

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

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# Senate Standing Committee for the Scrutiny of Bills

## Members of the Committee

Senator M Fifield (Chair)  
Senator C Brown (Deputy Chair)  
Senator M Bishop  
Senator S Edwards  
Senator G Marshall  
Senator R 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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## **Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011**

Introduced into the Senate on 17 August 2011

By: Senator Xenophon

### **Background**

This bill seeks to protect the workplace conditions of foreign or overseas-based flight or cabin crew who are working on Australian-owned airlines or their subsidiaries.

*The Committee has no comment on this bill.*

## **Business Names Registration Bill 2011**

Introduced into the House of Representatives on 17 August 2011  
Portfolio: Innovation, Industry, Science and Research

### **Background**

This bill is a package of three bills and is a regulatory reform of the Council of Australian Governments.

The bill provides for the establishment of a National Business Names Registration System.

### **'Henry VIII' clause**

#### **Schedule 1, subclause 6(2)**

Schedule 1 of the Bill contains a list of the registers, or kinds of registers, that may be notified State/Territory registers. Names which are entered on such a register are ones to be received electronically by ASIC (the agency which will administer the new system) and to be updated from time to time. Subclause 6(2) of the bill provides that Schedule 1 has effect subject to any modifications made by the regulations to reflect changes in the registers, or kinds of registers, maintained by the States and Territories. It is noted that subclause 6(3) provides that the Commonwealth Minister must consult with all States/Territories in relation to proposed modifications of the sort referred to in subclause 6(2). Although this enables regulations to change the effect of the primary Act, given the nature of this being a national scheme of regulation, the Committee **leaves the question of whether this approach is appropriate to the Senate as a whole.**

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

### **'Henry VIII' clause**

#### **Schedule 1, clause 15**

Clause 15 of the bill confers a power for regulations to modify the primary legislation in broader terms than the power discussed above. It provides that the operation of the legislation may be modified so that the legislation does not apply to a matter that is dealt with by a law of the referring/adopting State

or an affected Territory, or so that no inconsistency arises between the business names legislation and laws of the referring/adopting States or affected Territories. It is acknowledged that the Bill will provide the basis for a national regulatory scheme and that this may justify this approach. Nevertheless, it is regrettable that the explanatory memorandum does not address the justification of this delegation of legislative power. The Committee therefore **seeks the Minister's advice as to the appropriateness of this approach.**

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

### **Strict liability**

#### **Part 2, clauses 18, 19, 20 and 21; Part 4**

Part 2 of the Bill provides for various offences relating to business names. The offences in clauses 18, 19, 20, and 21 are all offences of strict liability. The approach has been formulated having considered the Committee's report (6/2002) on the *Application of Absolute and Strict Liability Offences*, and the explanatory memorandum at page 17 contains a very detailed justification of the appropriateness of framing the offences as ones of strict liability.

The same issue and explanation arises in relation to the offences related to obligations to give information to ASIC in Part 4 of the Bill.

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

### **Reversal of onus**

#### **Determination of important matters by regulation**

#### **Part 2, clauses 18, 19, 20 and 21; Part 4**

In contrast to the discussion above, unfortunately the explanatory memorandum does not address the appropriateness of the imposition of an evidential burden of proof in relation to subclauses within these provisions, which identify a number of exceptions in relation to each of the offences. In addition, each of the exceptions includes 'other circumstances prescribed by the regulations'. It is difficult to determine the appropriateness of imposing

an evidential burden in relation to circumstances which remain to be specified. The Committee therefore **seeks the Minister's explanation of the appropriateness of this approach, particularly given that important matters can be included in regulations rather than the primary act.**

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

### **Reversal of onus**

#### **Schedule 1, subclause 31(6), subclause 54(2)**

Subclause 31(6) of the Bill imposes an evidential burden of proof in relation to establishing an exception to an offence under the proposed subsection 18(1) (carrying on a business under an unregistered business name). The exception relates to whether a potential applicant for registration of a business name has given the appropriate notice to ASIC under proposed subsection 31(4) that a holder of a registered business name has consented to the potential applicant registering that business name. The explanatory memorandum does not justify the imposition of an evidential burden, but as it appears that whether the appropriate notice of the relevant matters has been given will be something within the knowledge of a defendant, the Committee has no further comment.

The same issue arises in relation to proposed subsection 54(2), and again the Committee has no further comment.

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

### **Review of decisions**

#### **Clause 56**

Clause 56 provides that decisions specified in the table are subject to administrative review (internal review and Administrative Appeals Tribunal review). The category of persons who may seek review for a decision to register a business name to an entity is limited to 'an entity in relation to whom there is a real risk of substantial detriment because of the registration of

the business name'. Unfortunately the explanatory memorandum does not explain why the standing requirement for review is more restrictive than the default requirement under section 27 of the *Administrative Appeals Tribunal Act*. 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 provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.*

### **Reversal of onus Schedule 1, clause 77**

Clause 77 of the Bill imposes custodial penalties in relation to the misuse of confidential information. A number of exceptions to the offences apply, but the evidential burden is placed on the defendant in relation to them. It is regrettable that the explanatory memorandum does not address the appropriateness of imposing an evidential burden on a defendant in relation to establishing a number of exceptions in relation to the offences. The Committee therefore **seeks the Minister's explanation as to the justification of the approach.**

*Pending the Minister'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.*

### **National scheme – parliamentary scrutiny**

While the Committee understands the arrangements by which cooperative schemes are often implemented and the arguments in favour of a uniform national approach, it is concerned to ensure that legislation is subject to appropriate legislative scrutiny. The Committee would welcome an opportunity for it to consider and comment on an exposure draft of any amendments proposed to this legislation prior to their adoption. **The Committee therefore requests the Minister's advice about the process by which any future amendments will be agreed to between the Commonwealth and the other jurisdictions for this and related Acts, and**

**whether any proposed changes will be referred to this committee for comment prior to their adoption (whether in the form of an exposure draft or in another form).**

*Pending the Minister's reply, the Committee draws Senators' attention to the issue, as the approach 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.*

## **Business Names Registration (Fees) Bill 2011**

Introduced into the House of Representatives on 17 August 2011

Portfolio: Innovation, Industry, Science and Research

### **Background**

This bill is a package of three bills which aims to establish a national business names registration system, a regulatory reform of the Council of Australian Governments.

The bill proposes to impose fees for registering business names in the new national registration system.

### **Setting the rate of a fee by regulation**

#### **Subclause 5(3)**

Under this Bill, fees (to be imposed as taxation) may be charged in relation to the registration and renewal of a business name and for an extract of the Business Names Register. The fees for the specified 'chargeable matters' are to be prescribed by regulations.

The Committee has consistently drawn attention to legislation that provides for the rate of a fee or levy to be set by regulation. Where the rate of a fee is to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power.

In this case, subclause 5(3) states that 'the fee, or sum of the fees, for a chargeable matter must not exceed \$50, 000'. It should also be noted that the explanatory memorandum at page 7 states that the regime for imposing fees needs to be viewed in light of the Intergovernmental Agreement for Business Names, entered into between the Commonwealth and the States and Territories. That Agreement provides (1) that the fees would be commensurate with the total costs involved in establishing and administering the national scheme for business names registration, (2) that consistent with the objective of full cost recovery, the Commonwealth fees should not be higher than the lowest similar fees currently paid in relation to State and Territory registration schemes, and (3) that ASIC will consult with the States and Territories prior to recommending to the Government any changes in relation the level of fees. In these circumstances the Committee **leaves the appropriateness of the**

**delegation of legislative power to set the level of fees or the method for calculating the amount of fees to the Senate as a whole.**

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

## **Business Names Registration (Transitional and Consequential Provisions) Bill 2011**

Introduced into the House of Representatives on 17 August 2011

Portfolio: Innovation, Industry, Science and Research

### **Background**

This bill is a package of three bills which aims to establish a national business names registration system, a regulatory reform of the Council of Australian Governments.

The bill proposes to:

- make transitional provisions covering a range of matters relating to business names registration; and
- make consequential amendments to a number of Acts.

### **'Henry VIII' clause**

#### **Schedule 1, subclause 10(3)**

Subclause 10(3) provides that this Act and the Business Names Registration Act are to have effect subject to any modifications made by the regulations to deal with business names in relation to which outstanding matters under the law of a State or territory are to be resolved. It is regrettable that the explanatory memorandum does not address the justification of this delegation of legislative power (it amounts to a 'Henry VIII clause' in which subordinate legislation can override the effect of the primary legislation). The Committee **therefore seeks the Minister's advice as to the appropriateness of this approach.**

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

## **Corporations (Fees) Amendment Bill 2011**

Introduced into the House of Representatives on 18 August 2011

Portfolio: Treasury

### **Background**

This bill amends the *Corporations (Fees) Act 2001* and provides for the charging of participants on licensed financial markets for the purposes of supervision by the Australian Securities and Investments Commission.

*The Committee has no comment on this bill.*

## **Defence Legislation Amendment Bill 2011**

Introduced into the House of Representatives on 18 August 2011

Portfolio: Defence

### **Background**

This bill amends the *Defence Act 1903*, the *Naval Defence Act 1910* and the *Air Force Act 1923* to provide the Chief of the Defence Force with the authority to issue directions to the Service Chiefs in relation to the administration of their respective Cadet schemes.

*The Committee has no comment on this bill.*

## **Indigenous Affairs Legislation Amendment (No.2) Bill 2011**

Introduced into the House of Representatives on 17 August 2011

Portfolio: Families, Housing, Community Services and Indigenous Affairs

### **Background**

This bill amends the *Aboriginal and Torres Strait Islander Act 2005* to:

- change the title of a number of office-holders from ‘General Manager’ to ‘Chief Executive Officer’;
- ensure that information held by Indigenous Business Australia will be appropriately protected but capable of being disclosed by that organisation in carrying out its proper functions, consistent with similar Commonwealth arrangements; and
- remove references to the availability of review under the Administrative Decisions (Judicial Review) Act 1977 for two discontinued Aboriginal Hostels Limited schemes.

The bill also amends the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Coordinator-General for Remote Indigenous Services Act 2009*, allowing the Minister to delegate the power to appoint a person to act as the Executive Director of Township Leasing or the Coordinator-General for Remote Indigenous Services.

### **Reversal of onus**

#### **Schedule 1, item 75**

This bill contains amendments which enable information to be disclosed by Indigenous Business Australia in a broad range of circumstances. The amendments proposed by item 75 of Schedule 1 of the bill introduce a number of exceptions in relation to the offence created in section 191 of the *Aboriginal and Torres Strait Islander Act 2005* which prevents the release of any information. These proposed amendments place an evidential burden of proof on the defendant. The explanatory memorandum, at page 7, justifies this approach on the basis that the relevant matters are ‘within the exclusive knowledge of the defendant or...significantly more difficult and costly for the

prosecution to disprove than for the defendant to establish'. It is also noted that the penalty is a relatively low, 50 penalty units. In the circumstances the Committee **leaves the appropriateness of the proposed approach to the Senate as a whole.**

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

## **National Residue Survey (Excise) Levy Amendment (Deer) Bill 2011**

Introduced into the House of Representatives on 17 August 2011

Portfolio: Agriculture, Fisheries and Forestry

### **Background**

This bill amends the *National Residue Survey (Excise) Levy Act 1998* to increase the cap on the NRS component of the levy from 4 cents to 10.5 cents per kilogram.

*The Committee has no comment on this bill.*

## COMMENTARY ON AMENDMENTS TO BILLS

### **Competition and Consumer Amendment Bill (No.1) 2011**

*[Digest 4/11 & 8/11 [amendments] – response in 6<sup>th</sup> Report]*

On 18 August 2011 a revised explanatory memorandum was tabled in the Senate. None of the material falls within the Committee's terms of reference.

### **Customs Amendment (Anti-Dumping Improvements) Bill 2011**

*[Digest 8/11 – no comment]*

On 18 August 2011 the House of Representatives tabled a replacement explanatory memorandum and passed the bill without amendment. None of the material falls within the Committee's terms of reference.

### **Horse Disease Response Levy Bill 2011**

*[Digest 8/11 – no comment]*

On 18 August 2011 the House of Representatives agreed to two Government amendments and tabled supplementary explanatory memorandum. None of the material falls within the Committee's terms of reference.

### **Indigenous Affairs Legislation Amendment Bill 2011**

*[Digest 7/11 – no response required]*

On 18 August 2011 the House of Representatives agreed to three Government amendments, tabled a supplementary explanatory memorandum and passed the bill. None of the material falls within the Committee's terms of reference.

### **National Health Reform Amendment (National Health Performance Authority) Bill 2011**

*[Digest 5/11 & 8/11 [amendments] – response in 4<sup>th</sup> Report]*

On 17 August 2011 the House of Representatives agreed to 29 Government and three Independent (Mr Oakeshott) amendments, tabled a supplementary memorandum and passed the bill.

**Procedural fairness**

**Amendment (7), clause 62**

In the original Bill, the manager of an entity which is to be the subject of a report for poor performance is given an opportunity to respond, to allow 'contextual information to be provided which might vary an assessment of performance' (see the supplementary explanatory memorandum at page 4).

Item (7) of the amendments proposes to substitute a new section 62, which deals with reports. In short, this proposed provision requires that the Performance Authority give a State or Territory Health minister the opportunity to comment on a final draft of a report which may contain adverse comments on poor performance and requires that the comments provided be considered. Although subsection 62(6) requires that an affected LHN or public hospital be given a final draft report by the Performance Authority prior to completion, the amendments make it clear that 'the manager of the network or hospital is not entitled to give the Performance Authority any comments about the final draft'. Further, although subsection 62(7) states that the Performance authority may consult such persons and bodies it considers appropriate, subsection 62(8) states that, where a report indicates poor performance by a LHN or a public hospital, the Authority must not consult and is 'not otherwise obliged to observe any requirements of procedural fairness' in relation to managers or employees of the relevant entity or in relation to 'any other person who provides services' in the relevant facility.

By its terms, this provision attempts to expressly exclude the operation of the 'common law' rules of procedural fairness. These rules are constraints implied into all statutory powers unless they are excluded with 'unmistakeable clarity'. The supplementary explanatory memorandum confirms the exclusion of the rules of procedural fairness (i.e. natural justice): it states that subsection 62(8) is intended to remove 'the obligation on the Performance Authority to provide natural justice directly to LHNs and public hospitals which are likely to be the subject of a report of poor performance'. Further, the supplementary explanatory memorandum states that this is necessary 'given previous decision[s] of the High Court which would otherwise impose an obligation on the Performance Authority to provide procedural fairness regardless of whether the other provisions of the legislation attempted to limit the path of communications to that between the Performance Authority and state/territory ministers' (see the supplementary explanatory memorandum at page 5).

The idea that persons who are directly affected by the exercise of executive power have a right to a fair hearing is considered to be a fundamental common law principle. It is therefore surprising that the explanatory memorandum says relatively little to justify the abrogation of this principle. The supplementary explanatory memorandum states at page 5 that the approach ‘reflects the lines of communication preferred by state and territory health ministers, and the role of those ministers as health system managers’. Further, that ‘it is expected that state and territory health ministers will organise matters within their own administrative arrangements to ensure appropriate flows of communication between LHNs, hospitals and the health minister in relation to potential reports of poor performance’ (supplementary explanatory memorandum at 5). However, to the extent that reports of poor performance may contain adverse comment on managers and employees of LHNs and hospitals, there is no guarantee that these persons will have the opportunity to be heard in relation to these matters. Clearly, such comments may have a significant impact on such a person’s reputation, an interest which the law of procedural fairness does protect.

Although the supplementary explanatory memorandum appears to suggest that these concerns will be dealt with through administrative arrangements put in place by State and territory Health Ministers, there is no guarantee that these arrangements will give affected persons procedural fairness. In addition, to the extent that State and Territory Ministers make decisions or take actions in relation to such matters, the Committee's understanding is that these decisions or actions are unlikely to be subject to judicial review (under State and Territory judicial review jurisdictions). The Committee therefore **seeks the Minister's further explanation about the appropriateness of this 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.*

**Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Bill 2011**

*[Digest 4/11 & 8/11 [amendments] – response in 7<sup>th</sup> Report]*

On the 18 August 2011 a revised explanatory memoranda was tabled in the Senate. The revised explanatory memorandum responds to an issue previously raised by the Committee. The Committee thanks the Minister for the action taken.

**Offshore Petroleum (Royalty) Amendment Bill 2011**

*[Digest 5/11 – no comment]*

On the 18 August 2011 a revised explanatory memoranda was tabled in the Senate. None of the material falls within the Committee's terms of reference.

**Territories Self-Government Legislation Amendment (Disallowance and Amendment Laws) Bill 2011**

*Previous citation: Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010*

*[Digest 8/10 – no comment]*

On the 18 August 2011 the Senate agreed to four Government amendments, tabled a supplementary explanatory memorandum and passed the bill. None of the material falls within the Committee's terms of reference.

## **BILLS GIVING EFFECT TO NATIONAL SCHEMES OF LEGISLATION**

The Chairs and Deputy Chairs of Commonwealth, and state and territory Scrutiny Committees have noted (most recently in 2000) difficulties in the identification and scrutiny of national schemes of legislation. Essentially, these difficulties arise because ‘national scheme’ bills are devised by Ministerial Councils and are presented to Parliaments as agreed and uniform legislation. Any requests for amendment are seen to threaten that agreement and that uniformity.

To assist in the identification of national schemes of legislation, the Committee’s practice is to note bills included in this *Alert Digest* that give effect to such schemes as they come before the Committee for consideration.

### **Business Names Registration (Fees) Bill 2011**

### **Business Names Registration (Transitional and Consequential Provisions) Bill 2011**

### **Business Names Registration Bill 2011**

*Please see above pages 2-9 for further information concerning the bills.*

## 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 43rd Parliament since the previous *Alert Digest***

Nil

### **Other relevant appropriation clauses in bills in the 43<sup>rd</sup> Parliament since the previous *Alert Digest***

Nil