Senate Standing Committee

for the

Scrutiny of Bills

Alert Digest No. 1 of 2011

9 February 2011

ISSN 1329-668X

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.

TABLE OF CONTENTS

Commentary on bills

Assisting Victims of Overseas Terrorism Bill 2010

Introduced into the Senate on 26 November 2010
By: Senator Brandis

Background

This bill provides for the establishment of a framework to facilitate financial assistance for Australians killed or injured, or their next of kin, as a result of international terrorist acts.

Delegation of legislative authority
Clause 6

Clause 6 requires the Minister to determine guidelines for the operation of the assistance scheme. The bill leaves the 'eligibility requirements' for the operation of the scheme entirely to the guidelines. Although the Minister is required to consult with various interests before the guidelines are made (clause 8), the Committee's view is that important matters such as eligibility requirements should be included in primary legislation whenever possible. It The Committee is aware that there may be good reasons for the approach which has been taken in the bill, but the explanatory memorandum does not explain why this delegation of legislative power is considered to be appropriate. If this bill procees to further stages of debate, the Committee **seek's the Senator's advice** as to why these eligibility requirements cannot be included in the legislation.

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

Broadcasting Legislation Amendment (Anti-Siphoning) Bill

Introduced into the Senate on 23 November 2010
By: Senator Bob Brown

Background

This bill amends the *Broadcasting Services Act 1992* in the following ways:

- it removes the expiry date from the current anti-siphoning list;
- it provides that a new anti-siphoning list does not take effect until 6 sitting days of each House of Parliament have elapsed.

The Committee has no comment on this bill.

Competition and Consumer (Price Signalling) Amendment Bill 2010

Introduced into the House of Representatives on 22 November 2010
By: Mr Billson

Background

This bill seeks to establish a new head of power under which the Australian Competition and Consumer Commission (ACCC) would be able to investigate and seek penalties for 'price signalling' that produces anti-competitive effects in the Australian market, to the detriment of consumers.

The Committee has no comment on this bill.

Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Bill 2010

Introduced into the House of Representatives on 24 November 2010
Portfolio: Special Minister of State

Background

This bill amends *the Commonwealth Electoral Act 1918* (the Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) to give effect to two decisions of the High Court of Australia:

- *Rowe* v *Electoral Commissioner* [2010] HCATrans 207 (Rowe), decided on 6 August 2010, which concerned the process following the calling of an election through the formal issue of a writ, and the period of time allowed for relevant voters to either ensure that they are on the electoral Roll, or to update their details (close of Rolls); and

- *Roach* v *Electoral Commissioner* (2007) 233 CLR 162 (Roach), decided on 30 August 2007, with reasons published on 26 September 2007, which concerned the franchise for relevant people who may be serving a sentence of imprisonment.

The bills updates the text of the *Electoral Act* to reflect the current legal position, as declared by the High Court, to:

- restore the close of Rolls period to 7 days after the date of the writ for a federal election; and

- reinstate the previous disqualification, for prisoners serving a sentence of imprisonment of 3 years or longer, from voting at a federal election.

Consequential amendments to the *Referendum Act* would be made to ensure consistency between the two Acts.

The bill also provides for:

- amendments to ensure that while prisoners serving a sentence of imprisonment of 3 years or longer will be disqualified from voting, they may remain on, or be added to, the electoral Roll; and

- includes an interpretative provision to ensure that certain references in the Electoral Act to 'an election for a Division', or similar expressions, can operate in the event of a half Senate election held independently from an election of the House of Representatives.

Trespass on personal rights and liberties
Schedule 1

The effect of the orders in *Rowe* were to restore the close of electoral Rolls to the period of 7 days after the date of the writ for a federal election, a period which had been diminished by provisions introduced into the electoral legislation by amendments passed in 2006. *Rowe* invalidated the 2006 amendments. Schedule 1 of the bill gives effect to this judgment. The explanatory memorandum recognises (at page 5) that requiring voters to enrol to vote or amend their details within a 7 day period does limit the right to vote. However, it is stated that this period is 'objective, reasonable, proportionate and non-discriminatory' and would not, therefore, constitute a breach of article 25 of the *International Covenant on Civil and Political Rights*, to which Australia is a party.

The purpose served by the provision of a cut-off date is to ensure that a certified list of eligible voters can practicably be prepared in advance of an election, especially given that voting is compulsory in federal elections. In the Committee's view the question of whether the period of 7 days is reasonable is a matter appropriately **left to the consideration of the Senate as a whole**.

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

Trespass on personal rights and liberties
Schedule 2

The *Roach* decision invalidated restrictions on the right to vote of prisoners introduced by the 2006 amendments and held that the relevant provisions in force immediately prior to those amendments continued to be in force and valid. Schedule 2 of the bill implements the *Roach* decision by reinstating the previous disqualification for prisoners serving a sentence of imprisonment of 3 years or longer. In addition to the constitutional concerns raised in *Roach* as to limits on the rights of prisoners to vote (based on the maintenance of the system of representative government established by the Constitution),

limitations on the rights of prisoners' rights to vote can be considered to encroach upon the right to vote recognised in article 25 of the *International Covenant on Civil and Political Rights*.

The explanatory memorandum acknowledges that any restrictions on such an important political right must be justified according to the 'principle of proportionality'. The explanatory memorandum states at page 6 that 'the Bill aims to ensure that the limitation on the right to vote as a consequence of the disqualification from voting by prisoners serving a term of imprisonment of 3 years or longer is objective, reasonable, proportionate and non-discriminatory and is intended to give better effect to Article 25 of the ICCPR'. In the Committee's view the question of whether the limitation is proportionate is a matter appropriately **left to the consideration of the Senate as a whole**.

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

Foreign Acquisitions Amendment (Agricultural Land) Bill 2010

Introduced into the Senate on 24 November 2010
By: Senator Xenophon

Background

This bill seeks to make three key changes to the current *Foreign Acquisitions and Takeovers Act 1975*. These changes include:

- provides for a national interest test which requires any interest in Australian agricultural land greater than 5 hectares to be subject to application to the Treasurer;
- lowers the threshold from $231 to 5 hectares for the acquisition of Australian agricultural land; and
- requires online publication of applications of interest in Australian agricultural land;

Possible severe penalty
Item 11

This bill requires private foreign investors to seek approval prior to acquiring any interest in Australian agricultural land greater than 5 hectares.

Item 11 of Schedule 1 would insert subsection 26B(2) into the legislation. This subsection specifies the penalty for breach of the obligation to not acquire agricultural land without approval is a fine not exceeding 500 penalty units or imprisonment for a period not exceeding 2 years, or both. These are heavy penalties and it is possible that these penalties unduly encroach upon personal rights and liberties. The Committee requests that if this bill proceeds to further stages of debate it would be helpful if the explanatory memorandum justified these penalties by reference to comparable penalties in Commonwealth legislation.

> *Pending the Senator's reply, 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.*

Insufficiently defined administrative powers
Item 5

Item 5 of Schedule 1 would insert subsection 21B(2) into the legislation. This provision gives the Treasurer a discretionary power to make an order prohibiting a proposed acquisition where he or she is satisfied that foreign person seeks to acquire an interest in Australian agricultural land which is greater than 5 hectares and that the proposed acquisition would be contrary to the public interest. This is a very broad discretionary power which may be thought to make rights unduly dependent upon insufficiently defined administrative powers.

However, proposed section 21C (also inserted by item 5 of Schedule 1) specifies in considerable detail a number of considerations to which the Treasurer must have regard in determining whether an acquisition would be contrary to the national interest. This requirement works to structure the exercise of the broad discretionary power.

Given the purpose of the bill is to enable the Treasurer to make policy decisions about whether or not to approve an application and the requirements (also inserted by item 5) to publish information about applications under consideration by the Treasurer, in the circumstances if the bill proceeds to further stages of debate the Committee leaves the question of whether this approach is appropriate to **the consideration of the Senate as a whole**.

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

Human Services Legislation Amendment Bill 2010

Introduced into the House of Representatives on 25 November 2010
Portfolio: Human Services

Background

This bill amends the *Medicare Australia Act 1973* (the MA Act) and the *Commonwealth Services Agency Delivery Act 1997* to formalises the changes already under way and further integrates service delivery agencies in the Portfolio by:

- The abolition of the statutory offices of Chief Executive Officer of Medicare Australia and Chief Executive Officer of Centrelink;
- The creation of the statutory offices of Chief Executive Medicare and Chief Executive Centrelink within the Department;
- The abolition of Medicare Australia and Centrelink as statutory agencies;
- Providing for service related functions currently delivered by Medicare Australia and Centrelink in support of their Chief Executives to be delivered by Departmental employees; and
- Providing for new functions taken on by the Chief Executive Medicare and the Chief Executive Centrelink in the future to be delivered by Departmental employees.

The bill clarifies the operation of program secrecy provisions after the restructure. to ensure, in particular, no new kinds of data sharing without customer consent

The bill also:

- amends the *Child Support (Registration and Collection) Act 1988* to align the provisions for the appointment of the Child Support Registrar with the provisions for the appointment of the Chief Executive Centrelink and the Chief Executive Medicare; and

- makes consequential amendments to a number of other Acts that currently refer to the agencies or statutory authorities which will be abolished; and

- amends investigative search and seizure provisions of the Part IID of the MA Act.

Wide delegation
Schedule 1, items 35 and 38; Schedule2, item 31

Item 35 of Schedule 1 inserts an amendment which allows the Chief Executive of Medicare to delegate any or all of their functions to 'a Departmental employee'. The Committee has stated that it prefers that delegates be confined to the holders of nominated offices or to members of the SES. However, the proposed amendment reflects the scope of the power to delegate under the existing legislation. The explanatory memorandum also notes at page 15 that this approach is justified given 'the very wide range of functions' performed by the Chief Executive of Medicare' and the large volume of exercises of powers and functions on a daily basis. Similar circumstances exist in relation to schedule 1, item 38 and schedule 2, item 31.

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

Trespass on personal rights and liberties
Schedule 1, items 74 and 76

Item 74 has the effect of diminishing the obligations on the Chief Executive of Medicare to notify a patient that their records have been seized as part of a Part IIID investigation. The old law required notification in all cases, whereas the new provision requires notification only in cases where a patient's record is actually examined. The explanatory memorandum at page 26 states that the old arrangements were 'onerous and expensive' and could 'cause needless worry to patients whose records have not been examined'.

Item 76 further diminishes the existing notice requirement by stating that no notice is required where, after examining a record, the officer did not obtain any knowledge of clinical details relating to the patient. The Committee is concerned that these items will impact on the privacy of individuals and is particularly interested to understand who will determine whether clinical knowledge was obtained, what training they will have and whether any

safeguards are in place to protect patients. The Committee therefore **seeks the Minister's further advice** about these matters.

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

Retrospective effect
Schedule 5, item 1

It is noted that Item 1 of Schedule 5 enables the Governor-General to make regulations in relation to transitional matters arising out of the amendments made by this bill which, if made within six months of the commencement of this item, may be expressed to take effect at a 'time that is earlier than the time when the regulations are made' (but not earlier than the commencement of this item). The explanatory memorandum simply restates the effect of this item.

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.

A bill such as this involves many and complex technical issues relating to moving from one set of administrative and governance structures to another. Nevertheless, it would have been helpful for the explanatory memorandum to explain the need for the making of regulations which may have retrospective effect and whether it is envisaged that this may have any potential adverse consequences on affected persons. The Committee **seek's the Minister's advice** as to the appropriateness of the proposed approach.

Pending the Minister's replym, 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 Broadband Network Companies Bill 2010

Introduced into the House of Representatives on 25 November 2010
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill accompanies the Telecommunication Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010. The bill establishes the regulatory framework covering the ownership and operations of NBN Co, and the arrangements for the eventual sale of the Commonwealth's stake in NBN Co.

Legislative instruments Act - exemptions
Various

This bill contains a number of provisions which state that instruments made by the relevant Ministers are not 'legislative instruments'. The effect of these provisions is to remove the operation of the *Legislative Instruments Act* (*LIA*).

The following discussion divides the various provisions into the following categories: (1) provisions which are clearly considered to be substantive exemptions from the operation of the *LIA* or provisions which exclude only the operation of section 42 (disallowance provisions) of the *LIA*; (2) provisions which are said to be included for the 'avoidance of doubt' but for which a substantive justification for exemption appears to be given, leading to confusion about whether or not an exemption is sought or needed.

1. Substantive Exemption Provisions

Clause 24

This clause enables the Communications Minister to determine, in writing, 'functional separation principles'. These operate as standards with which an NBN Corporation must comply (clause 23). Subclause 24(5) states that these determinations are not legislative instruments. The explanatory memorandum states at page 76 that this is a substantive exemption from the LIA, which is justified on the basis that it is 'important that industry has certainty that the principles set out in legislation and in the determination will apply and will not be overturned, or modified, by the Parliament.' The Committee is

concerned to ensure that Parliamentary oversight is maintained appropriately and therefore **seeks the Minister's further advice** as to the justificaiton for this approach and whether certainty might be achieved by specifying the 'functional separation principles' fully in the legislation.

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

Subclause 50(2)

Subclause 50(2) gives the Finance Minister the power to declare that in his or her opinion conditions are suitable for the entering into and carrying out of an NBN Corporation sale scheme. Subclause 50(9) states that this is not a legislative instrument, subclauses 50(4)-50(8) set out specific tabling, disallowance and publication requirements. In these circumstances, the Committee notes these provisions but makes no further comment.

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

Subclause 54(4)

Subclause 54(4) enables the Finance Minister to make a written determination setting out rules for an NBN Co sale scheme. Subclause 54(9) provides that these rules are a legislative instrument but that they are not disallowable under section 42 of the *LIA*. At page 96 the explanatory memorandum gives the following justification for this exemption:

> For commercial reasons, it is not appropriate that an instrument made by the Finance Minister setting out rules that are to be complied with by an NBN Co sale scheme should be disallowable. It will be important to ensure commercial certainty in connection with the NBN Co sale scheme. It may be necessary depending on market conditions…for additional rules governing...a sale scheme which operate with the force of law. A ministerial determination would provide this force of law, and commercial certainty. This certainty would not be available if the determination were subject to disallowance.

The explanatory memorandum also notes that the determination operates in a manner akin to a direction from a Minister and therefore would not be subject to disallowance under the *LIA* in any event pursuant to subsection 44(2) of the *LIA*. The Committee **leaves to the Senate as a whole** the consideration of the exemption from disallowance in these circumstances.

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

Subclause 50(12)

Subclause 50(12) declares that an NBN Co sale scheme, to the extent it is in writing, is not a legislative instrument. The explanatory memorandum at page 97 details the justification for this, which is that the government of the day will require certainty that it can enter into a sale, and that there will be commercially sensitive information involved. The explanatory memorandum also notes that the Finance Minister's earlier declaration that the sale is to be proceeded with is subject to Parliamentary scrutiny and may be disallowed. In these circumstances the Committee leaves consideration of this matter **to the Senate as a whole.**

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

Clause 55

Under subparagraph 55(1)(i)(i) the Minister may declare a security or financial product to be a 'sale-scheme hybrid security'. Subclause 55(7) provides that such a declaration is a legislative instrument, but that section 42 of the *LIA* (disallowance) does not apply to it. The reason for this outlined at page 98 of the explanatory memorandum is said to be 'the interests of ensuring commercial certainty in connection with an NBN Co sale scheme'. In the circumstances the Committee leaves the question of whether this approach is appropriate to the **consideration of the Senate as a whole**.

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

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

2. 'Avoidance of Doubt' Provisions

In a number of instances it was not clear whether provisions were thought to constitute substantive exemptions from the *LIA*. Acommon reason given for either (1) excluding the operation of the LIA or (2) 'avoiding doubt' or 'clarifying' the status of an instrument, is that the instruments would not be disallowable under the *LIA* by the operation of subsection 44(2), which concerns directions from a minister to a person. The fact that subsection 44(2) of the *LIA* may apply neither demonstrates an instrument is not of a legislative character (so that other provisions of the *LIA* would not apply) or that the instruments should be exempted from the other requirements set out in the *LIA*. For this reason, the reference to section 44(2) of the *LIA* in the explanatory memorandum was often apt to cause confusion.

Clause 25

This clause empowers the Communications Minister and the Finance Minister to make a written determination specifying requirements to be complied with by a draft or final functional separation undertaking given by a specified NBN Corporation. Subclause 25(5) states that these 'functional separation requirements determinations' are not legislative instruments. At page 77 of the explanatory memorandum this approach is said to reflect the 'fact that a direction from the Ministers to any person is not subject to disallowance (see section 44 of the LIA) and the fact that the instrument made by the Ministers…operates as a direction to an NBN corporation to include certain requirements in its draft undertaking'.

Although it is true that the section 44 of the *Legislative Instruments Act* does operate to remove certain legislative instruments from the disallowance provisions, this does not change the *legislative* character of the instruments. Even if section 44 of the *LIA* applies, other requirements (such as the tabling requirements) continue to apply in relation to legislative instruments. The Committee there **seek's the Minister's advice** as to the reason for the exclusion of these further requirements or about whether consideration has been given to another form of publication requirement to improve transparency and accountability in relation to the making of these determinations.

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

Clause 26

This clause requires an NBN corporation to give certain undertakings in a set time period. However, pursuant to subclause 26(2) and (3) the Ministers can issue an instrument in writing which specifies a longer time period or varies a period which has already been specified. These instruments are, by subclause 26(7), declared not to be legislative instruments.

The explanatory memorandum states that this statement is for 'the avoidance of doubt', suggesting this is not a substantive exemption from the LIA. However, reasons are given (at page 79) for the exemption as follows: (1) that the instrument functions as a Ministerial direction and so would not be subject to disallowance (section 44 LIA), and (2) because the 'industry will require certainty that the requirements set out in legislation and in the determination will apply and will not be overturned, or modified, by the Parliament'. Neither reason appears to the Committee to be relevant to the question of whether the instrument is of a legislative character. Thus it is unclear whether or not this is intended to be a substantive exemption from the LIA or not.

To the extent that this is a substantive exemption, it is noted that subclause 26(6) requires that a copy of the instrument be published on the Department's website. This provides an alternative process for enabling transparency and accountability. Furthermore, the instruments do not relate to the imposition of new requirements or standards but concern time limits for complying with those requirements. Although the exact reasoning for the approach is not entirely clear, in these circumstances the Committee leaves the appropriateness of any substantive exemption from the *LIA* **to the Senate as a whole.**

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

Clause 27

Subclauses 27(8) and 30(10) provide that that the following are not legislative instruments: (1) an instrument approving an original or replacement draft functional separation undertaking, and (2) a variation of a final functional separation undertaking. In relation to each, the explanatory memorandum states at pages 80 and 82 that disallowance provisions of the *LIA* would not apply on the basis that the undertakings function as a direction from the Minister to an NBN corporation. It is also said that disallowance would undermine certainty required by industry. These reasons appear to the Committee undermine the claim that the statement in the explanatory memorandum that the instruments are not legislative is 'for the avoidance of doubt', making it unclear whether these are intended to be substantive exemptions or not.

If a substantive exemption is intended, it is relevant to note that a measure of accountability and transparency is provided for by (1) requirements to undertake a consultation process (see subclauses 27((3)-(6)); 30((4)-(7)); and (2) the final functional separation undertaking must be published on the NBN corporation's website (clause 30). If, however, these arrangements were thought relevant to establishing a substantive exemption from the *LIA* it would have been helpful for this to have been explained in the explanatory memorandum as the instruments in question do create binding legal obligations on NBN corporations (see clause 32). The Committee **seek's the Minister's clarification** as to whether the inapplicability of the *LIA* is thought to be a substantive exemption and, if so, why this approach is thought appropriate.

> *Pending the Minister's reply, 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.*

Clauses 33 and 34

Subclauses 33(1) and 34(1) provide for Ministerial directions to an NBN corporation to dispose of or transfer specified assets and for other directions considered necessary for these purposes. Subclauses 33(5) and 34(6) declare these notices not to be legislative instruments.

It is unclear whether this is intended as a substantive exemption as the explanatory memorandum states that each provision 'clarifies that the direction is not a legislative instrument. Nevertheless, at page 82 of the explanatory memorandum the subclauses are justified by reference to subsection 44(2) of the *LIA* and the potential threat disallowance would pose to industry and Government certainty. The Committee **seek's the Minister's further advice** as to whether these provisions are intended to be substantive exemptions for the LIA and, if so, the reasons why the provisions of the *LIA* which do not deal with disallowance do not apply.

> *Pending the Minister's reply, 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.*

Clauses 79 and 80

Clause 79(6) provides that written guidelines issued by the Communications and Finance Minister under paragraph 79(4)(a) is not a legislative instrument. These guidelines concern the preparation of financial statements which NBN may be required to prepare. The explanatory memorandum at page 107 justifies this exclusion of the *LIA* by stating that the guidelines would function as directions to the Board of an NBN corporation and therefore would not be disallowable under section 44(2) of the *LIA* in any event. The same approach is taken in relation to guidelines which may be issued under clause 80. The Committee **seeks the Minister's advice** as to why provisions in the *LIA* other than those relating to disallowance should not apply to guidelines made under these provisions.

> *Pending the Minister's reply, 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.*

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

National Broadband Network Financial Transparency Bill

Introduced into the Senate on 23 November 2010
By: Senator Birmingham

Background

This bill requires the publication of a 10 year business case for the NBN and refer the NBN project to the Productivity Commission for a thorough cost-benefit analysis.

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.

> *Pending the Senator's reply, 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.*

Drafting issue
Clause 4

Clause 4 of this bill would require the NBN Co to prepare a business case for the NBN and publish it by 19 November 2010. The Committee notes that as this date has passed an appropriate timeframe will now need to be reconsidered.

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

National Vocational Education and Training Regulator Bill 2010

Introduced into the Senate on 26 November 2010
Portfolio: Education, Employment and Workplace Relations

Background

This bill provides for the establishment of a national regulator for the vocational education and training sector. It also sets out the regulatory framework within which the National Vocational Education and Training Regulator will operate.

Scope of legislative instrument to set fees
Clauses 17 and 232

Subclause 17(3) of the bill gives the National VET Regulator ('Regulator') power conduct an audit of any matter relating to an application prior to deciding whether to grant an application for registration. Subclause 17(4) provides that the Regulator may charge a registration assessment fee for considering the registration Although subclause 16(3), which allows an application fee, provides that such fees must be determined by the Minister by legislative instrument under clause 232 of the bill, subclause 17(4) does not indicate how the assessment fee is to be determined.

Clause 232 empowers the Minister to, by legislative instrument, determine 'amounts of fees the National VET Regulator may charge for goods or services it provides'. This provision is drafted in terms broad enough to enable the determination of fees applicable under subsection 17(4). It is currently unclear whether the Regulator can determine the level of fees appropriate for the purposes of subclause 17(4) in the absence of a legislative instrument dealing with this issue.

In addition, 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.

As this may be thought to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, the Committee **seeks the Minister's clarification** as to whether the fees applicable under

subclause 17(4) must be made by legislative instrument pursuant to clause 232 and as to 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 Minister's reply, 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 – excluding natural justice
Clauses 36 and 37

Division 3 of the bill deals with ensuring compliance with the VET Quality Framework and allows for the imposition (Subdivision B) of administrative sanctions, including the suspension and cancellation of registration. Subclause 36(a) provides that subdivision B only applies, inter alia, if 'natural justice requirements' have been satisfied and clause 37 details these 'natural justice requirements'. However, subclause 36(b) provides that the Regulator may impose administrative sanctions 'without satisfying natural justice requirements' in 'exceptional circumstances'. These circumstances are not defined in the bill, but the explanatory memorandum at page 23 gives the following examples: major occupational health and safety breaches; evidence of significant and high levels of fraud or malpractice; further issuing of qualifications that would undermine health and safety in other industries.

Although in theory Parliament may exclude common law natural justice requirements, the courts are extremely reluctant to accept that legislation has this affect. Natural justice is a fundamental common law principle. Such principles will not be abrogated by legislation unless the intention to do so is manifested by unmistakable and unambiguous language. Although subclause 36(b) is unlikely to exclude all aspects of the common law of natural justice, it is important to note that natural justice obligations are applied flexibly and the need for urgent action is one reason why the courts may accept that the content of obligations to give a fair hearing may be diminished or modified. In this regard it is noteworthy that paragraph 37((b)(i) allows the Regulator to require an organisation to give its response to a notice indicating that administrative sanctions may be imposed within 24hours.

The Committee is concerned to understand whether the proposed approach adequately balances the serious health and safety issues envisaged with the

fundamental principles of natural justice. The Committee therefore **seeks the Minister's further explanation** as to whether paragraph 37(b)(i) is sufficient to deal with the problem of exceptional circumstances and also if a prior hearing is to be excluded in 'exceptional circumstances' whether consideration has been given to providing for the making of a provisional decision which might be followed promptly by a hearing to an affected organisation.

Pending the Minister's reply, 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
Clause 51

Subclause 51(1) enables the Regulator to amend an accredited course if 'the Regulator considers it necessary to do so'. It may do so on receiving an application or on its own initiative (subclause 51(2)). On its face, this is a very broad discretionary power which may have significant ramifications for affected organisations. The explanatory memorandum states at page 30 that it is 'not envisaged that the NVR would be involved in the substantial re-writing or amendment of courses' and explains that the power is likely to be used to correct specific errors that have been identified or in response to changes in applicable standards or legislation to which the course refers. The Committee is concerned about the seemingly unnecessary breadth of this discretionary power and **seeks the Minister's advice** as to whether consideration has been given to the possibility of drafting a more narrowly defined power to better reflect the intended use of this power.

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

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Possible severe penalties
Clauses 60 and 61

Clauses 60 and 61 impose civil penalties for failure to return VET qualifications which have been cancelled in certain circumstances and for purporting to hold a qualification that has been cancelled. The penalties are, respectively, $11000 and $26400. The explanatory memorandum does not in any way seek to justify the level of penalty to be imposed. To ensure that there is no undue trespass on rights, it is desirable that civil penalties be consistently imposed across Commonwealth legislation. The Committee therefore **seeks the Minister's clarification** as to why the level of penalties imposed by these provisions are appropriate.

> *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.*

Possible undue trespass on personal rights and liberties
Clause 62

Clause 62 of the bill enables the Regulator to request the provision of information and production of documents or things directed to persons who are or were connected with a registered training organisation or former registered training organisation. Although subclause 62(4) states that at least 14 days must be given to comply with a request, a shorter time (not less than 24hours) may be specified if the Regulator considers this 'reasonably necessary'.

The *Guide* at page 98 states that especially where non-compliance with such a request is an offence (as it is in this case, clause 64) 14 days is considered 'the minimum time in which a response can reasonably be expected.' The explanatory memorandum gives the examples of where a person is likely to leave Australia and where training is being provided in a manner which would result in a health or safety risk as circumstances where a shorter period would be justified. However, given that the legislation allows a shorter period where the Regulator considers this reasonably necessary (ie it is the Regulator's opinion which matters), the circumstances justifying a shorter period would not be subjected to searching review by courts.

The Committee is concerned that this provision may make rights unduly dependent on insufficiently defined administrative powers and **seeks the Minister's advice** as to whether consideration has been given to specifying in the legislation the circumstances in which the Regulator could impose a shorter period rather than leaving this to the opinion of the Regulator.

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

Privilege against self-incrimination
Clause 65

Clause 65 of the bill abrogates the privilege against self incrimination in relation to the giving of information or production of a document or thing pursuant to clause 62 in relation to the so-called 'penalty privilege'. Although subclause 65(2) provides for a use and derivative use immunity in relation to the privilege against self-incrimination, paragraph 65(2)(f) makes it clear that these immunities do not apply in relation to civil proceedings for a civil penalty provision. Given that in the modern regulatory state civil and administrative penalties are often just as significant (in practical terms) as criminal punishment, it is not clear why a different approach should be taken on the availability of these immunities in relation to the 'penalty privilege'.

The explanatory memorandum argues at page 40 that the approach is appropriate given that the regulator 'will necessarily rely on the information provided by persons who are, or were, connected with current or former nationally registered training organisations in undertaking its regulatory and quality assurance functions, one of the aims of which is to protect the students in these organisations'. Although it is not made explicit, the underlying rationale for this approach may be to be that those persons (who lose their ability to rely on the privilege) are connected to a regulatory scheme, in which they participate voluntarily, and so may be taken to submit to being compelled to provide necessary information. This interpretation of the explanatory memorandum is supported by the further comment at page 40 of the explanatory memorandum that 'the civil penalties and offences provisions are an important way for the [Regulator] to enforce quality standards and maintain integrity in vocational education and training'. The explanatory

memorandum also makes the point that information gathered under clause 62 'would otherwise not have been able to be gathered'.

The Committee has accepted that the privilege against self-incrimination is not absolute, but has indicated that the public benefit from its negation should decisively outweigh the resultant harm to individual rights. It is suggested that the mere fact the abrogation of the privilege is most serious in relation to its operation in the context of civil penalties should not be significant in weighing the relevant public interests. Nevertheless, some of the points made in the explanatory memorandum are relevant: that the abrogation only applies in relation to persons 'connected with' a registered training organisation and that the information could not otherwise be gathered. Unfortunately, however, these arguments are brief and the Committee expects that they would be developed further if they are to justify the abrogation of the important privilege against self-incrimination.

To assist in determining whether the public interest in abrogating the privilege decisively outweighs that in the preservation of an important individual right, the Committee **seeks the Minister's further explanation** of the rationale for the approach. In particular, clarification is sought as to the nature and seriousness of harm which may be suffered and the extent to which information gained is can reasonably be expected to serve this public interest. Also, given the extensive search powers set out in Division 2 of the bill, the comment in the explanatory memorandum that relevant information 'would not otherwise be gathered' might be helpfully elaborated.

> *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.*

Possible trespass on personal rights and liberties
Division 2, clause 68

Division 2 of the bill allows for searches of premises and the seizure of material through the exercise, by 'authorised officers', of monitoring and enforcement warrants. For the most part these provisions appear to comply with the principles set out in the *Guide*. The following comments can, however, be made. Subclause 68(6) enables an authorised officer, executing an enforcement warrant, to seize evidential material which has not been

specified in the warrant where the officer 'believes on reasonable grounds that it is necessary to seize the thing in order to prevent its concealment, loss or destruction'. It appears to the Committee that there is potential for the power to seize material which is not the kind of evidential material specified in the warrant to be abused. Unfortunately the explanatory memorandum merely repeats the effect of the legislation and does not explain why these powers are necessary and proportionate, including examples of circumstances in which they may be needed, whether they are comparable to powers in other legislation and what safeguards are in place to ensure that they are used appropriately. The Committee therefore **seeks the Minister's advice** about the justification for clause 68(2).

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.

Possible trespass on personal rights and liberties
Clause 70

Clause 70 provides that in executing a warrant authorised officers may use such force against things as is necessary and reasonable in the circumstances. The explanatory memorandum restates the provision and gives the example of the moving of furniture or other objects to allow access to documents and other material. Given this limited example of the use of force, this provision is arguably drafted in terms which are too broad. Alternatively, it might be thought that the exercise of this power should be subject to explicit accountability requirements, such as a requirement that any use of force be recorded by video or that the provision does not authorise damage to any property, except in limited circumstances (see, for example subsection 3U(d) of the *Crimes Act*). The Committee **seeks the Minister's advice** as to whether this provision may be more narrowly drafted and whether its exercise may be made more accountable.

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.

Possible trespass on personal rights and liberties
Division 2, clause 71

Subclause 71(2) provides that if an officer is authorised to enter premises under a warrant that any person on the premises may be required to answer specified questions and produce specified documents. Failure to comply with such a request is an offence punishable by 30 penalty units. Clause 62 of the bill empowers the Regulator to request the provision of information and production of documents or things. However, the exercise of that power is (in general) subject to the person having at least 14 days to comply with the request. The explanatory memorandum neither explains why clause 71(2) is necessary given the power of the Regulator in clause 62, nor does it address the question of what a reasonable time for compliance with a request under subclause 71(2) might be. The Committee **seeks the Minister's advice** about these issues and the justification for the proposed 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.*

Possible trespass on personal rights and liberties
Division 2, paragraph 85(4)(f)

Paragraph 85(4)(f) provides that a monitoring warrant must specify the day, not more than 6 months after the issue of the warrant, on which the warrant ceases to be in force. The explanatory memorandum neither explains why such a lengthy period is justified nor indicates whether this is consistent with similar regulatory regimes which authorise the grant of monitoring warrants. The Committee **seeks the Minister's advice** about these issues.

> *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.*

Possible trespass on personal rights and liberties
Division 2

The Committee notes that there is no requirement in the bill that, as a general rule, searches should be conducted during reasonable hours and on reasonable notice. The Committee is aware that there may be reasons for this approach, but in the absence of an explanation in the explanatory memorandum, the Committee **seeks the Minister's advice** as to whether consideration has been given to including a provision dealing with this matter.

> *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.*

Insufficiently defined administrative powers
Clause 89

Clause 89 allows for the appointment of authorised officers—who may execute monitoring and enforcement powers under the bill—and subclause 89(2) states that the Chief Commissioner must not appoint a person as an authorised officer unless satisfied that the person has suitable qualifications and experience to properly exercise the powers of an authorised officer. Given the significance of the proposed powers of authorised officers the Committee **seeks the Minister's advice** as to whether consideration has been given to the inclusion of a legislative provision specifying the qualification and training procedures for authorised officers and guidelines for the execution of the coercive powers exercised by authorised officers (see for example the requirements of the Defence Legislation Amendment (Security of Defence Premises) Bill 2010).

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

Broad delegation
Clauses 224, 225 and 226

Clause 224 of the bill enables the Regulator to delegate all or any of the Regulator's powers and functions to a member of the staff of the Regulatory; a consultant; a Commonwealth authority; or a person who holds any office or appointment under a law of the Commonwealth. Unfortunately, the explanatory memorandum makes no effort to explain the breadth of the categories of persons whom may hold such a delegation. Of particular concern is the power to delegate important regulatory functions to persons outside the Commonwealth public service, including persons engaged as consultants under clause 84 of the bill.

A similar issue arises in relation to clause 225, which enables the delegation of powers to an occupational licensing body or other industrial body that 'deals with, or has an interest in, matters relating to vocational education and training'. The explanatory memorandum does not explain the justification for this approach. Nor does the explanatory memorandum seek to justify the necessity of the Regulator's capacity to delegate to a registered training organisation under clause 226 the Regulator's function of amending the organisation's scope of registration or accrediting a course.

The Committee **seeks the Minister's advice** about the appropriateness of these delegations.

> *Pending the Minister's reply, 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 they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010

Introduced into the Senate on 26 November 2010
Portfolio: Education, Employment and Workplace Relations

Background

This bill provides for the transfer of existing registrations, applications and other matters from state regulators to the National VET Regulator with minimal disruption to existing registered training organisations.

Henry VII clause
Retrospective effect
Clause 30

Subclause 30(2) provides that transitional regulations which may be made under subclause 30(1) of the bill 'have effect despite anything else in this Act'. Technically this is a Henry VIII clause at its effect is to enable regulations to override primary legislation. The Committee has long drawn attention such clauses as they may inappropriately delegate legislative power. In this case it is difficult to assess the appropriateness of the delegation of legislative power as the explanatory memorandum is silent on the issue.

In addition, subclause 30(4) provides that despite subsection 12(2) of the *LIA*, regulations may be expressed to take effect from a day before they are registered under that Act. Pursuant to this provision regulations may be lawful despite having a retrospective effect. Again the explanatory memorandum is silent as to the appropriateness of this approach. The Committee is aware that there may be legitimate reasons for the approach adopted in subclauses 30(2) and 30(4), but expects that they would be outlined in the explanatory memorandum. The Committee therefore **seeks the Minister's advice** as to the reasons why these provisions are required.

> *Pending the Minister's reply, 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 they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Patent Amendment (Human Genes and Biological Materials) Bill 2010

Introduced into the Senate on 24 November 2010
By: Senators Coonan, Heffernan, Siewert and Xenophon

Background

This bill amends the *Patents Act 1990* to advance medical and scientific research and the diagnosis, treatment and cure of human illness and disease by enabling doctors, clinicians and medical and scientific researchers to gain free and unfettered access to biological materials, however made, that are identical or substantially identical to such materials as they exist in nature.

The bill:

- reinforces the applicability of the proviso in section 6 of the Statute of Monopolies within the meaning of section 18(1)(a) and section 18(1A)(a);
- reinforces the applicability of the distinction between discovery and invention; and
- applies that distinction by expressly excluding from patentability, biological materials which are identical or substantially identical to such materials as they exist in nature, however made.

The Committee has no comment on this bill.

Plastic Bag Levy (Assessment and Collection) Bill 2010

Introduced into the Senate on 21 October 2002, restored to *Notice Paper* on 14 May 2008 and reintroduced on 23 November 2010
By: Senator Bob Brown

Background

This bill provides for the assessment and collection of a 25 cent levy on the use of plastic bags at retail points of sale. The bill also includes reporting requirements and contains a regulation making power.

The Committee has no comment on this bill.

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.

Statute Law Revision Bill (No.2) 2010

Introduced into the House of Representatives on 24 November 2010
Portfolio: Attorney-General

Background

This bill corrects technical errors that have occurred in Acts as a result of drafting and clerical mistakes, and to remove references to specific Ministers and Departments so that when changes are made to the Administrative Arrangements Order, legislation does not need to be amended. The bill also repeals a number of Acts that are obsolete.

The Committee has no comment on this bill.

Tax Laws Amendment (2010 Measures No.5) Bill 2010

Introduced into the House of Representatives on 25 November 2010
Portfolio: Treasury

Background

Schedule 1 to the bill amends the *Income Tax Assessment Act 1997* to make two changes to the eligibility criteria for accessing the film tax offsets. The minimum qualifying expenditure threshold for the post, digital and visual effects offset is reduced from $5 million to $500,000. The requirement for films with qualifying Australian production expenditure of less than $50 million to have at least 70 per cent of the total of all the company's production expenditure on the film as qualifying Australian production expenditure, in order to qualify for the location offset, is removed.

Schedule 2 to the bill amends Division 247 of the *Income Tax Assessment Act 1997* and Division 247 of the *Income Tax (Transitional Provisions) Act 1997* to adjust the benchmark interest rate used to determine the cost of capital protection on a capital protected borrowing from the Reserve Bank of Australia's (RBA's) Indicator Lending Rate for Personal Unsecured Loans to the RBA's Indicator Lending Rate for Standard Variable Housing Loans plus 100 basis points.

Legislation by press release
Schedule 2

Schedule 2 makes amendments which adjust the benchmark interest rate used to determine the cost of capital protection on a capital protected borrowing from the RBA's Indicator Lending Rate for Personal Unsecured Loans to the RBA's Indicator Lending Rate for Standard Variable Housing Loans plus 100 basis points. These changes apply retrospectively, from 13 May 2008, to the detriment of taxpayers. The justification for this in the explanatory memorandum at page 4 is that: (1) changes to the applicable lending rates were announced on 13 May 2008; (2) implementation of the announced changes was delayed to address industry concerns; and (3) as a result of the consultation with industry, the changes now introduced (announced in the 2010-11 Budget) are 'beneficial to affected taxpayers compared to the benchmark interest rate announced on 13 May 2008'.

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).

These amendments were announced in July 2010, but will take effect from 13 May 2008. The Committee notes that although the more recent modification to the original changes are beneficial to taxpayers, the normal assumption is that citizens are not required to order their affairs in accordance with announcements made by the Executive which have not been enacted into law by the Parliament. As this example illustrates, one press release may be modified by a later press release, and where this happens over a long period of time the law is left in a state of uncertainty. The Committee is concerned about this approach, but 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.

> *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.*

Telecommunication Legislation Amendment (National Broadband Network Measures-Access Arrangements) Bill 2010

Introduced into the House of Representatives on 25 November 2010
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill accompanies the National Broadband Network Companies Bill 2010. The bill introduces new access, transparency and non-discrimination obligations relating to the supply of wholesale services by NBN Co Limited. It also extends technical and open access obligations to owners of other superfast networks.

Legislative Instruments Act – exemption
Delegation of legislative power
Schedule 1, items 50 and 99

Item 50 of Schedule 1 would insert the proposed section 152AXC into the *Telecommunications Act*. This proposed section sets out non-discrimination requirements for NBN corporations and provides for a number of exceptions. Various subsections (namely, subsections 152AXC(5), (6), (8) and (9)) allow, in effect, the ACCC to specify exceptions on certain grounds or in specified circumstances. These instruments are not legislative instruments by the operation of subsection 152AXC(11). This is a substantive exemption from the *LIA*. However, as the explanatory memorandum points out at page 146, the bill imposes requirements on the ACCC to consult on draft instruments (subsection 152AXC(10)), and 'this will ensure that any instrument is subject to appropriate public commentary and transparency'.

The exclusion of the *LIA* is said to be appropriate given that the 'telecommunications industry will require certainty about what specific grounds or circumstances identified by the ACCC will be permissible'(see explanatory memorandum at page 146). An identical issue arrises in relation to item 99 of schedule 1 and the proposed section 152ARA.

In these circumstances, the appropriateness of this delegation of legislative power to the ACCC is a matter which the Committee **leaves to the consideration of the Senate as a whole**.

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

Possible delayed commencement
Schedule 1, items 86 and 88

Item 86 of Schedule 1 introduces the proposed section 141. This section regulates the supply of 'layer 2 bitstream services'. The new arrangements are to commence on proclamation or, if there is no proclamation, 12 months from the date on which the Access bill receives Royal Assent. This potential delay is justified at page 165 of the explanatory memorandum by reference to the desirability of providing a transitional period to 'signal to carriers upgrading or building new networks that these rules will apply to their networks, but to provide a period of up to 12 months for them to put in place arrangements to meet these requirements.'

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No 1.3. In the circumstances a justification has been provided and the Committee **leaves consideration of the issue to the Senate as a whole**.

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

Legislative Instruments Act - exemption
Schedule 1, item 86

This item also enables, in proposed subsections 141(5) and (6), the Minister to, by written instrument, exempt specified owners or a specified network unit from the general requirements of the proposed section 141. Before making such an instrument the Minister must consult the ACCC and ACMA (subsection 141(8)) but the instrument is exempted from the operation of the *LIA* (subsection 141(9)). The explanatory memorandum indicates at page 167 that the potential for disallowance of the instruments would be inconsistent with the maintenance of industry certainty. This appears to be intended as a

substantive exemption from the *LIA*. Although the need for industry certainty can be appreciated, the Committee **seek's the Minister's advice** as to whether this would be sufficiently achieved through excluding only section 42 of the *LIA* (disallowance) and allowing the other provisions of the *LIA* (such as requirements for publication) to continue to apply. The same issue also arises in relation to item 88 which would insert proposed subsection 389B(7) and the Committee also **seeks the Minister's advice** in relation to this provision.

Pending the Minister's reply, 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.

Incorporation of material by reference
Item 88

Item 88 would also insert proposed section 389A, which confers power on the ACMA to determine technical standards relating to Layer 2 bitsream services by legislative instrument. The *Note* to this section indicates that these instruments may provide for matters by reference to other instruments.

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. However, given the technical nature of the standards the Committee has no further comment.

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

COMMENTARY ON AMENDMENTS TO BILLS

Airports Amendment Bill 2010
[Digest 8 and response in 10th Report]

On 26 November 2010 a correction to the explanatory memorandum and a supplementary memorandum were tabled in the Senate. Subsequently, 33 government amendments were also agreed to. On 29 November 2010 the House of Representatives agreed to the Senate amendments and the bill was passed. None of the amendments fall within the Committee's terms of reference.

Corporations Amendment (Sons of Gwalia) Bill 2010
[Digest 8 no comment]

On 24 November 2010 the House of Representatives a supplementary explanatory memorandum was tabled and six amendments to the bill were agreed to. On 26 November a revised explanatory memorandum was tabled in the Senate and the bill was agreed to without amendment. None of the amendments fall within the Committee's terms of reference.

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Budget and Other Measures) Bill 2010
[Digest 8 and response in 9th Report]

On 18 November 2010 a supplementary memorandum was tabled and three governments were agreed to in the House of Representatives. On 22 November 2010 a revised explanatory memorandum was tabled in the Senate. None of the amendments fall within the Committee's terms of reference.

Financial Framework Legislation Amendment Bill 2010
[Digest no comment]

On 25 November 2010 the House of Representatives agreed to one opposition amendment and passed the bill. On 26 November a revised explanatory memorandum was tabled and the bill as passed without amendment in the Senate. None of the amendments fall within the Committee's terms of reference.

Health Insurance Amendment (Pathology Requests) Bill 2010
[Digest 8 no comment]

On 22 November 2010 the House of Representative agreed to one opposition amendment and passed the bill. On 26 November 2010 a revised explanatory memorandum was tabled and the bill was passed without amendment in the Senate. None of the amendments fall within the Committee's terms of reference.

Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010 ***[Digest 8 no comment]***

On 22 November 2010 the House of Representatives agreed to the bill without amendment. On 26 November 2010 the Senate agreed to nine amendments. On 29 November 2010 the House of Representatives agreed to the amendments and the bill was passed. None of the amendments fall within the Committee's terms of reference.

Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010
[Digest 8 and response in 10th Report]

On 16 November 2010 the House of Representatives agreed to the bill without amendment. On 24 November the Senate agreed to 10 Australian Greens amendments and eight Independent (Senator Xenophon) amendments. On 26 November 2010 the Senate agreed to a further two Australian Greens, two Independent (Senator Xenophon) and one government amendment. On 29 November 2010 the House of Representatives agreed to the Senate amendments and the bill was passed. None of the amendments fall within the Committee's terms of reference.

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
National Vocational Education and Training Regulator Bill 2010	Clause 64	Failure to comply with National VET Regulator's request for information	30 penalty units
	Clause 71(3)	Failure to comply with an authorised officer's request for information and documents	30 penalty units

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 43rd Parliament from the previous Alert Digest

National Broadband Network Companies Bill 2010 2010 — subclauses 58(1) and 61(3)

Any Senator who wishes to draw matters to the attention of the Committee under its terms of reference is invited to do so.