

Senate Standing Committee for the Scrutiny of Bills



Alert Digest

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for the
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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator the Hon H Coonan (Chair)

Senator M Bishop (Deputy Chair)

Senator D Cameron

Senator J Collins

Senator R Siewert

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

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

Australian National Preventive Health Agency Bill 2009

Introduced into the House of Representatives on 10 September 2009
Portfolio: Health and Ageing

Background

This bill establishes the Australian National Preventive Health Agency (ANPHA) as a statutory authority under the *Financial Management and Accountability Act 1997*, and specifies its functions, governance and structure. The ANPHA will support the Australian Health Ministers' Conference and, through it, the Council of Australian Governments (COAG) in addressing the challenges associated with preventing chronic disease. The ANPHA will be established under the auspices of the National Partnership Agreement on Preventive Health, a COAG initiative announced in November 2008, and will commence operations on 1 January 2010.

The bill also provides for the establishment of the Australian National Preventive Health Agency Advisory Council (Advisory Council) which has the function of advising the ANPHA's Chief Executive Officer (CEO) on preventive health matters, particularly those identified by the Ministerial Conference through the ANPHA's strategic and annual operational plans.

Legislative Instruments Act—exemption Subclauses 41(8) and 42(5)

Clause 41 provides for meetings of the Advisory Council, with subclause 41(2) providing that the CEO may determine, in writing, matters relating to the operation of the Advisory Council. Subclause 41(8) provides that such a determination is not a legislative instrument. Similarly, subclause 42(1) provides for the establishment of committees by the CEO, by instrument, to assist the CEO in the performance of his or her functions or the Advisory Council in the performance of its function. Subclause 42(5) provides that such an instrument is not a legislative instrument. The explanatory memorandum does not provide any explanation as to why these provisions are not subject to the *Legislative Instruments Act 2003*.

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 of the law (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. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying its need.

Therefore, the Committee **seeks the Minister's advice** as to the reasons for the proposed exemptions and **requests that the explanatory memorandum be amended** to include the appropriate explanations.

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

Standing (special) appropriation

Clause 50

Clause 50 establishes the ANPHA Special Account that is a special account for the purposes of the *Financial Management and Accountability Act 1997* (FMA Act) (see subclause 50(2)). Section 21 of the FMA Act provides that the Consolidated Revenue Fund is appropriated for the purposes of a special account. Clause 50 therefore establishes a standing appropriation.

In scrutinising standing appropriations, the Committee looks to the explanatory memorandum for an explanation of the reason for the standing appropriation. In addition, the Committee likes to see some limitation placed on the amount of funds that may be so appropriated and a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to the Parliament. The Committee notes that the bill specifies the purposes for which money in the Special Account may be expended (clause 52). However, while the explanatory memorandum refers to the FMA Act (at pages 21 and 22), the reason for the standing appropriation has not

been provided. The Committee **seeks the Minister's advice** on the reason for the standing appropriation, whether any limitation could be placed on the amounts to be appropriated, and how parliamentary scrutiny of expenditure under the appropriation will be secured. The Committee also **requests that the explanatory memorandum be amended** to include this information.

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.

Higher Education Legislation Amendment (Student Services and Amenities) Bill 2009

Introduced into the House of Representatives on 9 September 2009

Portfolio: Education

Background

This bill amends the *Higher Education Support Act 2003* to:

- provide for a fee to be imposed by higher education providers for a compulsory student services and amenities fee (to be capped at \$250 per student per annum and indexed annually);
- provide for the establishment of a new component of the Higher Education Loan Program (HELP): Services and Amenities-HELP (SA-HELP) which will provide eligible students with an option to access a loan for the student services and amenities fee through SA-HELP; and
- require higher education providers that receive funding for student places under the Commonwealth Grant Scheme, to comply with new benchmarks from 2010 onwards for the provision of information on, and access to, basic student support services of a non-academic nature, and requirements to ensure the provision of student representation and advocacy.

The bill also makes a minor consequential amendment to the *Income Tax Assessment Act 1936*.

The Committee has no comment on this bill.

Higher Education Support Amendment (VET FEE-HELP and Tertiary Admission Centres) Bill 2009

Introduced into the House of Representatives on 9 September 2009
Portfolio: Education

Background

This bill amends the *Higher Education Support Act 2003* (Higher Education Support Act) as part of the extension of the VET FEE-HELP Assistance Scheme to certain subsidised students from 1 July 2009.

Schedule 1 broadens guidelines-making powers to allow lesser VET FEE-HELP debt amounts to apply for a particular class of student and to allow for matters in relation to VET credit transfer requirements to be dealt with in guidelines.

Schedule 2 provides that Tertiary Admission Centres (TACs) have the same status and duty of care as Officers of a Higher Education Provider (HEP) and VET provider in relation to the processing of students' personal information, ensuring that student information may be shared between relevant Commonwealth agencies, HEPs, VET providers and TACs (as appropriate and in accordance with privacy requirements under the Higher Education Support Act).

Absolute liability

Schedule 2, item 15, subparagraphs 78(1)(d)(iii) and (iv)

Item 15 of Schedule 2 inserts new provisions into the Higher Education Support Act to extend the offence under clause 78 (relating to causing unauthorised access to, or modification of, VET personal information) to include information held on, or on behalf of, a computer of a TAC. The Committee notes that a clause 78 offence is an offence of absolute liability (see subclause 78(2)) which means the defence of mistake of fact is excluded. The explanatory memorandum does not contain any reference to absolute liability.

In February 2004, the Minister for Justice and Customs published a *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*, which draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the *Guide* contains a statement of the matters which should be considered in framing strict and absolute liability offences. The Committee will generally draw to Senators' attention provisions which create strict liability and absolute liability offences. Where a bill creates such an offence, the Committee considers that the reasons for its imposition should be set out in the explanatory memorandum that accompanies the bill.

The Committee therefore **seeks the Minister's advice** as to whether the explanatory memorandum might be amended to include the reasons and justification for the imposition of absolute liability in subparagraphs 78(1)(d)(iii) and (iv).

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.

Migration Amendment (Complementary Protection) Bill 2009

Introduced into the House of Representatives on 9 September 2009
Portfolio: Immigration and Citizenship

Background

This bill amends the *Migration Act 1958* (Migration Act) to:

- introduce complementary protection arrangements to allow all claims that may engage Australia's *non-refoulement* obligations (under various international conventions) to be considered under a single Protection visa application process;
- provides relevant tests and definitions for identifying a *non-refoulement* obligation in determining whether a person is eligible for a protection visa on complementary protection grounds;
- provides a criterion for the grant of a protection visa (where the applicant has been found not to be owed protection obligations under the *Convention relating to the Status of Refugees* and the *Protocol relating to the Status of Refugees* (Refugee Convention)) in circumstances where the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that a non-citizen will be irreparably harmed in a specified way;
- provides that applicants who would currently be ineligible for the grant of a protection visa because of the exclusion provisions contained in the Refugees Convention, will also be ineligible for the grant of a visa on complementary protection grounds through a similar exclusion provision;
- extends the current review arrangements for decisions to refuse to grant a protection visa so that decisions to refuse complementary protection claims may be reviewed in the same way as decisions to refuse Refugees Convention claims;

- extends current provisions in the Migration Act that ensure that an applicant raising Refugee Convention claims is not eligible for a protection visa if the applicant can access protection in another country, to also cover applicants raising complementary protection claims;
- ensures that only applicants who engage Australia's *non-refoulement* obligations will be eligible for a protection visa on complementary protection grounds, by specifying certain circumstances in which a non-citizen will be taken not to face a real risk of being irreparably harmed; and
- enables protection visa applicants who engage Australia's *non-refoulement* obligations on complementary protection grounds, and to whom the exclusion provisions do not apply, to be granted a protection visa with the same conditions and entitlements as applicants owed *non-refoulement* obligations under the Refugees Convention.

Drafting note

Schedule 1, item 13, new subsection 36(2A)

Proposed new subsection 36(2A) of the Migration Act, to be inserted by item 13 of Schedule 1, lists 'matters' that could form the basis of a claim for protection by an offshore entry person under proposed new paragraph 36(2)(aa) (to be inserted by item 11 of Schedule 1). Proposed new subsection 36(2A) simply begins with the words: 'The matters are'. This functional statement is inelegant and provides little context or description. The Committee **draws this drafting matter to the attention of the Minister**.

Trespass unduly on rights and liberties

Schedule 1, item 13, new subsections 36(2B) and (2C)

Proposed new subsections 36(2B) and (2C), to be inserted by item 13 of Schedule 1, contain specific exceptions for when Australia will *not* have a *non-refoulement* obligation to a non-citizen who seeks protection pursuant to the proposed complementary protection provisions. New subsection 36(2B) reflects that *non-refoulement* obligations exist only in circumstances of a 'real

risk' of harm that is personal and present, by listing particular circumstances when it will be taken *not* to be a real risk that a non-citizen will be irreparably harmed.

The Committee notes that new paragraphs 36(2C)(a) and (b) mirror, respectively, Articles 1F and 33(2) of the Refugee Convention. The explanatory memorandum states (at paragraphs 62 and 63) that the intended effect of these provisions is to provide the same exclusions to the complementary protection regime as applies to those who make a valid application for a protection visa, claiming protection under the Refugees Convention.

The explanatory memorandum explains (at paragraph 64) that, while the *International Covenant on Civil and Political Rights* (International Covenant) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) have absolute *non-refoulement* obligations which cannot be derogated from, it was considered necessary to exclude an obligation to certain applicants (including those who pose national security risks).

This is because the delivery of Australia's humanitarian program must be balanced 'with protecting the Australian community and to prevent Australia from becoming a safe haven for war criminals and others of serious character concern'. The explanatory memorandum notes further that there is no obligation on Australia to grant a particular form of visa to those to whom *non-refoulement* obligations are owed, and that it is intended that alternative case resolution solutions will be identified where a person might not be granted a protection visa because of this exclusion provision.

Under principle (1)(a)(i) of its terms of reference, the Committee has regard to whether provisions in bills trespass *unduly* on rights and liberties. The explanatory memorandum notes (at page 10) that the proposed exceptions will ensure Australia's obligations accord with international law (because the Covenant and the CAT require a high threshold for these obligations to be engaged), at the same time balancing the obligation to the Australian community. Since this is clearly a matter of policy, the Committee considers that **further consideration of these provisions and whether they strike the appropriate balance should be left to the Senate as a whole.**

Military Justice (Interim Measures) Bill (No. 1) 2009

Introduced into the Senate on 9 September 2009 and passed on 10 September 2009

Introduced into, and passed by, the House of Representatives on 14 September 2009

Portfolio: Defence

Background

Introduced with the Military Justice (Interim Measures) Bill (No. 2) 2009, this bill reinstates the service tribunal system that existed before the creation of the Australian Military Court (AMC), following the High Court decision of *Lane v Morrison* on 26 August 2009 which held the AMC to be invalid.

The bill amends the *Defence Force Discipline Act 1982*, the *Defence Force Discipline Appeals Act 1955*, the *Defence Act 1903*, the *Migration Act 1958* and the *Judges Pensions Act 1968* to reinstate provisions in each of those Acts that existed prior to the enactment of the *Defence Legislation Amendment Act 2006* (which established the AMC). The re-instatement of the previous military justice scheme is an interim measure until the Federal Government can legislate for a court which meets the requirements of Chapter III of the Australian Constitution.

In particular, the measures will:

- re-establish trials by courts martial and Defence Force magistrates;
- reinstate the positions of Chief Judge Advocate, Judge Advocates and the Registrar of Military Justice (Registrar);
- reinstate the system of reviews and petitions in respect of both summary trials and trials held by Courts martial or Defence Force magistrates; and
- reinstate the powers of reviewing authorities.

Trespass unduly on rights and liberties

Schedule 1, item 103, new subsection 145A(2)

Schedule 1, item 72, new subsection 120(1)

Proposed new section 145A of the *Defence Force Discipline Act 1982*, to be inserted by item 103 of Schedule 1, provides for an accused person to be notified of the convening of a court martial or reference of a charge to a Defence Force magistrate for trial (proposed new subsection 145A(1)); and to be given an opportunity to provide particulars of an alibi (proposed new subsection 145A(2)). Under new subsection 145A(2), an accused person has 14 days to provide the particulars, commencing on the day of the making of the order convening the court martial or the referring of the charge to the Defence Force magistrate. This timeframe can be extended with the leave of the Judge Advocate or Defence Force magistrate.

Proposed new subsection 120(1), to be inserted by item 72 of Schedule 1, provides that the Registrar must, ‘as soon as practicable’ after making an order convening a court martial, cause a copy of that order to be given to the accused person. However, there does not appear to be an obligation on the Registrar to notify the accused of the reference of the charge to a Defence Force magistrate. In addition, there is no explanation as to why the 14 days available to the accused does not run from the date of giving him or her a copy of the order, as opposed to the date of the making of the order.

The Committee is of course mindful that the bill has passed both Houses of the Parliament, is considered urgent and contains measures which are interim in nature. Nevertheless, the Committee considers that new subsections 145A(2) and 120(1) contain serious defects. The Committee **seeks the Minister’s advice** on why a statutory obligation has not been imposed on the Registrar to notify the accused of the reference of a charge to a Defence Force magistrate; and why the notice period in new subsection 145A(2) does not run from the time of providing a copy of the order or reference to the accused. The Committee also holds the strong view that these issues should be given proper consideration when the Federal Government legislates to establish a Chapter III court so that the defects may be remedied.

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 I(a)(i) of the Committee's terms of reference.

**Trespass unduly on rights and liberties
Schedule 1, item 82, new subsection 137(1)**

Proposed new subsection 137(1) of Schedule 1 provides that: ‘The Chief of the Defence Force shall if, and to the extent that, the exigencies of service permit, cause an accused person awaiting trial by a court martial or by a Defence Force magistrate to be afforded the opportunity...to be advised before the trial, by a legal officer’. The Committee notes that there is no time limit on when this advice would be provided. This means, for example, that 14 days for the provision of alibi particulars (as discussed above) might elapse before legal advice is available to the accused.

The Committee has abiding concerns about how this provision would operate in practice and considers that appropriate safeguards must be in place to protect an accused person’s rights and liberties (for example, in situations where he or she may not be contactable). Further, it is not clear exactly what the phrase ‘the exigencies of service’ would cover. The Committee **seeks the Minister’s advice** on precisely what this phrase means and, specifically, whether ‘the exigencies of service’ would include provision of legal advice as soon as possible after the making of an order convening a court martial or the reference of a charge to a Defence Force magistrate.

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 I(a)(i) of the Committee’s terms of reference.

Wide discretion

Schedule 1, item 227, new section 36

Proposed new section 36 of the *Defence Force Discipline Appeals Act 1955*, to be inserted by item 227 of Schedule 1, enables the Defence Force Discipline Appeal Tribunal, when it is hearing an appeal against a conviction or prescribed acquittal by a court martial or a Defence Force magistrate, to obtain reports to assist in the determination of appeals. Section 36 enables the Tribunal to: ‘direct such steps to be taken as are necessary to obtain from the person who was the judge advocate of the court martial or from the Defence Force magistrate, a report giving his or her opinion upon the case, or upon a point arising in the case, or containing a statement as to any facts the ascertainment of which appears to the Tribunal to be material for the purpose of the determination of the appeal’.

The Committee notes that this gives the Tribunal a broad power and that any failure to comply with the Tribunal’s direction may constitute contempt. It is unclear what the provision is seeking to achieve and the explanatory memorandum does not provide any explanation or context. Accordingly, the Committee **seeks the Minister’s advice** in relation to the context and background to the provision, the specific reasons for granting such a broad power to the Tribunal, and whether any alternatives were (or might be) considered.

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

Military Justice (Interim Measures) Bill (No. 2) 2009

Introduced into the Senate on 9 September 2009 and passed on 10 September 2009

Introduced into, and passed by, the House of Representatives on 14 September 2009

Portfolio: Defence

Background

Introduced with the Military Justice (Interim Measures) Bill (No. 1) 2009, this bill seeks to maintain the continuity of discipline in the Australian Defence Force in light of the High Court's decision in *Lane v Morrison* on 26 August 2009 which held the Australian Military Court (AMC) to be invalid.

The principal mechanism by which the bill seeks to maintain the continuity of discipline is by imposing disciplinary sanctions on persons corresponding to punishments imposed by the AMC and, to the extent necessary, summary authorities in the period between the AMC's establishment and the declaration of invalidity by the High Court.

The bill does not purport to validate any convictions or punishments imposed by the AMC, nor does it purport to convict any person of any offence. Instead, the bill imposes disciplinary sanctions by its own force. The bill does not purport to impose any liability in relation to imprisonment and, consistently with the exclusively disciplinary purpose of its provisions, is expressed to have effect for service purposes only. The bill also provides for rights of review in relation to disciplinary liability imposed by the bill.

Retrospective application

Various provisions

Since the bill validates certain things done by the AMC and the Defence Force Discipline Appeal Tribunal (on appeal from decisions of the AMC) before the High Court decision, this will inevitably result in certain provisions having retrospective application. Such provisions include items 4, 8, 13, 18, 29, 30,

31 and 32 of Schedule 1. However, in light of the context and purpose of the bill (and noting that the bill has been passed by both Houses of the Parliament), the Committee considers that such retrospective application is necessary and appropriate.

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

Social Security and Other Legislation Amendment (Income Support for Students) Bill 2009

Introduced into the House of Representatives on 10 September 2009

Portfolio: Employment and Workplace Relations

Background

This bill amends the *Social Security Act 1991*, the *Higher Education Support Act 2003*, the *Military Rehabilitation and Compensation Act 2004*, the *Social Security (Administration) Act 1999* and the *Veterans' Entitlements Act 1986* to make wide-ranging changes to income support arrangements for students. The bill implements relevant recommendations from the *Review of Australian Higher Education* conducted by Emeritus Professor Denise Bradley AC, and aims to make higher education generally more accessible by increasing income support for students who need it the most.

In particular, the bill:

- changes the criteria upon which a youth allowance recipient is considered to be ‘independent’ by reducing the age at which a person is automatically independent from 25 to 22 years (to be phased in over three years commencing in 2010), and prevents a youth allowance claimant from attaining ‘independence’ through part-time employment or wages;
- makes major changes to means testing for payments to students and youth from 1 January 2010, and increases the personal income-free area for youth allowance and Austudy students, and Australian Apprentices, from 1 July 2012;
- provides for new scholarships for students on income support; and
- exempts merit and equity based scholarships from the income test under social security and veterans’ entitlements legislation.

Delayed commencement

Subclause 2(1)

Item 4 in the table to subclause 2(1) provides that Divisions 3 and 4 of Part 2 of Schedule 1 commence on 1 July 2012. Where there is a delay in commencement of longer than six months, 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 case, the explanatory memorandum does not provide an explanation for the delayed commencement. The Committee **seeks the Minister's advice** on the reasons for the delayed commencement and **requests that these reasons be included in the explanatory memorandum** to assist readers and those affected by the legislation.

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.

Incorporating matter as in force from time to time

Schedule 2, item 4, new subsection 592N(2)

Proposed new section 592N of the *Social Security Act 1991*, to be inserted by item 4 of Schedule 2, provides for the Minister to approve scholarship courses by legislative instrument which may make provision for, or in relation to, a matter by applying, adopting or incorporating any matter contained in an instrument or writing 'as in force or existing from time to time'. The explanatory memorandum clearly and comprehensively explains (at page 25) why this incorporation by reference is necessary and also provides relevant examples. The explanatory memorandum also states that 'only very limited non-legislative instruments would be incorporated as in force from time to time'. The Committee is satisfied that this incorporation by reference is thoroughly explained.

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

Special Broadcasting Service Amendment (Prohibition of Disruptive Advertising) Bill 2009

Introduced into the Senate on 7 September 2009

By Senator Ludlam

Background

This bill amends the *Special Broadcasting Service Act 1991* to prohibit non-program content (advertising) being shown during programs on SBS television.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Automotive Transformation Scheme Bill 2009

On 14 September 2009, the Senate agreed to one amendment to the bill, which does not fall within the Committee's terms of reference. On 15 September 2009, the House of Representatives disagreed to this amendment. On 16 September 2009, the Senate agreed not to insist on its amendment.

Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009

On 14 September 2009, the House of Representatives agreed to 14 government amendments to the bill, three of which fall within the Committee's terms of reference.

'Henry VIII' clause

Schedule 1, item 11A, new subsection 911A(5A)

New subsection 911A(5A), inserted by item 11A of Schedule 1, is a 'Henry VIII' clause which authorises the amendment of the *Australian Securities and Investment Commission Act 2001* by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to such provisions. New subsection 911A(5A) provides that, despite paragraph (2)(b) (which sets out exemptions to the requirement to hold an Australian financial services licence for a financial service provided in certain circumstances), the regulations may provide that the exemption under that paragraph does not apply in relation to a particular financial product or a particular kind of financial product.

In the second reading debate, the Minister advised that this regulation-making power will provide the flexibility to address different corporate structures in the margin-lending context and potentially other lending arrangements or products at a later stage. In light of this clear explanation, the Committee makes no further comment.

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

Strict liability

Schedule 2, items 3E and 3F, new subsections 42(3) and 44(4)

New sections 42 and 44, inserted by items 3E and 3F of Schedule 2, provide powers to the Australian Securities and Investment Commission (ASIC) in relation to investigations into the acquisitions and disposal of trust property by trustee companies. New subsection 42(1) provides that ASIC may require a trustee company to disclose to it the name of a person from, to or through whom the trust property was acquired or disposed; and whether this was effected on the instructions of another person, as well as the nature of any such instructions, or the names of the beneficiaries of the trust. Failure to provide such information is an offence of strict liability under new subsection 42(3) and the defendant bears an evidential burden in criminal proceedings under new subsection 42(2).

Similar principles are contained in new section 44 in relation to ASIC requiring a director, secretary or senior manager of a trustee company to disclose to ASIC information of which he or she is aware and that may have affected an acquisition or disposal of trust property by the trustee company, in circumstances where ASIC considers that the trustee company has contravened the law (where the contravention involves fraud or dishonesty and relates to trust property).

The Committee notes that the strict liability provisions contained in these amendments replicate existing ASIC powers to ensure that those powers are available in relation to trust property held by trustee companies.

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

Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Bill 2009

On 9 September 2009, the House of Representatives agreed to three government amendments to the bill, none of which falls within the Committee's terms of reference.

Resale Royalty Right for Visual Artists Bill 2008

On 8 September 2009, the House of Representatives agreed to four government amendments to the bill, none of which falls within the Committee's terms of reference.

Therapeutic Goods Amendment (2009 Measures No. 2) Bill 2009

On 9 September 2009, the Senate agreed to one amendment to the bill, which does not fall within the Committee's terms of reference; on the same date, the House of Representatives also agreed to the amendment.

PROVISIONS OF BILLS WHICH IMPOSE CRIMINAL SANCTIONS FOR A FAILURE TO PROVIDE INFORMATION

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

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

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

Bill/Act	Section/Subsection	Offence	Penalty
Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (government amendments passed in House of Representatives on 14 September 2009)	Schedule 2, item 3E, new subsection 42(1)	Failure to provide information to public authority	50 penalty units or imprisonment for 12 months, or both

Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (government amendments passed in House of Representatives on 14 September 2009)	Schedule 2, item 3F, new subsection 44(3)	Failure to provide information to a public authority	50 penalty units or imprisonment for 12 months, or both
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BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION

The Chairs and Deputy Chairs of Commonwealth, and state and territory Scrutiny Committees have noted (most recently in 2000) difficulties in the identification and scrutiny of national schemes of legislation. Essentially, these difficulties arise because ‘national scheme’ bills are devised by Ministerial Councils and are presented to Parliaments as agreed and uniform legislation. Any requests for amendment are seen to threaten that agreement and that uniformity.

To assist in the identification of national schemes of legislation, the Committee’s practice is to note bills that give effect to such schemes as they come before the Committee for consideration.

Australian National Preventive Health Agency Bill 2009

This bill establishes the Australian National Preventive Health Agency (ANPHA) as a statutory authority under the *Financial Management and Accountability Act 1997*, and specifies its functions, governance and structure. The ANPHA will support the Australian Health Ministers’ Conference and, through it, the Council of Australian Governments (COAG) in addressing the challenges associated with preventing chronic disease. The ANPHA will be established pursuant to the National Partnership Agreement on Preventive Health, a COAG initiative announced in November 2008, which will reform how the Commonwealth and the states and territories work together on preventive health. The ANPHA is a key initiative of the Partnership Agreement.

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 bill passed by the Senate
- N Indicates bill negatived by the Senate

	Asian Development Bank (Additional Subscription) Bill 2009 — clause 6
N	Australian Business Investment Partnership Bill 2009 — clauses 13 and 14
	Australian National Preventive Health Agency Bill 2009 — clause 50 (Special Account: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Automotive Transformation Scheme Bill 2009 — clause 10
*	Car Dealership Financing Guarantee Appropriation Bill — clause 5
N	Carbon Pollution Reduction Scheme Bill 2009 — subclauses 103B(5), 139(4) and 291(4)
*	COAG Reform Fund Bill 2008 — clause 5 (Special Account: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Commonwealth Securities and Investment Legislation Amendment Bill 2008 — Schedule 1, item 10, subsection 5BA(7)
*	Defence Home Ownership Assistance Scheme Bill 2008 — clause 84
*	Dental Benefits Bill 2008 — clause 65

*	Education Legislation Amendment Bill 2008 — Schedule 1, item 6, section 14B
*	Fair Work Bill 2008 — Subclause 559(4)
*	Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008 — Schedule 1, item 29
*	Federal Financial Relations Bill 2009 — clause 22
*	Federal Financial Relations (Consequential Amendments and Transitional Provisions) Bill 2009 — Schedule 4, subitem 2(3)
*	Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Bill 2008 — Schedule 1, item 49, section 54A and Schedule 2, item 23, section 70E (Special Accounts: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008 — Schedule 1, item 79, section 94B (Special Account: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008 — Schedule 5, item 141, section 65A
*	Guarantee of State and Territory Borrowing Appropriation Bill 2009 — clause 5
*	Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Bill 2008 — clause 5
*	International Monetary Agreements Amendment (Financial Assistance) Bill 2009 — Schedule 1, item 4, subsection 8CA(4)
	Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009 — subclause 43(2), clause 70 and subclause 78(2)
*	Nation-building Funds Bill 2008 — clauses 13, 61, 68, 75, 82, 132, 181, 188, 215 and 255 — (Special Accounts: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
	National Consumer Credit Protection Bill 2009 — Schedule 1, subclause 115(2)
*	Protection of the Sea Legislation Amendment Bill 2008 — Schedule 1, item 20, section 46N
*	Safe Work Australia Bill 2008 — clause 64 (Special Account: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Safe Work Australia Bill 2008 [No. 2] — clause 64 (Special Account: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Schools Assistance Bill 2008 — clause 167
*	Uranium Royalty (Northern Territory) Bill 2008 — clause 18

*	Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008 — Schedule 1, item 1
*	Wheat Export Marketing Bill 2008 — clause 58 (Special Account: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)

Other relevant appropriation clauses in bills

- * Indicates bill passed by the Senate

*	Household Stimulus Package Bill 2009 — Schedule 4, subitem 1(5): special appropriation clause – for a finite period of time (ie for circumstances arising in a particular financial year).
*	Social Security and Other Legislation Amendment (Economic Security Strategy) Bill 2008 — Schedule 4, item 4: special appropriation clause – for a finite period of time (ie for circumstances arising in a particular financial year).
*	Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008 — Schedule 2, items 1 and 2, and Schedule 4, item 1: special appropriation clauses – for a finite period of time (ie. for circumstances arising in a particular financial year).

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2008/2009

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Bills dealt with in 2008							
Corporations Amendment (Short Selling) Bill 2008	13(26.11.08)	13.11.08	27.11.08	Treasury	26.11.08	7.1.09	1(4.2.09)
Drink Container Recycling Bill 2008	2(19.3.08)		13.3.08	Senator Fielding	20.3.08		
Environment Protection and Biodiversity Conservation Amendment (Control of Power Station Emissions) Bill 2008	6(25.6.08)		19.6.08	Senator Allison	26.6.08		
Fair Work Bill 2008	14(3.12.08)	25.11.08	4.12.08	Education, Employment and Workplace Relations	4.12.08	19.1.08	1(4.2.09)
<i>Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008</i>	12(12.11.08)	15.10.08	16.10.08	Treasury	13.11.08	4.12.08	1(4.2.09)
National Commissioner for Children Bill 2008	3(14.5.08)		18.3.08	Senator Bartlett	15.5.08		
Nation-building Funds (Consequential Amendments) Bill 2008	13(26.11.08)	13.11.08	3.12.08	Finance and Deregulation	27.11.08	23.1.09	1(4.2.09)
Tax Agent Services Bill 2008	13(26.11.08)	13.11.08	12.2.09	Treasury	27.11.08	3.2.09	1(4.2.09)

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Bills dealt with in 2009							
Anti-Terrorism Laws Reform Bill 2009	9(12.8.09)		23.6.09	Senator Ludlam	13.3.09	8.9.09	10(9.9.09)
Appropriation Bill (No. 2) 2009-2010	6(2.6.09)	12.5.09	23.6.09	Finance and Deregulation	3.6.09	15.6.09	6(17.6.09)
Australian Climate Change Regulatory Authority Bill 2009	6(2.6.09)	14.5.09	15.6.09	Climate Change and Water	3.6.09	18.6.09	7(25.6.09)
Australian Wine and Brandy Corporation Amendment Bill 2009	9.(12.8.09)	22.6.09		Agriculture, Fisheries and Forestry	13.8.09		
Aviation Legislation Amendment (2008 Measures No. 2) Bill 2008	1(4.2.09)	3.12.08	12.2.09	Infrastructure, Transport, Regional Development and Local Government	5.2.09	10.3.09	2(11.3.09)
Aviation Transport Security Amendment (2009 Measures No. 1) Bill 2009	9(12.8.09)	24.6.09	9.9.09	Infrastructure, Transport, Regional Development and Local Government	13.8.09	19.8.09	10(9.9.09)
Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009	8(24.6.09)	17.6.09	17.8.09	Education, Employment and Workplace Relations	25.6.09	10.8.09	8(12.8.09)
Carbon Pollution Reduction Scheme Bill 2009	6(2.6.09)	14.5.09	15.6.09	Climate Change and Water	3.6.09	18.6.09	7(25.6.09)
Carbon Pollution Reduction Scheme (Consequential Amendments) Bill 2009	6(2.6.09)	14.5.09	15.6.09	Climate Change and Water	3.6.09	18.6.09	7(25.6.09)
<i>Civil Aviation Amendment Act 2009</i>	3(11.3.09)	12.2.09	11.3.09	Infrastructure, Transport, Regional Development and Local Government	12.3.09	12.5.09	4(13.5.09)

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009	4(18.3.09)	12.3.09	17.3.09	Special Minister of State	19.3.09	22.4.09	4(13.5.09)
Coordinator-General for Remote Indigenous Services Bill 2009	6(2.6.09)	27.5.09	25.6.09	Families, Housing, Community Services and Indigenous Affairs	3.6.09	16.6.09	6(17.6.09)
Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009	9(12.8.09)	24.6.09	10.9.09	Treasury	13.8.09	28.8.09	10(9.9.09)
Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009	9(12.8.09)	25.6.09		Treasury	13.8.09	11.9.09	11(16.9.09)
Crimes Amendment (Working With Children—Criminal History) Bill 2009	11(9.9.09)	20.8.09		Home Affairs	10.9.09		
Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009	9(12.8.09)	24.6.09		Attorney-General	13.8.09	4.9.09	10(9.9.09)
Customs Amendment (Enhanced Border Controls and Other Measures) Bill 2008	1(4.2.09)	3.12.08	10.3.09	Home Affairs	5.2.09	23.2.09	2(11.3.09)
Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008	1(4.2.09)	3.12.08	12.2.09	Attorney-General	5.2.09	27.2.09	2(11.3.09)
Education Services for Overseas Students Amendment (Re-registration of Providers and Other Measures) Bill 2009	11(9.9.09)	19.8.09		Education, Employment and Workplace Relations	10.9.09		

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Employment and Workplace Relations Amendment Bill 2008	1(4.2.09)	3.12.08	12.2.09	Employment and Workplace Relations	5.2.09	16.3.09	3(18.3.09)
Environment Protection (Beverage Container Deposit and Recovery Scheme) Bill 2009	6(2.6.09)		14.5.09	Senator Ludlam	3.6.09	16.6.09	6(17.6.09)
Fair Work (State Referral and Consequential and Other Amendments) Bill 2009	6(2.6.09)	27.5.09	15.6.09	Education, Employment and Workplace Relations	3.6.09	29.6.09	8(12.8.09)
Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009	5(13.5.09)	19.3.09	15.6.09	Education, Employment and Workplace Relations	14.5.09	12.6.09	6(17.6.09)
Family Assistance Amendment (Further 2009 Budget Measures) Bill 2009	7(17.6.09)	3.6.09	17.6.09	Families, Housing, Community Services and Indigenous Affairs	18.6.09	5.8.09	8(12.8.09)
Family Assistance Legislation Amendment (Child Care) Bill 2009	6(2.6.09)	14.5.09	15.6.09	Education, Employment and Workplace Relations	14.5.09	17.6.09	7(17.6.09)
Financial Sector Legislation Amendment (Enhancing Supervision and Enforcement) Bill 2009	5(13.5.09)	19.3.09	15.6.09	Treasury	14.5.09	24.6.09	8(12.8.09)
Foreign States Immunities Amendment Bill 2009	11(9.9.09)	19.8.09	14.9.09	Attorney-General	10.9.09	11.9.09	11(16.9.09)
Fuel Quality Standards Amendment Bill 2009	5(13.5.09)	18.3.09	15.6.09	Environment, Heritage and the Arts	14.5.09	12.8.09	9(19.8.09)
Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009	9(12.8.09)	24.6.09	9.9.09	Health and Ageing	13.8.09	18.8.09	9(19.8.09)

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Higher Education Support Amendment (VET FEE-HELP and Providers) Bill 2009	5(13.5.09)	18.3.09	15.6.09	Education	14.5.09	16.6.09	6(17.6.09)
Infrastructure Australia Amendment (National Broadband Network and Other Projects) Bill 2009	8(24.6.09)		15.6.09	Senator Minchin	25.6.09	10.8.09	8(12.8.09)
Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009	9(12.8.09)	24.6.09	9.9.09	Health and Ageing	13.8.09	18.8.09	9(19.8.09)
Migration Amendment (Immigration Detention Reform) Bill 2009	9(12.8.09)		25.6.09	Immigration and Citizenship	13.8.09	18.8.09	9(19.8.09)
Nation Building Program (National Land Transport) Amendment Bill 2009	6(2.6.09)	13.5.09	15.6.09	Infrastructure, Transport, Regional Development and Local Government	3.6.09	16.6.09	6(17.6.09)
National Consumer Credit Protection Bill 2009	9(12.8.09)	25.6.09	7.9.09	Treasury	13.8.09	21.8.09	10(9.9.09)
National Consumer Credit Protection (Fees) Bill 2009	9(12.8.09)	25.6.09	7.9.09	Treasury	13.8.09	21.8.09	10(9.9.09)
National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009	9(12.8.09)	25.6.09	7.9.09	Treasury	13.8.09	21.8.09	10(9.9.09)
National Greenhouse and Energy Reporting Amendment Bill 2009	5(13.5.09)	18.3.09	17.8.09	Climate Change and Water	14.5.09	22.6.09	7(24.6.09)

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
National Health Security Amendment Bill 2009	9(12.8.09)	24.6.09	10.9.09	Health and Ageing	13.8.09	19.8.09	10(9.9.09)
National Security Legislation Monitor Bill 2009	9(12.8.09)		25.6.09	Cabinet Secretary	13.8.09	8.9.09	10(9.9.09)
Native Title Amendment Bill 2009	5(13.5.09)	19.3.09	15.6.09	Attorney-General	14.5.09	23.6.09	7(24.6.09)
Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Bill 2009	5(13.5.09)	19.3.09	10.9.09	Resources and Energy	14.5.09	1.6.09	5(2.6.09)
Personal Property Securities Bill 2009	9(12.8.09)	24.6.09		Attorney-General	13.8.09		
Renewable Energy (Electricity) Amendment Bill 2009	8(24.6.09)	17.6.09	18.8.09	Climate Change and Water	25.6.09	18.8.09	9(19.8.09)
Social Security and Family Assistance Legislation Amendment (2009 Budget Measures) Bill 2009	6(2.6.09)	12.5.09	13.5.09	Families, Housing, Community Services and Indigenous Affairs	3.6.09	6.7.09	8(12.8.09)
Social Security and Other Legislation Amendment (Pension Reform and Other 2009 Budget Measures) Bill 2009	8(24.6.09)	15.6.09	17.6.09	Families, Housing, Community Services and Indigenous Affairs	25.6.09	5.8.09	8(12.8.09)
Tax Agent Services (Transitional and Consequential Amendments) Bill 2009	9(12.8.09)	24.6.09		Treasury	13.8.09	28.8.09 15.9.09	10(9.9.09) 11(16.9.09)
Tax Laws Amendment (2009 Measures No. 2) Bill 2009	5(13.5.09)	19.3.09	15.6.09	Treasury	14.5.09	28.5.09	5(2.6.09)

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE	INTRODUCED SENATE	MINISTER	RESPONSE SOUGHT	RESPONSE RECEIVED	REPORT NUMBER
Tax Laws Amendment (2009 Measures No. 4) Bill 2009	9(12.8.09)	25.6.09	8.9.09	Treasury	13.8.09	7.9.09	10(9.9.09)
Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008	1(4.2.09)	4.12.08	12.2.09	Treasury	5.2.09	11.3.09	3(18.3.09)
Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009	9(12.8.09)		25.6.09	Broadband, Communications and the Digital Economy	13.8.09	20.8.09	9(9.9.09)
Therapeutic Goods Amendment (2009 Measures No. 1) Bill 2009	5(13.5.09)	19.3.09	15.6.09	Health and Ageing	14.5.09	15.6.09	6(17.6.09)
Therapeutic Goods Amendment (Medical Devices and Other Measures) Bill 2008	1(4.2.09)	12.5.09	3.12.08	Health and Ageing	5.2.09	12.2.09	2(11.3.09)
Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008	1(4.2.09)	3.12.08	12.2.09	Treasury	5.2.09	11.3.09	3(18.3.09)
<i>Transport Safety Investigation Amendment Act 2009</i>	3(11.3.09)	12.2.09	11.3.09	Infrastructure, Transport, Regional Development and Local Government	12.3.09	5.5.09	4(13.5.09)
Veterans' Affairs and Other Legislation Amendment (Pension Reform) Bill 2009	10(19.8.09)	12.8.09	19.8.09	Veterans' Affairs	20.8.09	4.9.09	10(9.9.09)