

Part 1

Bills introduced 17–20 September 2012

Clean Energy package of seven bills

- **Clean Energy (Charges – Customs) Amendment Bill 2012**
- **Clean Energy (Charges – Excise) Amendment Bill 2012**
- **Clean Energy (Unit Issue Charge–Auctions) Amendment Bill 2012**
- **Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012**
- **Excise Tariff Amendment (Per-tonne Carbon Price Equivalent) Bill 2012**
- **Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment (Per-tonne Carbon Price Equivalent) Bill 2012**
- **Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment (Per-tonne Carbon Price Equivalent) Bill 2012**

Introduced into the House of Representatives on 19 September 2012

Portfolio: Climate Change and Energy Efficiency; Treasury; and Sustainability, Environment, Water, Population and Communities

Committee view

1.1 The committee seeks further information from the Minister for Climate Change and Energy Efficiency on the impact of the Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012 on the right to a fair hearing in article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and whether the bill may be considered to also engage the criminal process rights in article 14 of ICCPR.

1.2 The committee also draws the attention of the Minister for Climate Change and Energy Efficiency, the Treasurer and the Minister for Sustainability, Environment, Water, Population and Communities to the requirement for each bill to be accompanied by a statement of compatibility and the committee's expectations for statements to provide the necessary information in an accessible way.

Purpose of the bill

1.3 This is a package of seven bills sponsored by the Minister for Climate Change and Energy Efficiency, the Treasurer and the Minister for Sustainability, Environment, Water, Population and Communities to facilitate linkages between Australia's carbon pricing mechanism and foreign emissions trading schemes.

1.4 All seven bills are accompanied by a single statement of compatibility, prepared under the authority of the Minister for Climate Change and Energy Efficiency.

Any Member or Senator who wishes to draw matters to the attention of the committee under the *Human Rights (Parliamentary Scrutiny) Act 2011* is invited to do so.

1.5 The statement of compatibility falls short of the committee's expectations as it does not set out the relevant information in an accessible manner. In particular, the statement does not consider each bill individually and does not specify the provisions in the bill that are considered to engage human rights.

Compatibility with human rights

Right to privacy

1.6 The statement states that the bills engage the right to privacy because they enable the publication of information which could include personal information, and provide for the making of regulations which could require certain persons to provide personal information to particular entities.

1.7 The statement concludes that the bills are compatible with human rights because 'the nature of the information to be published is precisely defined and the publication requirement does not involve the exercise of any discretionary powers'. The statement also notes that 'a statement of compatibility with human rights would be prepared in relation to any regulation made under [the relevant] regulation-making power[s]' in the bills.

1.8 The discussion in the statement does not identify the particular provisions in the bills which are considered to engage the right to privacy.

1.9 **The committee considers that the bills do not appear to raise any concerns with regard to the right to privacy in article 17 of ICCPR.**

Right to a fair hearing and criminal process rights

1.10 New Part 6B in item 23 of the Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012, which deals with the relinquishment of Australian-issued international units (AIU). In particular:

- Proposed section 66C provides that a court may, on application by the Director of Public Prosecutions or the Regulator, order a person to relinquish a specified number of AIUs if a person is convicted of a prescribed offence relating to fraudulent conduct and the issue of AIUs is attributable to the commission of the offence.
- Section 66C will apply retrospectively to offences committed before the commencement of these powers.
- The failure to comply with a relinquishment requirement is subject to an automatic administrative penalty under proposed section 66F. In addition, a person commits a criminal offence (subject to 3-10 years imprisonment) if they enter into 'schemes' aimed at ensuring that a body corporate or trust

becomes unable to pay an existing or future liability to pay an administrative penalty under section 66F (proposed sections 66L-66M).

- If an amount payable by a person under section 66F remains unpaid after the time when it became due for payment, the person is then automatically liable for a late payment penalty under proposed section 66G.
- The Regulator does not have any discretion to remit administrative penalties but may remit late payment penalties in certain circumstances (subsection 66G(2)). A decision by the Regulator to refuse to remit a late payment penalty is reviewable decision (item 26).

1.11 The statement of compatibility does not address whether or not these provisions are compatible with human rights.

(i) Right to a fair hearing

1.12 The committee notes that section 66C would appear to operate as a forfeiture regime. As such, applications for relinquishment orders under section 66C are likely to engage the right to a fair hearing in article 14(1) of ICCPR. The requirement of a fair hearing relates to the principle of equality of arms. The main factor when considering 'fairness' is whether the respondent's rights were sufficiently safeguarded vis-à-vis the complainant. That is, both parties must be afforded a reasonable opportunity to present his or her case under conditions that do not put either party at a substantial disadvantage. It is generally accepted that this requirement is less exacting in civil proceedings than in criminal proceedings.

1.13 The bill does not appear to contain any specific safeguards for making and determining an application for a relinquishment order. For example, it would appear that an application may be made without notifying the person against whom the order is sought and a court may hear and determine an application in the absence of the affected person. Without these procedural guarantees an affected person may not have an adequate opportunity to present their case such that their right to a fair hearing is not limited.

(ii) Criminal process rights

1.14 Depending on whether the regime could be characterised as imposing criminal penalties, these provisions may also engage the criminal process rights in article 14 of ICCPR. These rights apply where a person is exposed to a charge or penalty that is criminal in nature. The approach under international and comparative human rights law is to look at the substance and the effect of the proceedings, rather than their label. Therefore, it is possible for a civil regime which subjects a person to a high penalty and is intended to be punitive or deterrent in nature to constitute a 'criminal penalty' for the purposes of these rights.

1.15 Before forming a view on whether the bill is compatible with human rights, the committee proposes to write to the Minister for Climate Change and Energy Efficiency to seek further information on the impact of s66C, s66F and s66G of the Clean Energy Amendment (International Emissions Trading and Other Measures) Bill 2012 on the right to a fair hearing in article 14(1) of ICCPR, including whether the provisions may be considered to also engage the criminal process rights in article 14 of ICCPR.

1.16 The committee also proposes to write to the Minister for Climate Change and Energy Efficiency, the Treasurer and the Minister for Sustainability, Environment, Water, Population and Communities in an advisory capacity to outline the committee's expectations for statements of compatibility, in particular:

- The *Human Rights (Parliamentary Scrutiny) Act 2011* requires each bill and disallowable legislative instrument to be accompanied by a statement of compatibility. The provision of a single statement for a package of bills does not meet this requirement.
- The committee expects statements to provide sufficient detail to allow it to undertake its scrutiny tasks efficiently. This includes specifying the particular provisions of the bill that are being discussed. Where no rights are engaged, the committee still expects that reasons should be given to support this conclusion.