

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



Alert Digest

No. 6 of 2010

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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 L Pratt

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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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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Committee under its terms of reference is invited to do so.

Airports (On-Airport Activities Administration) Validation Bill 2010

Introduced into the House of Representatives on 12 May 2010

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill ensures the effectiveness and validity of all actions performed and powers exercised under the *Airports (Control of On-Airport Activities) Regulations 1997* (the Regulations), including the issue of infringement notices, before the commencement of this legislation to the extent that they were performed or exercised by persons, not appointed, or not validly appointed, as authorised persons under any of the provisions of the Regulations.

Retrospective effect

Various

This bill seeks to cure various actions performed (in particular the issuance of infringement notices) under regulations which were invalid due to them having been undertaken by persons who were not properly authorised. The problem sought to be fixed extends as far back as 2004 and the bill therefore has retrospective effect.

The explanatory memorandum at page 2 notes that the bill:

...ensures that persons who have paid the administrative penalty specified in an infringement notice issued by [an unauthorised person] for an alleged offence continue to enjoy the immunity from prosecution and protection from liability for the alleged offence that a payment in respect of an infringement notice issued by a properly authorised person confers.

It is also the case that the bill will not affect rights or liabilities arising between parties to court proceedings which have been heard and finally determined by a court on or before the commencement of this bill.

On the other hand, in relation to infringement notices which have not yet been paid or in relation to rights and liabilities arising under the regulations where

court proceedings have not yet been finalised, the bill may have an adverse affect on persons.

Clearly, the bill is designed to correct an obvious administrative problem caused by a failure in administrative arrangements to secure appropriate authorisations for officers purporting to exercise powers under the regulations. To achieve its aims the bill will have a significant retrospective effect. Under the circumstances the Committee leaves the question of whether the bill is a justified trespass on personal rights and liberties to the **consideration of the Senate as a whole**.

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

Appropriation Bill (No.1) 2010-2011

Introduced into the House of Representatives on 11 May 2010
Portfolio: Finance and Deregulation

Background

This bill appropriates \$71.9 billion to meet payments for the ordinary annual services of the government for the financial year ending 30 June 2011.

The Committee has no comment on this bill.

Appropriation Bill (No.2) 2010-2011

Introduced into the House of Representatives on 11 May 2010

Portfolio: Finance and Deregulation

Background

The bill provides for appropriations totalling \$9.5 million from the Consolidated Revenue Fund for services that are not the ordinary annual services of the government.

The Committee has no comment on this bill.

Appropriation (Parliamentary Departments) Bill (No.1) 2010-2011

Introduced into the House of Representatives on 11 May 2010
Portfolio: Finance and Deregulation

Background

This bill appropriates \$222.1 million to meet the expenses of the parliamentary departments for the financial year ending 30 June 2011.

The Committee has no comment on this bill.

Autonomous Sanctions Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Foreign Affairs

Background

This bill provides a framework for the implementation in Australia of autonomous sanctions. The bill seeks to increase the range of measures Australia can implement, which is intended to match the scope and extent of measures implemented by like-minded countries. The bill will also assist the administration of, and compliance with, sanctions measures by removing distinctions between the scope and extent of autonomous sanctions and UN sanction enforcement laws.

Incorporation by reference

Proposed clause 10

The regulation making power in clause 10 of the bill allows, in subclause 10(3), for material to be incorporated by reference to other instruments as they are in force or existence from time to time. The explanatory memorandum explains why these regulations may cover central features of the scheme—such as which persons or entities are proscribed and what activities are restricted—by reference to the need for ‘flexibility to apply new, or amend existing, autonomous sanctions measures in response to international developments which change rapidly’. This justification, however, does not identify the necessity for the regulations to incorporate other instruments by reference. The Committee prefers that important matters are included in primary legislation to increase the level of Parliamentary scrutiny of the proposal and to assist those whose rights may be affected by the provision. The Committee therefore **seeks the Minister's advice** as to the justification for including this aspect of the regulation making power.

Pending the advice of the Minister, 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.

Henry VIII Proposed clause 12

A ‘Henry VIII’ clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to ‘Henry VIII’ clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and can be a matter of concern to the Committee.

Clause 12 is a Henry VIII clause insofar as it ensures that regulations made under the bill (once enacted) will have effect despite a contrary provision in another Act. As the explanatory memorandum does not explain the necessity for this delegation of legislative power to the Governor-General under clause 10 of the bill, the Committee **seeks the Minister's advice** as to the justification for this approach.

Pending the advice of the Minister, 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.

Inappropriate delegation of legislative power Proposed clause 13

Clause 13 of the bill is an interpretive provision, the effect of which is to require that a future Act of Parliament can only be taken as amending or repealing or otherwise altering a provision of Part 2 of this bill (once enacted) or of the regulations made under it, if the Act provides for this outcome expressly. This overrides the normal assumption that future legislation may impliedly repeal earlier legislation, and does so even with respect to regulations made under this Act. Although such an interpretive rule may be considered as appropriate in relation to legislation which is considered to be of special or quasi-constitutional importance, the explanatory memorandum does not explain why it is appropriate in this case. The Committee therefore **seeks the Minister's advice** as to why this rule is appropriate, especially in relation to matters determined in delegated legislation.

Pending the advice of the Minister, 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.

Trespass on personal rights and liberties

Proposed subclause 14(5)

Subclause 14(5) of the bill would relieve the Attorney-General of the normal rule in civil cases that a person seeking an interim injunction give an undertaking in relation to damages. Although special considerations can arise in the context of public law cases (in which the Attorney-General is seeking to enforce the law) the explanatory memorandum does not address this issue. The Committee is concerned to ensure that there is no undue trespass on personal rights and liberties as a result of this provision and therefore **seeks the Minister's advice** as to the justification for the provision and extent of any detriment persons may suffer as a result of it.

Pending the advice of the Minister, 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.

Determination of important matters by delegated legislation

Proposed clause 16

Clause 16 seeks to introduce offences for contraventions of a 'sanction law' and defines part of the offences by reference to what is, by a legislative instrument, specified as a 'sanction law' (pursuant to proposed clause 6). Offences committed by an individual can attract a penalty of imprisonment of 10 years or a fine of 2,500 penalty units. Given the seriousness and nature of the offences provided for under clause 16, the Committee **seeks the Minister's advice** as to whether it would be possible to prescribe mechanisms for ensuring that potentially affected persons receive appropriate notice that a particular law has, under clause 6, been specified as a 'sanction law'.

Pending the advice of the Attorney-General, 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

Proposed clause 16

As a matter of practice, the Committee draws attention to any bill that seeks to impose strict liability and will comment adversely where such a bill does not accord with principles of criminal law policy of the Commonwealth outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

If a body corporate contravenes a sanction law under proposed subsections 16(5) and 16(6) the offence is one of strict liability (subclause 16(8)) attracting fines of 3 times the value of the transaction or 10,000 penalty units (subsection 16(9)). Subsection 16(7) provides that an offence did not occur if the body corporate took all reasonable precautions and exercised due diligence to avoid the contravention. The explanatory memorandum notes the effect of these provisions, but does not explicitly discuss the justification for the application of strict liability to bodies corporate. The Committee therefore **seeks the Minister's advice** as to the reasons for this approach and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

Pending the advice of the Minister, 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.

Privilege against self-incrimination

Proposed clause 22

Clause 22 abrogates the privilege against self-incrimination in relation to a requirement that an individual give information or a document under clause 19. The clause 19 requirement to give information is limited to information sought for the purpose of determining whether a sanction law has been or is being complied with.

Although the bill makes clear that it will operate subject to a 'use' immunity, there is no express inclusion of 'derivative use' immunity. This means that

although information required to be given cannot be used against the person who makes the disclosure in court proceedings, it may be used indirectly to gather other evidence against the person. Although the privilege against self-incrimination should not be thought of as absolute, the Committee considers that any derogation of the privilege should be fully justified in the explanatory memorandum.

In this case the explanatory memorandum does not justify its abrogation nor provide reasons as to why the ‘derivative use’ immunity is not appropriate in these circumstances. The Committee therefore **seeks the Minister's advice** as to the justification for this approach and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

Pending the advice of the Attorney-General, 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.

Possible inappropriate delegation of legislative power

Proposed clause 24

Subclause 24(2) sets out those to whom the CEO of a designated Commonwealth entity may disclose information. However, paragraph (f) of the subclause allows disclosure to any person or entity specified in a legislative instrument made by the Minister under subclause 24(3). The explanatory memorandum does not indicate why this is necessary nor in what sort of circumstances further entities or persons may need to be identified for this purpose. The Committee prefers that important matters are included in primary legislation to increase the level of Parliamentary scrutiny of the proposal and to assist those whose rights may be affected by the provision. The Committee therefore **seeks the Minister's advice** as to the justification for this approach and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

Pending the advice of the Minister, 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

The Committee notes that this bill has been referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee so they may be taken into account during that inquiry.

Child Support and Family Assistance Legislation Amendment (Budget and Other Measures) Bill 2010

Introduced into the House of Representatives on 26 May 2010
Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill provides for several measures to amend the child support legislation and the family assistance law. These measures include:

- amendments to the income estimate provisions in the child support legislation to align estimate periods with financial years rather than with child support periods;
- align care determinations made under the family assistance law and the child support legislation. This will allow parents or carers who are entitled to family tax benefit and are also child support payers or payees to have the same care determinations made for a child where the care of the child involves more than one carer.
- minor amendments to the family assistance law to exclude two circumstances from the provisions that prevent payment of family tax benefit on the basis of an income estimate if relevant tax returns have not been lodged; and
- make minor amendments to the *A New Tax System (Family Assistance) Act 1999* and the *Child Support (Registration and Collection) Act 1988*.

Wide discretion

Schedule 1, item 51

Item 51 of Schedule 1 sets out transitional arrangements for income elections made for the period 1 April 2008 to 30 June 2010. Subitem 51(4) provides that the existing section 64 of the *Child Support (Assessment) Act* will not apply in relation to election decisions made in this period unless the Registrar determines that it should. Subitems 51(5) and (6) have the effect that even if a parent requests the Registrar to determine that the existing section 64 of the *Child Support (Assessment) Act* applies in relation to an election made for the period 1 April 2008 to 30 June 2010, the Registrar has a discretion to

determine the question. The explanatory memorandum states at page 17 that these provisions ensure the Registrar is able to prioritise resources according to cases of most need. While the Committee notes this explanation, the Committee is concerned to ensure that the discretion is appropriate and **seeks the Minister's advice** as to whether the exercise of this discretion may be detrimental to any parent who made an income election in the period 1 April 2008 to 30 June 2010 under the existing provisions of the legislation.

Pending the advice of the Minister, 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.

Commonwealth Commissioner for Children and Young People Bill 2010

Introduced into the Senate on 12 May 2010

Portfolio: Senator Hanson-Young

Background

This private Senator's bill seeks to establish an independent statutory office of Commonwealth Commissioner for Children and Young People, to advocate at a national level for the needs, rights and views of people below the age of eighteen.

The Committee has no comment on this bill.

Competition and Consumer Legislation Amendment Bill 2010

Introduced into the House of Representatives on 27 May 2010

Portfolio: Treasury

Background

This bill amends the *Trade Practices Act 1974* to clarify the operation of various provisions relating to mergers and acquisitions.

The bill also inserts a statement of interpretative principles into the unconscionable conduct provisions of the Australian Consumer Law (ACL) and the Australian Securities and Investments Act (ASIC Act) and unify sections 21 and 22 of the ACL (formerly sections 51AB and 51AC of the TP Act). The changes to the unconscionable conduct provisions will generally be reflected in the ASIC Act.

The Committee has no comment on this bill.

Corporations Amendment (Corporate Reporting Reform) Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Treasury

Background

This bill will amend the *Corporations Act 2001* to simplify Australia's corporate reporting framework, amend disclosure requirements and implementing a number of other refinements to the corporate regulatory framework.

Strict liability

Schedule 1, Part 1, proposed section 294B and proposed section 316A

As a matter of practice, the Committee draws attention to any bill that seeks to impose strict liability and will comment adversely where such a bill does not accord with principles of criminal law policy of the Commonwealth outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

Section 294B empowers ASIC to give a small company limited by guarantee a direction to comply with certain requirements and creates an offence of strict liability for a failure to comply. In relation to this section the explanatory memorandum simply states at page 9 that the use of strict liability 'will facilitate effective enforcement and compliance of this requirement.'

Section 316A relates to annual financial reporting to members of companies limited by guarantee and imposes requirements for providing information to members. Proposed subsection 316A(5) provides that an offence for a failure to comply with these requirements is one of strict liability. In relation to proposed subsection 316A(5) the explanatory memorandum states at page 14 that the use of strict liability 'will facilitate effective enforcement and

compliance of this requirement, and will safeguard member's rights to access financial information relating to the company.'

While the use of strict liability undoubtedly assists with effective enforcement, the Committee considers that an explanatory memorandum should include information about the reasons for seeking to impose strict liability and trespassing on personal rights and liberties in this way. Consistent with this view, while there may well be sound reasons for seeking to apply strict liability to an offence the 2007 *Guide* observes (at page 24) that:

Commonwealth Governments and Parliaments have long taken the view that any use of strict or absolute liability should be properly justified...

The Committee therefore **seeks the Treasurer's advice** about the reasons for seeking to impose strict liability for these offences and also requests advice about the penalties for these offences.

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.

Corporations Amendment (Sons of Gwalia) Bill 2010

Introduced into the House of Representatives on 2 June 2010

Portfolio: Financial Services, Superannuation and Corporate Law

Background

This bill amends the rights of persons bringing claims for damages in relation to shareholdings under the *Corporations Act 2001*. The amendments contained in the Bill give effect to a decision of the Government to reverse the effect of the High Court's decision in *Sons of Gwalia Ltd v Margaretic* and to make other amendments to streamline external administrations. The bill contains three key measures:

- provides that all claims in relation to the buying, selling, holding or otherwise dealing with shares are to be ranked equally and after all other creditors' claims;
- removes the right of persons bringing claims regarding shareholdings to vote as creditors in a voluntary administration or a winding up unless they receive permission from the Court. They will also not be entitled to receive reports to creditors unless they make a request in writing to the external administrator; and
- eliminates any restriction on the capacity of a shareholder to recover damages against a company based on how they acquired the shares or whether they still hold the shares.

The Committee has no comment on this bill.

Crimes Amendment (Royal Flying Doctor Service) Bill 2010

Introduced into the House of Representatives on 2 June 2010

Portfolio: Home Affairs

Background

This bill amends section 85W of the *Crimes Act 1914* to insert an exception to the offence of 'causing narcotic substances to be carried by post' for Australia Post and the Royal Flying Doctor Service of Australia (RFDSA) and their officers, employees, agents and contractors. The exception would allow those organisations to arrange for the carriage of medicine by Australia Post for the purpose of enabling the RFDSA to administer its Medical Chest Program.

Retrospective application

Schedule 1, item 3

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. This item seeks to apply the amendments made by items 1 and 2 of Schedule 1 to conduct engaged in by a person before the commencement of the legislation. The amendments proposed in items 1 and 2 of Schedule 1 will allow Australia Post and the RFDS to lawfully provide for the supply of medicines through Australia Post under the RFDS Medical Chest Program under an exception to the Customs Act section 85W offence of 'causing narcotic substances to be carried by post'. This corrects an oversight in which the effect of the repeal of the definition in 1990 on the operation of section 85W was not taken into account. In relation to the retrospective application of the exemption, the Minister explained in the Second Reading Speech (at page 3) that the effect is beneficial as it:

...will also ensure that those persons involved in administering the Medical Chest Program are protected from prosecution under section 85W for conduct engaged in before the commencement of the amendment.

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

Customs Tariff Amendment (Aviation Fuel) Bill 2010

Introduced into the House of Representatives on 3 June 2010

Portfolio: Home Affairs

Background

This bill was introduced together with the Excise Tariff Amendment (Aviation Fuel) Bill 2010. These bills will amend the *Excise Tariff Act 1921* and the *Customs Tariff Act 1995* to alter the excise and customs duty applying to aviation fuel from \$0.02854 per litre to \$0.03556 per litre from 1 July 2010.

The Committee has no comment on this bill.

Customs Tariff Amendment (Tobacco) Bill 2010

Introduced into the House of Representatives on 12 May 2010

Portfolio: Home Affairs

Background

This bill amends the *Customs Tariff Act 1995* to increase the excise and excise-equivalent customs duty rate applying to tobacco, cigars, cigarettes and snuff by 25 per cent, from \$0.26220 to \$0.32775 per stick not exceeding in weight 0.8 grams per stick actual tobacco content, and from \$327.77 to \$409.71 per kilogram for other tobacco.

Retrospective commencement

Various

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.

It is proposed that this bill and the related *Excise Tariff Amendment (Tobacco) Bill 2010* also introduced on 12 May 2010 both commence on 30 April 2010. Although the commencement date means that the bills themselves have a retrospective effect the Committee has regularly accepted that there is no detrimental result because they are essentially technical amendments giving effect to Customs Notices No. S63 and S62 published in *Commonwealth Government Special Notices Gazette* of 29 April 2010.

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

Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill (No.2) 2010

Introduced into the House of Representatives on 2 June 2010
Portfolio: Special Minister of State

Background

This bill amends the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984*.

The Joint Standing Committee on Electoral Matters (JSCEM) conducted an inquiry into the conduct of the 2007 federal election and the resulting report is entitled *Report on the conduct of the 2007 federal election and matters related thereto* (JSCEM Report). The bill will implement the Governments response to two of the recommendation in the JSCEM Report.

The bill contains provisions that will:

- restore the close of Rolls period to seven days after the issue of the writ for an election; and
- repeal the requirement for provisional voters to provide evidence of identity before their votes are admitted to scrutiny.

The Committee has no comment on this bill.

Electoral and Referendum Amendment (How-to-Vote Cards and Other Measures) Bill 2010

Introduced into the House of Representatives on 2 June 2010

Portfolio: Special Minister of State

Background

This bill amends the *Commonwealth Electoral Act 1918* (Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) to:

- introduce specific and expanded authorisation requirements for how-to-vote cards; and
- add the terms ‘telephone’ and ‘internet’ to the definition of publish in section 329 of the Electoral Act and section 122 of the Referendum Act.

The Committee has no comment on this bill.

Electoral and Referendum Amendment (Modernisation and Other Measures) Bill 2010

Introduced into the House of Representatives on 2 June 2010

Portfolio: Special Minister of State

Background

This bill amends the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984*.

Following its inquiry into the conduct of the 2007 federal election, the Joint Standing Committee on Electoral Matters (JSCEM) tabled a report entitled *Report on the conduct of the 2007 federal election and matters related thereto* (JSCEM Report). The bill implements the Government response to the majority of the recommendations made in the JSCEM Report requiring legislative amendment. The bill also makes a number of minor amendments that are consistent with, or incidental to, the amendments made in response to the JSCEM Report.

The Bill contains provisions that:

- remove the requirement to publish enrolment and election-related forms and information in the *Government Gazette* and substitute the requirement for the Electoral Commissioner to publish the information, at a minimum, on the Australian Electoral Commission's website;
- provide that a person making an application for enrolment or changing the name under which they are enrolled (which does not include amending address details) needs to include with their application either their driver's licence number, passport number or an attestation of identity signed by an enrolled elector;
- reduce the age at which people may provisionally enrol from 17 years old to 16 years old;
- allow for electronic Roll information to be provided to parliamentarians and allow for electronic certified lists;

- introduce flexibility to print ballot papers at the local level by removing the technical requirement for ballot-papers to be ‘overprinted’;
- introduce one form of mobile polling which may visit anywhere that the Electoral Commissioner determines. The amendment removes inconsistencies that currently exist in the arrangements for visits at various places or institutions;
- enable a person to apply for a postal vote electronically by removing the requirement for an application for a postal vote to be signed and witnessed;
- prohibit written material from being attached to a postal vote application;
- clarify that a right to inspect the electoral Roll does not include the right to electronically copy or record the Roll;
- allow the AEC to provide the postal address of general postal voters to state and territory electoral commissions;
- introduce specific provisions to facilitate enrolment and continued enrolment for people experiencing homelessness;
- expand the grounds upon which a person may apply for a pre-poll or postal vote; and
- make a number of minor technical amendments.

The Committee has no comment on this bill.

Electoral and Referendum Amendment (Pre-poll Voting and Other Measures) Bill 2010

Introduced into the House of Representatives on 2 June 2010

Portfolio: Special Minister of State

Background

This bill amends the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984*.

Following its inquiry into the conduct of the 2007 federal election, the Joint Standing Committee on Electoral Matters (JSCEM) tabled a report entitled *Report on the conduct of the 2007 federal election and matters related thereto* (JSCEM Report). Schedules 1,2 and 4 of the Bill implement the Government response to a number of recommendations made in the JSCEM Report. Schedule 3 limits the number of candidates that can be endorsed by a political party in each Division. This issue emerged at the 2009 Bradfield by-election and requires legislative amendment prior to the conduct of future federal elections.

The bill contains provisions that will:

- enable pre-poll votes cast in an elector's 'home' Division to be cast and counted as ordinary votes, wherever practicable;
- allow the Australian Electoral Commission to manage its workload more efficiently by enabling enrolment transactions to be processed outside the Division for which the person is enrolling;
- modernise enrolment processes to enable electors to update their address details electronically;
- restrict the number of candidates that can be endorsed by a political party in each Division; and
- provide a framework for sight-impaired voters to cast an independent and secret vote by electronically assisted means;

**Wide delegation of power
Schedule 2, items 3 and 188**

The Committee has consistently drawn attention to legislation that allows delegations to a relatively large class of persons with little or no specificity as to their qualifications or attributes. Generally, the Committee prefers to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Where broad delegations are made, the Committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this case the explanatory memorandum at pages 13 and 14 provides a comprehensive explanation of the justification for the approach. The Committee particularly notes that in undertaking delegated functions and powers the delegate must comply with any directions of the Electoral Commissioner.

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

**Possible trespass on the right to vote
Schedule 3, item 1**

Item 1 of Schedule 3 of the bill inserts a new subsection 166(1AA) into the *Commonwealth Electoral Act 1918*. This provision provides that a registered political party can only nominate one candidate as an endorsed candidate for election in a single Division.

This provision may be thought to impact on the right to vote in a representative democracy to the extent that it deprives political parties of the capacity to nominate more than one candidate, and thereby may reduce the range of choices with which voters may otherwise be presented.

Alternatively, however, the provision may be thought of as a measure designed to improve the integrity of the voting system. As the explanatory memorandum notes at page 27, in a recent by-election for the Division of Bradfield there were a total of 22 candidates, 9 of whom were nominated by

the Christian Democratic Party. In this by-election the informal vote was 9 per cent, more than double that in the 2007 general election and the highest ever recorded for the Division of Bradfield.

Although more explanation of the rationale for this amendment would have been of assistance, the clear (though unarticulated) implication is that confusion and scope for error is created by allowing political parties to nominate multiple candidates and that may in practice lead unintentional informal votes.

While on one view the bill may be thought to adversely impact on the right to vote, the Committee notes the alternative argument and as the bill is seeking to formalise in legislation what is a clear policy decision the Committee, as is its practice, **leaves to the Senate as a whole** the question of whether this provision encroaches on voters' rights in a way which unduly trespasses on personal rights and liberties.

Excise Tariff Amendment (Aviation Fuel) Bill 2010

Introduced into the House of Representatives on 3 June 2010

Portfolio: Home Affairs

Background

This bill was introduced together with the Customs Tariff Amendment (Aviation Fuel) Bill 2010. These bills will amend the *Excise Tariff Act 1921* and the *Customs Tariff Act 1995* to alter the excise and customs duty applying to aviation fuel from \$0.02854 per litre to \$0.03556 per litre from 1 July 2010.

The Committee has no comment on this bill.

Excise Tariff Amendment (Tobacco) Bill 2010

Introduced into the House of Representatives on 12 May 2010

Portfolio: Home Affairs

Background

This bill amends the *Excise Tariff Act 1921* to increase the excise and excise-equivalent customs duty rate applying to tobacco, cigars, cigarettes and snuff by 25 per cent, from \$0.26220 to \$0.32775 per stick not exceeding in weight 0.8 grams per stick actual tobacco content, and from \$327.77 to \$409.71 per kilogram for other tobacco.

Retrospective commencement

Various

See the Committee's comments outlined above on the related *Customs Tariff Amendment (Tobacco) Bill 2010* for discussion relating to both bills.

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

Export Market Development Grants Amendment Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Trade

Background

This bill makes a range of amendments to the *Export Market Development Grants Act 1997*, including to:

- extend the Export Market Development Grants (EMDG) scheme so that it applies to all grant years from 2011-12 to 2015-16 inclusive and reduce the maximum grant from \$200,000 to \$150,000;
- reduce the maximum number of grants available for an individual recipient (other than an approved body or an approved joint venture) from eight to seven;
- cap intellectual property registration expenses at \$50,000 per application;
- increase the minimum expenses threshold from \$10,000 to \$20,000;
- increase the income limit for members of approved joint ventures/consortia from \$30 million to \$50 million;
- remove approved trading houses as an eligible special approval applicant category;
- reinstate disqualifying conviction provisions in the Act that were unintentionally removed when *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* rules replaced earlier Act disqualifying conviction provisions; and
- enable Austrade to impose conditions on the accreditation of EMDG consultants.

The Committee has no comment on this bill.

Family Assistance Legislation Amendment (Child Care Budget Measures) Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Early Childhood Education, Childcare and Youth

Background

This Bill amends the *A New Tax System (Family Assistance) Act 1999* to set the annual child care rebate limit at \$7,500 for four income years starting from 1 July 2010, with the first indexation of this amount occurring on 1 July 2014.

Retrospective application

Items 2 and 4

The bill contains measures announced in the Budget on 11 May that will take effect for the income year ending on 30 June 2010. Even if the legislation has been passed by that date it has a retrospective effect because it applies to the income year commencing on 1 July 2009.

However, the Committee has regularly been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced. In this case the Committee notes that the legislation has been introduced very soon after the measures were announced in the Budget and that the measure for the 2009-10 income year is the same as for the 2008-09 income year so although its application is retrospective will have no detrimental effect.

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

The Committee notes that this bill has been referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee for information.

Farm Household Support Amendment (Ancillary Benefits) Bill 2010

Introduced into the House of Representatives on 26 May 2010
Portfolio: Agriculture, Fisheries and Forestry

Background

This bill amends the *A New Tax System (Family Assistance) Act 1999* to set the annual child care rebate limit at \$7,500 for four income years starting from 1 July 2010, with the first indexation of this amount occurring on 1 July 2014.

The Committee has no comment on this bill.

Financial Sector Legislation Amendment (Prudential Refinements and Other Measures) Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Treasury

Background

This bill amends the *Australian Prudential Regulation Authority Act 1998*, the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995*, the *Superannuation Industry (Supervision) Act 1993*, and the *Financial Sector (Collection of Data) Act 2001* and related Acts relating to Australia's crisis management and prudential framework.

The bill seeks to make the following amendments to:

- APRA'S powers to prevent prudential concerns arising and to address them should they arise;
- the Financial Claims Scheme to facilitate APRA's administration of the scheme;
- the *Financial Sector (Collection of Data) Act 2001* in relation to the data collection and publishing regime, and APRA's role as the central repository for the collection of financial data;
- the financial sector levies framework to charge the methodologies governing the determination of levies; and
- repeal five redundant Acts.

Possible retrospective commencement

Legislation by press release

Clause 2, item 16, Schedule 5

Schedule 5 contains some of the amendments to the financial sector levies framework to change the methodologies governing the determination of levies. The commencement clause provides that Schedule 5 comes into effect on 1 July 2010. If this bill is passed after 1 July 2010 the provisions of this

schedule will apply retrospectively. 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 explanatory memorandum at page 8 notes that these amendments were announced by the Minister for Financial Services, Superannuation and Corporate Law in his press release *No. 5 of 2010* dated 19 January 2010 and that an exposure draft of the measures was also publicly released that day. The Committee believes that reliance on Ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the Executive. While the making of legislation retrospective to the date of its introduction into Parliament may be countenanced as part of the Parliamentary process, a similar rationale cannot be advanced for the treatment of Ministerial announcements as de facto legislation.

However, the Committee has been prepared to accept amendments announced by press release if the legislation to implement them is introduced within 6 months of the announcement. In this case the measures have been introduced within 6 months.

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

Incorporation by reference

Schedule 1, item 11 and Schedule 3, item 50

These items seek to insert subsection 11AF(7BA) into the *Banking Act 1959* and subsection 230A(12C) of the *Life Insurance Act 1995* which will allow a prudential standard to apply, adopt or incorporate, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time. The explanatory memorandum notes at page 13 that:

The inability to incorporate documents by reference increases the burden on APRA of maintaining and administering prudential standards. For example, it means that APRA is required to make new prudential standards each time versions of documents referred to in the standards (such as the Audit and Assurance Standards Board's Audit Guidance are updated).

The explanatory memorandum also notes at pages 19 and 20 that these amendments 'harmonise' the banking and life insurance Acts with a similar power in the *Insurance Act 1973*.

The Committee has, in the past, expressed concern about provisions which allow a change in obligations imposed without the Parliament's knowledge, or without the opportunity for the Parliament to scrutinise the variation. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. In this case, the Committee can understand that there could be reasons why the proposed approach is desirable, but given that this type of approach can be contrary to Standing Order 24, is concerned that the proposal has not been fully justified. In particular, the Committee **seeks the Treasurer's advice** as to the full scope of the material likely to be incorporated, whether any of the material likely to be incorporated that should be subject to full parliamentary scrutiny and whether there is ready access to the material likely to be incorporated by reference by those affected and whether any person is likely to be adversely affected by the amendments.

Pending the advice of the Treasurer, 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 and 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.

Insufficiently defined offence

Schedule 1, item 27, proposed subsection 14AD(3)

Schedule 1, item 27 seeks to introduce section 14AD into the Banking Act to enable APRA to require a person to provide information or documents that relate to the affairs on an ADI that is under statutory management. Subsection 14AD(3) provides that the period specified for the production 'must be reasonable in all the circumstances'. The explanatory memorandum does not explain why it is not possible to define more precisely in the legislation what minimum period for compliance is appropriate. [The general principles for formulating offences are outlined in the 2007 *A Guide to Framing Commonwealth Offences* approved by the Minister for Home Affairs. See particularly page 98 in relation to *Time for compliance*].

Given that breach of the requirement constitutes an offence (attracting a custodial sentence of up to 12 months) the Committee is concerned that the lack of specificity in the provision of a minimum time requirement could make rights and liabilities unduly dependent on an insufficiently defined administrative discretion. The Committee therefore **seeks the Treasurer's advice** as to whether minimum time periods for compliance, or at least the principles to be applied when determining minimum time periods, can be specified in the bill.

Pending the advice of the Treasurer, 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.

Possible severe offence

Schedule 1, item 27, proposed subsection 14AD(4)

Subsection 14AD(4) makes non-compliance with the requirements to produce documents or information an offence (discussed above) punishable by 12 months imprisonment or 50 penalty units or both. The 2007 *A Guide to Framing Commonwealth Offences* approved by the Minister for Home Affairs states at page 98 that the maximum penalty for such offences should be 6 months imprisonment and/or a 30 penalty unit fine. In this case the explanatory memorandum does not justify the severity of the penalty and the Committee therefore **seeks the Treasurer's advice** as to the justification for the severity of the penalty.

Pending the advice of the Treasurer, 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.

Privilege against self-incrimination

Schedule 1, item 27, proposed subsections 14AD(5) and 14AD(6)

Subsection 14AD(5) abrogates the privilege against self-incrimination in relation to the above requirement to produce documents or information. Subsection 14AD(6) appears to provide for both 'use' and 'derivative use' immunity in relation to information or documents which are proffered.

Although the privilege against self-incrimination is not absolute, before accepting legislation which affects the privilege the Committee must be convinced that the public benefit following from its abrogation will outweigh any harm to the maintenance of accepted common law rights. As the explanatory memorandum does not appear to outline the justification for these provisions, the Committee **seeks the Treasurer's advice** as to the reasons for the proposed approach.

Pending the advice of the Treasurer, 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 2, item 52; Schedule 3, item 27, proposed section 88B; Schedule 3, item 30

Item 52 of Schedule 2 introduces a new 62ZD into the Insurance Act. Two offences are introduced relating to a failure of a judicial manager to comply with a written notice from APRA to produce information within a period specified as reasonable. Subsection 62ZD(3) is a fault based offence, whereas the offence in subsection 62ZD(4), which is in the same terms, is specified (in subsection 62ZD(5)) to be a strict liability offence (attracting a fine up to 60 penalty units). The explanatory memorandum at paragraph 4.34 states that strict liability 'reflects APRA's need to receive prompt and accurate information about the conduct of judicial management and other relevant matters.'

The penalty is within the maximum penalty generally considered to be acceptable for strict liability offences (see page 27 of the 2007 *A Guide to Framing Commonwealth Offences* approved by the Minister for Home Affairs). However, the justification in the explanatory memorandum for the application of strict liability at paragraph 4.34 is cursory and seems to refer only to administrative convenience. The Committee expects that the use of strict liability, which dispenses with the requirement of fault for an offence, should be fully justified and this is consistent with the principles described in the 2007 *Guide* at page 24.

The same issue arises in relation to Schedule 3, item 27 (subsection 88B(5)) and Schedule 3, item 30 (subsection 98B(5)) which introduce strict liability offences into the Life Insurance Act for auditors and actuaries.

In the circumstances the Committee **seeks the Treasurer's advice** as to the justification for the use of strict liability for these offences.

Pending the advice of the Treasurer, 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.

No or poor explanatory memorandum

Various including Schedule 1, item 25 (including proposed sections 13E, 13J, 13K, 13Q); Schedule 1, item 83; Schedule 2, item 18; item 35 and item 83 (including proposed sections 103F, 103G, 103L, 103M, 103N); and Schedule 3, item 29 and item 51

The Committee is concerned that many of the items in this bill are not explained, or are inadequately explained, in the explanatory memorandum. The Committee considers that an explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including by this Committee), greatly assists those whose rights may be affected by a bill to understand the legislative proposal, and an explanatory memorandum may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

An example of a provision for which the Committee could locate no explanation is item 83 in schedule 1 which introduces a new 103N into the Insurance Act. This is an offence provision. Subsection (2) places an evidential burden on a defendant; and subsections (4) and (5) make the offence depend on whether 'reasonable steps' have been taken. The same issue arises in relation to item 51 of Schedule 3 which introduces section 230AL into the Life Insurance Act.

In addition to the items that have no substantive explanation in the explanatory memorandum, there are some items which attract a level of commentary, however, the content in the explanatory memorandum is incomplete. For example, item 38 of Schedule 1 introduces section 16D and section 16E into the Banking Act. These provisions establish a number of offences relating to auditors. The explanatory memorandum indicates that the

penalties to be imposed mirror those applicable to equivalent offences in the Corporations Act (see paragraphs 5.26, 5.28 and 5.30). The new subsection 16E(2)(e) imposes liability where the person ‘did not take reasonable steps to ensure that the information was not’ deficient in relevant respects. This appears to the Committee to be akin to requiring proof of negligence and as such it is expected that the explanatory memorandum should explain the reasons for the use of negligence, consistent with the 2007 *A Guide to Framing Commonwealth Offences* approved by the Minister for Home Affairs. Identical provisions are also introduced into the Insurance Act by item 35 of Schedule 2; and into the Life Insurance Act by item 29 of Schedule 3.

The Committee recognises that this is lengthy and complex legislation and that the explanatory memorandum contains a considerable amount of information. However, in the Committee's view it remains essential that explanatory memoranda comprehensively explain the effect of each provision in a legislative proposal. The Committee therefore **seeks the Treasurer's advice** about whether the explanatory memorandum can be revised to include comprehensive information about all provisions in the bill.

Pending the advice of the Treasurer, 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.

Fisheries Legislation Amendment Bill (No.2) 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Agriculture, Fisheries and Forestry

Background

This bill will amend the *Fisheries Management Act 1991*, the *Fisheries Administration Act 1991* and the *Fishing Levy Act 1991* to facilitate the implementation of co-management, regulatory simplification, the rationalisation of management advisory committees and allow the Australian Fisheries Management Authority to provide services to other agencies.

The Committee has no comment on this bill.

Food Importation (Bovine Meat – Standards) Bill 2010

Introduced into the House of Representatives on 31 May 2010
Portfolio: Mr Cobb

Background

This bill seeks to reduce the risk of bovine spongiform encephalopathy being present in imported meat.

Explanatory memorandum

This bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. While noting that the second reading speech provides some explanation of the background, intent and operation of the bill, the Committee prefers to see explanatory memorandums to all bills and recognises the manner in which such documents can assist in the interpretation of bills, and ultimately, Acts. The Committee **seeks the proposer's advice** as to whether an explanatory memorandum could be provided.

Pending the private Senator'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.

Food Standards Australia New Zealand Amendment Bill 2010

Introduced into the House of Representatives on 13 May 2010

Portfolio: Health and Ageing

Background

The bill implements a reform agreed to by the Council of Australian Governments on 3 July 2008, that calls for the recognition, for domestically grown produce, by Food Standards Australia New Zealand, of the Australian Pesticides and Veterinary Medicines Authority's residue risk assessment and the promulgation of the resulting maximum residue limits in the Australia New Zealand Food Standards Code. The implementation of this reform requires the amendment of the *Food Standards Australia New Zealand Act 1991*, and consequential amendments to the *Agricultural and Veterinary Chemicals (Administration) Act 1992* and the *Agricultural and Veterinary Chemicals Code Act 1994*.

The bill also amends the annual reporting requirements for the Authority and corrects some minor inconsistencies inadvertently made to the Act in 2007.

Legislative instruments – sunseting and disallowance

Item 14, proposed subsection 82(2)

The purpose of this bill is to streamline the regulatory process in relation to the legal use of particular chemical products in food production. Schedule 1, item 14, of the bill introduces a new Division 2A of the *Food Standards Australia New Zealand Act 1991*. The proposed new section 82(2) of this Act states that a variation made by the Australian Pesticides and Veterinary Medicines Authority (APVMA) to the Maximum Residue Limits Standard, although a legislative instrument, is not subject to the disallowance and sunseting provisions of the *Legislative Instruments Act 2003 (LIA)*.

The explanatory memorandum at page 5 justifies the exclusion of these elements of the *LIA* by reference to their consistency with current provisions of the *FSANZ Act*. In relation to disallowance the explanatory memorandum also notes that section 44 of the *LIA* does not apply in relation to instruments which relate to intergovernmental bodies or schemes involving the

Commonwealth and one or more of the states. The FSANZ scheme is said to involve the Commonwealth, the States and Territories, and New Zealand.

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

Legislative Instruments Act 2003 – consultation
Schedule 1, item 14, proposed section 82

This section seeks to introduce the ability for the APVMA to vary the maximum Residue Limits Standard by legislative instrument. A requirement of the *Legislative Instruments Act 2003* that is sometimes overlooked or inadequately fulfilled relates to the section 17 requirement for appropriate consultation to take place before a legislative instrument is made. In relation to this bill, page 6 of explanatory memorandum states in relation to any section 82 legislative instruments (variations) that:

...this consultation requirement will normally be met through the consultation which the APVMA undertakes as part of its assessment processes when considering the registration, or permit for use, of a chemical product under the AgVet Code.

The Committee is pleased to note that in preparing the explanatory memorandum consideration has already been given to meeting this LIA requirement in the future and thanks the Minister for this approach.

Legislative instrument – commencement
Schedule 1, item 20

The proposed new s 82(8) of the *Food Standards Australian New Zealand Act 1991* states that a variation made to the Maximum Residue Limits Standard takes effect on the day a copy of the variation is published in the Gazette despite subsections 12(1) and (2) of the *LIA*. The Committee accepts that there are circumstances in which this approach is appropriate, but considers that the explanatory memorandum should explain why the general rule set out in the *LIA* should be overridden. In this case the explanatory memorandum does not address the issue. The Committee therefore **seeks the Minister's advice** about the reasons for the why this is necessary and whether this approach will be to the detriment of any person.

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.

**Explanatory memorandum – no explanation
Items 29, 30, 32, 33, 36, 38 and 39**

There is no explanation in the explanatory memoranda for these items. The Committee recognises the manner in which information in explanatory memorandums can assist in the interpretation of bills, and ultimately, Acts and **seeks the Minister's advice** about whether material about these items can be included in the explanatory memorandum.

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.

The Committee notes that this bill has been referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee for information.

Health Legislation Amendment (Australian Community Pharmacy Authority and Private Health Insurance) Bill 2010

Introduced into the House of Representatives on 12 May 2010

Portfolio: Health and Ageing

Background

This bill amends the *National Health Act 1953* to extend the authority of the Pharmacy Location Rules and the Australian Community Pharmacy Authority from 30 June 2010 to 30 June 2015.

The bill also amends the *Private Health Insurance Act 2007* to correct technical errors relating to 'new arrivals' and lifetime health cover.

The Committee has no comment on this bill.

Higher Education Support Amendment (Indexation) Bill 2010

Introduced into the House of Representatives on 12 May 2010
Portfolio: Education

Background

This bill amends section 198-20 of the *Higher Education Support Act 2003* to specify the revised indexation arrangements under Part 5-6 of the Act.

The Committee has no comment on this bill.

Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010

Introduced into the House of Representatives on 2 June 2010

Portfolio: Attorney-General

Background

The bill contains consequential amendments that arise as a consequence of the Human Rights (Parliamentary Scrutiny) Bill 2010 and other matters. The two Bills implement the legislative elements of Australia's Human Rights Framework announced by the Government in April 2010. The Human Rights Framework outlines a range of measures to further protect and promote human rights in Australia.

The key amendments in Schedule 1 to the bill are:

- amend the *Administrative Appeals Tribunal Act 1975* to include the President of the Australian Human Rights Commission, as established by subsection 8(1) of the *Australian Human Rights Commission Act 1986*, as an ex officio member of the Administrative Review Council;
- amend the AAT Act to increase the quorum of the ARC from four to five members; and
- amend the *Legislative Instruments Act 2003* to require an explanatory statement in respect of a disallowable legislative instrument to contain a statement of compatibility prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2010*.

The Committee has no comment on this bill.

Human Rights (Parliamentary Scrutiny) Bill 2010

Introduced into the House of Representatives on 2 June 2010

Portfolio: Attorney-General

Background

This bill, together with the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010, implements the legislative elements of Australia's Human Rights Framework announced by the Government in April 2010. The Human Rights Framework outlines a range of measures to further protect and promote human rights in Australia. It reflects the key recommendations of the National Human Rights Consultation Committee which undertook extensive public consultation on the promotion and protection of human rights in Australia.

The Committee has no comment on this bill.

Income Tax Rates Amendment (Research and Development) Bill 2010

Introduced into the House of Representatives on 13 May 2010

Portfolio: Treasury

Background

This bill supports the introduction of a new research and development tax incentive to replace the existing R & D Tax Concession for all income years starting on or after 1 July 2010.

The bill amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Income Tax (Transitional Provisions) Act 1997*, the *Income Tax Rates Act 1986*, the *Taxation Administration Act 1953* and the *Industry, Research and Development Act 1986*.

Possible inappropriate delegation of legislative power Schedule 2, Part 1, items 1 and 32A

Schedule 2, Part 1, item 1 includes the new section 29A to be inserted in the *Industry Research and Development Act 1986*. This section deals with the registration of research service providers by the Board. Subsection 29A(2) provides that the Board must not register an entity unless satisfied that it meets criteria specified in regulations made for the purposes of this subsection.

The explanatory memorandum (at page 145) notes that ‘regulations will specify the criteria the entity must meet to satisfy the Board that it is capable of providing services to R&D entities in one or more specified fields of research’ and that specified fields of research will also be prescribed in the regulations. There is, however, no explanation as to why such criteria might not be specified in the primary legislation.

Similarly, section 32A provides for ‘decision-making principles’ to be made by legislative instrument. These principles play an important role in determining how the Board should exercise various powers. The explanatory memorandum, at page 153, does little more than repeat the terms of section

32A as to why the ‘decision-making principles’ cannot be set out in the primary legislation.

The Committee prefers that important matters are included in primary legislation to increase the level of Parliamentary scrutiny of the proposal and to assist those whose rights may be affected by the provision. The Committee therefore **seeks the Treasurer's advice** as to the why the criteria referred to in item 1 and the ‘decision-making principles’ of section 32A cannot be set out in the primary legislation.

Pending the advice of the Minister, 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.

The Committee notes that this bill has been referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee for information.

Interstate Road Transport Charge Amendment Bill 2010

Introduced into the House of Representatives on 12 May 2010

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill provides for a technical amendment that repeals sub-section 5(6) of the *Interstate Road Transport Charge Act 1985* (the Act). This amendment to the Act will reduce the 2010-2011 annual automatic charge adjustment from 9.7 per cent to 4.2 per cent and will take effect from 1 July 2010.

The Committee has no comment on this bill.

Migration Amendment (Visa Capping) Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Immigration and Citizenship

Background

This bill amends the *Migration Act 1958* to enable the Minister for Immigration and Citizenship to cap visa grants and terminate visa applications based on the class or classes of applicant applying for the visa.

Inappropriate delegation of legislative power Schedule 1, item 8, proposed section 91AA

Proposed section 91AA would enable the Minister for Immigration and Citizenship to specify, by legislative instrument, caps in relation to visas of a specified class or classes in a given year to an applicant who is included in a specified class, or specified classes, of applicants. The main purpose of the provision is to provide the Minister with a more flexible tool for management of the General Skilled Migration program.

In relation to this program, the explanatory memorandum at page 7 states that such characteristics, which would be used to determine which applicants are subject to an imposed cap in visa numbers, would ‘include, but are not limited to, the occupation nominated by the applicant...or the date of the application’. It is also said that the characteristics will be ‘objective’.

Two potential problems arise in terms of this delegation of legislative power to the Minister. First, it is unclear why it is not possible for the Act to specify the general categories of characteristics which may be used to specify which applicants will be subject to the caps.

More generally, although the second reading speech makes it clear that the primary policy objective of the bill is to respond to problems in the General Skilled Migration program, the power given to the Minister in section 91AA reaches more broadly. The explanation of this substantial delegation of power to limit applications in all classes of visas (except of protection visas, see subsection 91AA(2)), by allowing the Minister to set caps in relation to particular areas is justified in the explanatory memorandum at paragraph 32

by reference to providing ‘maximum flexibility to enable the government to effectively target and manage the migration program.’

The Committee is concerned to ensure that delegations of legislative power are appropriate and fully justified and therefore the Committee **seeks the Minister's advice** as to (1) whether the primary legislation can specify general categories of characteristics which may be used to specify which applicants will be subject to the caps and (2) why the capping system thought appropriate in relation to the skilled migration program needs to also apply to other classes of visa (excluding protection visas).

Pending the advice of the Minister, 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.

The Committee notes that this bill has been referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee for information.

National Health Amendment (Continence Aids Payment Scheme) Bill 2010

Introduced into the House of Representatives on 12 May 2010

Portfolio: Health and Ageing

Background

This bill amends the *National Health Act 1953* that will provide the Minister with the legislative authority (via legislative instrument) to formulate the Continence Aids Payments Scheme (the CAP Scheme) which will replace the Continence Aids Assistance Scheme (CAA Scheme).

The CAP Scheme will provide payments to eligible persons towards the cost of purchasing products that help manage incontinence.

Strict liability

Schedule 1, item 13

As a matter of practice, the Committee draws attention to any bill that seeks to impose strict liability and will comment adversely where such a bill does not accord with principles of criminal law policy of the Commonwealth outlined in part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* approved by the Minister for Home Affairs in December 2007. The Committee considers that the reasons for the imposition of strict and absolute liability should be set out in the relevant explanatory memorandum.

In this case, page 3 of the explanatory memorandum notes that strict liability applies to the offence for failing to provide requested information, but does not explain the reasons for this approach. The Committee therefore **seeks the Minister's advice** about the justification for making this an offence of strict liability and whether the principles in the *Guide* were taken into account.

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.

National Health Amendment (Pharmaceutical Benefits Scheme) Bill 2010

Introduced into the House of Representatives on 2 June 2010
Portfolio: Health and Ageing

Background

This bill amends the *National Health Act 1953* (the Act) to:

- set out new Pharmaceutical Benefits Scheme (PBS) pricing arrangements aimed at reducing growth in PBS expenditure and will provide certainty to the pharmaceutical industry in relation to PBS pricing policy; and
- provide for the collection of 'under co-payment data' from approved suppliers (certain pharmacists, hospitals and medical practitioners).

The bill also amends the *Health Insurance Act 1973* and the *Medicare Australia Act 1973* which are consequential to the changes made in relation to section 100 listing arrangements.

The Committee has no comment on this bill.

Ozone Protection and Synthetic Greenhouse Gas Management Amendment Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Environment Protection, Heritage and the Arts

Background

This bill seeks to amend the operation of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Ozone Act) by:

- introducing a civil penalties regime and providing for the establishment of an infringement notice scheme;
- clarifying the powers of inspectors, particularly in relation to the collection and testing of ozone depleting substances and synthetic greenhouse gases and search of electronic data storage;
- providing for inspectors to be assisted in exercising their powers. This is particularly important where technical specialists are required;
- improving the procedures for dealing with evidential material, including the seizure, retention, return or forfeiture of that material and providing for enhanced testing arrangements;
- clarifying the purposes of the Ozone Account (the Account), which is a Special Account established by the Act, to support the development of evidence-based policy by allowing research to be funded from the Account; and
- making a number of other technical and administrative amendments to the Act.

Retrospective application

Schedule 1, item 118

Item 88 seeks to amend section 57 of the *Ozone Protection and Synthetic Greenhouse Gas Managements Act 1989* in relation to forfeitable goods. Item 118 is a transitional provision which provides that the amended definition of forfeitable goods applies to contraventions that occurred before,

at or after the commencement of the item. The explanatory memorandum at paragraph 177 simply restates the effect of the provision without explaining the justification for it.

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 **seeks the Minister's advice** as to the justification for the retrospective application and whether it may cause detriment to any person.

Pending the advice of the Minister, 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.

Paid Parental Leave Bill 2010

Introduced into the House of Representatives on 12 May 2010

Portfolio: Health and Ageing

Background

This bill introduces a paid parental leave scheme (PPL) from 1 January 2011. Parental leave pay of up to 18 weeks at the national minimum wage will be paid to eligible primary carers who have or adopt a child on or after 1 January 2011 and who can satisfy work, income and residency tests. In most cases, the mother will be the primary carer, but allowance is also made for transfers of all or part of the payment to the other parent, or to another carer, in exceptional circumstances.

Determination of important matters by regulation

Proposed section 80

Proposed section 80 requires an employer to give information prescribed in the PPL rules in the form (if any) prescribed in the PPL rules. The sort of information to be given relates to an instalment paid to a person and breach of the obligation will result in a civil penalty. The explanatory memorandum states at page 38 that the sort of information relates to matters such as the 'amount of the instalment, any PAYG withholdings and other deductions...and other matters relating to the instalment'. The Committee prefers that important matters are included in primary legislation to increase the level of Parliamentary scrutiny of the proposal and to assist those whose rights may be affected by the provision. The Committee therefore **seeks the Minister's advice** as to whether the required information can be outlined in the primary legislation and whether this explanation can be included in the explanatory memorandum.

Pending the advice of the Minister, 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.

Henry VIII Proposed section 98

A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to 'Henry VIII' clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and can be a matter of concern to the Committee.

Subsection 98(1) states that parental leave pay is not to be taken into account for the purposes of Commonwealth, State and Territory laws dealing with workers' and accident compensation. Subsection 98(2) enables the PPL rules to provide that subsection 98(1) of the Act does not apply in relation to a prescribed provision of a law of the Commonwealth, a State or a Territory. As such it operates as a Henry VIII clause and the Committee considers that it may inappropriately delegate legislative power. The explanatory memorandum notes the effect of subsection 98(2), but does not give examples or an explanation of the circumstances in which it may be invoked. The Committee therefore **seeks the Minister's advice** as to the intended operation of this section and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

Pending the advice of the Minister, 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.

Broad discretion Subsections 101(4)(e), 108(3), 111(1)

A number of provisions in the Act empower the Secretary to make certain decisions (such as to make or revoke an 'employer determination') if satisfied of one of a number of things, including whether an employer is not a fit and proper person. In each case reference is made to subsection 101(5) which sets out a number of matters which the Secretary may take into account in making

such a determination, including, in paragraph (f) ‘any other matter the Secretary considers relevant’.

It is unclear to the Committee why the permissible considerations in making such determinations need to be cast so broadly, and the Committee notes that no explanation for this approach is given in the explanatory memorandum. The Committee is aware that a court would be likely to read subsection 101(5)(f) in light of the general purposes of the Act, so as to confine its possible meanings, however, the Committee remains concerned about the breadth of the terms of paragraph 101(5)(f) and **seeks the Minister's advice** as to the justification for its inclusion in the bill.

Pending the advice of the Minister, 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.

Possible inconsistent treatment and retrospective application Proposed subsection 108(1)

Subsection 108(1) sets out the circumstances where an employer determination must be revoked by the Secretary. Under the terms of subsection 108(1) revocation generally comes into force on the day of the revocation. However, where revocation is due to a decision that parental leave pay is not payable the revocation comes into force on the day of the decision.

The explanatory memorandum does not explain this difference, and also does not address whether the possible retrospective operation of the decision (which will occur when the day of revocation of the employer determination is later than the day of the decision referred to in subsection 108(1) table item 3) will have any detrimental affect on any person.

The Committee therefore **seeks the Minister's advice** as to the justification for the different approaches to the day the revocation comes into force in subsection 108(1), whether the terms of subsection 108(1) table item 3 in are likely to have a retrospective effect and if so, whether this will have any detrimental affect on any person.

Pending the advice of the Minister, 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.

Possible inconsistency

Possible undue trespass on personal rights and liberties

Proposed sections 117, 119 and paragraph 156(3)(b)

Sections 117 and 119 both authorise the Secretary to require persons to give information or produce documents. Section 122 makes it an offence to fail to comply with requirements under sections 117 and 119. In section 117 the power is enlivened if:

...the Secretary considers that the information or document may be relevant [emphasis added].

In section 119 the power is enlivened if:

...the Secretary believes that a person may have information or a document' that (a) 'would help ... locate another person who owes a debt...under or because of this Act' or (b) 'that is relevant to the debtor's financial situation' [emphasis added].

The explanatory memorandum does not explain why the different language ('considers' and 'believes') is used to enliven the powers to require the giving of information or the production of documents in each section. In addition, the Committee's view is that it is preferable (so as to avoid undue interference with rights) to condition coercive powers such as these on *reasonable grounds to believe* a particular state of affairs exists or other wording which makes it clear that there is an objective element in test for determining whether the power is enlivened. An objective approach is consistent with *George v Rockett* (1990) 170 CLR 104 and page 97 of the *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* published by the Minister for Home Affairs in December 2007.

The Committee notes that a similar problem arises in relation to proposed subsection 156(3)(b) in which the power to request a person to assist in applications for a civil penalty order is enlivened if:

...the Secretary suspects or believes that the person can give information relevant to the application.

The Committee therefore **seeks the Minister's advice** about whether the condition in these provisions can be drafted consistently with each other and whether the requirement relating to the Secretary's knowledge can include an objective element such as that the Secretary has *reasonable grounds to believe* a particular state of affairs exists.

Pending the advice of the Minister, 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.

Insufficiently defined defence Proposed subsection 112(2)

Subsection 112(1) imposes a penalty of 6 months imprisonment for failing to comply with a requirement to give information or produce documents under this subdivision. Subsection 112(2) makes it a defence that a person has a 'reasonable excuse'. *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* at page 28 cautions against using language such as 'without reasonable excuse' to define defences on the ground that such words are 'too open-ended' and 'uncertain'. Given that the defendant bears an evidential burden in relation to this defence (see the Note to subsection 112(2)) the Committee is concerned that this provision may unduly trespass on personal rights and liberties. The Committee also notes that the neither the bill nor the explanatory memorandum indicate whether common law privileges in relation to self-incrimination and legal professional privilege are intended to be preserved. The Committee therefore **seeks the Minister's advice** about these concerns.

Pending the advice of the Minister, 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.

Possible severe penalty Proposed section 125

Proposed section 125 requires that a person notify the Secretary of certain things concerning their eligibility for parental leave pay. Breach of this

provision is an offence and carries a penalty of 6 months imprisonment. The explanatory memorandum does not justify the severity of the penalty. The December 2007 *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, published by the Minister for Home Affairs, notes at page 11 that imprisonment 'is the most onerous penalty that can be imposed on an individual'.

Given the general life circumstances in which claimants for parental leave pay will find themselves (which often include significant new responsibilities and a considerable lack of sleep for some time), along with the fact that subsection 125(3) does not specify the timeframe for notification with specificity (it is required 'as soon as practicable'), the Committee is concerned that this provision will trespass unduly on personal rights and liberties. The Committee therefore **seeks the Minister's advice** as to why it is considered that a custodial penalty is required to adequately enforce these obligations.

Pending the advice of the Minister, 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.

Insufficiently defined offence

Proposed section 156

Section 156 of the proposed Act makes it an offence for a person to fail to comply with a request from the Secretary to give 'all reasonable assistance in connection with an application for a civil penalty order'. The offence attracts a penalty up to 10 penalty units. The Committee is concerned that the elements of the offence are not prescribed with sufficient clarity and may leave persons unsure as to the extent of their legal obligations.

The December 2007 *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, published by the Minister for Home Affairs, observes at page 11:

In drafting a proposed offence, consideration should be given to both the fairness and the effectiveness of the offence...If it is clear when an offence is being drafted that there will be uncertainty about the scope of the meaning of the offence, or that it contains elements which may be unduly difficult for a prosecution to prove, consideration should be given to drafting the offence differently.

Although the provision does not seek to abrogate common law privileges or immunities, the Committee is concerned to ensure that this offence is both fair and effective and **seeks the Minister's advice** as to whether the elements of the offence could be expressed with greater specificity.

Pending the advice of the Minister, 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.

Non-reviewable decisions **Proposed section 157**

Section 157 gives the Secretary or the Fair Work Ombudsman the discretion to issue compliance notices in relation to a contravention of a civil penalty. It does not appear that these decisions are subject to the merits review scheme (see section 206). The explanatory memorandum merely states (at page 88) which decisions under the proposed Act may be internally reviewed without explaining the exclusions. As a general rule, review by the Social Security Appeals Tribunal is only available in relation to decisions which have undergone internal review.

The Committee is aware that there may be legitimate grounds for excluding merits review, such as that the relevant decision is preliminary or relates to enforcement. However, the Committee considers that it is preferable that the explanatory memorandum deals with the exclusions explicitly and therefore **seeks the Minister's advice** about why these section 157 decisions are not reviewable and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

Pending the advice of the Minister, 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.

Possible undue trespass on personal rights and liberties
Proposed subsection 184(3)

Subsection 184(3) provides that for the purposes of issuing a garnishee notice under section 184, if money due or repayable to the original debtor is dependent on the fulfilment of a condition, that the money is taken to be due or repayable even if the condition has not been fulfilled. The explanatory memorandum (at page 79) simply restates the effect of the provision and does not provide any explanation about its intended operation. It seems possible that in practice this provision may have an adverse affect on the garnishee or third parties, and the Committee therefore **seeks the Minister's advice** as to whether or not this is a possibility and, if so, the justification for the approach.

Pending the advice of the Minister, 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.

Possible severe penalty
Proposed sections 187 and 233

Section 187 imposes a penalty of 12 months imprisonment for the offence of not complying with a garnishee notice. The December 2007 *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, approved by the Minister for Home Affairs, notes at page 11 that imprisonment 'is the most onerous penalty that can be imposed on an individual' yet the explanatory memorandum does not explain why this penalty is considered proportionate to the offence.

A similar issue arises in section 233 of the Act which provides that a person commits an offence and is subject to a maximum penalty of imprisonment for 2 years if he or she contravenes a direction of the Social Security Appeals Tribunal. Again, the explanatory memorandum (at page 99) describes the terms of the section, but does not explain it.

In these circumstances the Committee **seeks the Minister's advice** as to whether, in both instances, the penalty is proportionate and is consistent with other similar penalties in Commonwealth legislation.

Pending the advice of the Minister, 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.

Insufficiently defined administrative power

Proposed section 193

Section 193 of the Act sets out the circumstances when the Secretary can write off debts. Subsection 193(7) states that 'nothing in this section prevents anything being done at any time to recover a debt that has been written off under this section.' Although there are some circumstances in which the Secretary may determine that it is more appropriate to waive a debt rather than write off the debt, the explanatory memorandum does not explain or give examples of when that might be so, nor does it indicate what circumstances would justify the recovery of a debt that had been written off. The Committee is therefore concerned that the provision may subject affected persons to an insufficiently defined administrative power and **seeks the advice of the Minister** about the justification for this approach.

Pending the advice of the Minister, 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.

Excluding merits review

Proposed sections 215 and 260

Section 215 of the Act lists those decisions which are subject to review by the Social Security Appeals Tribunal. Subsections 215(2)(b), (c), and (d) exclude various decisions from merits review. No justification for this approach is provided in the explanatory memorandum and the Committee **seeks the Minister's advice** as to why reasons for these exclusions were not provided in the Explanatory Memorandum.

In addition, Part 5.4, Division 2 of the Act concerns the review of SSAT decisions by the AAT. Section 260 states that employers may not seek AAT review, though no reason is given for this in the explanatory memorandum.

The Committee **seeks the Minister's advice** as to the justification for this approach.

Pending the advice of the Minister, 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.

Henry VIII

Proposed subsection 277(2)

A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to 'Henry VIII' clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and can be a matter of concern to the Committee.

Proposed section 277 sets out how the Act applies to claims made when a child is stillborn or dies. Subsection 277(2) is a Henry VIII clause enabling the rules set out in subsection (1) of the provision to be modified by the PPL Rules. The explanatory memorandum at page 117 outlines the justification for this approach and notes that it is 'necessary because the full range of exceptional cases in which it may be desirable to allow payment of parental leave pay where a child was stillborn or has died are not yet known, and the above rule may not be appropriate for all circumstances'.

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

Possible undue trespass on personal rights and liberties

Strict liability

Availability of privilege and immunities

Proposed section 289

There are a number of issues arising in relation to section 289, which makes it an offence (30 penalty units) for a 'nominee' to fail to comply with a notice

issued by the secretary requiring them to give a statement about a matter relating to the disposal by the nominee of an instalment paid to the nominee on behalf of a person receiving paid parental leave.

First, subsection 289(7) makes it a defence that a person has a 'reasonable excuse'. *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* at page 28 cautions against using language such as 'without reasonable excuse' to define defences on the ground that such words are 'too open-ended' and 'uncertain'. The defendant bears an evidential burden in relation to this defence (see the Note to subsection) and the explanatory memorandum (at page 122) simply notes the effect of the subsection, but does not explain the justification for the approach. The Committee is concerned that this provision may unduly trespass on personal rights and liberties and **seeks the Minister's advice** as to whether the defence can be drafted with specificity.

Pending the advice of the Minister, 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.

Secondly, subsection 289(8) makes the offence one of strict liability. At page 122 the explanatory memorandum states that the existence of the reasonable excuse defence 'softens' the impact of strict liability and argues that strict liability is appropriate because:

...nominees are receiving parental leave pay on behalf of a third party and, if they do not comply, the third party could be disadvantaged'.

The Committee remains concerned about the use of strict liability in these circumstances, but notes, however, that the bill is seeking to formalise in legislation what is a clear policy decision. As a result, as is its practice, the Committee **leaves to the Senate as a whole** the question of whether it unduly trespasses on 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.

Finally, although this provision requires the giving of information, neither the bill nor the explanatory memorandum indicates whether it is intended that common law privileges and immunities are intended to be preserved. The Committee **seeks the Minister's advice** about this and whether this information can be included in the explanatory memorandum in order to assist those whose rights may be affected by the provision.

Pending the advice of the Minister, 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.

Henry VIII

Determination of important matters by delegated legislation

Proposed subsection 299(2)

A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to 'Henry VIII' clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and can be a matter of concern to the Committee.

Section 299(2) is a Henry VIII clause which provides that the PPL rules may modify any provision in the Act relating to persons who are in a relationship that is similar to that between employer and employee. The explanatory memorandum notes at page 125 that this provision will enable greater flexibility to include other types of employees within the scheme as required and that there may be a need to amend provisions to extend the powers of a relevant regulator to undertake compliance of PPL as these employers will not be regulated by the Fair Work Ombudsman.

The Committee notes these arguments, however, given that the understanding of the employer and employee relationship in Part 3.5 of the Act is central to its operation, the Committee is concerned about the ability for it to be amended by delegated legislation. Therefore, the Committee **seeks the Minister's advice** as to the frequency with which it is envisaged that the PPL rules are likely to require adjustment under subclause 299(1) of the Act.

Pending the advice of the Minister, 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.

Inappropriately delegated legislative powers Proposed sections 298 and 308

Section 308 enables the Governor-General to make regulations prescribing various matters. The terms of this provision are effectively identical to the section 298 provision allowing for the making of legislative instruments to be known as the PPL rules, save that this section reposes the power in the Minister (not the Governor-General). No reason is offered for the inclusion of two separate heads of statutory power for the making of the regulations in identical terms (see pages 124 and 127). The Committee **seeks the Minister's advice** as to why it is appropriate to include both provisions in the proposed legislation.

Pending the advice of the Minister, 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.

Paid Parental Leave (Consequential Amendments) Bill 2010

Introduced into the House of Representatives on 26 May 2010
Portfolio: Health and Ageing

Background

This bill amends various Commonwealth Acts as a consequence of the introduction of the Paid Parental Leave Bill 2010. This bill also provides for certain transitional matters, including provisions to ensure that the requirement for employers to pay parental leave pay to their employees will take effect for children born or adopted on or after 1 July 2011 (although employers will be able to opt in to provide any eligible employees with parental leave pay from 1 January 2011).

The bill includes amendments to:

- address the relationship between parental leave pay and income for certain purposes in the social security law and veterans' entitlements legislation;
- enable parental leave pay debts to be recovered from social security, family assistance and veterans' entitlements payments;
- enable amounts due under a maintenance liability and child support debts to be paid or recovered from parental leave pay;
- ensure that a person and their partner cannot receive both baby bonus and parental leave pay for a child and make related baby bonus changes;
- ensure that a person and their partner cannot receive family tax benefit Part B for a child for the period for which parental leave pay is payable in relation to the child;
- provide for early claims for family tax benefit, baby bonus and maternity immunisation allowance; and
- include parental leave pay within the compliance activities provided for in the data-matching program.

The bill also makes changes to various taxation laws including that:

- a taxpayer will generally not be entitled to a dependent spouse, child-housekeeper or housekeeper rebate for that part of the income year for which parental leave pay was payable to the taxpayer or their spouse;
- parental leave pay is subject to PAYG withholding;
- employees can salary sacrifice their parental leave pay for non-cash remuneration where that arrangement is offered by the employer;
- parental leave pay is appropriately covered within the system of tax file numbers established under taxation laws;
- taxpayer information can be disclosed for the purposes of administration of what will become the *Paid Parental Leave Act 2010*;
- tax withheld from parental leave pay that was not payable can be refunded; and
- incorrect payments of parental leave pay are not included on the taxpayer's payment summary if the error is detected in time, or, if not detected in time, notice is given that an issued payment summary is not correct.

The Committee has no comment on this bill.

Primary Industries (Excise) Levies Amendment Bill 2010

Introduced into the House of Representatives on 26 May 2010
Portfolio: Agriculture, Fisheries and Forestry

Background

This bill amends the *Primary Industries (Excise) Levies Act 1999* to increase the cap on the research and development component of the laying chickens levy from 10 to 30 cents per laying chicken.

The Committee has no comment on this bill.

Renewable Energy (Electricity) Amendment Bill 2010

Introduced into the House of Representatives on 12 May 2010

Portfolio: Climate Change, Energy Efficiency and Water

Background

This bill will separate the Renewable Energy Target scheme into two parts – the Large-scale Renewable Energy Target (RET) and the Small-scale Renewable Energy Scheme. The changes will provide greater certainty for households, large-scale renewable energy projects and installers of small-scale renewable energy systems such as solar panels and solar water heaters.

In particular the bills will:

- create separate small-scale and large-scale obligations on liable entities and two new categories of renewable energy certificates – large-scale generation certificates and small-scale technology certificates.
- require the Renewable Energy Regulator (the Regulator) to:
 - establish an optional ‘clearing house’ to transfer certificates from owners of small-scale installations to liable entities at \$40;
 - set a small-scale technology percentage annually, based on the estimated amount of small-scale technology certificates expected to be created in that year;
- require liable entities to surrender renewable energy certificates from small-scale technologies in quarterly increments throughout a compliance year to encourage the frequent transfer of renewable energy certificates;
- allow for the effective rate of assistance for emissions-intensive, trade-exposed activities to be preserved;
- adjust the profile of annual targets to be met by renewable energy certificates from large-scale generation to take account of the renewable energy certificates from small-scale technologies and to remove the proportion of the annual targets for the inclusion of waste coal mine gas until eligibility of that source is set in regulations;

- amend the provisions relating to waste coal mine gas eligibility to allow for the commencement of eligibility of waste coal mine gas in the RET to be determined by regulations; and
- make a number of technical amendments.

Scope of regulations to set fees

Schedule 1, item 58, proposed subsection 30U(5)

This item provides that regulations about the operation of the clearing house may prescribe the fees that are payable relating to matters connected to the clearing house. While the use of regulations to set fees is often appropriate, the Committee's view is that it is preferable for the primary legislation to either include a limit on the amount of any fee or to prescribe a formula for calculating each fee.

In this case there is no limit or formula included in the legislation and the explanatory memorandum does not provide any guidance about the intended scope of any fees. The Committee therefore **seeks the Minister's advice** about whether the primary legislation can be amended to include a limit on the amount of any fee or to prescribe a formula for calculating each fee.

Pending the Committee'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.

Limiting the effectiveness of review

Schedule 1, item 66

Item 66 of Schedule 1 inserts at new section 40A into the *Renewable Energy (Electricity) Act 2000*. This provision enables the Governor-General to make regulations, the effect of which is to determine an important element for the calculation of the charge which may be payable by liable entities.

Subsection 40A(3) sets out a number of considerations which the Minister 'must take into consideration' before regulations are made by the Governor-General. However, subsection 40A(5) provides that failure to comply with subsection (3) does not affect the validity of the regulations.

The practical effect of this provision would be that courts would have limited capacity to judicially review the regulations for breach of subsection 40A(3) which sets out a number of considerations which the Minister ‘must take into consideration’. The explanatory memorandum does not include an explanation for the inclusion of subsection 40A(5) in the bill. The Committee therefore **seeks the Minister's advice** about the reasons for the inclusion of subsection 40A(5) and whether it will have a detrimental effect on a person's ability to obtain review, including judicial review, of a failure to comply with subsection 40A(3).

Pending the Committee's advice, 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.

Strict liability

Schedule 1, proposed section 154M

Section 154M, to be inserted by item 134, has the effect of making certain civil penalty provisions subject to a strict liability standard. However, section 154L makes it clear that mistake of fact is a defence and the explanatory memorandum offers a plausible justification for the adoption of strict liability, namely that it is reasonable (particularly in light of information asymmetries) for those subject to the provisions to take steps to guard against inadvertent contravention of the provisions.

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

Civil penalties scheme

Schedule 1, Part 2, item 134

Incorporation by reference

Schedule 1, Part 2, item 136

The use of civil penalty schemes and the incorporation of information by reference are matters that regularly attract the Committee's attention to ensure that legislative proposals comply with the terms of reference in Standing Order 24. The types of problems the Committee encounters are that some proposals breach the terms of Standing Order 24 or it is not apparent that

proposals comply with the terms of Standing Order 24 because there is inadequate, or no, explanation of the provisions in the explanatory memorandum.

The Committee was very pleased to note the comprehensive and useful explanations for these items included in the explanatory memorandum at pages 44 to 46 and thanks the Minister for this approach.

Retrospective effect
Schedule 2, item 11

This is a transitional item which provides that the amendment made by item 113 of Schedule 1 relating to the creation of large-scale generation certificates applies from the 'year of generation' starting on 1 January 2008. As the explanatory memorandum simply describes the operation of the section without any explanation of its effect, the Committee **seeks the Minister's advice** about whether this is a beneficial provision or will have an adverse effect on any person.

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.

Renewable Energy (Electricity) (Charge) Amendment Bill 2010

Introduced into the House of Representatives on 12 May 2010
Portfolio: Climate Change, Energy Efficiency and Water

Background

This bill supports the separation of the Renewable Energy Target scheme into two parts – the Large-scale Renewable Energy Target and the Small-scale Renewable Energy Scheme outlined in the Renewable Energy (Electricity) Amendment Bill 2010.

In particular, the bill will establish the *rate of charge* to be used in the calculation of the taxation liability assessed under Subdivision B of Division 1 of Part 4 of the *Renewable Energy (Electricity) Act 2000*.

The Committee has no comment on this bill.

Renewable Energy (Electricity) (Small-scale Technology Shortfall Charge) Bill 2010

Introduced into the House of Representatives on 12 May 2010
Portfolio: Climate Change, Energy Efficiency and Water

Background

This bill supports the separation of the Renewable Energy Target scheme into two parts – the Large-scale Renewable Energy Target and the Small-scale Renewable Energy Scheme outlined in the Renewable Energy (Electricity) Amendment Bill 2010.

In particular, the bill will establish the *rate of charge* to be used in the calculation of the taxation liability assessed under Subdivision C of Division 1 of Part 4 of the *Renewable Energy (Electricity) Act 2000*.

The Committee has no comment on this bill.

Responsible Takeaway Alcohol Hours Bill 2010

Introduced into the Senate on 13 May 2010

Portfolio: Senator Fielding

Background

This private Senator's bill seeks to restrict the hours during which takeaway alcoholic beverages can be sold.

Explanatory memorandum

This bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. While noting that the second reading speech provides some explanation of the background, intent and operation of the bill, the Committee prefers to see explanatory memorandums to all bills and recognises the manner in which such documents can assist in the interpretation of bills, and ultimately, Acts. The Committee **seeks the proposer's advice** as to whether an explanatory memorandum could be provided.

Pending the advice of the Minister, 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.

The Committee notes that this bill has been referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee so they may be taken into account during that inquiry.

Superannuation Industry (Supervision) Amendment Bill 2010

Introduced into the House of Representatives on 26 May 2010
Portfolio: Treasury

Background

This bill amends the *Superannuation Industry (Supervision) Act 1993* to reduce the risks for superannuation funds investing in limited recourse borrowing arrangements.

The Committee has no comment on this bill.

Tax Laws Amendment (2010 GST Administration Measures No. 3) Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Treasury

Background

Schedule 1 to the bill amends the *A New Tax System (Goods and Services Tax) Act 1999* to:

- shift the liability to pay goods and services tax (GST) on the Australian transport leg of the international transport of imported goods from transport service suppliers to the importer of the goods in some situations. This reduces compliance costs for Australian transporters and non-residents;
- make the GST treatment of exports of postal and containerised non-postal goods more consistent and reduce GST compliance costs for transporters; and
- make subcontracted Australian transport services that form part of the Australian leg of an outbound or inbound international transport service GST-free when made to a non-resident not in Australia. This reduces compliance costs for Australian transporters and non-residents.

Retrospective effect

Schedule 2, item 2

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.

This proposed amendment applies to supplies made on or after 1 July 2000 (the commencement of the GST). In this case, the retrospective application will benefit suppliers as it is consistent with the existing industry practice of not applying GST to these supplies (see explanatory memorandum at page 24).

The Committee has no further comment on this bill.

Tax Laws Amendment (2010 Measures No.3) Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Treasury

Background

This bill amends various taxation and superannuation laws including the following:

- Schedule 1 freezes indexation of the co-contribution income thresholds for the 2010-11 and 2011-12 income years. Schedule 1 also permanently maintains the current matching rate and maximum co-contribution that is payable on an individual's eligible superannuation contributions.
- Schedule 2 amends the operation of the thin capitalisation rules for authorised deposit-taking institutions (ADIs) to take account of the change in the accounting treatment of certain assets from the adoption of the *Australian equivalents to International Financial Reporting Standards* in January 2005.
- Schedule 3 amends the tax law to provide the heads of the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service with the power to declare that Commonwealth tax laws do not apply to a particular entity in relation to a particular transaction. This ensures that the tax authorities will not need to obtain information that should remain secret in the interests of national security.
- Schedule 4 amends Division 6 of the *Income Tax Assessment Act 1936* so that the unexpended income of a Special Disability Trust is taxed at the relevant principal beneficiary's personal income tax rate rather than automatically at the top personal tax rate plus the Medicare levy.
- Schedule 5 amends the definition of a 'managed investment trust' (MIT) in Subdivision 12-H of Schedule 1 to the *Taxation Administration Act 1953*. The amended definition will apply for the purposes of the MIT withholding tax rules in that Subdivision, and for the purposes of the deemed capital account rules for MITs in Division 275 of the *Income Tax Assessment Act 1997* (ITAA 1997).

These amendments to the definition of a MIT also apply in relation to capital gains tax events happening on or after 1 November 2008, for the purpose of Subdivision 126-G of the ITAA 1997.

Legislation by press release
Retrospective commencement
Schedule 2, item 9 and Schedule 4, item 8

Schedule 2 amends the operation of the thin capitalisation rules for authorised deposit-taking institutions (ADIs) to take account of the change in the accounting treatment of certain assets from the adoption of the *Australian equivalents to International Financial Reporting Standards* in January 2005. These amendments will apply to income years commencing on or after 1 January 2009. The explanatory memorandum notes (at page 4) that this measure was announced in the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs' Media Release *No. 048 of 2009*.

Schedule 4 amends Division 6 of the *Income Tax Assessment Act 1936* and the amendments apply from 1 July 2008. The explanatory memorandum notes (page 5) that this measure was announced jointly by the Minister for Families, Housing, Community Services and Indigenous Affairs and the Parliamentary Secretary for Disabilities and Children's Services in Media Release *Extra support for people with disability and their carers* of 12 May 2009.

The Committee believes that reliance on Ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the Executive. While the making of legislation retrospective to the date of its introduction into Parliament may be countenanced as part of the Parliamentary process, a similar rationale cannot be advanced for the treatment of Ministerial announcements as de facto legislation.

The Committee believes that reliance on Ministerial announcements and the implicit requirement that persons arrange their affairs in accordance with such announcements, rather than in accordance with the law, tends to undermine the principle that the law is made by Parliament, not by the Executive. While the making of legislation retrospective to the date of its introduction into Parliament may be countenanced as part of the Parliamentary process, a

similar rationale cannot be advanced for the treatment of Ministerial announcements as de facto legislation.

While the Committee has regularly been prepared to accept that amendments proposed in the Budget will have some retrospective effect when the legislation is introduced, this is usually limited to publication of a draft bill within 6 calendar months after the date of that announcement. Proposed legislation introduced outside this timeframe is at particular risk of the Senate amending the commencement date to the date of introduction of the bill (see Senate Resolution 40). In this case the legislation has been introduced more than 12 months after the Schedule 2 and Schedule 4 measures were announced. In the circumstances the Committee **leaves to the Senate as a whole** the question of whether this amounts to an undue trespass on individual rights and liberties.

Pending the advice of the Minister, 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.

Inappropriate delegation/wide discretion Schedule 3, item 1, 850-100

The object of this section is stated to be to 'remove the possibility of a conflict arising between Australia's national security interests and Australia's taxation laws'. In pursuit of this object the provision seeks to grant broad powers to the Directors-General of ASIO and ASIS to grant declarations excluding an entity from having to declare the existence or amount of a tax liability, benefit relating to taxation or any related obligation.

In relation to this arrangement the explanatory memorandum states at page 25 that:

Under current tax law, the administrative obligations on tax authorities can require them to seek information that, for reasons of Australia's national security, is very sensitive and should remain confidential. In practice, the tax authorities have usually respected requests from the security and intelligence agencies not to seek such information but there are doubts whether complying with such requests would always be legally justified.

The Committee notes that this is a broad discretion and considers that the provision may inappropriately delegate legislative power, but leaves to **Senate as a whole** the question of whether it does so unduly.

Tax Laws Amendment (Foreign Source Income Deferral) Bill (No.1) 2010

Introduced into the House of Representatives on 13 May 2010

Portfolio: Treasury

Background

Schedule 1 to this bill repeals the foreign investment fund (FIF) and the deemed present entitlement rules contained in the *Income Tax Assessment Act 1936* (ITAA 1936).

This Schedule also makes consequential amendments to the ITAA 1936, the *Income Tax Assessment Act 1997* (ITAA 1997) and to the *Superannuation Industry (Supervision) Act 1993* as a result of the repeal of the FIF and deemed present entitlement rules.

Retrospective effect

Schedule 1, Part 3, item 94

This item provides that the amendments made by Schedule 1, Part 2 apply to assessments for the 2006-07 income year and later income years. The explanatory memorandum explains at page 15 that:

The amendments made by Part 2 apply to assessments for the 2006-07 income year and later income years. These are backdated because the amendments reverse the effect of the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* and are consistent with the application date of that Act.

The Committee also notes the statement at page 8 of the explanatory memorandum that:

Part 2 of this Schedule ensures the provisions dealing with the disposal of interest in foreign entities where amounts have been previously attributed will continue to operate as intended.

In addition to this information, the Committee **seeks the Treasurer's advice** about whether these provisions could adversely affect any person, and if so, whether this is consistent with the arrangements under the current law.

Pending the Treasurer's advice, the Committee draws Senators' attention to the provisions, as the retrospective effect of this provision 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.

Tax Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2010

Introduced into the House of Representatives on 13 May 2010

Portfolio: Treasury

Background

This bill amends the *Medicare Levy Act 1986* to:

- increase the Medicare levy low-income thresholds for individuals and families. The dependent child/student component of the family threshold will also be increased. These increases are in line with movements in the consumer price index; and
- increase the Medicare levy low-income threshold for pensioners below age pension age so that they do not have a Medicare levy liability where they do not have an income tax liability.

The bill also amends the *A New Tax System (Medicare Levy Surcharge-Fringe Benefits) Act 1999* to increase the Medicare levy surcharge low-income threshold in line with movements in the consumer price index.

Retrospective effect Schedule 1, item 13

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 proposed increases in the Medicare levy thresholds were announced in the 2010-11 Budget on 11 May 2010 (see explanatory memorandum at page 3) and apply to the 2009-10 income year. Although this will have a retrospective effect, the Committee notes that in this case the measure is beneficial.

The Committee has no further comment on this bill.

Tax Laws Amendment (Research and Development) Bill 2010

Introduced into the House of Representatives on 13 May 2010

Portfolio: Treasury

Background

This bill is part of a package of two bills which introduces a new research and development tax incentive to replace the existing R & D Tax Concession for all income years starting on or after 1 July 2010.

The bill amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Income Tax (Transitional Provisions) Act 1997*, the *Income Tax Rates Act 1986*, the *Taxation Administration Act 1953* and the *Industry, Research and Development Act 1986*.

Determination of important matters by regulation Determination of important matters by legislative instrument Schedule 2, Part 1, proposed sections 29A and 32A

Item 1 of Schedule 2, Part 1 includes the new section 29A to be inserted in the *Industry Research and Development Act 1986*. This section deals with the registration of research service providers by the Board. Subsection 29A(2) provides that the Board must not register an entity unless satisfied that it meets criteria specified in regulations made for the purposes of this subsection. The explanatory memorandum (at page 145) notes that ‘regulations will specify the criteria the entity must meet to satisfy the Board that it is capable of providing services to R&D entities in one or more specified fields of research’ and that specified fields of research will also be prescribed in the regulations’. The explanatory memorandum does not explain why such criteria might not be specified in the primary legislation.

Similarly, section 32A provides for ‘decision-making principles’ to be made by legislative instrument. These principles play an important role in determining how the Board should exercise various powers. The explanatory memorandum at page 153 essentially repeats the terms of section 32A and does not explain why such principles might not be specified in the primary legislation.

Although the regulations and legislative instruments will be disallowable and therefore subject to Parliamentary scrutiny, the Committee prefers that important matters are included in primary legislation to increase the level of parliamentary scrutiny and to assist those whose rights may be affected by the provision. The Committee therefore **seeks the Treasurer's advice** as to why the criteria referred to in proposed section 29A and why the decision-making principles outlined in proposed section 32A cannot be set out in the primary legislation.

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.

The Committee notes that this bill has been referred to a legislation Committee for inquiry and report. Given that the Committee has made substantive comments on the bill, the Committee intends to forward its comments to that committee for information.

Veterans' Affairs Legislation Amendment (2010 Budget Measures) Bill 2010

Introduced into the House of Representatives on 26 May 2010

Portfolio: Veterans' Affairs

Background

The bill will give effect to a number of Veterans' Affairs 2010 Budget measures that will:

- create a new category of service eligibility under the *Veterans' Entitlements Act 1986* to be known as British nuclear test defence service;
- reclassify certain submarine special operations between 1978 and 1992 as operational and qualifying service;
- reclassify certain service in Ubon in Thailand as qualifying service;
- lower the age of domicile of choice from 21 to 18 for the purposes of the *Veterans' Entitlements Act 1986*; and
- cease eligibility for war widow or war widower pension for widows and widowers who enter into a de facto relationship prior to claiming the war widow or war widower pension.

The Committee has no comment on this bill.

COMMENTARY ON AMENDMENTS TO BILLS

Australian Information Commissioner Bill 2010 (formerly Information Commissioner Bill 2009)

In *Alert Digest No. 1 of 2010*, the Committee drew to the attention of the Cabinet Secretary that there was no provision for disclosure of interests by IAC members or written directions about the way the IAC is required to carry out its functions relating to the Australian Information Commissioner Bill 2010. The Cabinet Secretary responded to the Committee and committed to amend the bill to ensure that all IAC members will be required to disclose interests. (see Report No. 3 of 2010).

A supplementary explanatory memorandum was tabled in the House of Representatives on 12 May 2010 which incorporated 21 proposed government amendments, including an amendment in response to the Committee's comments on the bill. The 21 government amendments were agreed to on the same day. On 13 May 2010 a revised explanatory memorandum was tabled in the Senate and the bill was passed.

The Committee thanks the Minister for amending the bill in response to its comments.

Comsuper Bill 2010

On 2 June 2010 a supplementary explanatory memorandum was tabled and 7 amendments were passed by the House of Representatives. None of the amendments fall within the terms of reference of the Committee.

Do Not Call Register Legislation Amendment Act 2010

On 12 May 2010 a supplementary explanatory memorandum was tabled in the House of Representatives and 30 government amendments were agreed to. On 13 May 2010 a revised explanatory memorandum was tabled in the Senate. Subsequently the bill received Royal Assent on 18 May 2010.

Foreign Evidence Amendment Bill 2008

On 13 May 2010 a supplementary explanatory memorandum was tabled in the Senate and the Senate agreed to three government amendments. Subsequently on the same day the amendments were agreed to in the House of Representatives. None of the amendments fall within the terms of reference of the Committee.

Freedom of Information Amendment (Reform) Bill 2010

On the 12 May 2010 a supplementary explanatory memorandum was tabled and 20 government amendments were agreed to in the House of Representatives. None of the amendments fall within the terms of reference of the Committee.

On 13 May 2010 revised explanatory memorandum was tabled in the Senate. The Committee is pleased to note that the Minister has taken the opportunity to clarify the legal status of Ministerial staff in the context of receiving requests for access to a document as discussed in *Digest No.1/10* and reported in the Committee's *3rd Report of 2010*.

Governance of Australian Government Superannuation Schemes Bill 2010

On 2 June 2010 a supplementary explanatory memorandum was tabled and 12 amendments were passed in the House of Representatives. None of the amendments fall within the terms of reference of the Committee.

The Committee is disappointed that the Minister did not take the opportunity to include information about the reasons for seeking to exclude the Commonwealth Superannuation Corporation from the operation of section 15 of the Commonwealth Authorities and Companies Act 1997 as detailed in *Alert Digest No.2/10* and *5th Report of 2010*.

Health Practitioner Regulation (Consequential Amendments) Bill 2010

On 12 May 2010 a supplementary explanatory memorandum was tabled in the House of Representatives and nine government amendments agreed to. On 13 May 2010 a revised explanatory memorandum was tabled in the Senate.

None of the amendments fall within the terms of reference of the Committee.

Superannuation Legislation (Consequential Amendments and Transitional Provisions) Bill 2010

On 2 June 2010 a supplementary explanatory memorandum was tabled and 4 amendments were passed by the House of Representatives. None of the amendments fall within the terms of reference of the Committee.

Tax Laws Amendment (2010 Measures No.1) Bill 2010

On 12 May 2010 a supplementary explanatory memorandum was tabled in the Senate. On the same day 16 amendments were passed in the Senate and subsequently in the House of Representatives. None of the amendments fall within the terms of reference of the Committee.

Territories Law Reform Bill 2010

On 3 June 2010 a correction to the explanatory memorandum was tabled in the House of Representatives. None of the amendments fall within the terms of reference of the Committee.

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
Financial Sector Legislation Amendment (Prudential Refinements and Other Measures) bill 2010	14AD(4)	A person who is an employee or officer of a general insurer provides false, misleading information in prescribed circumstances	Imprisonment for 12 months or 50 penalty units, or both
	62ZD(3)	A judicial manager refuses or fails to give information to APRA	Imprisonment for 12 months or 100 penalty units, or both
	62ZD(4)	Offence is in identical terms to 62ZD(3), but with the application of strict liability	60 penalty units

	103M(4)	Failure to take reasonable steps to ensure that the insurer complies with a recapitalisation direction, direction, or with a class of directions that includes the direction	50 penalty units
	88B(3)	Providing false or misleading information	Imprisonment for 12 months or 100 penalty units, or both
	88B(4)	Offence is in identical terms to 88B(3), but with the application of strict liability	60 penalty units
	98B(3)	Providing false or misleading information	Imprisonment for 12 months or 100 penalty units, or both
	98B(4)	Offence is in identical terms to 98B(3), but with the application of strict liability	60 penalty units
National Health Amendment (Continence Aids Payment Scheme) Bill 2010	13(4)	Failure to provide information to the official that is relevant in deciding whether a contribution is payable or the amount of a contribution that is payable under the Continence Aids Payment Scheme.	30 penalty units

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.

Competition and Consumer Legislation Amendment Bill 2010

On 22 January 2010, the Government announced that it would amend the *Trade Practices Act 1974* (TP Act) to ensure the Australian Competition and Consumer Commission (‘the ACCC’) has the power to reject acquisitions that would substantially lessen competition in any local, regional, or national market and on 3 March 2010, the Government announced changes to the unconscionable conduct provisions of the Australian Consumer Law (ACL). These changes arose from the findings of an expert panel established to consider whether a list of examples of unconscionable or a statement of principles of what constitutes unconscionable conduct should be incorporated into the legislation.

This bill amends the TP Act to clarify the operation of various provisions relating to mergers and acquisitions. The bill also inserts a statement of interpretative principles into the unconscionable conduct provisions of the ACL and the Australian Securities and Investments Act.

Food Standards Australia New Zealand Amendment Bill 2010

The bill implements a reform agreed to by the Council of Australian Governments (COAG) on 3 July 2008, that calls for the recognition, for domestically grown produce, by Food Standards Australia New Zealand, of

the Australian Pesticides and Veterinary Medicines Authority's residue risk assessment and the promulgation of the resulting maximum residue limits in the Australia New Zealand Food Standards Code.

Interstate Road Transport Charge Amendment Bill 2010

The Council of Australian Governments (COAG) agreed in February 2008 that heavy vehicle charges should be adjusted annually to maintain cost recovery. This agreement was given effect through an automatic adjustment formula in the Interstate Road Transport Charge Regulations in 2009.

All Governments have agreed, through their transport ministers, to amend their respective charges regulations to modify the annual adjustment formula to maintain cost recovery. This would result in a 4.2 per cent adjustment for 2010-11.

This bill provides for a technical amendment that repeals sub-section 5(6) of the *Interstate Road Transport Charge Act 1985* (the Act). This amendment to the Act will reduce the 2010-2011 annual automatic charge adjustment from 9.7 per cent to 4.2 per cent and will take effect from 1 July 2010.

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 new entries

P Indicates bills passed by the Senate

N Indicates bills negated by the Senate

P	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>)
P	Automotive Transformation Scheme Bill 2009 — clause 10
P	Car Dealership Financing Guarantee Appropriation Bill 2009 — clause 5
N	Carbon Pollution Reduction Scheme Bill 2009 — subclauses 103B(5), 139(4) and 291(4)
N	Carbon Pollution Reduction Scheme Bill 2009 [No. 2] — subclauses 103B(5), 139(4) and 291(4)
	Carbon Pollution Reduction Scheme Bill 2010 — subclauses 103B(5), 139(4) and 291(4)

P	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>)
P	Commonwealth Securities and Investment Legislation Amendment Bill 2008 — Schedule 1, item 10, subsection 5BA(7)
	ComSuper Bill 2010 — clause 21 (SPECIAL ACCOUNT: CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
P	Defence Home Ownership Assistance Scheme Bill 2008 — clause 84
P	Dental Benefits Bill 2008 — clause 65
P	Education Legislation Amendment Bill 2008 — Schedule 1, item 6, section 14B
P	Fair Work Bill 2008 — subclause 559(4)
P	Family Assistance Legislation Amendment (Child Care) Bill 2010 — Schedule 6, item 1
P	Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008 — Schedule 1, item 29
P	Federal Financial Relations Bill 2009 — clause 22
P	Federal Financial Relations (Consequential Amendments and Transitional Provisions) Bill 2009 — Schedule 4, subitem 2(3)
P	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>)
P	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>)
	Governance of Australian Government Superannuation Schemes Bill 2010 – paragraphs 33(1)(b), 33(2)(b), and 34(3)(a), and subsection 34(4)
P	Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008 — Schedule 5, item 141, section 65A

P	Guarantee of State and Territory Borrowing Appropriation Bill 2009 — clause 5
P	Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Bill 2008 — clause 5
P	International Monetary Agreements Amendment (Financial Assistance) Bill 2009 — Schedule 1, item 4, subsection 8CA(4)
P	Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009 — subclause 43(2), clause 70, and subclause 78(2)
P	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>)
P	National Consumer Credit Protection Bill 2009 — Schedule 1, subclause 115(2)
	Occupational Health and Safety and Other Legislation Amendment Bill 2009 — Schedule 3, Part 2, subitem 10(5)
*	Paid Parental Leave Bill 2010 — clause 307
P	Protection of the Sea Legislation Amendment Bill 2008 — Schedule 1, item 20, section 46N
*	Renewable Energy (Electricity) Amendment Bill 2010 — Schedule 1, item 58, section 30R (SPECIAL ACCOUNT : CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
P	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>) [bill laid aside by House of Representatives on 4 December 2008]
P	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>)
P	Schools Assistance Bill 2008 — clause 167
P	Textile, Clothing and Footwear Strategic Investment Program Amendment (Building Innovative Capability) Bill 2009 — Schedule 1, item 32, section 37ZO

P	Uranium Royalty (Northern Territory) Bill 2008 — clause 18
P	Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008 — Schedule 1, item 1
P	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

N	Household Stimulus Package Bill 2009 — Schedule 4, subitem 1(5): special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).
P	Household Stimulus Package Bill (No. 2) 2009 — Schedule 4, subitem 1(5): special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).
P	Social Security and Other Legislation Amendment (Economic Security Strategy) Bill 2008 — Schedule 4, subitem 1(4): special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).
P	Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008 — Schedule 2, subitems 1(4) and 2(4), and Schedule 4, subitem 1(4): special appropriation clauses – for a finite period of time (i.e. for circumstances arising in a particular financial year).