

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.

Australian Security Intelligence Organisation Amendment (Restoring Merits Review) Bill 2014

Introduced into the House of Representatives on 1 September 2014

By: Mr Wilkie

Background

The bill seeks to amend the *Australian Security Intelligence Organisation Act 1979* to provide asylum seekers access merits review through the Administrative Appeals Tribunal.

The bill also makes a consequential amendment to the *Administrative Appeals Tribunal Act 1975*.

The committee has no comment on this bill.

Corporations Amendment (Financial Advice) Bill 2014

Introduced into the Senate on 2 September 2014

By: Senator Whish-Wilson

Background

This bill seeks to amend the *Corporations Act 2001* to ensure that in reference to financial advice the term 'advice' can be only be utilised in reference to financial advice that takes into account the personal circumstances of the consumer.

The committee has no comment on this bill.

Customs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014

Introduced into the House of Representatives on 4 September 2014

Portfolio: Immigration and Border Protection

Background

This bill seeks to amend the *Customs Act 1901* to implement Australia's obligations under Chapter 3 of the Korea-Australia Free Trade Agreement.

The Customs Act amendments will enable goods that satisfy the rules of origin to enter Australia at preferential rates of customs duty.

To give effect to the preferential entry of goods under the Agreement, the amendments contained in this Bill provide rules for determining whether goods are Korean originating goods.

The amendments contained in this Bill also impose obligations on exporters of Australian goods to Korea and for which a preferential rate of duty will be claimed, and on people who produce such goods.

Incorporation by reference

Schedule 1, proposed subsection 153ZMB(6)

New subsection 153ZMB(6) provides that despite subsection 14(2) of the *Legislative Instruments Act 2003*, regulations made for specific purposes may 'apply, adopt or incorporate, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time.'

The committee routinely draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of changes being made to the law in the absence of Parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. However the explanatory memorandum (at p. 32) explains that this will enable regulations to refer to accounting principles of Korea for the purposes of the regional value content calculations.

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

Customs Tariff Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014

Introduced into the House of Representatives on 4 September 2014

Portfolio: Immigration and Border Protection

Background

This bill seeks to amend the *Customs Tariff Act 1995* (the Customs Tariff) to implement the Korea-Australia Free Trade Agreement (the Agreement) by:

- providing duty-free access for certain goods and preferential rates of customs duty for other goods that are Korean originating goods;
- phasing the preferential rates of customs duty for certain goods to Free by 2021;
- amending Schedule 4 to the Customs Tariff to maintain customs duty rates for certain Korean originating goods in accordance with the applicable concessional item; and
- creating a new Schedule 10 in the Customs Tariff to accommodate the preferential, phasing and excise-equivalent rates of duty.

The committee has no comment on this bill.

Fair Entitlements Guarantee Amendment Bill 2014

Introduced into the House of Representatives on 4 September 2014

Portfolio: Employment

Background

This bill seeks to amend the *Fair Entitlements Guarantee Act 2012* (the Act) to align the maximum redundancy pay entitlement under the Fair Entitlements Guarantee scheme with the maximum set by the National Employment Standards contained in the *Fair Work Act 2009*.

The bill also makes a number of technical amendments to clarify the operation of the Act.

Standing Appropriation

Schedule 1, item 13, proposed section 51

Proposed section 51 provides for payments to be made from the Consolidated Revenue Fund for the purposes of payments under section 50 of the Act. Section 50 provides for the establishment of a scheme for assistance of workers who were not employees, and for payment of certain legal costs incurred by the department in relation to an application to the Administrative Appeals Tribunal.

The committee is not questioning the ability for payments to be made, only whether the use of a standing appropriation is an appropriate mechanism. In scrutinising standing appropriations, the committee looks to the explanatory memorandum for an explanation of the reason for the proposed approach. In addition, the committee considers whether the bill:

- places a limitation on the amount of funds that may be so appropriated; and
- includes a sunset clause that ensures the appropriation cannot continue indefinitely without any further reference to Parliament.

In this instance the explanatory memorandum simply repeats the effect of the provision and does not provide an explanation. **The committee therefore seeks the Minister's advice as to the justification for including a standing appropriation in the bill.**

Pending the Minister's advice, the committee draws Senators' attention to the provision, as it 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.

Infrastructure Australia Amendment (Cost Benefit Analysis and Other Measures) Bill 2014

Introduced into the House of Representatives on 4 September 2014

Portfolio: Infrastructure and Regional Development

Background

This bill seeks to amend the *Infrastructure Australia Act 2008* (the Act) to clarify the legislative and administrative arrangements for Infrastructure Australia and rectify the currently incorrect placement of provisions pertaining to cost benefit analyses of infrastructure proposals in the Act.

The committee has no comment on this bill.

Minerals Resource Rent Tax Repeal and Other Measures Bill 2014

Introduced into the House of Representatives on 1 September 2014

This bill received Royal Assent on 5 September 2014

Portfolio: Treasury

A similar bill was introduced into the House of Representatives on 13 November 2013 and the committee did not comment on the bill in *Alert Digest No. 8 of 2013*. The bill was then re-introduced on 23 June 2014 and the committee again had no comment on the bill in *Alert Digest No. 8 of 2014*. This digest deals only with comments on the new or amended provisions.

Background

This bill seeks to repeal the Minerals Resource Rent Tax (MRRT) by repealing the following Acts:

- *Minerals Resource Rent Tax Act 2012*;
- *Minerals Resource Rent Tax (Imposition—Customs) Act 2012*;
- *Minerals Resource Rent Tax (Imposition—Excise) Act 2012*; and
- *Minerals Resource Rent Tax (Imposition—General) Act 2012*.

The bill also makes consequential amendments to the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953*.

Amendments to the Bill made by the Senate made changes to Schedules 7 to 9.

Delayed Commencement Clause 2

Schedules 1 to 5 will commence on dates fixed by proclamation. However if any of the provisions do not commence within 12 months of Royal Assent then they will commence on the day after that period. Schedule 7 will commence on 1 July 2017 and schedules 8 and 9 will commence either on the day the Act receives the Royal Assent, or on 31 December 2016. The

explanatory memorandum (at p. 21) justifies this approach by citing the delay in the passage of the legislation:

Due to the delays in the passage of the legislation, the repeal is no longer proposed to commence from a fixed date. This ensures that further delays will not result in the legislation applying retrospectively and imposing unnecessary compliance burdens on taxpayers.

The explanatory memorandum goes on to explain that because of this delay it is appropriate to commence the provisions in Schedules 1 to 5 within 12 months of Royal Assent instead of the usual six months:

Providing for the date of commencement to be fixed by proclamation allows the Government to minimise compliance burdens for taxpayers. The Bill specifies that if a date is not fixed within 12 months of Royal Assent, the Schedule will commence on that day. While it more usual to provide that legislation will commence within six rather than twelve months, in this case it was important that it be possible to specify a date in the next financial year rather than the current financial year, in order to avoid significant compliance implications for taxpayers and administrative problems for the Commissioner.

Where there is a delay in commencement of legislation longer than six months it is appropriate for the explanatory memorandum to outline the reasons for the delay in accordance with paragraph 19 of Drafting Direction No. 1.3.

In light of the explanation provided in the explanatory memorandum, and noting that the bill has already been passed by both Houses of Parliament, the committee makes no further comment in relation to this bill.

Stop Dumping on the Great Barrier Reef Bill 2014

Introduced into the Senate on 4 September 2014

By: Senator Waters

Background

This bill seeks to ban new offshore dumping of dredge spoil in the Great Barrier Reef World Heritage Area.

Trespass on personal rights and liberties—penalties

Item 2, proposed subsection 10AA(1)

Subsection 10AA(1) provides that it is an offence to dump dredged material within the Great Barrier Reef World Heritage Area, and imposes a penalty of 250 penalty units, 12 months' imprisonment, or both.

The committee's expectation is that the rationale for the imposition of significant penalties, especially if those penalties involve imprisonment, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties. This issue is not addressed in the explanatory memorandum. **The committee therefore seeks the Senator's further advice as to the justification for the penalties imposed by these subsections.**

Pending the Senator's advice, 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.

Strict liability offence

Item 2, proposed subsection 10AA(2)

Subsection 10AA(2) provides that strict liability applies to the element of the offence that the dumping of dredged material occurs within the Great Barrier Reef World Heritage Area. The explanatory memorandum justifies this approach as follows:

It is appropriate that strict liability apply to the Great Barrier Reef element of the offence as a defendant can reasonably be expected, because of his or her professional involvement in the dredging industry, to know the requirements of the law and the location of the Great Barrier Reef World Heritage Area.

In light of this information **the committee leaves the question of whether strict liability is appropriate in these circumstances 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.

Retrospective commencement

Item 4

This item provides that 'the amendments made by this Schedule do not apply in relation to dumping or loading if an approval or permission for the dumping or loading was granted on or before 9 December under the *Environment Protection and Biodiversity Conservation Act 1999*, the *Environment Protection (Sea Dumping) Act 1981* or the *Great Barrier Reef Marine Park Act 1975* (including regulations made under those Acts)'. The explanatory memorandum (at p. 3) indicates that:

This item prevents the amendments applying retrospectively in cases where a permit or approval was given for the activities prohibited by this Schedule on or before 9 December 2013. However, this provision makes sure that the dumping approved at Abbot Point on 10 December 2013, or any other offshore dumping approved after 9 December 2013, cannot proceed.

While the explanatory memorandum is explicit in stating that permits or approvals given before 9 December 2013 will not be subject to the amendments, it is not clear whether approvals given after this date, but before the bill has gained Royal Assent, will be. **The committee therefore seeks clarification as to whether there are any cases where the amendments are capable of applying retrospectively and, if there are, a detailed justification for their application.**

Pending the Senator's advice, 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.

Tax and Superannuation Laws Amendment (2014 Measures No. 5) Bill 2014

Introduced into the House of Representatives on 4 September 2014

Portfolio: Treasury

Background

This bill seeks to amend the *Income Tax Assessment Act 1997* to:

- abolish the mature age worker tax offset;
- abolish the seafarer tax offset;
- reduce the rates of the tax offset available under the research and development tax incentive by 1.5 percentage points; and
- update the list of specifically listed deductible gift recipients.

Retrospective commencement Schedules 1 and 3

Schedule 1 will abolish the mature age worker tax offset. The measure will commence on 1 July 2014 (i.e. it will apply to the 2014-15 income year). The measure was announced in the 2014-15 budget.

Schedule 3 reduces the rates of the tax offset available under the research and development tax incentive by 1.5 per cent. The measure will commence on 1 July 2014 (i.e. it will apply to the 2014-15 income year). The measure was announced in the 2014-15 budget.

In the circumstances, the committee makes no further comment on this bill

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

Fair Entitlements Guarantee Amendment Bill 2014

Other relevant appropriation clauses in bills

Nil