

**Senate Standing Committee
for the
Scrutiny of Bills**



Alert Digest

No. 3 of 2008

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator the Hon C Ellison (Chair)

Senator M Bishop (Deputy Chair)

Senator A McEwen

Senator A Murray

Senator the Hon J Troeth

Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

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

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

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Bills restored to the *Notice Paper*

On 12 March 2008, on the motion of Senator Allison on behalf of Senator Bartlett, a number of bills introduced in the Senate in the previous Parliament were restored to the *Notice Paper*. The Committee has dealt with these bills in previous Alert Digests, as indicated below.

Migration Legislation Amendment (Access to Judicial Review of Migration Decisions) Bill 2006

See Alert Digest No. 3 of 2007

Migration Legislation Amendment (Complementary Protection Visas) Bill 2006

See Alert Digest No. 11 of 2006

Migration Legislation Amendment (End of Mandatory Detention) Bill 2006

See Alert Digest No. 10 of 2006

Migration Legislation Amendment (Migration Zone Excision Repeal) Bill 2006

See Alert Digest No. 6 of 2006

Migration Legislation Amendment (Migration Zone Excision Repeal) (Consequential Provisions) Bill 2006

See Alert Digest No. 6 of 2006

Migration Legislation Amendment (Provisions Relating to Character and Conduct) Bill 2006

See Alert Digest No. 9 of 2006

Migration Legislation Amendment (Restoration of Rights and Procedural Fairness) Bill 2007

See Alert Digest No. 10 of 2007

Migration Legislation Amendment (Temporary Protection Visas Repeal) Bill 2006

See Alert Digest No. 7 of 2006

On 18 March 2008, on the motion of Senator Murray, a bill introduced in the Senate in a previous Parliament was restored to the *Notice Paper*. The Committee dealt with this bill in a previous Alert Digest, as indicated below.

**Freedom of Information Amendment (Open Government) Bill 2003
[2004]**

See Alert Digest No. 8 of 2003

A New Tax System (Family Assistance) (Improved Access to Baby Bonus) Amendment Bill 2008

Introduced into the Senate on 20 March 2008

By Senator Stott Despoja

Background

This bill amends the *A New Tax System (Family Assistance) Act 1999* to provide parents adopting a child over two years of age access to the baby bonus scheme.

The Committee has no comment on this bill.

Australian Crime Commission Amendment Act 2007

At its meeting of 19 September 2007, the Committee noted that it had not yet been able to consider this bill, which had been introduced into and passed by, the Senate on 18 September 2007. The bill was subsequently passed by the House of Representatives on 20 September 2007.

The Parliament was prorogued on 15 October 2007, prior to the Committee's next meeting and, as such, the Committee did not get the opportunity to consider this bill at all during the 41st Parliament. As the Committee normally comments on every bill introduced into the Parliament, the following comments in relation to this bill are provided for the information of Senators, notwithstanding that the bill has already become an Act.

Background

This bill amends the *Australian Crime Commission Act 2002* (ACC) to clarify that an Australian Crime Commission examiner can record their reasons for issuing a summons or notice to produce before, at the same time as, or as soon as practicable after, the summons or notice has been issued.

The bill also provides that:

- summonses or notices issued after the commencement of the ACC Act, but prior to the commencement of this bill, are not invalid merely because reasons were recorded subsequent to their issue;
- a summons or notice will not be invalid merely because it fails to comply with technical requirements in the Act; and
- a witness may appear before an examiner, or produce documents to an examiner, who may not be the same examiner who issued the summons or notice to produce.

These amendments were developed in response to findings made by Justice Smith of the Victorian Supreme Court in *ACC v Brereton* [2007] BSC 297, which was handed down on 23 August 2007. Justice Smith held that for a summons to be valid, reasons for issuing the summons must have been recorded prior to the time it was actually issued.

Trespass on personal rights and liberties
Schedule 1, items 2 and 7

Proposed new paragraph 28(1A)(c) of the *Australian Crime Commission Act 2002*, to be added by item 2 of Schedule 1, would permit an examiner carrying out an examination of a person under that Act not to make a record of the reasons for the issue of a summons requiring a person to appear before the Commission until after the summons has been issued, so long only as the record of reasons is made ‘as soon as practicable after the issue of the summons’. Proposed new paragraph 29(1A)(c) of the same Act, to be added by item 7 of Schedule 1, would permit an examiner who has required a person to produce a document to an examiner not to make a record of the reasons for the issue of that notice until after it has been issued, so long only as the record of reasons is made ‘as soon as practicable after the issue’ of the summons or notice.

The explanatory memorandum notes that the purpose of these amendments is to limit the effect of the decision of Smith J in *ACC v Brereton* [2007] VSC 297, handed down on 23 August 2007. The Committee is of the view that these proposed amendments may be considered to trespass on personal rights and liberties but, as is its practice, **leaves for the Senate as a whole** the question of whether they do so *unduly*.

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

Trespass on personal rights and liberties
Schedule 1, items 5 and 8

Proposed new paragraphs 28(8)(a) and 29(5)(a) of the *Australian Crime Commission Act 2002*, to be added by items 5 and 8 respectively of Schedule 1, provide that a failure to comply with either of proposed new subsections 28(1A) or 29(1A) of the Act ‘does not affect the validity of’ a summons under subsection 28(1) or a notice under subsection 29(1) respectively, insofar as those subsections relate to the making of a record.

It appears that if an examiner issues a summons under section 28 or a notice under section 29, the effect of these amendments is that the summons or notice is still valid, even though the examiner never made a record of the reasons for issuing the summons or notice. If this interpretation is correct, these proposed new paragraphs would go much further than merely limiting the effect of the decision in *ACC v Brereton*, and would render ineffective the second sentence of both subsection 28(1A) and 29(1A), which provide that an examiner must record in writing the reasons for the issue of a summons or notice.

The Committee **seeks the Minister's advice** whether that is the intended effect of these proposed amendments and, if so, whether they trespass *unduly* on personal rights and liberties.

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

Retrospective application Schedule 1, items 10 and 12

Items 10 and 12 of Schedule 1 would retrospectively validate any summonses or notices issued under subsection 28(1) or 29(1) since 1 July 1984 (the date that the *Australian Crime Commission Act 2002* commenced, under the then title of the *National Crime Authority Act 1984*), which would be rendered invalid by the application of the principles adopted in *ACC v Brereton*.

The explanatory memorandum seeks to justify this retrospective application on the ground that the Government 'does not consider that a failure to record reasons for issuing a summons or notice prior to issue of the summons or notice should give a person who would otherwise have been convicted of an offence technical grounds to challenge the admissibility of evidence and escape conviction.' The Committee is of the view that this retrospectivity may be considered to trespass on personal rights and liberties but, as is its practice, **leaves for the Senate as a whole** the question of whether it does so *unduly*.

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

Australian Energy Market Amendment (Minor Amendments) Bill 2008

Introduced into the House of Representatives on 20 March 2008

Portfolio: Resources, Energy and Tourism

Background

This bill amends the *Australian Energy Market Act 2004*, the *Administrative Decisions (Judicial Review) Act 1977*, the *Australian Energy Market Amendment (Gas Legislation) Act 2007* and the *Trade Practices Act 1974* to correct the year of enactment, from 2007 to 2008, of South Australian and Western Australian legislation relating to the introduction of a new regime for the regulation of access to natural gas pipelines.

Uncertainty of commencement Schedules 1, 3 and 4

Items 2 and 4 in the table to subclause 2(1) of this bill provide that the amendments proposed in Schedules 1, 2, and 4 will commence immediately after the commencement of Schedule 1 to the *Australian Energy Market Amendment (Gas Legislation) Act 2007*, while item 3 in the table to subclause 2(1) provides that the amendments proposed by Schedule 3 will commence at the same time as that commencement. Reference to the *Australian Energy Market Amendment (Gas Legislation) Act 2007* indicates that Schedule 1 will commence on Proclamation, with no time fixed within which it must commence in any event.

The Committee notes that, unfortunately, the explanatory memorandum does not give any indication of when the *Australian Energy Market Amendment (Gas Legislation) Act 2007* may commence, or whether it has already commenced. It is therefore impossible to determine if this bill will have some provisions operating retrospectively, or possibly left for commencement at an indeterminate future time. The Committee **seeks the Minister's advice** whether the amendments to the *Australian Energy Market Amendment (Gas Legislation) Act 2007*, referred to in the table to subclause 2(1) of this bill,

have commenced or, if they have not commenced, when they are likely to do so.

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

Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008

Introduced into the House of Representatives on 20 March 2008

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill amends the *Civil Aviation (Carriers' Liability) Act 1959*, the *Air Accidents (Commonwealth Government Liability) Act 1963* and the *Civil Aviation Act 1988* to give effect to the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air. This will allow Australia to accede to the 1999 Convention.

The bill:

- inserts a definition of 'family member' into the *Civil Aviation (Carriers' Liability) Act 1959*, which will expand the categories of family members of a passenger killed in an air incident who are eligible to bring an action against a carrier;
- allows regulations to be made to: include other groups of people in the proposed definition of 'family member'; increase insurance levels for air carriers; and increase the liability limits for Australian international carriers; and
- enables the Minister to give notice in the *Gazette* of a variety of matters relevant to the new Part relating to the Montreal Convention.

The bill also contains technical provisions.

Uncertainty of commencement Schedules 1 and 2

Item 2 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedules 1 and 2 will commence on Proclamation, and further

provides that commencement must not occur prior to the 1999 Montreal Convention entering into force for Australia, but must occur within 6 months after that Convention enters into force for Australia. The Committee notes that this item is clearly premised on the fact that this Convention will at some stage enter into force for Australia, but there is no certainty that it will do so at any particular time.

The Committee has for some time been concerned that measures may be passed by the Parliament and the first few sections then commence, but there is no certainty as to when (or whether) the operative provisions of the bill might commence. The Committee **seeks the Minister's advice** whether item 2 might also provide that, if the Convention does not enter into force for Australia within some fixed period after assent, this bill will never commence, thus providing some certainty.

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

Legislative Instruments Act - declarations Schedule 1, item 3

Proposed new subsection 9K(3) of the *Civil Aviation (Carriers' Liability) Act 1959*, to be inserted by item 3 of Schedule 1, provides that a notice made under proposed new subsection 9K(1) is not a legislative instrument. As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*.

The Committee notes that, in this instance, the explanatory memorandum makes no mention of the proposed new subsection, let alone indicating whether it is purely declaratory or not. The Committee **seeks the Minister's**

advice whether this provision is declaratory in nature or provides for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

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

Customs Amendment (Strengthening Border Controls) Bill 2008

Introduced into the House of Representatives on 20 March 2008
Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* to:

- allow a person to surrender certain prohibited imports that have not been concealed;
- allow for the granting of post-importation permissions for certain prohibited imports;
- allow infringement notices to be served for certain offences, including importing certain prohibited imports, and border security related offences; and
- enable Customs officers boarding a ship or aircraft to conduct personal searches for, and take possession of, weapons or evidence of specified offences.

The bill also contains application and consequential provisions.

Search without a warrant Schedule 2, item 8

Proposed new subsections 185AA(1A) and (2A) of the *Customs Act 1901*, to be inserted by item 8 of Schedule 2, provide that a person found on a ship or aircraft that has been boarded under either section 185 or section 185A may be searched, as may the person's clothing and any property under the person's control, without a warrant. The Committee has regularly commented on provisions that permit searches of a person without a warrant, as it may be regarded as trespassing on personal rights.

The Committee notes that the explanatory memorandum to the bill does not provide any rationale as to why these search without warrant powers are considered necessary. The Committee **seeks the Minister's advice** whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was consulted in the preparation of this part of the bill and whether the provisions are consistent with that guide.

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

Customs Legislation Amendment (Modernising) Bill 2008

Introduced into the House of Representatives on 20 March 2008
Portfolio: Home Affairs

Background

This bill amends the *Customs Act 1901* and the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* to implement recommendations of the first Ministerial Review of the Singapore-Australia Free Trade Agreement (SAFTA), which took place in July 2004. The bill:

- provides for new Certificate of Origin requirements for the SAFTA;
- updates the broker licensing provisions to recognise the changing environment, including the contractual arrangements that exist between some brokerages and nominees;
- modernises provisions relating to duty recovery and payments under protest, and allows refunds to be applied against unpaid duty in some circumstances; and
- makes it an offence to make false or misleading declarations in using the new SmartGate automated passenger processing system.

The bill also contains application and transitional provisions.

Uncertainty of commencement Schedule 1

Item 2 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedule 1 will commence on the later of the day after the Act receives the Royal Assent or the day on which Articles 11 and 12 of Chapter 3 of the SAFTA come into force for Australia. The item goes on to provide that

Schedule 1 does not commence at all if those Articles do not come into force for Australia.

The Committee has for some time been concerned that measures may be passed by the Parliament, and the first few sections commence, but there is no certainty as to when (or whether) the operative provisions of the bill might commence. The Committee, therefore, **seeks the Minister's advice** whether item 2 in the table to subclause 2(1) might provide that if Articles 11 and 12 of the SAFTA do not come into force for Australia within some fixed period after assent, the Minister shall announce that fact by *Gazette* notice (just as item 2 already provides that the Minister must announce, by *Gazette* notice, when Articles 11 and 12 come into force for Australia).

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

Export Market Development Grants Amendment Bill 2008

Introduced into the House of Representatives on 20 March 2008
Portfolio: Trade

Background

This bill amends the *Australian Trade Commission Act 1985* and the *Export Market Development Grants Act 1997* to:

- increase the maximum Export Market Development grant available to all applicants, except approved trading houses, from \$150,000 to \$200,000, increase the income ceiling of applicants from \$30 million to \$50 million, and cut the minimum threshold of expenditure by \$5,000, to a minimum of \$10,000;
- add two new eligible expense categories to the range of eligible expenses, where these expenses are incurred for an approved promotional purpose in terms of the *Export Market Development Grants Act 1997*;
- allow approved State/Territory or regional not-for-profit bodies representing industries that promote Australian exporters to access the Export Market Development scheme;
- extend the limit on the number of annual grants that an applicant can receive from seven to eight;
- provide that all non-tourism services are eligible products, unless specified in the Export Market Development Grants Regulations; and
- introduce a performance measure for applicants claiming their third and subsequent grants.

The bill also contains application provisions.

The Committee has no comment on this bill.

Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008

Introduced into the House of Representatives on 20 March 2008

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill amends the *Fisheries Administration Act 1991*, the *Fisheries Management Act 1991*, the *Torres Strait Fisheries Act 1984* and the *Migration Act 1958* with a view to improving governance of the Australian Fisheries Management Authority (AFMA) and strengthening measures to combat illegal, unregulated and unreported fishing. The changes to the governance arrangements are in response to recommendations of the Uhrig Review. The bill:

- removes the AFMA Board and Managing Director, replacing them with a new commission, comprising a chairperson and no more than eight other commissioners, including the Chief Executive Officer, who will replace the position of Managing Director;
- provides that AFMA will become a prescribed agency under the *Financial Management and Accountability Act 1997* and a statutory agency under the *Public Service Act 1999*;
- makes the commission responsible for acting on AFMA's behalf in matters relating to domestic fisheries management;
- makes the CEO solely responsible for AFMA's foreign compliance activities, subject to direction from the Minister;
- provides for new eligibility criteria, conflict of interest disclosure and reporting requirements for Commissioners; and
- provides that the CEO will have sole responsibility for AFMA's financial and human resource management.

In respect of amendments aimed at strengthening measures to combat illegal, unregulated and unreported fishing, the bill:

- makes it an offence for Australian persons and corporations to breach an agreed fishing measure of an international fisheries management organisation or arrangement to which Australia is a party;
- makes it possible for Australian nationals to be prosecuted in Australian courts for activities on board a foreign vessel in waters outside the Australian Fishing Zone;
- clarifies the ability of fisheries officers to exercise powers of the *Fisheries Management Act 1991* outside the Australian Fishing Zone, in specific circumstances; and
- further defines and expands on the stowage requirements for foreign fishing vessels transiting through the Australian Fishing Zone.

The bill also contains transitional provisions.

Commencement on Proclamation Schedule 3

Item 4 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedule 3 will commence on Proclamation but must commence in any event 12 months after assent. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less. Where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with Paragraph 19 of Drafting Direction No. 1.3.

The Committee notes that, in this instance, the explanatory memorandum seeks to justify a delayed commencement of up to 12 months on the basis that it will ‘allow time for the necessary regulations underpinning those items to be prepared and put in place’. The Committee is of the view that six months is an adequate period of time to allow for the drafting of any necessary delegated legislation, thus the Committee’s practice of not commenting on delayed

commencement of six months or less. The Committee **seeks the Minister's advice** as to why up to 12 months is required for the preparation of regulations in this instance.

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

Wide delegation of powers Schedule 1, item 79

Proposed new sections 92 and 93 of the *Fisheries Administration Act 1991*, to be inserted by item 79 of Schedule 1, would permit the Commission, which is to be established under new section 10B of the same Act, to delegate to the CEO of that Commission any of the domestic fisheries management functions and powers of the Australian Fisheries Management Authority. Proposed new subsection 92(3) then empowers the CEO to sub-delegate any of those delegated powers and functions to any one of a wide range of people. Although new subsection 92(3) lists the descriptions of the various types of persons to whom the sub-delegation may be made, it includes, for instance, 'a person engaged as a consultant to the Authority' or 'a person engaged under a contract to assist the Authority'.

Similarly, proposed new sub-section 93(1) of the *Fisheries Administration Act 1991*, also to be inserted by item 79 of Schedule 1, would permit the CEO to delegate to a wide range of people, including consultants and contractors, 'any of the functions or powers of the Authority for which the CEO is responsible. The Committee notes that subsection 69(1) of the Act, as proposed to be amended by item 67 of Schedule 1, would permit the CEO to engage a person as a consultant to the Authority. Similarly, 'a person engaged under a contract to assist the Authority' may also be engaged by the CEO. Thus the CEO may delegate any of his or her functions and powers and/or sub-delegate any delegated powers and functions, to any one of a wide range of people, many of whom may have been appointed by the CEO.

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons. Where such delegations are made, the Committee considers that an explanation of why such broad delegations are considered necessary should be included in the explanatory memorandum. In this instance, the Committee notes that the explanatory memorandum merely paraphrases the relevant provision but provides no explanation for why it is necessary for the CEO to be able to delegate or sub-delegate these powers and functions to such a wide range of people, including contractors and consultants. The Committee **seeks the Minister's advice** on this matter.

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

Standing (special) appropriation Schedule 1, item 79, new section 94B

Proposed new section 94B of the *Fisheries Administration Act 1991*, to be inserted by item 79 of Schedule 1, establishes the Australian Fisheries Management Authority Special Account. If an Act establishes a Special Account and identifies the purposes of the account then, by virtue of section 21 of the *Financial Management and Accountability Act 1997*, the consolidated revenue fund is appropriated for those purposes. This proposed new section is, therefore, establishing a standing appropriation.

In its *Fourteenth Report of 2005*, the Committee stated that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The Committee notes that, in this instance, proposed new section 94C of the *Fisheries Administration Act 1991*, also to be inserted by item 79 of Schedule 1, places some limits on the amounts to be credited to the Special Account. Nevertheless, the Committee expects that the explanatory memorandum to a bill establishing a standing appropriation will include an explanation of the reason the standing appropriation was considered necessary. In this instance, the Committee notes that the explanatory memorandum merely records the operation of the clause and does not provide any further reason for the special appropriation. The Committee, therefore, **seeks the Minister's advice** whether an explanation could be included in the explanatory memorandum regarding why this special (standing) appropriation is considered necessary.

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

Legislative Instruments Act—declarations Schedule 1, item 79, new sub-section 94E(2)

Proposed new sub-section 94E(2) of the *Fisheries Administration Act 1991*, to be inserted by item 79 of Schedule 1, provides that a determination made under paragraph (b) of the definition of **deductible component** in proposed new subsection 94E(1) is not a legislative instrument. As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*.

The Committee notes that, in this instance, the explanatory memorandum makes no mention of the proposed new subsection, let alone indicating whether it is purely declaratory or not. The Committee **seeks the Minister's**

advice whether this provision is declaratory in nature or provides for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

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

Strict liability Schedule 3, item 52

Proposed new subsections 105E(2), 105F(2) and 105H(2) of the *Fisheries Management Act 1991*, to be inserted by item 52 of Schedule 3, would impose strict liability for the offences created by subsections 105E(1), 105F(1) and 105H(1) of the same Act. The offences are the contravention of an international fisheries management measure by anyone on a foreign boat on the high seas or by an Australian national on a foreign boat in foreign waters, and unauthorised fishing on a foreign boat on the high seas. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this instance, the Committee notes that the explanatory memorandum seeks to justify this imposition of strict liability on the basis that 'the requirement to prove all fault elements as part of an offence can create a substantial impediment to the prosecution of such offences.' The Committee is of the view that a similar comment could be made about prosecutions for many offences and does not, in itself, justify the imposition of strict liability.

The explanatory memorandum goes on to note that there are two tiers of offences, at least in relation to new subsections 105E(2) and 105F(2), and that the strict liability offences carry a maximum penalty of 60 penalty units, whereas the offences in relation to which the prosecution must prove some

elements of intention carry a maximum penalty of 500 penalty units. The explanatory memorandum correctly observes that to impose strict liability for the lower tier of offence, where the maximum penalty is 60 penalty units, ‘is consistent with Commonwealth policies and principles on strict liability offences.’ The Committee **seeks the Minister’s advice** whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was consulted in the framing of these provisions and whether the imposition of strict liability in these circumstances is consistent with that *Guide*.

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

Strict liability Schedule 3, item 52

Proposed new subsections 105EA(2) and 105FA(2) of the *Fisheries Management Act 1991*, to be inserted by item 52 of Schedule 3, would impose strict liability for two elements of the offences created by subsections 105EA(1) and 105FA(1) of the same Act. The elements to which strict liability applies are the location of the boat (either on the high seas or in foreign waters) and the fact that the boat is a foreign boat. The Committee will generally draw to Senators’ attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this instance, the Committee notes that the explanatory memorandum seeks to justify this imposition of strict liability on the ground that the ‘Commonwealth Director of Public Prosecutions has not been able to prosecute people for similar offences in the Fisheries Management Act because there have been difficulties collecting sufficient evidence to prove that the defendants intended, for instance, to be in the location’ in which they were found.

The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (page 24) states that applying strict liability to a particular physical element of an offence (as is proposed in this instance) may be considered appropriate where there is “demonstrated evidence that the requirement to prove fault of that particular element is undermining or will undermine the deterrent effect of the offence, and there are legitimate grounds for penalising persons lacking ‘fault’ in respect of that element.” It is unclear to the Committee the extent to which the imposition of strict liability in these instances is consistent with the *Guide*.

The Committee notes that it raised similar concerns in its *Seventh Report of 2007*, in respect of provisions in the Fisheries Legislation Amendment Bill 2007, which applied strict liability to the element of the location of a foreign fishing vessel in the territorial sea of Australia. The imposition of strict liability in these circumstances was also raised when the Senate considered that bill (*Senate Hansard*, 21 June 2007, pp. 139-149.)

The Committee **seeks the Minister’s advice** whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was consulted in the course of framing these amendments and, if so, what was the nature of the ‘demonstrated evidence’ and ‘legitimate grounds’ referred to in the *Guide*.

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

Health Insurance Amendment (90 Day Pay Doctor Cheque Scheme) Bill 2008

Introduced into the House of Representatives on 19 March 2008

Portfolio: Health and Ageing

Background

This bill amends the *Health Insurance Act 1973* to allow specialists and consultant physicians access to the 90 Day Pay Doctor Cheque Scheme, where the original claim for the Medicare benefit is submitted electronically to Medicare Australia.

The bill also contains application provisions.

Commencement on Proclamation Schedule 1

Item 2 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedule 1 will commence on Proclamation but must commence in any event 12 months after assent. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less. Where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with Paragraph 19 of Drafting Direction No. 1.3.

In this instance, the Committee notes from the explanatory memorandum that a period of up to twelve months is considered necessary 'to allow Medicare Australia adequate time to complete and test changes to the internal administrative claiming systems which are required to implement the 90 Day Pay Doctor Cheque scheme for specialists and consultant physicians.'

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

Independent Reviewer of Terrorism Laws Bill 2008

Introduced into the House of Representatives on 17 March 2008

By Mr Georgiou

Background

This bill establishes the position of ‘Independent Reviewer of Terrorism Laws’, to review the operation, effectiveness and implications of laws relating to terrorist acts. The bill specifies:

- the functions of the independent reviewer, the process for conducting a review and reporting requirements; and
- the terms and conditions of appointment of the independent reviewer, basis for termination of appointment, and disclosure of interests requirements.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Member’s bill, was accompanied by a statement made on presentation of the bill and was introduced without an explanatory memorandum. The consideration of bills by the Committee and by the parliament is assisted if they are accompanied by explanatory memoranda. The Committee recognises, of course, that private Senators and Members do not generally have access to the resources of departments and agencies to assist in the development of such documents. In this context, the Committee notes that the Department of the Senate has developed a set of guidelines to assist Senators with the preparation of private bills and explanatory material, *Preparing Private Senator’s Bills, Explanatory Memoranda and Second Reading Speeches: A Guide for Senators*. This guide, which is available from the Clerk Assistant (Procedure) and on the Senate’s intranet site, may assist Senators and Members in preparing explanatory memoranda.

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

Commencement on Proclamation Clause 2

Clause 2 provides that this bill shall commence on Proclamation, with no time fixed by which it must commence in any event. The Committee takes the view that Parliament is responsible for determining when laws are to come into force and that commencement provisions should contain appropriate restrictions on the period during which legislation might commence. Paragraphs 16-22 of Drafting Direction No. 1.3 provide that a clause which provides for commencement by Proclamation should also specify a period or date after which the Act either commences or is taken to be repealed. It also provides that any proposal to defer commencement for more than six months after assent should be explained in the explanatory memorandum.

The Committee notes that, in the absence of an explanatory memorandum, there is no explanation for this departure from Drafting Direction 1.3. The Committee **seeks the advice of the Member** as to the reason for this open commencement clause and whether clause 2 might specify a period or date after which the Act either commences or is taken to be repealed.

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

Military Memorials of National Significance Bill 2008

Introduced into the House of Representatives on 19 March 2008
Portfolio: Veterans' Affairs

Background

This bill establishes a process, separate to the *National Memorials Ordinance 1928*, to recognise war memorials outside of the Australian Capital Territory as Military Memorials of National Significance.

The Committee has no comment on this bill.

National Commissioner for Children Bill 2008

Introduced into the Senate on 18 March 2008

By Senator Bartlett

Background

This bill provides for the establishment of an Office of the National Commissioner for Children and Young People, comprised of a National Commissioner for Children and Young People and the staff necessary to assist the Commissioner, with a view to promoting and protecting the rights, interests and wellbeing of all Australian children under 18 years of age. The bill:

- makes provision for the appointment, termination and remuneration of the Commissioner;
- specifies the Commissioner's functions and reporting requirements;
- provides for the establishment of an Advisory Committee on Children; and
- provides for the development of a National Code for the Protection of Children.

Commencement on Proclamation

Clause 2

Clause 2 provides that this bill will commence on Proclamation, but must commence in any case within six months of the Parliament appropriating funds for the operation of the Office of the National Commissioner for Children and Young People. Subclause 2(4) goes on to provide that if the Parliament does not appropriate those funds, the measure does not commence at all. While the sponsor of this bill has clearly tried to ensure that there is some certainty in the time when this bill might commence, there is no indication of how one might determine that Parliament has not appropriated the necessary funds. The Committee **seeks the advice of the Senator** whether subclause 2(4) might specify some fixed time within which the Parliament

must have appropriated the necessary funds, or the measure does not commence at all.

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

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008

Introduced into the House of Representatives on 20 March 2008

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

Introduced with the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) (Consequential Amendments) Bill 2008, this bill gives effect to Australia's commitment to ratify the International Convention on Civil Liability for Bunker Oil Pollution Damage (the Bunker Oil Convention). The Bunker Oil Convention, which will enter into force internationally on 21 November 2008, establishes a liability and compensation regime to apply in cases of pollution damage following the escape or discharge of bunker oil from a ship that is not an oil tanker.

The bill provides that:

- shipowners are strictly liable for pollution damage resulting from the escape or discharge of bunker oil from their ships, although shipowners can limit their liability, the liability limit depending on the size of the ship;
- ships with a gross tonnage greater than 1,000 will be required to be insured to cover the owners' liability for pollution damage related to bunker oil and will be required to carry evidence of that insurance; and
- persons suffering pollution damage will be able to seek compensation directly from the shipowner's insurer.

Uncertainty of commencement

Clauses 3 to 30

Item 2 in the table to subclause 2(1) of this bill provides that clauses 3 to 30 will commence on the later of assent and the day on which the International Convention on Civil Liability for Bunker Oil Pollution Damage enters into

force for Australia. The item goes on to provide that these provisions do not commence at all if that Convention does not enter into force for Australia. The Committee has for some time been concerned that measures may be passed by the Parliament and the first few sections then commence, but there is no certainty as to when (or whether) the operative provisions of the bill might commence.

The Committee **seeks the Minister's advice** whether item 2 in the table to subclause 2(1) might provide that if the Convention does not enter into force for Australia within some fixed period after assent, the Minister shall announce that fact by *Gazette* notice, thus providing some certainty (just as item 2 already provides that the Minister must announce, by *Gazette* notice, when the Convention enters into force for Australia).

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

Strict liability

Subclauses 16(1) and 17(1)

Subclauses 16(2) and 17(2) provide that the offences created by subclauses 16(1) and 17(1) – which relate to the failure of a ship to carry an effective insurance certificate – are offences of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The Committee notes from the explanatory memorandum (pages 11 and 12 respectively), that strict liability in these instances is consistent with 'the equivalent offence in the *Protection of the Sea (Civil Liability) Act 1981*' and that the 'offence is directed only at the registered owner or master of a ship. Such a person can be expected to be fully aware of the requirements of the legislation'. The explanatory memorandum (page 12) goes on to refer, in a

slightly different context, to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

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

Setting the rate of a fee by regulation Subclauses 18(3) and 27(6)

Subclause 18(3)(b) provides that an application for an insurance certificate must be ‘accompanied by the fee (if any) prescribed by the regulations for the purposes of this paragraph’. Subclause 27(6) provides that ‘regulations may make provision for and in relation to fees payable in respect of matters arising under regulations made for the purposes of this section’.

The Committee has consistently drawn attention to legislation that provides for the rate of a charge or levy to be set by regulation. Where the rate of a charge is to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. The Committee notes that subclauses 18(5) and 27(7) both provide that ‘a fee must not be such as to amount to taxation’, thus imposing a limit on the amount of the fees.

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

Legislative Instruments Act—declarations Subclause 19(7)

Subclause 19(7) provides that a certificate issued under that clause for a ship owned or operated by the Commonwealth, a State or a Territory, is not a legislative instrument. As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or

expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

The Committee notes that the explanatory memorandum makes no mention of subclause 19(7), let alone indicating whether it is purely declaratory or not. The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

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

Strict liability Subclause 20(2)

Subclause 20(3) provides that the offence created by subclause 20(2) – of failing, when required to do so, to produce an appropriate insurance certificate – is an offence of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The Committee notes that the explanatory memorandum seeks to justify this imposition of strict liability on the basis that 'intention would be difficult to prove and, particularly where the penalty level is so low [at 20 penalty units], the Director of Public Prosecutions may not pursue a prosecution if there was a need to prove intention. It is necessary that there be a disincentive to fail to produce insurance certificates. There is little disincentive if prosecution is unlikely to occur.' The explanatory memorandum also notes that the

‘equivalent penalty under the *Protection of the Sea (Civil Liability) Act 1981*, is also a strict liability offence’.

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

Strict liability
Subclause 21(3)

Subclause 21(4) provides that the offence created by subclause 21(3) – of leaving port when an enforcement officer has detained a ship because of that officer’s reasonable belief that the ship does not have an appropriate insurance certificate – is an offence of strict liability. The Committee will generally draw to Senators’ attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The Committee notes that the explanatory memorandum seeks to justify this provision on the basis that the ‘requirement for insurance is fundamental to the liability and compensation scheme established by the Bunker Oil Convention and implemented in Australia by [this] bill. An effective liability and compensation scheme is a basic component of any comprehensive marine pollution response regime.’

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

Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) (Consequential Amendments) Bill 2008

Introduced into the House of Representatives on 20 March 2008

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill makes amendments to the *Admiralty Act 1988*, the *Protection of the Sea (Civil Liability) Act 1981* and the *Protection of the Sea (Powers of Intervention) Act 1981*, consequential upon the enactment of the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008.

Amendments to the *Admiralty Act 1988* will confer jurisdiction on the Federal Court and State and Territory Supreme Courts to hear and determine matters (including claims for compensation) arising under the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008.

Amendments to the *Protection of the Sea (Civil Liability) Act 1981* will ensure that there is no duplication of insurance requirements between the Civil Liability Act and the Bunker Oil Bill.

Amendments to the *Protection of the Sea (Powers of Intervention) Act 1981* aim to ensure that, even if the owner or master of a ship is the subject of a direction under that Act, the registered owner of the ship will remain liable for compensation costs under the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008 and there will be no effect on court proceedings under the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Bill 2008.

The Committee has no comment on this bill.

Quarantine Amendment (National Health Security) Bill 2008

Introduced into the House of Representatives on 19 March 2008
Portfolio: Health and Ageing

Background

This bill amends the *Quarantine Act 1908* to give effect to Australia's obligations under the International Health Regulations 2005 (the IHR) in relation to vaccinations, health certificates and charges for the provision of health measures.

The bill also contains application and technical provisions.

The Committee has no comment on this bill.

Reserve Bank Amendment (Enhanced Independence) Bill 2008

Introduced into the House of Representatives on 20 March 2008

Portfolio: Treasury

Background

This bill amends the *Reserve Bank Act 1959* with a view to enhancing the independence of the Board of the Reserve Bank of Australia (RBA). The bill:

- removes the authority of the Treasurer to appoint, suspend and terminate the positions of the Governor or Deputy-Governor of the RBA and places this authority in the hands of the Governor-General;
- provides that, in the case of the termination of the positions of the Governor or the Deputy-Governor of the RBA, the Governor-General exercises this authority at the discretion of the Parliament; and
- requires the Governor or Deputy-Governor of the RBA to provide a written letter of resignation to the Governor-General should they resign from office.

The bill also contains application provisions.

The Committee has no comment on this bill.

Statute Law Revision Bill 2008

Introduced into the Senate on 19 March 2008

Portfolio: Attorney-General

Background

This bill amends numerous Acts to correct minor technical errors that have occurred as a result of drafting and clerical mistakes. The bill also:

- repeals a number of Acts that are obsolete and makes consequential amendments to provisions of other Acts that refer to a repealed Act; and
- amends a large number of Commonwealth Acts to replace gender-specific language with gender-neutral language.

Retrospective commencement

Schedules 1 and 2

The table to subclause 2(1) to this bill provides that many of the amendments proposed by the bill will be to some extent retrospective. As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

In respect of these amendments, the Committee notes from the explanatory memorandum that: ‘the items in Schedule 1 to the bill amend errors contained in principal Acts. The commencement of most items is tied to the commencement of the provision that created the error’; and ‘most of the items in Schedule 2 to the bill relate to misdescribed or redundant amendments or errors contained in amending Acts. The commencement of those items is tied to the time specified in the amending Act for the commencement of the misdescribed or redundant amendment.’ It is therefore clear that all of the instances of retrospective commencement are no more than corrections of previous errors, and do not affect the substance of the law.

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

Sydney Airport Demand Management Amendment Bill 2008

Introduced into the House of Representatives on 20 March 2008

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill amends the *Sydney Airport Demand Management Act 1997* to clarify the operation of the slot management regime and allow resolution of the administrative issues identified by the Australian National Audit Office in its report into the Implementation of the *Sydney Airport Demand Management Act 1997*. The bill:

- introduces a distinction between aircraft movements on the runway and aircraft movements at the gate;
- clarifies the relationship between slot allocation and compliance and movements during the Sydney Airport curfew period; and
- provides the Minister with the power to vary the operation of the compliance regime in exceptional circumstances.

Legislative Instruments Act—exemption Schedule 1, item 41

Proposed new subsection 59A(4) of the *Sydney Airport Demand Management Act 1997*, to be inserted by item 41 of Schedule 1, provides that a determination under new subsection 59A(1) is a legislative instrument, but that ‘section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to the determination.’ The Committee notes from the explanatory memorandum that such a determination would be made only ‘where there are considered to be exceptional circumstances’, which it defines as ‘major changes to the operations of all airlines for reasons beyond the airlines’ control, such as the collapse of Ansett in 2001 or in the aftermath of September 11. The explanatory memorandum goes on to argue that ‘the

urgency and immediacy of the determination warrant an exemption from the disallowance provisions.’

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

Tax Laws Amendment (2008 Measures No. 2) Bill 2008

Introduced into the House of Representatives on 20 March 2008
Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997* and the *Superannuation Guarantee (Administration) Act 1992*.

Schedule 1 allows taxpayers to: claim a deduction in relation to an amount misappropriated by an employee or agent following the disposal of an asset that has been dealt with under the uniform capital allowance provisions; recognise the misappropriation under the capital gains tax provisions; or both claim a deduction and recognise the misappropriation (depending on whether the use of the asset was for taxable purposes or not).

Schedule 2 extends the period within which an employer can make a contribution, after the due date, and still be eligible to use the late payment offset to reduce their superannuation guarantee charge liability.

Schedule 3 provides that the market value substitution rule in section 116-30 of the *Income Tax Assessment Act 1997* does not apply to certain capital gains tax events.

Schedule 4 ensures that the Endeavour Executive Award and research fellowships under the Endeavour Awards scholarship program are exempt from income tax.

Schedule 5 extends an income tax exemption to early completion bonuses paid to apprentices by State and Territory governments.

Schedule 6 updates the list of deductible gift recipients to include nine new recipients and extend the time period of four existing recipients.

The bill also contains application and transitional provisions.

**Retrospective application
Schedule 3**

Item 3 of Schedule 3 provides that the amendments made by that Schedule ‘apply to CGT [Capital Gains Tax] events happening after the start of the 2006-07 income year.’

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. However, the Committee notes from the explanatory memorandum that the financial impact of this amendment is ‘unquantifiable but insignificant.’

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

Telecommunications (Interception and Access) Amendment Bill 2008

Introduced into the House of Representatives on 20 February 2008
Portfolio: Attorney-General

The Committee dealt with this bill in *Alert Digest No. 1 of 2008*. The Committee made no comment on the bill as it understood that it contained no new powers for security or law enforcement agencies. Rather, the bill extended by 18 months existing network protection provisions.

The Committee did, however, comment on the initial provisions when they were introduced in the Telecommunications (Interception) Amendment Bill 2006. These comments, from the Committee's *Alert Digest No. 2 of 2006*, are reproduced below for the information of Senators.

Extract from Alert Digest No. 2 of 2006

Trespass on personal rights and liberties Schedule 2

The amendments proposed by Schedule 2 to this bill would permit the issue of an interception warrant in relation to the telecommunications services used by a person whom the relevant interception agency has no reason to suspect of any offence, but who may be a recipient of communications from a person whom the agency does suspect of being guilty of an offence. The Committee notes that these amendments have the potential to trespass on the personal rights and liberties of the subject of such a warrant. The Committee makes no final determination on this matter, but **leaves for the Senate as a whole** the question of whether these amendments *unduly* trespass upon personal rights and liberties.

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

Trespass on personal rights and liberties

Schedule 3

The amendments proposed by Schedule 3 to this bill would permit the issue of an interception warrant in relation to specified telecommunications equipment, rather than to telecommunications made by a named person. For example, the proposed amendments would permit a warrant to be issued to intercept all communications made to or from a specified computer terminal, whoever might in fact be using that terminal. The Committee notes that the amendments in this Schedule would appear to trespass on the personal rights and liberties of anyone who happened, in all innocence, to use a computer terminal or mobile telephone handset in relation to which an interception warrant had been issued. The Committee makes no final determination on this matter but **leaves for the Senate as a whole** the question of whether the amendments trespass *unduly* on those personal rights and liberties.

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

Telecommunications Legislation Amendment (National Broadband Network) Bill 2008

Introduced into the Senate on 19 March 2008

Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Telecommunications Act 1997* to:

- allow specified information to be provided by telecommunications carriers to the Commonwealth for disclosure to companies considering or intending to make a submission in response to a request for proposal issued by the Commonwealth for the creation or development of a National Broadband Network;
- allow the Minister to make a disallowable instrument that specifies the particular information to be provided by specified carriers, the manner and form in which the information is to be provided, and the time limit for providing the information after the commencement of the instrument;
- provide for the development of eligibility requirements to ensure that only genuine proponents can be provided with protected carrier information and enable the Minister to specify any other conditions that may be appropriate in relation to the disclosure of information to potential proponents;
- allow the Minister to specify, by legislative instrument, rules relating to the storage, handling or destruction of protected carrier information to mitigate the risk of unauthorised disclosures or the mishandling of carrier information; and
- allow entrusted company officers to disclose information to other entrusted company officers for the purpose of considering whether to make a proposal or prepare a proposal.

Non-reviewable decisions**Schedule 1, item 11, proposed new subsections 531G(2) and 531H(1)**

Proposed new subsection 531G(4) of the *Telecommunications Act 1997*, to be inserted by item 11 of Schedule 1, provides that an ‘entrusted public official’ (as defined in proposed new section 531B) is not required to give a telecommunications carrier an opportunity to be heard in relation to a decision to disclose information under proposed new subsection 531G(2). Similarly, proposed new subsection 531H(2) of the Act, also to be inserted by item 11 of Schedule 1, provides that an ‘authorised information officer’ (as defined in proposed new section 531B) is not required to give a telecommunications carrier an opportunity to be heard in relation to a decision to disclose information under proposed new subsection 531H(1).

The Committee notes that the explanatory memorandum (pages 24-25) seeks to justify both of these provisions on the basis that they will:

ensure that the intended purpose of Part 27A, which is to facilitate the conduct of a request for proposal process for the development of a National Broadband Network, is not undermined by delays created by the potential need for an entrusted public official [or an authorised information officer] to consult with a carrier every time an official [or company] proposes to disclose information in reliance on one of the exceptions in proposed section 531G [or 531H]. This provision is intended to displace any common law obligation to consult a carrier. However, a consultation process is provided for by the Bill at the beginning of the process (prior to the provision of the information by carriers), which is the making of an instrument under subsection 531C(4).

Nevertheless, the Committee considers that these provisions make the rights of telecommunication carriers dependent upon non-reviewable decisions but, as is its practice, **leaves for the Senate as a whole** the question of whether they do so *unduly*.

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

Non-reviewable decisions

Schedule 1, item 11, proposed new section 531J

The effect of proposed new section 531J of the *Telecommunications Act 1997*, to be inserted by item 11 of Schedule 1, is that the Federal Court or the Federal Magistrates Court would not be able to order, under the *Administrative Decisions (Judicial Review) Act 1977*, a stay of a decision by an entrusted public official or an authorised information officer, under proposed new subsections 531G(2) or 531H(1), to disclose information. Furthermore, the Federal Court could not make any orders staying such a decision in circumstances where a person has sought judicial review under section 39B of the *Judiciary Act 1903*.

The Committee consistently draws attention to provisions that explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. The Committee notes that the explanatory memorandum seeks to justify this provision on the ground that Part 27A of the *Telecommunications Act 1997*, the insertion of which is the major reason for this bill, is intended to facilitate a competitive proposal process in the setting up of a National Broadband Network, and that new section 531J is designed to prevent legal challenges to decisions made under Part 27A stalling the conduct of that process. The explanatory memorandum goes on to assert that: ‘Given the benefits that will flow to the Australian public with the roll-out of a National Broadband Network, preventing the stay of decisions under Part 27A is considered appropriate to ensure that these benefits can be realised as soon as possible.’

Nevertheless, the Committee considers that this provision makes the rights of some interested parties dependent upon non-reviewable decisions but, as is its practice, **leaves for the Senate as a whole** the question of whether it does so *unduly*.

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

Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008

Introduced into the House of Representatives on 19 March 2008

Portfolio: Veterans' Affairs

Background

Schedule 1 of this bill amends the *Veterans' Entitlements Act 1986* (VEA) to:

- give effect to revised arrangements for entering into agreements with the Governments of certain other countries in relation to the payment of pensions and the provision of assistance and benefits to eligible overseas veterans or dependants now resident in Australia;
- authorise the use of funds from the Consolidated Revenue Fund for the initial payment of pensions and the provision of assistance and benefits to eligible overseas veterans and dependants resident in Australia;
- further align the Veterans' entitlements means test with the social security means test; and
- make a number of minor and technical amendments, including as a consequence of the enactment of the *Legislative Instruments Act 2003*.

Schedule 2 amends the *Australian Participants in British Nuclear Tests (Treatment) Act 2006* to extend the period for which Commonwealth or Australian Federal Police may be considered to be a nuclear test participant.

Schedule 3 amends the *Military Rehabilitation and Compensation Act 2004* to correct minor errors and anomalies.

The bill also contains application provisions.

**Standing (special) appropriation
Schedule 1, item 1**

Proposed new paragraph 199(f) of the *Veterans' Entitlements Act 1986*, to be inserted by item 1 of Schedule 1, provides that the Consolidated Revenue Fund is appropriated to the extent necessary for the payment of 'amounts for the purpose of giving effect to arrangements entered into under section 203' of that Act. The provision is, therefore, establishing a standing appropriation.

In its *Fourteenth Report of 2005*, the Committee stated that:

The appropriation of money from Commonwealth revenue is a legislative function. The committee considers that, by allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe upon the committee's terms of reference relating to the delegation and exercise of legislative power.

The Committee notes from the explanatory memorandum (pages 1 and 2) that while the consolidated revenue fund is initially appropriated to pay for pensions, assistance and benefits provided to eligible overseas veterans and dependants resident in Australia, 'these amounts are then reimbursed, to the maximum possible, by the respective foreign Government'. The explanatory memorandum goes on to note that 'withheld payments are generally either for services provided to ineligible overseas veterans or for treatment of conditions other than accepted disabilities' and that 'administratively, it would be too cumbersome and costly to enforce compliance with [restrictions limiting assistance and benefits to overseas veterans to the same as those which the veteran would be entitled to receive in their own country].'

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

Retrospective commencement
Schedule 1, item 70 and Schedule 3, part 5

Item 6 in the table to subclause 2(1) of this bill provides that the amendment proposed by item 70 of Schedule 1 will commence retrospectively on 4 September 2001, immediately after the commencement of item 20 of Schedule 3 to the *Veterans' Affairs Legislation Amendment (2001 Budget Measures) Act 2001*. Item 10 in the same table provides that the amendment proposed in part 5 of Schedule 3 will commence retrospectively on 16 March 2007, immediately after the commencement of item 22 of Schedule 4 to the *Veterans' Affairs Legislation Amendment (Statements of Principles and Other Measures) Act 2007*.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. However, the Committee notes that the explanatory memorandum (pages 14 and 25 respectively) makes it clear that both of the amendments are technical only, and correct earlier drafting errors.

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

Retrospective application
Schedule 1, item 7

Proposed new paragraph 5H(8)(hab) of the *Veterans' Entitlements Act 1986*, to be inserted by item 7 of Schedule 1, provides that one of the items to be excluded from the income test applicable for the purpose of a pension under that Act is an approved scholarship 'awarded on or after 1 September 1990.'

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this instance, however, the Committee notes that there is no application provision relating to this amendment, and it is not clear whether it applies to someone who, for example, has been paid a part pension since, say 1998, and who now is entitled to a greater pension because his or her scholarship is no longer included in the income test for that pension.

The Committee notes that there is also no indication of whether, in such circumstances, the pensioner would be entitled to recover the difference between those two pension amounts for the past 10 years. The Committee **seeks the Minister's advice** about when this amendment is intended to apply from.

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

Retrospective application Schedule 1, items 43 and 83

The effect of proposed new subsections 29(10) and 29(11) of the *Veterans' Entitlements Act 1986*, to be inserted by item 43 of Schedule 1, is that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, the document prepared by the Repatriation Commission, known as the *Guide to the Assessment of Rates of Veterans' Pensions*, may be expressed to take effect from the day that the Minister approves it, even though that is a date earlier than its registration under the *Legislative Instruments Act 2003*, which is the date on which such a determination would normally take effect.

Similarly, the effect of proposed new subsection 196B(13) of the *Veterans' Entitlements Act 1986*, to be inserted by item 83 of Schedule 1, is that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, a Statement of Principles made by the Repatriation Medical Authority takes effect from the day on which a decision of the Specialist Medical Review Council was notified in the *Gazette*, even though that is a date earlier than its registration under the *Legislative Instruments Act 2003*, which is the date on which such a determination would normally take effect.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes from the explanatory memorandum (pages 9 and 16 respectively) that these proposed new provisions preserve the effect of the existing sections of the *Veterans'*

Entitlements Act 1986, and that the rights of a person could be affected so as to disadvantage that person from the date of the approval by the Minister of the Guide, or notification of a decision of the Specialist Medical Review Council in the *Commonwealth Gazette*, rather than from the later date of registration.

The Committee therefore notes that the effect of these provisions is that the ‘Guide to the Assessment of Rates of Veterans’ Pensions’ and a ‘Statement of Principles’ made by the Repatriation Medical Authority will to some degree apply retrospectively. The Committee further notes that the explanatory memorandum makes it clear that this may disadvantage some people. As such, notwithstanding that these amendments are consistent with existing provisions in the *Veterans’ Entitlements Act 1986*, the Committee **seeks the Minister’s advice** as to the rationale for requiring these instruments to take effect from the date of ministerial approval or publication in the *Commonwealth Gazette* respectively, rather than from the date that they are registered under the *Legislative Instruments Act 2003*, which is the date on which such determinations would normally take effect.

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

Retrospective application Schedule 2

The effect of the amendments proposed by Schedule 2 is that some Commonwealth Police Officers and some members of the Australian Federal Police who took part in the Maralinga nuclear test, and who have received treatment for the effects of that participation since 19 June 2006, may claim the costs associated with that treatment from the Repatriation Commission.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that these amendments

clearly have some retrospective application, but it is equally clear that the retrospectivity is beneficial to the persons affected.

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

COMMENTARY ON AMENDMENTS TO BILLS

Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

On 18 March 2008 the Senate agreed to 37 amendments to the bill, none of which fall within the Committee's terms of reference. These amendments were agreed to by the House of Representatives on 19 March 2008.

Infrastructure Australia Bill 2008

On 19 March 2008 the Senate agreed to five amendments to the bill, none of which fall within the Committee's terms of reference. The House of Representatives disagreed to these five amendments on 19 March 2008 and, on 20 March 2008, the Senate did not insist on the amendments.

SCRUTINY OF STANDING APPROPRIATIONS

The Committee has determined that, as part of its standard procedures for reporting on bills, it should draw senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the Committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Further details of the Committee's approach to scrutiny of standing appropriations are set out in the Committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42nd Parliament.

Bills introduced with standing appropriation clauses – 42nd Parliament

*Indicates passed by Senate	Bills and Clauses
	Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008 — Schedule 1, item 79, section 94B (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
	Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008 — Schedule 1, item 1

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2007/2008

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Bills dealt with in 2007							
Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures Bill 2007	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 1(12.3.08)
Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007	8(8.8.07)	21.6.07	13.9.07	Treasurer	9.8.07	20.9.07	1(12.3.08)
Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007	8(8.8.07)	21.6.07	13.9.07	Treasurer	9.8.07	19.9.07	1(12.3.08)
National Greenhouse and Energy Reporting Bill 2007	11(12.9.07)	15.8.07	18.9.07	Environment and Water Resources	13.9.07	2.10.07	1(12.3.08)
<i>Northern Territory National Emergency Response Act 2007</i>	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 1(12.3.08)
<i>Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007</i>	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 1(12.3.08)
<i>Water Act 2007</i>	10(15.8.07)	8.8.07	15.8.07	Environment and Water Resources	16.8.07	23.11.07	1(12.3.08)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Bills introduced 2008							
<i>Aged Cared Amendment (2008 Measures No. 1) Act 2008</i>	1(12.3.08)	13.2.08	14.2.08	Health and Ageing	13.3.08		
Communications Legislation Amendment (Miscellaneous Measures) Bill 2008	2(19.3.08)	17.3.08	12.3.08	Broadband, Communications and the Digital Economy	20.3.08	13.5.08	3(14.5.08)
Drink Container Recycling Bill 2008	2(19.3.08)		13.3.08	Senator Fielding			
Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008	1(12.3.08)	11.3.08	13.2.08	Treasury	13.3.08	18.3.08	2(19.3.08)
Horse Disease Response Levy Bill 2008	1(12.3.08)	21.2.08		Agriculture, Fisheries and Forestry	13.3.08		
Horse Disease Response Levy Collection Bill 2008	1(12.3.08)	21.2.08		Agriculture, Fisheries and Forestry	13.3.08		
Infrastructure Australia Bill 2008	1(12.3.08)	21.2.08	18.3.08	Infrastructure, Transport, Regional Development and Local Government	13.3.08	18.3.08	2(19.3.08)
<i>Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008</i>	1(12.3.08)	13.2.08	17.3.08	Employment and Workplace Relations	13.3.08 20.3.08	18.3.08 22.4.08	2(19.3.08) 3(14.5.08)