

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

**Alert Digest No.9 of 2013**

**11 December 2013**

**ISSN 1329-668X**



# Senate Standing Committee for the Scrutiny of Bills

## Members of the Committee

Senator Helen Polley (Chair)  
Senator Anne Ruston (Deputy Chair)  
Senator Cory Bernardi  
Senator the Hon Kate Lundy  
Senator the Hon Ian Macdonald  
Senator Rachel Siewert

## Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
- (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.



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### **Senate Standing Legislation Committee Inquiries**

The committee will forward any comments it has made on a bill to any relevant legislation committee for information.



## **Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013**

Introduced into the House of Representatives on 14 November 2013

Portfolio: Employment

### **Background**

This bill provides for the following amendments in relation to the re-establishment of the Australian Building and Construction Commission:

- repeals the *Fair Work (Building Industry) Act 2012*;
- makes minor consequential amendments to Commonwealth legislation that are relevant to the operation of the Building and Construction Industry (Improving Productivity) Bill 2013; and
- makes transitional provisions for:
  - changes of names of institutions and offices;
  - preserving the appointments of senior position holders;
  - preserving the employment entitlements of staff of affected organisations;
  - preserving the confidentiality of certain information;
  - the timing of reports;
  - preserving the existing safety accreditation scheme;
  - preserving examination notices and their effect;
  - legal proceedings; and
  - other related matters.

### **Exclusion of judicial review rights**

#### **Part 2, schedule 1, item 2**

This item has the effect that decisions made under the *Building and Construction Industry (Improving Productivity) Act 2013* will be excluded from the application of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). No rationale is provided in the explanatory memorandum, though it is noted that the predecessor legislation (which is repealed when this

bill commences) was also excluded. The explanatory memorandum also notes that decisions made under the *Fair Work Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* are excluded from review under the ADJR Act.

The committee continues its practice of expecting a justification for excluding the operation of the ADJR Act. The ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act*) and also provides for the right to reasons in some circumstances. The proliferation of exclusions from the ADJR Act is to be avoided.

The committee also notes that the Administrative Review Council recently concluded that the current exemption of Australian Building and Construction Commission decisions from the application of the ADJR Act should be removed: *Federal Judicial Review in Australia*, Report No. 50 (2012) at 205.

**While it is likely that judicial review under other sources of jurisdiction would be available, in light of the recent ARC view referred to above and as the ADJR Act is beneficial legislation for the reasons outlined above, the committee seeks the Minister's detailed explanation as to why these decisions should not be reviewable under the ADJR Act.**

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

## **Building and Construction Industry (Improving Productivity) Bill 2013**

Introduced into the House of Representatives on 14 November 2013

Portfolio: Employment

### **Background**

This bill seeks to:

- replace the Office of the Fair Work Building Industry Inspectorate by re-establishing the Australian Building and Construction Commission;
- enable the minister to issue a Building Code;
- provide for the appointment and functions of the Federal Safety Commissioner;
- prohibit certain unlawful industrial action;
- prohibit coercion, discrimination and unenforceable agreements;
- provide the ABC Commissioner with powers to obtain information;
- provide for orders for contraventions of civil remedy provisions and other enforcement powers; and
- make miscellaneous amendments dealing with:
  - self-incrimination;
  - protection of liability against officials;
  - admissible records and documents, protection and disclosure of information; and
  - powers of the Commissioner in certain proceedings, and jurisdiction of courts.

## **Delegation of legislative power—determination of important matters by regulation**

### **Clause 5, definition of *authorised applicant***

Clause 5 sets out a number of definitions of terms used throughout the Bill. The explanatory memorandum indicates that many of the definitions replicate those contained in predecessor bills (the BCII Act and the FW(BI) Act). The term ‘authorised applicant’, however, appears to be a new term. The purpose of the term is to indicate who is entitled to seek an order relating to a contravention of a civil remedy provision. Such persons include:

- (a) the ABC Commissioner or any other inspector; or
- (b) a person affected by the contravention; or
- (c) a person prescribed by the rules for the purposes of this paragraph.

The explanatory memorandum does not indicate why it is necessary for further ‘authorised applicants’ (in addition to the persons identified in paragraphs (a) and (b)) to be prescribed by regulations. Given the breadth of persons covered by paragraph (b) of the definition (ie ‘a person affected’) it is unclear why such a power is necessary.

In the absence of an explanation it is not possible to address the appropriateness of this definitional matter being dealt with in the regulations as opposed to the primary Act. **Given that broadening the category of ‘authorised applicants’ affects who may seek enforcement action under the legislation (a matter of considerable importance) the committee seeks the Minister's advice as to the justification for the proposed approach.**

*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.*

## **Delegation of legislative power**

### **Clause 6**

Clause 6 defines the meaning of ‘building work’. As the explanatory memorandum notes, at page 5, the ‘definition is integral’ as it determines the scope of the bill's application. The bill re-establishes a regulator with strong enforcement powers, including examination powers, and increases existing

penalties. Given this, it is regrettable that subclause 6(4) which allows rules to be made to include additional activities within the definition of building work (subclause 6(5) allows for the exclusion of activities) is only briefly explained. The explanatory memorandum states that rules ‘will be made where it is not clear whether or not a particular activity falls within the definition of building work’ (see page 7). **In light of the significance of extending the operation of the legislation, the committee seeks the Minister's more detailed explanation as to why this approach is appropriate.**

*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—reversal of onus Subclause 7(4)**

Clause 7 defines the meaning of ‘industrial action’. Subclause 7(2) excludes from this definition, in paragraph (c), action by an employee if:

- (i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and
- (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work...that was safe and appropriate for the employee to perform.

Subclause 7(4) provides that (for the purposes of paragraph 2(c)) a person who seeks to rely on that paragraph has the burden of proving that the paragraph applies. The justification for reversing the onus of proof is dealt with in the statement of compatibility at pages 54 and 55:

This restriction serves the legitimate purpose of ensuring that the exception only applies in situations where the worker genuinely takes action based on a reasonable concern about the imminent risk to his or her health or safety. In proving this, the employee will not be required to demonstrate that there was in fact an imminent risk to his or her health or safety, just that they reasonably held that concern. The employee will also be required to demonstrate that they did not unreasonably fail to comply with a direction of his or her employer to perform other available work that was safe and appropriate. The wording of this provision restricts the type of work that the employer can require the employee to undertake to work that is ‘appropriate’. This ensures that an employee is not required to undertake tasks for which they are not reasonably

able to perform [sic]. Overall, it is considered that the approach taken by the Bill is a reasonable and proportional limitation on [the right to just and favourable work conditions] that is based on the approach taken by the Fair Work Act with modifications to take into account considerations that are unique to the building and construction industry.

Although the Fair Work Act includes this exception, it does not appear to similarly reverse the onus of proof. In addition, although the statement of compatibility states that this modification of approach takes into account considerations unique to the building and construction industry, **the committee seeks the Minister's elaboration of why these circumstances justify placing a legal burden of proof on the employee.**

In addition, two particular aspects appear to be worthy of further explanation. First, it is not clear from the explanatory materials why a legal, as opposed to an evidential burden, is thought justified. Second, although it may be accepted that whether action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety is a matter that is peculiarly within the knowledge of the employee (as per the *Guide to Framing Commonwealth Offences*), it not clear why this is also the case in relation to whether or not the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work...that was safe and appropriate for the employee to perform' (paragraph 7(2)(c)(ii)). **The committee therefore also seeks the Minister's more detailed explanation as to 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.*

## **Delegation of legislative power**

### **Subclause 11(2)**

This clause allows the rules to extend the application of the Act in relation to the exclusive economic zone and waters above the continental shelf. The explanatory memorandum repeats the effect of the provision, but does not address whether the use of delegated legislation for this purpose is appropriate. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

*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.*

## **Undue dependence upon insufficiently defined powers**

### **Delegation of legislative power**

#### **Paragraphs 19(1)(d) and 40(1)(c)**

This paragraph empowers the ABC Commissioner to delegate all or any of his or her powers and functions under the Act (other than his or her functions or powers as an inspector) to: 'a person (whether or not an SES employee) prescribed by the rules for the purposes of this paragraph'. The committee has consistently drawn attention to legislation which allows significant and wide-ranging powers to be delegated to 'a person', given that there are no limits set on the sorts of powers that might be delegated or on the categories of people to whom the powers may be delegated.

The same issue also arises in relation to clause 40(1)(c) in relation to the Federal Safety Commissioner.

**The committee therefore seeks the Minister's advice as to why, given that paragraphs 19(1)(a)-(c) already allow for delegations to a Deputy ABC Commissioner, an inspector and an SES employee or acting SES employee the proposed broader power of delegation is necessary and, if it is necessary, why limits cannot be imposed and or required by the primary legislation. The committee also seeks the Minister's advice as to the justification for the approach in paragraph 40(1)(c) relating to the Federal Safety Commissioner.**

*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.*

## **Broad discretionary power**

### **Subclause 21(3)**

This subclause empowers the Minister to appoint a person as a Commissioner subject only to his or her satisfaction that the person (a) has 'suitable qualifications or experience' and (b) is of 'good character'. **The committee notes that it may be desirable to indicate with more detail the nature of**

**suitable qualifications or experience, but in the circumstances leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*Pending the Minister's reply, 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.*

### **Merits review – provision of reasons**

#### **Clause 28**

This clause provides for the Minister to terminate the appointment of a Commissioner in specified circumstances. The provision does not include a requirement for the provision of reasons and the explanatory memorandum does not address this point. **Particularly in light of the exclusion of application for review under the ADJR Act, the committee seeks the Minister's advice as to whether consideration has been given to including a requirement in the bill that reasons be given if the appointment of a Commissioner is terminated.**

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

### **Delegation of legislative power—determination of important matters by regulation**

#### **Clause 43**

This clause provides for an accreditation scheme for Commonwealth building work to be established by the rules. There is very little detail about the scheme (which limits access to Commonwealth building work) set out in the primary legislation and the explanatory memorandum does not explain the appropriateness of this approach. **The committee therefore seeks the Minister's advice as to whether consideration has been given to including the important elements relating to the scheme in the primary legislation.**

*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.*

## **Penalties**

### **Clause 49**

This clause provides that Division 9 of Part 3-3 of the FW Act (payment relating to periods of industrial action) applies to industrial action relating to building work with modifications. One of the modifications is that if the person contravenes a civil remedy provision specified in the FW Act for payments relating to periods of industrial action and the person is a body corporate, the pecuniary penalty must not be more than 1000 penalty units. As noted in the explanatory memorandum, the maximum penalty under the FW Act is 60 penalty units. Although the explanatory memorandum argues, in general terms, that higher penalties are appropriate in the building industry context (at pages 2 and 3), there is no explanation for the large difference in penalties proposed by this particular clause. **The committee therefore seeks the Minister's explanation of the justification for the proposed approach.**

*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.*

## **Penalties**

### **Clause 81**

Similarly, the substantial civil penalties provided for in subclause 81(2) are not specifically justified in the documents supporting the bill. The provision of information about similar penalties in other Commonwealth legislation would allow the committee to better assess the appropriateness of increasing these penalties as proposed. **The committee therefore requests the Minister's advice as to similar penalties in other Commonwealth legislation for the purpose of assessing whether the proposed approach is appropriate.**

*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.*

## **Trespass on personal rights and liberties—reversal of onus Clause 57**

As noted in the explanatory memorandum, this clause reverses the onus of proof applicable to civil proceedings for a contravention of clause 47 (unlawful picketing prohibited) and Part 2 of Chapter 6 of the bill, which contains a number of civil penalty provisions. The fullest justification for this approach is given in the statement of compatibility (at pages 55 and 56), which states:

Chapter 6 is based on the General Protections in Part 3-1 of Chapter 3 of the Fair Work Act and those provisions also require the person to lead evidence regarding their intent. Like section 361 of the FW Act, this clause provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision, that person has to establish on the balance of probabilities that the conduct was not carried out unlawfully. This is because in the absence of such a clause it would be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason. A reverse onus is necessary in this context because the reasons for the person's action are a matter peculiarly known to them.

This presumption can be rebutted by the person on the basis that their conduct was motivated by another purpose. Whether the alternative motivation is accepted by the court will be determined on the balance of probabilities. It is therefore submitted that these restrictions are reasonable in the circumstances and are proportional, legitimate and necessary.

Although it may be accepted that a person's intent is a matter peculiarly known to the person, intentions and motivations (whether lawful or unlawful) may be difficult to prove as they will not necessarily be reflected in objective evidence. That is, although peculiarly within a person's knowledge, matters of intention may nonetheless remain difficult to prove. In this respect it is noted that the explanatory materials do not indicate why, in practice, it is considered that a person will, in this context, be able to produce evidence of a lawful intention. **As such the committee seeks the Minister's further advice as to the justification for, and fairness of, the proposed approach.**

*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.*

### **Trespass on personal rights and liberties—privacy Clause 61**

This clause provides for examination powers. The ABC Commissioner may issue a written notice to a person requiring them to give information, produce documents or attend before the ABC Commissioner. As a precondition to the exercise of these powers the Commissioner must hold a reasonable belief that the person has information or documents relevant to an investigation into a suspected contravention by a building industry participant of:

- the Act;
- a building law; or
- is capable of giving evidence that is relevant to such an investigation.

The statement of compatibility contains a detailed justification for this clause (at pages 62 to 64). It is noted that there are a number of safeguards designed to promote the appropriate implementation of the examination notice regime and these are set out at page 63. **In light of these points the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*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—broad delegation of powers Paragraphs 66(1)(c) and 68(1)(c)**

Paragraph 66(1)(c) provides that the ABC Commissioner may, by written instrument, appoint as an Australian Building and Construction Inspector 'a consultant engaged by the ABC Commissioner under section 32'. The Commissioner, under paragraphs 66(1)(a) and 66(1)(b) can also appoint a person who is an employee of the Commonwealth or who holds an office or

appointment under a law of the Commonwealth and persons who are employees of a State or Territory or who holds an office or appointment under a State or Territory law. Subclause 66(2) provides that a person can only be appointed under paragraph (1)(c) if the ABC Commissioner is ‘satisfied that the person is an appropriate person to be appointed as an inspector’.

Regrettably the explanatory memorandum merely repeats the effect of these provisions and does not explain the necessity to extend the class of persons who may be appointed as inspectors beyond government employees or office-holders. The same issue arises in relation to the appointment of Federal Safety Officers under paragraph 68(1)(c).

**The committee therefore requests the Minister's advice as to the justification for the approach proposed in these paragraphs.**

*Pending the Minister's reply, 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.*

## **Delegation of legislative power—determination of important matters by regulation**

### **Paragraph 70(1)(c)**

Clause 70 provides the purposes for which an inspector may exercise their ‘compliance powers’ in relation to a building matter. Paragraph 70(1)(c) provides that these purposes include ‘purposes of a provision of the rules that confer functions or powers on inspectors’. Compliance powers include a number of significant coercive powers, such as the power to enter premises, to interview any person, and to require the production of records or documents (see, generally, clauses 72 to 79).

The terms of paragraph 70(1)(c) have the result that the scope of application for these coercive compliance powers is not wholly contained in the parent (primary) legislation. Given the principle that coercive powers should be limited to contexts in which they are clearly warranted in the public interest, it is desirable they be specified within primary legislation. As the matter is not addressed in the explanatory memorandum **the committee seeks the Minister's advice as to why it is not possible to comprehensively provide**

**the purposes for which these powers may be exercised in the primary legislation.**

*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—Coercive powers, entry without consent or warrant**

### **Clause 72**

Clause 72 confers powers on authorised officers to enter premises for compliance purposes. Although there is a provision which provides that an officer must not enter a part of premises used for residential purposes unless the officer reasonably believes that the work is being performed on that part of the premises, the powers clearly cover both business and residential premises. Clause 72 does not permit forced entry and the inspector must reasonably believe that there is information or a person relevant to a compliance purpose at the premises. However, entry is authorised regardless of whether consent is given and there is no requirement for a warrant to be sought.

*The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (at page 76) states that:

Legislation should only authorise entry to premises by consent or under a warrant. Any departure from this general rule requires compelling justification.

Although Commonwealth legislation does in some cases depart from this principle, the committee's view is that such departures should be few and thoroughly justified. The *Guide* (at pages 85 and 86) sets out a number of categories of circumstances in which entry without consent or a warrant has been authorised in Commonwealth legislation. One such category relates to 'licensed premises' and this may be thought to be relevant in this context. However, it is not clear that this category of exception is appropriately applied and, in any event, the *Guide* clearly indicates that it is relevant only for entry into non-residential premises.

The committee has accepted that 'situations of emergency, serious danger to public health, or where national security is involved' (Report 4/2000 *Inquiry*

*into Entry and Search Provisions in Commonwealth Legislation*, paras 1.36 and 1.44) may justify the authorisation of entry without consent or warrant. Whether or not this power is justified on this basis would, however, require strong justification.

Further, even if such justification were provided, the committee may see fit to ask whether there has been consideration of the appropriateness of further accountability measures. For example, the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements, and requirements that guidelines for the implementation of these powers be developed, especially given that the persons who exercise them need not be trained law enforcement officers, is not addressed in the explanatory memorandum.

The only justification for the approach is contained within the statement of compatibility, where the limitation of the powers to instances in which inspectors hold a specified reasonable belief is given emphasis (at page 61). It is also argued that the powers are modelled on the powers granted to Fair Work Inspectors under the *Fair Work Act*, though the ‘modifications to reflect additional powers that were granted to inspectors under the BCII Act’ are left unelaborated.

It appears that the explanatory materials do not contain a compelling justification for departure from the general principle stated in the *Guide* and supported by the committee that authorised entry to premises be founded upon consent or a warrant. **The committee therefore seeks the Minister's detailed justification of the need for this approach in light of the principles stated in the *Guide* and with reference to the fact that the powers do authorise entry into residential premises. The committee also seeks the Minister's advice as to whether consideration was given to the appropriateness of senior executive authorisation for the exercise of the powers, reporting requirements, and requirements that guidelines for the implementation of these powers be developed, especially given the persons who exercise them need not be trained law enforcement officers.**

*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.*

**Trespass on personal rights and liberties—definition of offence, ‘reasonable excuse’****Subclauses 76(3), 77(3) and 99(8)**

Subclauses 76(3) and 77(3) provide for civil penalties for failing to comply with a request to a person to provide, respectively, their name and address and a record or document. Subclause 76(4) and subclause 77(4) provide that those provisions do not apply if the ‘person has a reasonable excuse’. As what constitutes a reasonable excuse is open ended it will often be unclear to a person what they need to establish to rely on this defence (see the *Guide to Framing Commonwealth Offences* at page 52). The explanatory memorandum merely repeats the terms of the subclauses and does not provide any guidance.

The same issue also arises in relation to subclause 99(8) in relation to compliance notices. **The committee seeks the Minister's advice as to the justification for the approach proposed in these subclauses.**

*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.*

**Trespass on personal rights and liberties—civil penalties****Clause 86**

This clause provides in relation to the civil remedy provisions that the rules of evidence and procedure for civil matters apply, ensuring that the criminal rules of evidence and procedure are not applicable. The statement of compatibility contains a detailed discussion about whether this approach is consistent with rights associated with a fair trial.

This matter falls more directly within the terms of reference of the PJCHR, who has issued a practice note on the distinction between civil and criminal penalties. **The committee notes this and if necessary will scrutinise the clause further after considering any view the PJCHR may express about it.**

*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.*

### **Trespass on personal rights and liberties—reversal of onus Clause 93**

Clause 93 provides that if a person wishes to rely on a defence to a civil remedy provision, that person bears an evidential onus of proof in relation to the matters relevant to establishing the defence. No discussion of this approach is contained in the explanatory memorandum. **Having regard to the significant penalties established by the Act and the relevant principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* the committee seeks the Minister's advice as to the justification for the reversal of onus proposed in this provision.**

*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.*

### **Trespass on personal rights and liberties—self-incrimination Clauses 102 and 104**

Clause 102(1) abrogates the common law privilege against self-incrimination. It provides that a person is not excused from giving information, producing a record or document or answering a question under an examination notice (clause 61) or when an authorised officer enters premises under paragraph 74(1)(d), or under a notice under subclause 77(1) on the grounds that to do so would incriminate the person or otherwise expose the person to a penalty or other liability.

Subclause 102(2) does provide for a *use* and *derivative use* immunity in relation to information given under an examination notice, subject to common exceptions to such an indemnity in relation to proceedings for offences for providing false information and the obstruction of Commonwealth officials under the Criminal Code. This means that any information or documents provided cannot be used in subsequent proceedings against the person who provided them (the *use* immunity) and that the information or documents provided by a person cannot be used to investigate unlawful conduct by the person who provided them (the *derivative use* immunity).

However, pursuant to subclause 102(3), information provided when an authorised officer enters premises under paragraph 74(1)(d), or under a notice under subclause 77(1), is subject only to *use* and *derivative use* immunities in relation to criminal proceedings (i.e. proceedings for a civil penalty are excluded from the immunities).

The statement of compatibility states that the abrogation of the privilege was ‘considered necessary by the Royal Commission [into the building and construction industry which reported in 2003] on the grounds that the [regulator] would otherwise not be able to adequately perform its functions due to the closed culture of the industry’. It is further argued that the serious consequences of abrogation are ameliorated by the existence of the *use* and *derivative use* immunity. The committee notes that the report relied upon to justify the necessity of the approach based on factual claims about the ‘closed culture of the industry’ was written 10 years ago.

A similar issue arises in relation to section 104 in relation to the admissibility of certain records and documents.

**Given (1) the significance of the this issue, and (2) the fact that neither the statement of compatibility nor the explanatory memoranda explains why, pursuant to subclause 102(3), information provided when an authorised officer enters premises under paragraph 74(1)(d), under a notice under subclause 77(1), or documents referred to in subclauses 104(a) and 104(b), are subject only to use/derivative use immunity in relation to criminal proceedings (i.e. proceedings for a civil penalty are excluded), the committee seeks the Minister's advice as to:**

- 1. a fuller explanation of the importance of the public interest and why the abrogation of the privilege is considered absolutely necessary; and**
- 2. why the use and derivative use immunities in relation to information provided when an authorised officer enters premises under paragraph 74(1)(d) or under a notice under subclause 77(1), and documents referred to in subclauses 104(a) and 104(b) are limited to criminal proceedings.**

*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.*

## **Trespass on personal rights and liberties—inappropriate delegation of legislative power**

### **Subclause 120(3)**

This clause enables rules to be made for the purposes of subsection 6(4) or 6(5) (relating to the meaning of building work) or subsection 10(2) (relating to the extension of the Act to Christmas Island and Cocos (Keeling) Islands) to take effect from the commencement of the subsection for which the rules are made, if those rules are made within 120 days. This appears to enable the rules to take effect retrospectively. The explanatory memorandum merely repeats the terms of the subclause. **The committee therefore seeks the Minister's advice as to the justification for the proposed approach.**

*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.*

### **Poor explanatory memorandum**

The committee notes that, generally, the explanatory memorandum is regrettably brief and uninformative, for the most part repeating the provisions of the bill. For example, the explanatory memorandum frequently notes that various provisions are modelled on or similar to provisions contained in the FW Act, but without any detail about the extent of similarities or whether there are salient differences.

A comprehensive explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including the scrutiny undertaken by this committee) as it greatly assists people to understand the legislative proposal and it may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.

An explanatory memorandum should demonstrate that the proposed policy approach reflects an informed choice that is appropriately justified. A comprehensive explanatory memorandum can provide the foundation for avoiding adverse scrutiny committee comment because the committee is provided with sufficient information to scrutinise the bill in accordance with its scrutiny principles.

## **Education Services for Overseas Students Amendment Bill 2013**

Introduced into the House of Representatives on 4 December 2013

Portfolio: Education

### **Background**

This bill amends the *Education Services for Overseas Students Act 2000* to:

- clarify existing provisions relating to pre-paid fees; and
- amend the 'National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007' to remove reference to 'Registration Authorities'.

*The committee has no comment on this bill.*

## **Fair Work (Registered Organisations) Amendment Bill 2013**

Introduced into the House of Representatives on 14 November 2013

Portfolio: Employment

### **Background**

This bill amends the *Fair Work (Registered Organisations) Act 2009* (RO Act) to:

- establish an independent body, the Registered Organisations Commission, to monitor and regulate registered organisations with amended investigation and information gathering powers;
- amend the requirements for officers' disclosure of material personal interests (and related voting and decision making rights) and change grounds for disqualification and ineligibility for office;
- amend existing financial accounting, disclosure and transparency obligations under the RO Act by putting certain obligations on the face of the RO Act and making them enforceable as civil remedy provisions; and
- increase civil penalties and introduce criminal offences for serious breaches of officers' duties as well as new offences in relation to the conduct of investigations under the RO Act.

### **Trespass on personal rights and liberties—penalties**

#### **Various**

One of the clear objectives of the bill is to increase maximum penalties for breaches of civil penalty provisions across the RO Act and to introduce criminal offences for serious breaches of officers' duties as well as in relation to offences associated with the conduct of investigations. At various points in the explanatory material (e.g. the RIS at page 10 and the statement of compatibility at page 5) it is suggested that the approach to obligations and penalties has been 'modelled' on the approach taken under the Corporations legislation. Although the explanatory memorandum does not explain how this is achieved or the extent to which particular amendments are similar to or different from those in the context of corporate regulation, the statement of compatibility does seek to justify the approach at a general level.

In relation to the increase of **civil penalties**, it is noted in the statement of compatibility that:

- (1) the ‘maximum penalty is equivalent to that applicable under the Corporations Act and many organisations have command of considerable resources similar to that of many companies’;
- (2) the maximum penalty is subject to a threshold test which mirrors the protection in subsection 1317G(1) of the Corporations Act, such that only ‘serious contraventions’ of civil penalty provisions will attract the maximum penalty (see item 4 schedule 2 of the bill);
- (3) there is no provision for imprisonment for non-payment of a penalty; and
- (4) the increases in penalties ‘reflect the seriousness of the provisions by reference to the objective of ensuring better financial management of organisations’ (at pages 7 and 8).

**In light of these matters, the committee leaves the question of whether the increases to civil penalties in the bill may be appropriate to the consideration of the Senate as a whole.**

The statement of compatibility lists (at page 8, under the heading ‘Right to the presumption of innocence and other guarantees’) the **new offence provisions** which the bill proposes to introduce into the RO Act, but unfortunately the explanatory material provides little explanation of the specific proposals included in the bill. **The committee therefore seeks clarification as to (1) the extent of similarities between these offences and offences under the Corporations Act, (2) whether the penalties are in any instance higher than in relation to offences under the Corporations Act; and (3) particularly whether the increase proposed by item 228 (proposed subsection 337(1)) for the offence of failing to comply with a notice to attend or produce to 100 penalty units or imprisonment for 2 years, or both is higher than other similar offences and the justification for the proposed approach.** In the *Guide to Framing Commonwealth Offences* it is suggested that the maximum penalty for non-compliance with attend or produce notices should ‘generally be 6 months imprisonment and/or a fine of 30 penalty units’. As further noted in the *Guide* this is the penalty imposed by, for example, subsection 167(3) the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* and section 211 of the *Proceeds of Crime Act*

2002. In this context the term of imprisonment in the current bill is proposed to be increased to four times the recommended level.

*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.*

**Trespass on personal rights and liberties—strict liability  
Schedule 2, item 230, proposed section 337AA**

Proposed subsections 337AA(1) and (2) provide that certain offences in relation to the conduct of an investigation are strict liability offences. These are offences for:

- (a) failure to comply with a requirement to take an oath or affirmation (subsection 335D(1));
- (b) contravention of a requirement that questioning take place in private (subsection 335E(2));
- (c) failure to comply with a requirement in relation to a record of a statement made during questioning (paragraph 335G(2)(a));
- (d) contravention of conditions on the use of copies of records of statements made during questioning (section 335H); and
- (e) failure to comply with a requirement to stop addressing an investigatory or questioning an attendee (subsection 335F(2)).

In justification of the use of strict liability, the statement of compatibility argues that:

1. each offence relates to a person's failure to comply with a requirement made of them relating to the conduct of an investigation;
2. there is a defence of reasonable excuse (though the evidential burden of proving this is placed on the defendant), and
3. the offences are 'regulatory in nature' and not punishable by a term of imprisonment.

It can also be noted that the maximum penalty (60 penalty units) is the maximum recommended by the *Guide to Framing Commonwealth Offences* for strict liability offences.

Although the points made in the statement of compatibility are noted and the defence of reasonable excuse does ameliorate the severity of strict liability (point 2 above), the committee notes that the vagueness of this defence may make it difficult for a defendant to establish (this is also identified in the *Guide to Framing Commonwealth Offences*). In addition, given that the offences occur within the context of an investigator questioning a person (point 1 above) it is not clear why a requirement to prove fault would undermine the enforcement of the obligations (e.g. why strict liability is necessary).

**The committee therefore seeks the Minister's advice as to a more detailed explanation of why strict liability is required to secure adequate enforcement of these obligations and, if the approach is to be maintained, whether consideration has been given to placing a requirement (where relevant) on investigators to inform persons that non-compliance with a particular requirement is a strict liability offence.**

*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.*

**Trespass on personal rights and liberties—reversal of onus of proof  
Schedule 2, items 229, proposed subsections 337(2) to (4) and  
230, proposed subsection 337AB(2)**

The proposed subsection provides for a 'reasonable excuse' defence in relation to 'obstructing a person' in the exercise of a number of powers of investigation. The use of a defence shifts the burden of proof from the prosecution to the defence, and as noted above, the vagueness of the 'reasonable excuse' defence may make it unclear what a person must prove to rely on this defence. The explanatory material does not include a justification for placing an evidential burden of proof.

Similarly, defences proposed by item 229 (proposed subsections 337(2)-(4)) which relate to offences for failing to adequately comply with a notice to produce or attend do not explain the justification for placing an evidential burden of proof on the defendant.

**The committee therefore seeks the Minister's advice as to the justification for reversing the onus of proof for these provisions.**

*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.*

**Trespass on personal rights and liberties—reversal of onus of proof  
Schedule 2, item 230, proposed subsection 337AC(2)**

The subsection provides for a defence for a contravention of the offence of concealing documents relevant to an investigation if 'it is proved that the defendant intended neither to defeat the purposes of the investigation, nor to delay or obstruct the investigation, or any proposed investigation under this Part'. In addition to placing the burden onto the defendant, a justification for placing the higher standard of a *legal* burden of proof was not located in the explanatory material. **The committee therefore seeks the Minister's advice as to the justification for 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.*

**Trespass on personal rights and liberties—privilege against self-incrimination  
Schedule 2, item 230, proposed section 337AD**

Subsection 337AD(1) provides that for the purposes of powers conferred under Part 4, Chapter 11 (as proposed to be amended), it is not a reasonable excuse for a person to fail or refuse to give information or produce a document or sign a record that doing so might tend to incriminate a person or make them liable to a penalty.

This abrogation of the important common law privilege against self-incrimination is justified on the basis that it pursues the objective of ensuring that offences under the RO Act can be properly investigated and that the limitation on the privilege is proportionate and reasonable to this objective because a *use* and *derivative use* immunity is provided for. It is noted

however, that these immunities will only be applicable if a person ‘claims that the information producing the document or signing the record might tend to incriminate the person or make the person liable to a penalty’ (proposed subsection 337AD(2)).

This justification in the explanatory memorandum does little more than assert the importance of the objective of enforcing the legislation. The committee notes that it does not normally take the view that the inclusion of a *use* and *derivative use* immunity mean that no further justification for abrogation of the privilege is required. In addition, the requirement that a person ‘claim’ the privilege before responding to a request for information, a document or record is unusual and is not explained or justified in the explanatory memorandum or statement of compatibility. **The committee therefore seeks the Minister's further advice as to the justification for the proposed approach.**

*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.*

### **Trespass on personal rights and liberties—rules of evidence Schedule 2, item 230, proposed section 337AF-337AK**

These provisions establish rules relating to the admissibility of, and weight to be given, to specified evidence. The explanatory memorandum essentially restates the terms of the provisions and does not provide information as to the justification for the provisions or comparative information about their effect. In particular the committee is interested in whether the provisions are designed to broaden the scope of admissible evidence against a defendant and, if so, the rationale for the proposed approach. **The committee therefore seeks the Minister's further advice as to the effect of, and rationale for, these provisions.**

*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.*

## **Trespass on personal rights and liberties—coercive powers Various**

The coercive powers contained in the bill are significant, including forced entry to premises. However, the statement of compatibility contains a relatively detailed justification of the investigation and information gathering powers, including the search and seizure powers contained in the bill. As detailed in the statement of compatibility (1) the powers are modelled on ASICs powers (though the extent of any departures is not clearly stated) and (2) there are a number of safeguards built into the exercise of the powers .

**In light of the discussion of these powers provided in the statement of compatibility and the safeguards, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.**

*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.*

## Migration Amendment (Regaining Control Over Australia's Protection Obligations) Bill 2013

Introduced into the House of Representatives on 4 December 2013

Portfolio: Employment

### Background

This bill amends the *Migration Act 1958* to remove the criterion for grant of a protection visa on 'complementary protection' grounds, and other related provisions.

The purpose of this bill is to change the process for determining whether Australia's *non-refoulement* obligations under the Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR) are engaged in particular cases.

The current system is based on the provisions of the *Migration Act 1958* (Cth). Under that Act a protection visa may be granted on the basis the applicant is a refugee as defined in the Refugee Convention or on the basis that *non-refoulement* obligations under CAT and the ICCPR are owed.

The proposed amendments would remove the criterion for grant of a protection visa on the basis of 'complementary protections' (i.e. on the grounds that obligations are owed to the applicant under the CAT or ICCPR). The grounds that engage Australia's obligations under these treaties are, in summary, that there is a real risk the person would suffer significant types of harm (including torture). The explanatory memorandum states that by removing this criterion for grant of a protection visa it is not the government's intention to resile from Australia's obligations under CAT and the ICCPR. Rather 'Australia's *non-refoulement* obligations under the CAT and the ICCPR will be considered through an administrative process, as was the case prior to March 2012'.

The explanatory material indicates that the process envisaged is not going to be directly regulated by statute, though it may lead to the exercise of statutory powers under the *Migration Act*. More particularly, '[w]here the Minister is satisfied that the person engages Australia's *non-refoulement* obligations under the CAT and the ICCPR, it is then available to the minister to exercise

his or her personal and non-compellable intervention powers in the Act to grant that person a visa' (at page 1). (The relevant provisions are sections 195A, 351, 391, 417, 454 and 501J of the *Migration Act*.) In the statement of compatibility it is stated that 'the form of the administrative arrangements [to be] put in place to support Australia in meeting its obligations is a matter for the Government' (at page 2). Further, the statement of compatibility indicates that although Australia's international obligations may be fulfilled through processes that ultimately result in the exercise of the Minister's personal, non-compellable powers under the *Migration Act*, it notes that they may, in the alternative, be fulfilled through 'pre-removal assessment procedures' (also at page 2).

## **Insufficiently defined administrative powers**

### **General**

As noted above, the explanatory memorandum states, at page 1, that the bill seeks to implement a process in which:

Australia's *non-refoulement* obligations under the CAT and the ICCPR will be considered through an administrative process, as was the case prior to March 2012.

The envisaged 'administrative process' is not regulated by statutory powers and, therefore, is not constrained by the limits statutory powers would necessarily impose.

The committee understands that administrative powers are proposed in bills from time-to-time and in these instances considers whether the relevant provisions could 'make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers' (standing order 24(1)(a)(ii)).

On this occasion the explanatory memorandum contains few details about the envisaged non-statutory administrative process. Although the explanatory materials (at page 1) state that the 'purpose of the amendments in this Bill is to give effect to the government's position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that *non-refoulement* obligations are a matter for the government to attend to in other ways', there is no statutory guidance in relation to the administrative process and no detail provided as to how the administrative powers will operate.

**It therefore appears that the purely administrative process by which the applicability of Australia's *non-refoulement* obligations will be determined is likely to render rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers. The committee therefore seeks the Minister's advice as to the justification for this approach.**

*Pending the Minister's reply, 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.*

**Rights liberties or obligations unduly dependent upon non-reviewable powers—availability of merits review  
Items 17 and 18**

An effect of removing 'complementary protection' as an available criterion for the grant of a protection visa is that merits review of protection visa decisions made on the basis of this criterion will, consequently, no longer be available. This is recognised by the consequential amendments relating to merits review in items 17 and 18.

The scrutiny principles against which the committee assesses bills are articulated in standing order 24 and include an assessment of whether provisions 'make rights, liberties or obligations unduly dependent upon non-reviewable decisions' (standing order 24(1)(a)(iii)).

Although the explanatory memorandum notes, at page 1, that the 'purpose of the amendments in this Bill is to give effect to the government's position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that *non-refoulement* obligations are a matter for the government to attend to in other ways', it does not address the justification for the absence of a statutory requirement for merits review for determinations about *non-refoulement* obligations as they will be applied to particular individuals, which will be a practical consequence of these amendments. In addition, it is unclear generally how a purely administrative process can satisfactorily ensure that a person affected by an assessment in relation to complementary protection will have adequate merits review available to them and, in particular, there are no details about how it is

proposed that the availability of merits review will be addressed in the administrative scheme envisaged in the context of this bill (such as during the 'pre-removal assessment procedures'). **The committee therefore seeks the Minister's advice as to the justification for the proposed approach and advice as to whether the bill will 'make rights, liberties or obligations unduly dependent upon non-reviewable decisions'.**

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

### **Rights liberties or obligations unduly dependent upon non-reviewable powers—availability of judicial review**

Transferring the determination of 'complementary protection' obligations from a statutory basis to a non-statutory administrative process may also have important consequences for the availability of judicial review. Although the High Court's jurisdiction under section 75(v) of the *Constitution*<sup>1</sup> would continue to be available in principle (assuming that the relevant decision-maker was an 'officer of the Commonwealth'), in practice the non-statutory nature of the decision-making process may diminish its effectiveness in ensuring legal accountability.

If the new administrative process for decision-making foreshadowed in the explanatory memorandum is linked to the exercise of the Minister's personal and non-compellable intervention powers to grant a person a visa under the *Migration Act* (see sections 195A, 351, 391, 417, 454 and 501J), the scope for judicial review will depend on whether the Minister has made a decision to consider the exercise of these powers in a particular case. If the Minister refuses to even consider the exercise of these powers, the result is likely to be that judicial review would in practice be unavailable. Further, even if judicial review is available the Minister could not be compelled to exercise these powers and questions may arise as to the utility of declaratory relief. (For example, by a *writ of mandamus*: the High Court considered these powers under the *Migration Act* in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.)

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<sup>1</sup> The *Judiciary Act 1903* (Cth) confers upon the Federal Court and Federal Circuit Court a similar jurisdiction to that granted to the High Court under s 75(v) of the Constitution.

As noted above, the explanatory memorandum suggests that the Australia's obligations under the CAT and the ICCPR may be fulfilled through 'pre-removal assessment procedures' as an alternative to the exercise of the Minister's personal and non-compellable intervention powers under the *Migration Act* (see page 2 of the explanatory memorandum). However, the explanatory materials do not contain details about what this process would involve. Assuming the ultimate source of power exercised is non-statutory Executive power, then questions may arise as to how effective judicial review of its exercise would be. The 'constitutional writs' (such as *mandamus*) are available only on the basis of jurisdictional errors and, typically, such errors are identified by reference to the statute under which a decision is made.

**The committee therefore seeks the Minister's advice as to the extent to which judicial review may, in practical effect, be limited under the new arrangements. In addition, if the amendments would diminish the practical effectiveness of judicial review in securing legal accountability, the committee seeks the Minister's justification for this result.**

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

### **Undue trespass on rights or obligations—new law applicable to the determination of existing applications and appeals Items 20 and 21**

Item 20 provides that the amendments will apply to applications for a protection visa that were made *before* the commencement date. The explanatory memorandum explains the effect of this item in relation to decisions on such applications made before the commencement date as follows:

Where there has been a primary decision and the matter is under review or has been the subject of review or judicial review (and has been remitted), the application will not be reviewed against the complementary protection criteria in paragraphs 36(2)(aa) or 36(2)(c).

Item 21 is a transitional provision that has the effect that an application for review to the Refugee Review Tribunal or the Administrative Appeals

Tribunal, which is made prior to commencement on the basis that a decision to refuse a protection visa was wrong in relation to the applicability of the complementary protection criteria, cannot be reviewed. As explained in the explanatory memorandum, ‘the RRT will be required to apply the amendments made by this Schedule, and not the law that applied at the time of the primary decision’.

The effect of these items is that applications made and decisions appealed, in reliance on the law as it existed at the time of those applications or appeals were lodged, will be determined on the basis of the proposed amendments. Indeed, an applicant for a protection visa may have succeeded in judicial review of such a decision (based on the old law), only to find that their claim will be defeated when remitted to the original decision-maker on the basis of the removal of visa criterion on which their original application relied.

Although the explanatory memorandum explains the legal effect of these provisions it does not explain why it is considered appropriate for these amendments to apply to applications made prior to the commencement of the amendments or to RRT and AAT reviews of decisions made prior to the commencement of the proposed amendments. Further, it is not clear why persons who apply before the commencement of the proposed amendments should not be considered to have an ‘accrued right’ to have their applications determined according to the law and legal processes that applied at the time their application was lodged (see *Esber v Commonwealth* (1992) 174 CLR 430).

**The committee therefore seeks the Minister's further advice in relation to these issues so it may better consider the proposed approach against its scrutiny principles.**

*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.*

## **Reserve Bank Amendment (Australian Reconstruction and Development Board) Bill 2013**

Introduced into the Senate on 5 December 2013

By: Senators Xenophon and Madigan

### **Background**

This bill amends the *Reserve Bank Act 1959* to establish an 'Australian Reconstruction and Development Board' tasked to reconstruct financial arrangements and provide tailored funds and capital arrangements that enable sustainability and development of at-risk Australian agriculture and its associated industries and infrastructures.

*The committee has no comment on this bill.*

## Commentary on amendments to bills

### Social Services and Other Legislation Amendment Bill 2013

*[Digest 8/13 – response required]*

On 4 December 2013 the House of Representatives agreed to three Government amendments and the Minister for Social Services (Mr Andrews) tabled a supplementary explanatory memorandum, and the bill was read a third time. The amendments delay the commencement of the *Charities Act 2013* by nine months to 1 September 2014. Where there is a delay in commencement of legislation longer than six months the committee expects that the explanatory memorandum will outline the reasons for the delay. In this instance the supplementary explanatory memorandum states that:

The delay will allow for further consultation on the legislation in the broader context of the Government's other commitments in relation to the civil sector.

**The committee leaves the question of whether the proposed approach is appropriate to the consideration of the Senate as a whole.**

*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.*

## 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 42<sup>nd</sup> Parliament.

### **Bills introduced with standing appropriation clauses in the 44rd Parliament since the previous *Alert Digest***

Nil

### **Other relevant appropriation clauses in bills**

Nil