
# SENATE STANDING COMMITTEE

# FOR THE

# SCRUTINY OF BILLS

## SECOND REPORT

## OF

## 2008

## 19 March 2008

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## SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

### MEMBERS OF THE COMMITTEE

Senator the Hon C Ellison (Chair
Senator M Bishop (Deputy Chair)
Senator A McEwen
Senator A Murray
Senator R Ray
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.

# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## SECOND REPORT OF 2008

The Committee presents its Second Report of 2008 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008

Infrastructure Australia Bill 2008

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

# Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2008*. The Minister for Superannuation and Corporate Law responded to the Committee's comments in a letter dated 17 March 2008. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 1 of 2008*

Introduced into the Senate on 13 February 2008
Portfolio: Treasury

### Background

This bill amends a number of Acts, including the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995*, and the *Retirement Savings Accounts Act 1997*, with a view to:

- improving the efficiency, transparency and consistency of the process for disqualifying individuals from operating financial sector entities; and
- enhancing the accountability of the Australian Prudential Regulation Authority (APRA) for administrative decision-making under various Acts.

Schedule 1 introduces a court-based process for disqualifying an individual from operating an APRA-regulated entity.

Schedule 2 streamlines APRA's direction powers into a general directions provision under the *Banking Act 1959*, the *Insurance Act 1973*, and the *Life Insurance Act 1995*. Such directions may be subject to merits review by the Administrative Appeals Tribunal.

Schedule 3 removes ministerial consent from certain administrative decisions made by APRA or the Australian Taxation Office, where wider policy interests are not involved.

Schedule 4 expands the availability of merits review for appropriate administrative decisions made by APRA or the ATO, consistent with the guidelines developed by the Administrative Review Council.

The bill also contains application, consequential and transitional provisions.

**Strict liability**
**Schedule 1, items 10, 17, 28, 32, 38, 57 and 67 and Schedule 2, item 12**

The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

This bill includes numerous provisions that create offences of strict liability, namely:

- proposed new subsections 24(3) and 24(6) of the *Insurance Act 1973*, to be inserted by item 10 of Schedule 1;
- proposed new subsections 43A(3) and 43A(6) of the *Insurance Act 1973*, to be inserted by item 17 of Schedule 1;
- proposed new subsection 125A(10) of the *Life Insurance Act 1995*, to be inserted by item 28 of Schedule 1;
- proposed new subsections 245(4) and 245(5B) of the *Life Insurance Act 1995*, to be inserted by item 32 of Schedule 1;
- proposed new subsection 67B(3) of the *Retirement Savings Accounts Act 1997*, to be inserted by item 38 of Schedule 1;
- proposed new subsections 126K(3), (6) and (8) of the *Superannuation Industry (Supervision) Act 1993*, to be inserted by item 57 of Schedule 1;
- proposed new subsection 131C(3) of the *Superannuation Industry (Supervision) Act 1993*, to be inserted by item 67 of Schedule 1; and

- proposed new subsections 108(2) and (5) of the *Insurance Act 1973*, to be inserted by item 12 of Schedule 2.

The Committee notes that the explanatory memorandum (paragraphs 1.16 to 1.19 and 2.20) seeks to justify the creation of these strict liability offences on the basis that they are 'offences for non-compliance with basic regulatory requirements that should be complied with by all persons' and that the use of offences of strict liability 'is designed to enhance the effectiveness of the enforcement regime in deterring contravention of key prudential requirements.'

In its *Sixth Report of 2002*, the Committee acknowledged that strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime, however, it also indicated that strict liability should only be introduced after careful consideration on a case-by-case basis of all the available options, rather than by applying a rigid formula. The Committee is of the view that the justification provided in the explanatory memorandum for the imposition of strict liability appears to be a generic one, which fails to demonstrate that consideration has been given to its application on a case-by-case basis.

The Committee **seeks the Treasurer's advice** whether consideration was given to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of each of these provisions.

*Pending the Treasurer'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.*

## *Relevant extract from the response from the Minister*

The Committee sought advice as to whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of strict liability offences in the Bill.

The Bill contains a number of strict liability offences relating to:

- A disqualified person must not act as a responsible person under the *Insurance Act 1973* (Insurance Act) (Schedule 1, item 10);

- A disqualified person must not act as an auditor or actuary under the Insurance Act (Schedule 1, item 17);

- Removal by APRA of an auditor or actuary of a life company under the *Life Insurance Act 1995* (Life Act) (Schedule 1, item 28);

- A disqualified person must not act as a responsible person under the Life Act (Schedule 1, item 32);

- A disqualified person must not act as a responsible person under the *Retirement Savings Account Act 1997* (RSA Act) (Schedule 1, item 38);

- A disqualified person must not act as a responsible person under the *Superannuation Industry Supervision Act 1993 (*SIS Act) (Schedule 1, item 57);

- A disqualified person must not act as an auditor or actuary under the *Superannuation Industry Supervision Act 1993 (*SIS Act) (Schedule 1, item 67); and

- Non-compliance with a direction under the Insurance Act (Schedule 2, item 12).

Strict liability offences adopted in the Bill comply with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and also with the *Senate Committee for the Scrutiny of Bills Sixth Report 2002* concerning the application of absolute and strict liability offences.

The strict liability offences are designed to promote a robust regulatory framework by improving the enforceability, and hence the incentives for compliance, with key prudential requirements. In this way, the strict liability offences help to ensure that the financial sector entities are managed prudently and the assets of depositors, policyholders and members are adequately protected.

Strict liability offences relating to key prudential requirements have been used in the Bill where it would prove difficult to prosecute fault provisions. For example, in relation to APRA's directions powers under the Insurance Act, the prosecution would be required to prove that a person intentionally failed to comply with the direction. In relation to a disqualified person, the prosecution would be required to prove that a person knowingly acted as a responsible person while disqualified from acting in this position.

Proof of intent in these cases would be peculiarly within the knowledge of the defendant, as such it would be difficult for the prosecution to prove intent. Inability to prosecute these offences would undermine the effectiveness of the prudential regulation system.

These strict liability offences are part of two-tiered offence provisions. The use two-tiered offences involving a fault liability offence and a strict liability offence, in relation to a disqualified person acting as a responsible person (Schedule 1, items 10, 32, 38, 57) or acting as an auditor or actuary (Schedule 1, items 17, 28 and 67) reflects the existing use of two-tiered penalty provisions in the prudential Acts for

offences of a comparable nature. The two-tiered offences include a strict liability offence which is subject to a lower penalty than the fault offence consistent with the principles set down in the *Senate Committee for the Scrutiny of Bills Sixth Report 2002.*

I trust this information will be of assistance to you.

The Committee thanks the Minister for this prompt response, but notes that it would have been helpful if this information had been included in the explanatory memorandum.

# Infrastructure Australia Bill 2008

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2008*. The Minister for Infrastructure, Transport, Regional Development and Local Government responded to the Committee's comments in a letter dated 18 March 2008. A copy of the letter is attached to this report.

## *Extract from Alert Digest No. 1 of 2008*

Introduced into the House of Representatives on 21 February 2008
Portfolio: Infrastructure, Transport, Regional Development and Local Government

### Background

This bill establishes Infrastructure Australia to provide advice to governments, investors and owners of infrastructure regarding:

- nationally significant infrastructure priorities;
- policy and regulation reforms desirable to improve the efficient utilisation of national infrastructure networks;
- options to address impediments to the development and provision of efficient national infrastructure;
- infrastructure policy issues arising from climate change;
- the needs of users; and
- mechanisms for financing investment in infrastructure.

The bill provides for the appointment and remuneration of members of Infrastructure Australia, specifies meeting and reporting requirements and creates a new office of Infrastructure Coordinator, which will be a statutory office within the Infrastructure, Transport, Regional Development and Local Government portfolio.

**Legislative Instruments Act—declarations**
**Subclauses 5(5), 6(6) and 28(4)**

Subclause 5(5) declares that a direction made under paragraph 5(2)(j) is not a legislative instrument. Subclause 6(6) declares that a direction given by the Minister under subsection 6(1) is not a legislative instrument and subclause 28(4) declares that a direction made under subsection 28(2) is not a legislative instrument.
As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.* In this instance, the explanatory memorandum makes no mention of any of the subclauses outlined above and, as such, provides no explanation as to whether these clauses are declaratory or provide for a substantive exemption.

The Committee **seeks the Minister's advice** whether these provisions are declaratory in nature or provide for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

*Pending the Minister's advice, the Committee draws Senators' attention to the 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.*

## *Relevant extract from the response from the Minister*

> I am writing in response to the comments contained in the Scrutiny of Bills Alert Digest No. l of 2008 (12 March 2008) concerning the Infrastructure Australia Bill 2008.
>
> As stated in the Alert Digest, subclauses 5(5), 6(6) and 28(4) all declare that particular directions made under the act are not legislative instruments. The digest seeks my advice as to whether these provisions are declaratory in nature (and included for avoidance of doubt) or express a policy intention to exempt an instrument (which is legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003.*

These clauses are declaratory in nature and have been included for the avoidance of doubt in accordance with Drafting Direction No. 3.8. The directions in question are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003.*

This advice should assist the Senate Scrutiny of Bills Committee to understand the reasons for the inclusion of these declaratory clauses. As there is no substantive exemption that would require explanation, I do not propose to revise the explanatory memorandum.

Thank you for raising this matter.

The Committee thanks the Minister for this prompt response, but notes that it would have been helpful if this information had been included in the explanatory memorandum, consistent with Drafting Direction No. 3.8.

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

## *Introduction*

The Committee dealt with this bill in *Alert Digest No. 1 of 2008*. The Minister for Employment and Workplace Relations responded to the Committee's comments in a letter dated 17 March 2008. A copy of the letter is attached to this report.

Introduced into the House of Representatives on 13 February 2008
Portfolio: Employment and Workplace Relations

**Background**

This bill amends the *Workplace Relations Act 1996*, along with a number of other Acts, to give effect to key Government election commitments and to begin the transition to a new workplace relations system. The bill:

- prevents Australian Workplace Agreements (AWA) being made after the commencement of the Act;
- creates an Individual Transitional Employment Agreement (ITEA), which can be made up until 31 December 2009 between an employee and an employer that employed at least one employee on an individual employment agreement at 1 December 2007;
- replaces the 'fairness test' with a no-disadvantage test for both ITEAs and collective agreements;
- introduces a number of changes relating to the circumstances in which workplace agreements commence operation;
- repeals provisions allowing unilateral termination of collective agreements and empowers the Australian Industrial Relations Commission (AIRC) to terminate a collective agreement on application; and

- introduces a new Part 10A dealing with award modernisation.

The bill also contains application, consequential and transitional provisions.

## Ousting of judicial review
## Schedule 2, Item 9

Proposed new subsection 576ZA(1) provides that a modern award or an order varying an award:

*(a) is final and conclusive; and*
*(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and*
*(c) is not subject to prohibition, mandamus or injunction in any court or any account.*

This is a privative clause that appears to limit the ability of those affected by a modern award, or an order varying an award, to seek judicial review. The Committee is of the view that ousting of judicial review is not a matter to be undertaken lightly by the Parliament. It has the potential to upset the delicate arrangement of checks and balances upon which our constitutional democracy is based. It is the function of the courts within our society to ensure that executive action affecting those subject to Australian law is carried out in accordance with the law. It is cause for the utmost caution when one arm of government (in this case the Executive) seeks the approval of the second arm of government (the Parliament) to exclude the third arm of government (the Judiciary) from its legitimate role. We ignore the doctrine of separation of power at our peril.

In this instance, the Committee notes that the explanatory memorandum does not seek to provide a justification for the proposed ousting of judicial review, other than stating that it would 'protect the validity of modern awards and orders varying modern awards'. The Committee **seeks the advice of the Minister** on the proposed operation of this privative clause, including: whether it goes further than the established practice in respect of industrial awards; whether it will allow for judicial review of secondary instruments, such as employer/employee agreements, created under a modern award; and whether the privative clause applies to all modern awards or only those created in the Northern Territory.

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

## *Relevant extract from the response from the Minister*

Thank you for your facsimile of 13 March 2008, drawing my attention to the Standing Committee's comments on the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, contained in the Scrutiny of Bills *Alert Digest No. 1 of 2008* (12 March 2008).

The Committee has sought advice on the intended operation of the privative clause in section 576ZA of the Bill, which provides that that awards and award related orders are final and conclusive and not subject to review, and raise some specific questions.

The purpose of section 576ZA is to provide certainty for employers and employees by ensuring that awards made by the Australian Industrial Relations Commission are not subject to court challenge. Awards provide fundamental conditions of employment and employers and employees subject to awards need to be confident of the permanency of the rights and conditions contained in them.

Section 576ZA does not affect the rights of parties to seek judicial review in the High Court as provided for under the Constitution.

The Committee asks whether section 576ZA reflects established practice in relation to awards. In fact, section 576ZA reflects very longstanding practice. A version of this provision has existed in Australian industrial legislation since 1904 when the Conciliation and Arbitration Act 1904 was passed.

The Committee has sought advice on whether section 576ZA will apply to all modern awards, or whether it is limited to awards that apply in the Northern Territory. In keeping with current practice, the provision will apply to all modern awards.

In response to the Committee's query about judicial review of secondary instruments created under awards, such as employer/employee flexibility agreements, I do not consider that this type of flexibility arrangement would be subject to judicial review. However, this is not a consequence of section 576ZA.

I trust the Committee finds this information useful.

The Committee thanks the Minister for this prompt response, but notes that it would have been helpful if this information had been included in the explanatory memorandum. The Committee also **seeks the Minister's further advice** as to why it is considered that secondary arrangements would not be subject to judicial review.

C Ellison
Chair

**Senator the Hon Nick Sherry**
**Minister for Superannuation and Corporate Law**

17 MAR 2008

Senator Chris Ellison
Chair of Committee
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator Ellison

I refer to the letter of 13 March 2008 from Ms Cheryl Wilson on behalf of the Standing Committee for the Scrutiny of Bills (the Committee) inviting a response to the comments contained in the *Scrutiny of Bills Alert Digest No. 1 of 2008* in relation to the Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008.

**Strict Liability – Schedule 1, items 10, 17, 28, 32, 38, 57, 67 and Schedule 2 item 12**

The Committee sought advice as to whether consideration was given to the matters listed at Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of strict liability offences in the Bill.

The Bill contains a number of strict liability offences relating to:

- A disqualified person must not act as a responsible person under the *Insurance Act 1973* (Insurance Act) (Schedule 1, item 10);
- A disqualified person must not act as an auditor or actuary under the Insurance Act (Schedule 1, item 17);
- Removal by APRA of an auditor or actuary of a life company under the *Life Insurance Act* 1995 (Life Act) (Schedule 1, item 28);
- A disqualified person must not act as a responsible person under the Life Act (Schedule 1, item 32);
- A disqualified person must not act as a responsible person under the *Retirement Savings Account Act 1997* (RSA Act) (Schedule 1, item 38);
- A disqualified person must not act as a responsible person under the *Superannuation Industry Supervision Act 1993* (SIS Act) (Schedule 1, item 57);
- A disqualified person must not act as an auditor or actuary under the *Superannuation Industry Supervision Act 1993* (SIS Act) (Schedule 1, item 67); and
- Non-compliance with a direction under the Insurance Act (Schedule 2, item 12).

Strict liability offences adopted in the Bill comply with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* and also with the *Senate Committee for the*

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*Scrutiny of Bills Sixth Report 2002* concerning the application of absolute and strict liability offences.

The strict liability offences are designed to promote a robust regulatory framework by improving the enforceability, and hence the incentives for compliance, with key prudential requirements. In this way, the strict liability offences help to ensure that the financial sector entities are managed prudently and the assets of depositors, policyholders and members are adequately protected.

Strict liability offences relating to key prudential requirements have been used in the Bill where it would prove difficult to prosecute fault provisions. For example, in relation to APRA's directions powers under the Insurance Act, the prosecution would be required to prove that a person intentionally failed to comply with the direction. In relation to a disqualified person, the prosecution would be required to prove that a person knowingly acted as a responsible person while disqualified from acting in this position.

Proof of intent in these cases would be peculiarly within the knowledge of the defendant, as such it would be difficult for the prosecution to prove intent. Inability to prosecute these offences would undermine the effectiveness of the prudential regulation system.

These strict liability offences are part of two-tiered offence provisions. The use two-tiered offences involving a fault liability offence and a strict liability offence, in relation to a disqualified person acting as a responsible person (Schedule 1, items 10, 32, 38, 57) or acting as an auditor or actuary (Schedule 1, items 17, 28 and 67) reflects the existing use of two-tiered penalty provisions in the prudential Acts for offences of a comparable nature. The two-tiered offences include a strict liability offence which is subject to a lower penalty than the fault offence consistent with the principles set down in the *Senate Committee for the Scrutiny of Bills Sixth Report 2002.*

I trust this information will be of assistance to you.

Yours sincerely

NICK SHERRY

**The Hon Anthony Albanese MP**
Minister for Infrastructure,
Transport, Regional Development
and Local Government
Leader of the House



18 MAR 2008

*Reference: 02763-2008*

Senator the Hon Christopher Ellison
Chair, Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator ~~Ellison~~ Chris,

I am writing in response to the comments contained in the Scrutiny of Bills Alert Digest No.1 of 2008 (12 March 2008) concerning the Infrastructure Australia Bill 2008.

As stated in the Alert Digest, subclauses 5(5), 6(6) and 28(4) all declare that particular directions made under the act are not legislative instruments. The digest seeks my advice as to whether these provisions are declaratory in nature (and included for avoidance of doubt) or express a policy intention to exempt an instrument (which is legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*.

These clauses are declaratory in nature and have been included for the avoidance of doubt in accordance with Drafting Direction No. 3.8. The directions in question are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

This advice should assist the Senate Scrutiny of Bills Committee to understand the reasons for the inclusion of these declaratory clauses. As there is no substantive exemption that would require explanation, I do not propose to revise the explanatory memorandum.

Thank you for raising this matter

Yours sincerely

THE HON ANTHONY ALBANESE MP

PARLIAMENT HOUSE CANBERRA ACT 2600
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# THE HON JULIA GILLARD MP
## DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

Ms Cheryl Wilson
Secretary
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600



Dear Ms Wilson,

Thank you for your facsimile of 13 March 2008, drawing my attention to the Standing Committee's comments on the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, contained in the Scrutiny of Bills *Alert Digest No. 1 of 2008* (12 March 2008).

The Committee has sought advice on the intended operation of the privative clause in section 576ZA of the Bill, which provides that that awards and award related orders are final and conclusive and not subject to review, and raise some specific questions.

The purpose of section 576ZA is to provide certainty for employers and employees by ensuring that awards made by the Australian Industrial Relations Commission are not subject to court challenge. Awards provide fundamental conditions of employment and employers and employees subject to awards need to be confident of the permanency of the rights and conditions contained in them.

Section 576ZA does not affect the rights of parties to seek judicial review in the High Court as provided for under the Constitution.

The Committee asks whether section 576ZA reflects established practice in relation to awards. In fact, section 576ZA reflects very longstanding practice. A version of this provision has existed in Australian industrial legislation since 1904 when the Conciliation and Arbitration Act 1904 was passed.

The Committee has sought advice on whether section 576ZA will apply to all modern awards, or whether it is limited to awards that apply in the Northern Territory. In keeping with current practice, the provision will apply to all modern awards.

In response to the Committee's query about judicial review of secondary instruments created under awards, such as employer/employee flexibility agreements, I do not consider that this type of flexibility arrangement would be subject to judicial review. However, this is not a consequence of section 576ZA.

I trust the Committee finds this information useful.

Yours sincerely

17 MAR 2008

**Julia Gillard**
**Minister for Employment and Workplace Relations**



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