

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

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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 G Marshall

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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## **Australian Research Council Amendment Bill (No.2) 2010**

Introduced into the House of Representatives on 17 November 2010

Portfolio: Innovation, Industry, Science and Research

### **Background**

This bill amends the *Australian Research Council Act 2001* (ARC Act) to apply indexation against existing schemes and add the last year of the forward budget estimates.

The bill specifically alters three existing financial year funding figures for indexation and extends the forward estimate period to include the financial year starting on 1 July 2013, resulting in additional spending of \$824.637 million over the four financial years.

Bills to amend the ARC Act to receive administered funding must occur each financial year to apply indexation to existing appropriation amounts and add the last year of the forward budget estimates. The proposed amendments only impact on administered special appropriation; they do not alter the substance of the Act or increase departmental funds.

*The Committee has no comment on this bill.*

## **Banking Amendment (Controls on Variable Interest Rate Changes) Bill 2010**

Introduced into the Senate on 18 November 2010

By: Senator Bob Brown

### **Background**

This bill amends the *Banking Act 1959* to require Authorised Deposit-taking Institutions to:

- not increase variable interest rates on loans and mortgages by more than Reserve Bank interest rate increases
- not decrease variable interest rates on loans and mortgages by less than the Reserve Bank interest rate decreases

The amendments made by the bill have effect for a period of 2 years from their commencement.

*The Committee has no comment on this bill.*

## **Banking Amendment (Delivering Essential Financial Services) Bill 2010**

Introduced into the House of Representatives on 15 November 2010

By: Mr Bandt

### **Background**

This bill amends the *Banking Act 1959* (the Banking Act) in four ways including:

- requires banks to offer basic transaction accounts that are free from account keeping fees and penalty fees for the actions of third parties, and that limit other fees to a level sufficient to recover the cost to the bank of the penalised conduct;
- provides that transactions at a bank's own-branded ATMs are to be free of charge, and caps charges for the use of a bank's ATMs by customers of another authorised deposit-taking institution (ADI) at the cost of service provision;
- requires ADIs to offer 'fixed interest gap' loans and mortgages with an interest rate fixed at a negotiated margin above the institution's cost of funds; and
- caps mortgage and loan exit fees at a level sufficient only to recover the cost to the lender of the early termination, and requires that exit fees are mentioned in advertising and included in mortgage contracts in a uniform way to ensure customers are aware of them when deciding whether to sign the contract.

*The Committee has no comment on this bill.*

## **Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2010**

Introduced into the House of Representatives on 15 November 2010

By: Mr Bandt

### **Background**

This bill aims to ensure that, as far as is constitutionally and practically possible, Australian Defence Force personnel are not sent overseas to engage in warlike actions without the approval of both Houses of the Parliament.

The bill is a revised version of one first introduced into the Senate in 1985 by Senator Colin Mason (NSW, Australian Democrats). The improvements in this bill consist mainly of more detailed provisions relating to emergency situations which occur when the Parliament is not meeting and the information which is required to be provided to the public and the Parliament.

This bill would replace section 50C of the *Defence Act 1903* with a new section under which service of members of the Defence Force beyond the territorial limits of Australia in warlike actions would require the approval of both Houses of the Parliament.

*The Committee has no comment on this bill.*

## **Defence Force Retirement and Death Benefits Amendment (Fair Indexation) Bill 2010**

Introduced into the Senate on 18 November 2010

By: Senator Ronaldson

### **Background**

This bill provides for Defence Force Retirement and Death Benefits Scheme and Defence Force Retirements Benefits Scheme superannuants aged 55 and over have their pensions indexed in the same way as Australian Government income support pensions.

### **No explanatory memorandum**

This bill, introduced as a private Member's bill, was introduced without an explanatory memorandum. 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. If the bill proceeds to further stages of debate the Committee **seeks the Senator's advice** as to whether an explanatory memorandum could be provided.

*The Committee draws Senators' attention to this circumstance, 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.*

## **Environment Protection and Biodiversity Conservation (Public Health and Safety) Amendment Bill 2010**

Introduced into the House of Representatives on 15 November 2010

By: Mr Hartsuyker

### **Background**

This bill amends the *Environment Protection and Biodiversity Conservation Act) 1999* to state that:

- The Minister is deemed to have unconditionally approved, for the purposes of the Act, relocation of the flying fox colony in the northern New South Wales town of Maclean, in the locale of the Maclean High School, upon completion of State approvals by the New South Wales Government.

The bill aims to clear any federal obstacles for granting removal of the bats and deems that the Minister has granted approval upon completions of State approvals by the New South Wales Government.

*The Committee has no comment on this bill.*

## **Family Law Amendment (Validation of Certain Parenting Orders and Other Measures) Bill 2010**

Introduced into the House of Representatives on 17 November 2010

Portfolio: Attorney-General

### **Background**

The bill amends the *Family Law Act 1975* (the Act) to:

- create new statutory rights and liabilities for families who may have been affected by the High Court's decision in *MRR v GR* [2010] HCA 4. This decision casts doubt on the validity of certain parenting orders made or purportedly made on or after 1 July 2006 when shared parenting reforms were introduced. The bill seeks to ensure that parenting arrangements under orders affected by the High Court decision continue to have effect; and
- amend the Act to provide that courts, in future proceedings, may, but are not required to, consider the matters set out in subsections 65DD(1) and (2) of that Act before making an order, with the consent of all the parties to the proceedings, providing for parents to have equal shared parental responsibility for their child.

The bill confirms that the best interests of the child remain the paramount consideration.

### **Ability to obtain review**

#### **Items 3 and 6**

The explanatory memorandum at paragraph 13 explains that item 3 seeks to provide that the rights and liabilities in relation to affected orders 'are the same as if the court or Registrar making the affected order had considered the required matters for the order...they include the right to appeal against or apply for a review of the affected order (Item 3(3)).' The explanatory memorandum states at paragraph 14 that:

Subject to the relevant court extending time for appeal or review where it has expired, parties dissatisfied with an affected order may challenge the affected

order through an appeal or review or taking proceedings for an order under Item 6.

The Committee understands the overall purpose of the Bill and supports the intention to create certainty for families and their children. However, in assessing the Bill against Standing Order 24 the Committee is interested to understand the potential impact of these sections and **seeks the Attorney-General's advice** about whether the proposed approach has the potential for any detrimental effect in relation to time limits for appeal and review, particularly in relation to orders that otherwise would have been invalidly made.

*Pending the Attorney-General'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.*

### **Possible retrospective effect**

#### **Item 4**

This item clarifies the effect of any acts done or omitted to be done in relation to rights and liabilities created by item 3. The explanatory memorandum states at paragraph 17 that item 4 seeks to ensure that they 'have effect for the purpose of any laws in the same way as if they were done or omitted to be done in relation to an order made under section 65D of the Family Law Act.'

As the explanatory memorandum notes at paragraph 19, the effect of item 4:

...could be detrimental to persons who have contravened an affected order and who might otherwise be able to avoid the consequences of contravention under Division 13A of Part VII of the Family Law Act.

This means that the Bill could retrospectively affect the rights that a person would otherwise have had. The justification for the proposed approach is that (also at paragraph 19):

It would not be just or appropriate to allow persons who have intentionally disregarded parenting orders to be able to avoid these consequences... There is a clear public benefit in ensuring that arrangements under parenting orders are upheld.

The Committee notes this information and acknowledges that it is very useful for this issue to be addressed in the explanatory memorandum. The Committee is also cognisant of the importance of an overall purpose of the bill to achieve ‘much needed certainty [for] families and their children’ (explanatory memorandum at page 1). In the circumstances the Committee **leaves to the Senate as a whole** the question of whether the provision trespasses unduly 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.*

### **Possible retrospective effect**

#### **Item 7**

The purpose of this item is to provide that interference with a right conferred or affected by item 3, or failure to satisfy or comply with a liability imposed by item 3, ‘can be dealt with in the same manner as it if had occurred in relation to a right or liability arising under [a] parenting order validly made under section 65D of the Family Law Act’ (see paragraph 27 of the explanatory memorandum).

As noted above, the Committee understands the overall purpose of the Bill and supports the intention to create certainty for families and their children. However, in assessing the Bill against Standing Order 24 it seems to the Committee that this approach could retrospectively affect rights that a person would otherwise have had in a case involving an invalidly made order. Unlike item 3 (discussed above), no justification for this approach is outlined in the explanatory memorandum. The Committee therefore **seeks the Attorney-General’s advice** about whether the proposed approach could detrimentally affect the rights of any person.

*Pending the Attorney-General’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 Amendment (Truth in Labelling-Genetically Modified Material) Bill 2010**

Introduced into the Senate on 16 November 2010

By: Senators Xenophon and Siewert

### **Background**

This bill requires producers, manufacturers and distributors of food to label all food products containing genetically modified organisms or ingredients.

*The Committee has no comment on this bill.*

## **Health Insurance Amendment (Compliance) Bill 2010**

Introduced into the House of Representatives on 17 September 2009 and reintroduced on 17 November 2010

Portfolio: Health and Ageing

This bill is substantially similar to a bill introduced in the previous Parliament and the reintroduced bill does not contain any new provisions that fall within the Committee's terms of reference.

### **Background**

This bill amends the *Health Insurance Act 1973* to give effect to the Increased Medicare Compliance Audits initiative which was announced in the 2008-09 Budget. The bill gives Medicare Australia the authority to require practitioners to produce relevant documents during compliance audits.

Specifically, the bill enables the Chief Executive Officer (CEO) of Medicare Australia to give a notice to a practitioner requiring the production of documents (or to another person who has custody, control or possession of the documents) to substantiate whether a Medicare benefit paid in respect of a service should have been paid. The CEO must fulfil several conditions before a notice to produce can be given.

The Committee dealt with this bill in *Alert Digest No. 13 of 2009*. Below is an extract of the Committee's comments on the previous bill.

**Abrogation of the privilege against self-incrimination  
Schedule 1, item 2, new section 129AAF**

Proposed new section 129AAF, to be inserted by item 2 of Schedule 1, provides that a person is not excused from producing a document, extract or copy of a document under proposed new section 129AAD on the ground that doing so would tend to incriminate the person or expose the person to a penalty.

However, the explanatory memorandum contains a full explanation for the provision (at pages 9-10); namely, that the new 'notice to produce' regime contained in the bill 'would not be workable if practitioners were able to resist notices by claiming privilege against self-incrimination' and that Medicare Australia's auditing ability 'would be severely compromised' (which is 'the gap' that the bill is aiming to fill).

The Committee notes also that a standard use and derivative use immunity provision limits the use of documents and information obtained pursuant to the bill to: criminal offences relating to false or misleading information, or documents, under the bill or the Criminal Code; or in specified civil proceedings under the bill.

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

## **Migration Amendment (Detention Reform and Procedural Fairness) Bill 2010**

Introduced into the Senate on 18 November 2010

By: Senator Hanson-Young

### **Background**

This bill amends the *Migration Act 1958* in relation to asylum seekers and immigration detention by:

- ending offshore processing and the excision policy;
- ensuring that detention is only used as a last resort;
- ending indefinite and long-term detention that is the legacy of mandatory detention; and
- introducing a system of judicial review of detention beyond 30 days.

*The Committee has no comment on this bill.*

## **Paid Parental Leave (Reduction of Compliance Burden for Employers) Amendment Bill 2010**

Introduced

into the House of Representatives on 15 November 2010

By: Mr Billson

### **Background**

This bill amends the *Paid Parental Leave Act 2010* to remove the ability to impose the ‘pay clerk’ responsibilities on employers and to indefinitely maintain the role of the Secretary to administer payments to eligible recipients (via Centrelink’s Family Assistance Office) beyond the first six months of the scheme.

*The Committee has no comment on this bill.*

## **Screen Australia (Transfer of Assets) Bill 2010**

Introduced into the House of Representatives on 17 November 2010  
Portfolio: Arts

### **Background**

This bill provides for the change of name of the National Film and Sound Archive (NFSA) and will facilitate the legal transfer of certain assets and liabilities associated with Screen Australia's (SA) film library and related sales and digital learning functions from SA to the newly named National Film and Sound Archive of Australia (the NFSAA).

### **Retrospective application Schedule 2, item 12**

This item in part that provides that a determination made under subitem (1) takes effect:

- (a) at the time specified in the determination (which may be a time before the determination is made but not a time earlier than the transition time).

As the explanatory memorandum at paragraph 64 simply describes the operation of the section without any explanation of its effect, the Committee **seeks the Minister's advice** about whether this provision 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.*

### **Legislative instrument – disallowance and sunseting Schedule 2, item 13**

This item seeks to provide that, for the purposes of the operation of an Appropriation Act, the Finance Minister may determine that one part of an amount referred to in that Act that relates to Screen Australia is to be read as an amount that relates to the NFSAA. The explanatory memorandum states that (at paragraph 68):

The sunseting exemption is to ensure that the instrument is enduring and will be permanently available through publication on the Federal Register of Legislative Instruments. The disallowance exemption is required so that the operations of SA and NFSAA will not be disrupted.

In the Committee's view the removal of parliamentary scrutiny through the avoidance of disallowance and sunseting is a serious matter. However, on this occasion it is apparent that the provision is consistent with the purpose of the Bill, which will be considered by Senate as a whole in the usual manner.

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

# **Tobacco Advertising Prohibition Amendment Bill 2010**

Introduced into the House of Representatives on 17 November 2010

Portfolio: Health and Ageing

## **Background**

This bill amends the *Tobacco Advertising Prohibition Act 1992* to clarify that it is an offence to advertise tobacco products on the internet and in other electronic media in line with restrictions in other media and at other retail points of sale.

## **Reversal of onus**

### **Item 13, section 15A(2)**

This item seeks to make it an offence for a person to publish electronically in Australia anything that meets the definition of a tobacco advertisement (see explanatory memorandum at page 43). The offence will not apply if any of sections 16A to 20 apply. These sections provide exceptions for circumstances in which the place the advertisement appears is also an online point of sale for the product provided that publishing the advertisement is not an offence under relevant State or Territory law.

The defendant will bear an evidential burden of proof in relation to the exceptions specified in sections 16A to 20. An evidential burden means that the defendant must adduce evidence that suggests a reasonable possibility that an exception to an offence is made out, which the prosecution must then refute beyond reasonable doubt.

In line with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* the explanatory memorandum notes at page 43 that this approach is consistent with the approach in existing offence sections 13 to 15, and also that the matters in sections 16A to 20 will be peculiarly in the knowledge of the defendant and particularly costly and difficult for the prosecution to prove beyond reasonable doubt.

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

## Retrospective application

### Item 16

This item seeks to provide that the Bill will apply to advertisements published electronically before the commencement of the Act if the advertisement is accessible by the public at or after its commencement. This would mean that proposed clause 15A, which establishes the offence of publishing a tobacco advertisement electronically, could apply retrospectively.

The explanatory memorandum explains at page 46 that:

The retrospective application of new section 15A is necessary to avoid the objects of the offence provision being undermined by permitting the continued display on the internet of tobacco advertisements that were published prior to the commencement of the Bill.

However, the practical effect of this retrospective application on a potential defendant is substantially diminished by the fact that the period between enactment of the Bill and its date of commencement will provide an opportunity for previously published tobacco advertisements to be removed from websites. It is intended that the Bill will commence automatically after Royal Assent, rather than by early proclamation.

The explanatory memorandum also observes at page 46 that ‘the practical effect of this retrospective application on a potential defendant is substantially diminished by the fact that the period between enactment of the Bill and its date of commencement will provide an opportunity for previously published tobacco advertisements to be removed from websites.’

The Committee notes that it is useful that this issue has been addressed directly in the explanatory memorandum. However, because of the retrospective application of this provision the Committee remains concerned about the potential for a person to unknowingly contravene the new offence. The Committee therefore **seeks the Minister’s further advice** about whether it is intended that any measures be taken to inform those affected about the retrospective application of the proposed law, whether consideration has been given to allowing a period of grace or a possible defence to be available for a short period of time for a defendant who was not aware of the retrospective application of the provision (once the law commences) and whether the commencement of the Act could be stated to be 6 months after Royal Assent is given rather than leaving the option for commencement by proclamation.

*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.*

## Wild Rivers (Environmental Management) Bill 2010

Introduced into the House of Representatives on 8 February 2010 and reintroduced on 15 November 2010

By: the Hon A J Abbott

### Background

This bill aims to protect the interests of Aboriginal traditional owners in the management, development and use of native title land situated in wild river areas, and for related purposes.

### Explanatory memorandum

This bill, introduced as a private Member'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. If the bill proceeds to further stages of debate, the Committee **seeks the Leader of the Opposition's advice** as to whether an explanatory memorandum could be provided.

*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.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Australian National Preventive Health Agency Bill 2010**

*[Digest No.8 commented but no response required]*

On 27 October 2010 the House of Representatives passed the bill with five amendments. On 15 November 2010 a revised explanatory memorandum was tabled in the Senate. On 17 November the Senate passed the bill with one amendment. Subsequently, on the same day the House of Representatives agreed to the Senate amendment. The amendment does not fall within the Committee's terms of reference.

### **Aviation Crimes and Policing Legislation Amendment Bill 2010**

*[Digest No.8 commented but no response required]*

On 18 November 2010 an addendum to the explanatory memorandum was tabled and the bill was passed without amendment in the Senate.

### **Corporations Amendment (No.1) Bill 2010**

*[Digest No.8 commented response in 9<sup>th</sup> Report]*

On 26 November 2010 the House of Representatives passed the bill without amendment. On 18 November 2010 a replacement explanatory memorandum was tabled and the bill was passed without amendment in the Senate. The Committee has considered the replacement explanatory memorandum in its *Tenth Report of 2010*.

### **Crimes Legislation Amendment Bill 2010**

*[Digest No.8 commented response in 9<sup>th</sup> Report]*

On 18 November 2010 an addendum to the explanatory memorandum was tabled and the bill was passed without amendment in the Senate.

### **Fisheries Legislation Amendment Bill (No.2) 2010**

*[Digest No.8 no comment]*

On the 26 November 2010 the House of Representatives passed the bill without amendment. On 18 November 2010 a supplementary explanatory memorandum was tabled and 20 amendments agreed to in the Senate. Two of the proposed amendments fall within the Committee's terms of reference.

Amendment No. (5) proposes the inclusion of new 84B to implement an agreement between Australia and the Government of the French Republic relating to the cooperative enforcement of fisheries laws in Antarctic and other territories. It is proposed in 84B(2) that for the purposes of conducting cooperative enforcement an

international officer is taken for the purposes of the Fisheries Act to have exercised the power as an officer. Proposed section 84B(5) and (7) seek to provide that:

An international officer is not liable to any civil or criminal proceedings in respect of anything done or omitted to be done in good faith in the exercise or purported exercise of a power...

...either conferred on an officer by subsection (3) or referred to in subsection (6).

The Committee is concerned that the effect of these sections could be to remove a court's jurisdiction to consider a range of issues relating to the conduct of an international officer. The supplementary explanatory memorandum describes the effect of these proposed amendments, but does not provide a justification for them. Although the Bill has been transmitted for Royal Assent, the Committee **seeks the Minister's advice** about the justification for the approach.

*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.*

**Tax Laws Amendment (2010 Measures No.4) Bill 2010**

*[Digest No.8 still awaiting response]*

On 15 November 2010 corrections to the explanatory memorandum were tabled in the House of Representatives.