

Senate Standing Committee
for the
Scrutiny of Bills

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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 or the provisions of bills not yet before 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 on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

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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.

Motor Vehicle Standards (Cheaper Transport) Bill 2014

Introduced into the Senate on 10 July 2014

By: Senator Milne

Background

This bill seeks to set carbon emissions standards for new passenger vehicles and light commercial vehicles purchased in Australia from 2017.

Delegation of legislative power

Clause 3, definitions of *light commercial vehicle* and *passenger vehicle*

The meaning of the above phrases, which are relevant to determining the application of the vehicle carbon emissions standard (see subclause 4(2)), is defined by reference to the ‘meaning given by the regulations’ or if the regulations do not give a definition, by reference to meanings specified in the Australian Design Rule (as in force at the commencement of this Act). Given the importance of these definitions to determining the scope of the scheme it is regrettable that the explanatory memorandum does not state the reasons for enabling them to be altered by delegated legislation. **The committee therefore seeks the Senator's advice as to the justification for the proposed approach.**

Pending the Senator's reply, the committee draws Senators' attention to the approach as it may be considered to delegate legislative powers inappropriately in breach of principle 1(a)(iv) of the committee's terms of reference.

Strict liability

Reversal of onus – reasonable excuse defence

Subclause 15(3)

Subclause 15(1) makes it an offence for a person to fail to give information or a return that the person is required to give under this Act or the regulations. Subclause (2) provides that the offence provision does not apply if the person has a reasonable excuse, though the defendant bears an evidential burden of

proof in relation to establishing this matter. Subclause 15(3) provides that the offence created by subsection (1) is an offence of strict liability.

The explanatory memorandum justifies this approach to strict liability by noting:

1. that the difficulty of proving intention, and the ease of complying with the reporting requirements, justifies strict liability;
2. the existence of the reasonable excuse defence; and
3. the penalty (60 penalty units) does not extend to imprisonment. [It is also consistent within the maximum penalty recommended for strict liability offences in the *Guide to Framing Commonwealth Offences*.]

It should be noted, however, that the *Guide to Framing Commonwealth Offences* recommends against framing defences in terms of ‘reasonable excuses’ given the uncertainties associated with what may constitute such an excuse and, thus, the associated difficulties that defendants may face in adducing relevant evidence. It may also be noted that the appropriateness of placing an evidential burden on the defendant in relation to the reasonable excuse defence is not specifically addressed. **Nevertheless, in light of the explanation provided 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 provision, as it may be considered to trespass unduly on personal rights and liberties in breach of principle 1(a)(i) of the committee’s terms of reference.

Privilege against self-incrimination

Subclause 15(4)

The committee routinely comments on provisions that abrogate the common law privilege against self-incrimination. The committee has, however, accepted that there may be circumstances in which the abrogation of the privilege is justified. In particular, it is easier to justify the abrogation of the privilege where the legislation provides for a use and derivative use immunity.

In this instance, subclause 15(4) provides that a person is not excused from a clause 14 requirement to provide information on the ground that doing so might tend to incriminate them. While the bill does include both a use and derivative use immunity, the explanatory memorandum does not address the

need for the abrogation of the privilege against self-incrimination. **The committee therefore seeks the Senator's advice as to the justification for the approach, including addressing relevant principles detailed in the *Guide to Framing Commonwealth Offences*.**

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

Reversal of onus Subclauses 16(2) and 16(4)

Subclause 16(1) provides that the actions of an employee or director of a body corporate will be attributed to the body corporate provided that they are within the scope of their employment duties.

Subparagraph 16(1)(b)(ii) provides that conduct of an employee or agent will be taken to have been engaged in by the body corporate if it is proved:

...that an employee or agent of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the policy of the body corporate engaged in the relevant conduct or expressly, tacitly or impliedly authorised or permitted the relevant conduct.

Subclause 16(2) provides that subparagraph 16(1)(b)(ii) 'does not apply if the body corporate proves that it exercised due diligence to prevent the relevant conduct'. Subclause 16(2) thus appears to place a legal burden of proof on the body corporate in relation to this defence.

A similar issue also arises in subclause 16(4) in relation to individuals.

Unfortunately, the explanatory memorandum does not address the justification for this approach. **The committee therefore seeks the Senator's advice on this matter generally, and is particularly interested in whether consideration has been given to the imposition of a lesser evidential burden of proof.**

Pending the Senator'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.

COMMENTARY ON AMENDMENTS TO BILLS

Trade Support Loans Bill 2014

[Digest 6/14 – awaiting response]

On 14 July 2014 the Senate agreed to two Opposition amendments and the bill was read a third time. The committee has no comment on these amendments.

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 bills containing standing appropriations that have been introduced since the committee's last Alert Digest.

Bills introduced with standing appropriation clauses since the previous Alert Digest

Nil

Other relevant appropriation clauses in bills

Nil