attempt in the Committee stage to reduce these ages to fifteen for both sexes failing.[4] Again this provision is alleviated by permitting a judge to make an order authorizing a marriage where, in the case of the male, he is over sixteen years of age and in the case of a female, she is over fourteen years of age, but only in circumstances that are so exceptional and unusual as to justify the order. In Committee the Attorney-General explained that the policy was that more than mere pregnancy of the intended wife would be required to justify the making of an order,[5]

1 Because the States will continue to operate registries for the registration of births and deaths.

2 See sec. 6 (a).

3 See secs. 22-24.

4 See (1961) 30 COMMONWEALTH PARL. DEB. (H. of R.) 501.

5 See (1961) 30 COMMONWEALTH PARL. DEB. (H. of R.) 501, where he gave two examples of circumstances which he considered would justify the making of an order. The first, where the parties wished to marry, the wife being under age, and the husband about to take up a position in an overseas country where the minimum marriageable age was higher than in Australia; the second, where again the parties could not marry because one was under age but if that party was not married before a particular date then he would be unable to succeed to property left by will. In each case the parties desire

as the view adopted was that "a marriage of immature people solely to ensure that an expectant child is born within wedlock is not in the real interests of the child or of the parents or, for that matter, of the community."[6] The usual prohibition on the marriage of minors, who have not been previously married, without the consent of the parent or guardian, or, depending on the circumstances of the minor, the person named in the schedule, appears.[7] If the obtaining of the consent is impracticable a prescribed authority[8] may dispense with the consent, or if the consent is refused a magistrate may give his consent in place of the person required by the schedule. If there is a refusal to dispense with the consent or if the consent of a magistrate is either given or refused in place of a person refusing to consent, then either such person or the minor may apply to a judge for a re-hearing of the application. Such re-hearing is an enquiry held in private; the parties may be represented and must be given an opportunity of being heard, but the judge is not bound by the rules of evidence.[9]

The Act next goes on to deal with the actual solemnization of marriages. It begins by preserving the principle, established in all States, of permitting the solemnization of marriages by ministers of religion (who are members of a declared religious body and are registered under the Act) or by other authorized persons who may be either State officers, whose function it is to register marriages, or other suitable persons. All such persons are defined as authorized celebrants.

The formalities surrounding the solemnization of the marriage include notice to the celebrant of the intended marriage, production of a birth certificate, a declaration as to status and that there is no impediment to the marriage, a requirement of two witnesses to the ceremony which may take place on any day and at any time. The ceremony itself must be in a form recognized by the religious body to which the minister belongs, or, if the celebrant is not a minister then there is provided a minimum form of words to be spoken by the parties, and a short explanation of the monogamous nature of marriage known to Australian law to be given by the celebrant.[10] When reference is made to the effect of non-compliance with these formalities one appreciates how the Act makes certainty of the marriage status

sincerely to marry and presumably in the view of the magistrate are sufficiently mature for marriage.

6 (1960) 27 COMMONWEALTH PARL. DEB. (H. of R.) 2003.

7 Secs. 13 and 14.

8 A prescribed authority is defined and includes an authorized celebrant.

9 Secs. 17-19.

10 Secs. 40-46.

of prime importance, as non-compliance with all these formalities, except one, including the requirement of consent in the case of a marriage of minors, will not invalidate the marriage. The one exception is the ceremony itself, without which there could be no marriage. Compliance with all these formalities is secured by creating offences for their non-observance. Even a marriage solemnized by an unauthorized person will not be invalid if either party believed that such person was authorized.[11]

Legitimation of children by subsequent marriage is the next matter dealt with by the Act. This method of legitimation was introduced to all States by statute during the period 1898-1902. The legislation in the States differed, however, by in some cases prohibiting legitimation where at the time of the birth of the child there was a legal impediment to the marriage of the parents, whereas in other cases this was not so. The Commonwealth Act clearly provides that such an impediment will not constitute a bar to the legitimation; the legitimation takes effect automatically upon the marriage of the parents, and dates back to the date of birth of the child or the commencement of the Act, whichever is the later.[12] The qualification to the operation of the provision is that the father, at the time of the marriage, was domiciled in Australia or the marriage took place in Australia, or, if it took place out of Australia that it did so pursuant to the provisions of the Act permitting marriages to be solemnized overseas. The same policy regarding registration of legitimated births has been followed as with registration of marriages, in that the keeping of registers and the obligation to register have been left to State law.

This part of the Act also provides the rules for the recognition of foreign legitimations by subsequent marriage. If the marriage of the parents takes place outside Australia and the father was domiciled outside Australia at this date and by the law of his domicile the child became legitimated by virtue of the marriage, then the child is for all purposes regarded as the legitimate child of his parents in Australia, from the date of the marriage or the commencement of the Act, whichever is the later.[13]

Finally, in this part dealing with legitimation, provision is made for the Supreme Courts of the States in the exercise of the federal jurisdiction with which they are invested, making declarations of legitimacy.[14]

11 Sec. 48 (3).
12 Sec. 89.
13 Sec. 90.
14 Sec. 92.

It was this part of the Act dealing with the subject of legitimacy that caused some concern. In the view of one member it was somewhat problematical whether the legislative powers of the Commonwealth extended to the question of legitimation; nevertheless, he was prepared to support the proposed legislation and hoped that it would not be challenged when the Bill was passed.[15] His hope, however, was not fulfilled for the State of Victoria has challenged the validity of the legitimation provisions,[16] which has, until the High Court gives its decision, delayed the proclamation bringing the Act into force.[17]

The Act, as the Attorney-General has said, was not devised merely to achieve uniformity throughout the Commonwealth but "to provide a modern code suitable to the conditions of the Australian society and conformable to the Christian basis of the life of the nation."[18] If the speedy though serious consideration given to the Bill in both Houses of Parliament and its passage without a division in the House of Representatives and without amendment in both Houses is any indication, then it would appear that Australia was ready for a measure such as this.

## XI. NATIONAL DEVELOPMENT.

*Petroleum.*

The Petroleum Search Subsidy Act 1961[19] extends the operation of the Petroleum Search Subsidy Act 1959[20] until 30th June 1964. The scope of the Act is also extended from the subsidizing of stratigraphic drilling to include the subsidizing of test drilling and detailed

15 See second reading speech of Mr. Whitlam to the 1960 Bill in (1960) 28 COMMONWEALTH PARL. DEB. (H. of R.) 115.

16 The challenge was also against the validity of sec. 94 creating the federal offence of bigamy.

17 Since this review was written the decision of the High Court has become available. The challenge was to the whole of Part VI of the Act and against sec. 94. The High Court by a majority has held that the sections of the Act providing for legitimation by subsequent marriage, providing for recognition of foreign legitimations, and legitimating children of a void marriage where at the time of conception or birth either party believed the marriage was valid are within the legislative power of the Commonwealth Parliament under sec. 51 (xxi) of the Constitution to make laws with respect to "marriage". The whole court held that sec. 94 making bigamy an offence was within the powers of the Commonwealth. Some doubt was raised as to the validity of sec. 92, which empowers a State Court to make declarations of legitimacy in the exercise of federal jurisdiction, but as no argument had been directed to this question the court made no adjudication thereon. See Attorney-General for Victoria v. The Commonwealth, (1962-1963) 36 Aust. L.J.R. 104.

18 (1962) 3 MELBOURNE U. L. REV. 305.

19 No. 74 of 1961.

20 Reviewed in 5 U. WEST. AUST. L. REV. 218.

structure drilling. This extension means, in effect, that all detailed exploration drilling will be eligible for a subsidy. An alternative method of determining the amount of subsidy on a footage basis is introduced. The Commonwealth will pay, as in the past, up to half the cost of approved drilling operations aimed at obtaining stratigraphic information or, now, any information relating to the presence or absence of petroleum, or, at the option of the applicant, will pay a subsidy for such drilling at a rate or rates per foot of hole drilled as may be determined by regulations made under the Act. The Commonwealth will continue to pay up to two-thirds of the cost of approved "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 respect of subsidized detailed structure drilling or test drilling, there are special provisions in the new Act for the repayment of the amount of subsidy to the Commonwealth in the event of petroleum being discovered in quantities of commercial significance.[21]

*Post and Telegraph.*

Section 16 of the Post and Telegraph Act 1901-1960 has been repealed.[22] Section 16, which prohibited the Commonwealth from entering into a contract for the carriage of mails unless the contract contained a condition that only white labour should be employed in such carriage, had apparently been included in the Act in 1901 with the intention of safeguarding the economic rights of those engaged in ships trading round the Australian coast, by ensuring that mails were carried only by ships which employed white labour and which paid appropriate wages.[23] In the course of time it has come to mean little more than that any person having a Post Office mail contract may not employ aborigines in his business, no matter how small a

21 The reviewer is unable to leave this Act without observing that in the new sec. 10A, which is added to the principal Act and which authorizes the Secretary of the Department of National Development to delegate any of his powers or functions to an officer of the Department, it is still considered necessary to authorize the delegate to "exercise or perform" "the power or function" "in accordance with the instrument of delegation." Why? And why "function"? Does this mean any more than "duty"? Because, if not, would it not be better to stick to established legal concepts?

22 By the Post and Telegraph Act (No. 64 of 1961). The first attempt to repeal this section was by the Post and Telegraph Act Amendment Bill 1903.

23 This, however, was only one way of looking at it; others appear from the debates of the period. Whether the policy was inspired by motives of economic protection or racial discrimination is one of the enigmas of the era, as of the "White Australia" policy itself. The original section, which was added to the Bill while in committee in the House of Representatives, caused no little difficulty over the carriage of overseas mails and even some embarrassment for the United Kingdom Government.

part of it is represented by the carriage of mails. Accordingly, it was considered that the requirement might safely be removed.

*Railways.*

The Railways Agreement (Western Australia) Act 1961[24] gave parliamentary approval to an agreement concluded between the Commonwealth and Western Australian Governments for the construction of a standard gauge railway line between Kalgoorlie and Kwinana.[25] Half the cost of this construction is regarded as developmental expenditure and the other half as standardization expenditure. For the developmental portion the Commonwealth will provide 70 per cent. of the funds required and the State the balance. The Commonwealth contribution will be repaid by the State over a period of 20 years with interest at the long-term bond rate ruling at the time the advances are made. The Commonwealth will provide the whole of the finance initially required for the standardization portion and the State will repay, over a period of 50 years, 30 per cent. of the amount provided during each financial year, together with interest at the long-term bond rate ruling at the end of each such year on the outstanding amount from time to time. In effect, therefore, the Commonwealth will initially provide 85 per cent. of the total cost, but the State will ultimately carry 65 per cent. of the cost.

D.E.A.

24 No. 67 of 1961.

25 The decision to construct this railway line enabled an agreement to be concluded between the Western Australian Government and Broken Hill Pty. Co. Ltd. for the establishment of an iron and steel industry in the State. To the delight of the Federal Opposition, the Prime Minister was able to inform the House that by the end of 1968 there would be an output of 450,000 tons per annum of *pig iron*! (1961) 33 COMMONWEALTH PARL. DEB. (H. of R.) 1847.