

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



**Alert Digest**

**No. 5 of 2005**

**1 June 2005**



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# Senate Standing Committee for the Scrutiny of Bills

## Members of the Committee

Senator R Ray (Chair)  
Senator B Mason (Deputy Chair)  
Senator G Barnett  
Senator D Johnston  
Senator G Marshall  
Senator A Murray

## 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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- **The Committee has commented on these bills**

This Digest is circulated to all Honourable Senators.  
Any Senator who wishes to draw matters to the attention of the  
Committee under its terms of reference is invited to do so.

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## **Aged Care Amendment (Extra Service) Bill 2005**

Introduced into the House of Representatives on 26 May 2005

Portfolio: Ageing

### **Background**

An aged care service with 'extra service status' can offer residents the choice of higher than average level of hotel-type services, including accommodation, food and recreational activities. The bill amends the *Aged Care Act 1997* to remove the requirement that providers need to reapply for extra service status every 5 years. According to the explanatory memorandum, 'This measure will provide more certainty for extra service providers, particularly in relation to their capital-raising requirements.'

*The Committee has no comment on this bill.*

## Appropriation Bills

Introduced into the House of Representatives on 10 May 2005

Portfolio: Finance and Administration

### Background

Appropriation Bill (No. 5) 2004-2005 appropriates additional money (\$291.6 million) to meet payments for the ordinary annual services of the government for the year ending on 30 June 2005.

Appropriation Bill (No. 6) 2004-2005 appropriates additional money (\$22.7 million) to enable agencies to meet payments to or for the states and territories, and payments for administered items, administered capital items and departmental capital items for the year ending on 30 June 2005.

Appropriation Bill (No. 1) 2005-2006 appropriates \$47.371 billion to meet payments for the ordinary annual services of the government for the year ending on 30 June 2006.

Appropriation Bill (No. 2) 2005-2006 appropriates \$7.787 billion to meet payments to or for the States and Territories, and payments for administered items, administered capital items and departmental capital items for the year ending on 30 June 2006.

Appropriation (Parliamentary Departments) Bill (No. 1) 2005-2006 appropriates \$167.4 million to meet the expenses of the parliamentary departments for the year ending on 30 June 2006.

*The Committee has no comment on these bills.*

## **Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005**

Introduced into the House of Representatives on 25 May 2005  
Portfolio: Employment and Workplace Relations

### **Background**

According to the Minister's second reading speech, the bill 'will allow Comcare to manage all asbestos-related claims brought at common law against the Government.' This follows the recommendation of an interdepartmental committee established in 2002, which recommended establishing a central unit within Comcare to manage all such claims.

The bill allows Comcare to assume liability for all such claims, provides Comcare with an additional function of managing that liability and makes a special appropriation to enable Comcare to meet those liabilities.

The bill was introduced with the Asbestos-related Claims (Management of Commonwealth Liabilities) (Consequential and Transitional Provisions) Bill 2005.

### **Special appropriations – Audit Report no. 15 of 2004-05**

#### **Clause 8**

Clause 8 of this bill appropriates to Comcare out of Consolidated Revenue 'such amounts as are necessary to enable Comcare to discharge any liability' transferred to it as a result of the operation of this measure. This appears to be a special appropriation of the kind referred to by the Auditor-General in Audit Report No. 15 of 2004-05.

In that report, the Audit Office concluded, at page 12, that 'widespread shortcomings have existed in the management and disclosure of Special Appropriations' and, at page 14, that 'there are many important considerations of appropriate accountability, including transparency, in relation to the Parliament.'

Under paragraph (v) of its terms of reference, the Scrutiny of Bills Committee reports on clauses of bills which ‘insufficiently subject the exercise of legislative power to parliamentary scrutiny’. The appropriation of money from consolidated revenue is a legislative function. The use of special appropriations may limit accountability and scrutiny by denying the Parliament the opportunity to approve expenditure through its annual appropriations processes.

In the light of the report, and the subsequent debate in the Senate, the Committee determined to keep a watching brief on the use of special appropriations. The Committee does not question the need to ensure the liabilities dealt with by this bill are properly met, only whether the use of a special appropriation is appropriate.

The bill provides for the centralisation of liability for asbestos-related claims in one agency. There is no indication in the explanatory memorandum how these liabilities are currently met and, in particular, whether the mechanism in the bill merely replaces special appropriations currently contained in other legislation. If that is the case, the question which arises is whether the provisions establishing those appropriations are to be repealed. If, however, liabilities are currently met out of ordinary appropriations, then it would appear that the mechanism in the bill *will* operate to reduce parliamentary scrutiny.

Accordingly, the Committee **seeks from the Minister** an explanation justifying the inclusion of a special appropriation in the bill and the exclusion of that appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process.

*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.*

## **Asbestos-related Claims (Management of Commonwealth Liabilities) (Consequential and Transitional Provisions) Bill 2005**

Introduced into the House of Representatives on 25 May 2005

Portfolio: Employment and Workplace Relations

### **Background**

Introduced with the Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005, this bill:

- makes consequential amendments to the *Safety, Rehabilitation and Compensation Act 1988* to accommodate Comcare's new function of managing asbestos-related claims; and
- repeals certain stevedoring legislation which is redundant, or will be redundant, following the transfer of liabilities from the Stevedoring Industry Finance Committee to Comcare.

*The Committee has no comment on this bill.*

## **Australian Technical Colleges (Flexibility in Achieving Australia's Skills Needs) Bill 2005**

Introduced into the House of Representatives on 11 May 2005  
Portfolio: Education, Science and Training

### **Background**

The purpose of the bill is to establish Australian Technical Colleges for years 11 and 12 students in 24 regions throughout Australia. The bill appropriates \$343.6 million over 5 years to support the establishment and operation of the colleges.

The administration of the colleges will be underpinned by funding agreements with either state and territory governments or the ATC authority of the college, which will contain the conditions under which funding will be allocated. Under the funding agreements colleges will be required to provide reports on expenditure and performance outcomes.

*The Committee has no comment on this bill.*

## Crimes Amendment Bill 2005

Introduced into the House of Representatives on 26 May 2005

Portfolio: Attorney-General

### Background

According to the Minister's second reading speech, 'Assumed identities are false identities adopted to facilitate intelligence and investigative functions, or the infiltration of a criminal, hostile or insecure environment with a view to collecting information and investigating offences.'

This bill amends the *Crimes Act 1914* to enable Commonwealth agencies to request assumed identity documents, such as birth certificates and drivers licences, from state and territory issuing agencies in accordance with legislation in force in those jurisdictions.

The second reading speech notes that the Crimes Act currently provides that agencies 'may acquire evidence of an assumed identity from a Commonwealth agency... [h]owever, the acquisition of evidence of identity from the States and Territories ... has generally proceeded in the absence of a legislative framework.'

The Committee notes that the use of assumed identities was the subject of one of the model laws in the discussion paper on cross-border investigative powers for law enforcement, published by the Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigation Powers (at pp 85–134; especially at pp 89-90 and 104–109).

*The Committee has no comment on this bill.*

## **Customs Legislation Amendment (Import Processing Charges) Bill 2005**

Introduced into the House of Representatives on 26 May 2005  
Portfolio: Justice and Customs

### **Background**

The bill amends the *Customs Act 1901* and the *Import Processing Charges Act 2001* to repeal provisions establishing two charges which would otherwise be imposed when the charging provisions of certain customs legislation commence in the second half of 2005.

The two charges would have been imposed on low value consignments imported into Australia. According to the explanatory memorandum, 'The Government has decided to streamline the total charging package to minimise the administrative burden on industry in relation to charges on low value consignments.' The costs will be incorporated into restructured charges to be imposed by the Import Processing Charges Amendment Bill 2005.

*The Committee has no comment on this bill.*

## **Family and Community Services Legislation Amendment (Family Assistance and Related Measures) Bill 2005**

Introduced into the House of Representatives on 26 May 2005

Portfolio: Family and Community Services

### **Background**

According to the Minister's second reading speech the bill will 'amend the social security law, the family assistance law and the *Veterans' Entitlements Act 1986* to provide several important measures for families and for low income Australians renting their homes.'

The measures include:

- a new method of calculating FTB Part B applicable to 'secondary earners' who commence or return to work;
- expanding the maternity payment eligibility criteria for adopting parents to cover children adopted under age two, including from overseas (rather than the current 26 weeks); and
- improvements to the administration of the rent assistance program for people in receipt of social security and family tax benefit.

### **Retrospective commencement**

#### **Schedule 3, item 4**

The amendment proposed by item 4 of Schedule 3 inserts additional detail into the formula used to calculate an individual's Part B Family Tax Benefit rate. The new detail specifies the order in which a reduction for income is applied to the components of the rate.

By virtue of item 7 in the table in subclause 2(1) of this bill, the amendment is to commence retrospectively on 1 January 2005. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective

impact and will comment adversely where such a bill has a detrimental effect on people.

In this case, while the explanatory memorandum gives some information on the effect of the amendment, on page 28, it does not indicate whether this retrospective commencement will adversely affect any person. The committee **seeks the Minister's advice** as to whether anyone will be disadvantaged by the retrospective application of the provision.

*Pending the Minister'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.*

### **Retrospective application Schedule 3, items 14 to 16**

The amendments proposed by items 14 to 16 of Schedule 3 will apply from the 2000-01 income year. In this case, the explanatory memorandum indicates that those amendments are beneficial to those recipients of family tax benefits or child care benefits to which they apply.

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

## **Film Licensed Investment Company Bill 2005**

Introduced into the House of Representatives on 26 May 2005

Portfolio: Communications, Information Technology and the Arts

### **Background**

This bill provides for an extension of the pilot Film Licensed Investment Company (FLIC) scheme. It provides for a company to apply for a concessional capital licence, which according to the explanatory memorandum, will be allocated following a competitive process. That company may then raise up to \$10 million in each of 2005-06 and 2006-07 for investment in qualifying Australian films.

The bill also provides a 100% income tax deduction for taxpayers investing funds in the company during the licence period.

The bill was introduced with the Film Licensed Investment Company (Consequential Provisions) Bill 2005.

### **Reversal of the onus of proof**

#### **Clause 41**

As the explanatory memorandum notes, 'Clause 40 creates an offence if a person or persons acquire shares in a company either knowing, or reckless as to whether, the acquisition would create or exacerbate an "unacceptable level of foreign ownership" in relation to the FLIC.' Although not explicitly spelt out in the memorandum, the offence also applies to the creation of an 'unacceptable level of individual ownership'. These concepts are introduced in clause 27 of the bill, which establishes ownership conditions for FLIC shares.

Clause 41 establishes a separate offence relating to the failure to dispose of shares in accordance with a written direction from the Minister.

Subclause 41(1) would permit the Minister to give a stakeholder a written direction to cease holding a stake in a film licensed investment company if the Minister has 'reasonable grounds to believe' that the stakeholder's sole or

dominant purpose was to avoid the restrictions on ownership levels stated in clause 27. By virtue of subclause 41(3), the stakeholder's failure to comply with such a direction is a criminal offence. It appears that, although, in a prosecution for such an offence, the prosecution would have to prove beyond reasonable doubt that the accused had failed to divest himself or herself of the stake in the film licensed investment company, it would not have to prove to any degree at all that the accused person's sole or dominant purpose in entering into a scheme was to avoid the limitations stated in clause 27.

The only circumstance in which the accused person's state of mind in entering into any scheme might be tested would be if he or she challenged the Minister's decision to issue the divestiture order. Such a challenge could only be made under the *Administrative Decisions (Judicial Review) Act 1977*, in which case the onus would be on the stakeholder to prove that the Minister did not have reasonable grounds for issuing the divestiture order.

The Committee usually comments adversely on provisions which place the onus on an accused person to disprove one or more elements of an offence with which he or she is charged. The Committee expects that the justification for such a provision will be set out in the explanatory memorandum.

It appears that the effect of clause 41 is to reverse the normal onus of proof in a criminal prosecution. The Committee **seeks the Minister's advice** as to whether that is in fact the case and, if so, whether reversal of the onus of proof is justified in these circumstances.

*Pending the Minister'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.*

## **Film Licensed Investment Company (Consequential Provisions) Bill 2005**

Introduced into the House of Representatives on 26 May 2005  
Portfolio: Communications, Information Technology and the Arts

### **Background**

Introduced with the Film Licensed Investment Company Bill 2005, this bill authorises an upfront taxation deduction for shares in the company purchased during the licence period by subscribing investors. The bill also repeals the *Film Licensed Investment Company Act 1998*, which provided for the pilot FLIC scheme.

*The Committee has no comment on this bill.*

## **Flags Amendment (Flying the Australian National Flag in a Heritage Place) Bill 2005**

Introduced into the House of Representatives on 24 May 2005  
By Mr M D Ferguson as a private member's bill.

### **Background**

According to its long title, this is a bill for an Act 'to amend the *Flags Act 1953* to enable the flying of the Australian National Flag in a heritage place without unnecessary encumbrance.'

The bill amends the Flags Act to provide that 'A person is entitled to erect a flagpole for the purpose of flying the Australian National Flag, on land which the person owns or leases.' The provision is to apply 'despite anything in State or Territory heritage legislation,' but does not apply where any other (ie, non-heritage) law of a state or territory would prevent the erection of a flagpole.

*The Committee has no comment on this bill.*

## **Health Legislation Amendment (Australian Community Pharmacy Authority) Bill 2005**

Introduced into the House of Representatives on 11 May 2005

Portfolio: Health and Ageing

### **Background**

The bill amends the *National Health Act 1953* to extend, until 31 December 2005, existing arrangements for approving pharmacists to supply Pharmaceutical Benefits Scheme (PBS) medicines. These arrangements, and the operation of associated administrative arrangements, will cease to have effect after 30 June 2005.

The extension is being sought to allow the Government and other stakeholders to consider the findings and recommendations of a review of the ministerial rules governing the operation of the Australian Community Pharmacy Authority. According to the explanatory memorandum, that review is expected to report before 30 June 2005.

The bill also makes a technical amendment to the *Health Legislation Amendment (Podiatric Surgery and Other Matters) Act 2004* to correct a misdescription. According to a note in the bill, 'This item repeals an item that inserts text after text that does not exist in the relevant provision.'

### **Retrospective application**

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

By virtue of item 2 of the table in subclause 2(1) of this bill, the amendment proposed by item 1 in Schedule 1 would commence on 13 January 2005, immediately after the commencement of earlier legislation. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

In this case, the explanatory memorandum assures readers that the purpose of that amendment is to correct a grammatical misdescription in the earlier legislation, and that it makes no change to the substantive law.

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

## **Import Processing Charges Amendment Bill 2005**

Introduced into the House of Representatives on 26 May 2005

Portfolio: Justice and Customs

### **Background**

This bill amends the *Import Processing Charges Act 2001* to restructure the import declaration processing charge and the warehouse declaration processing charge. The charging structure proposed by the bill is based on the method of importation, recognising the cost differences between importation by sea, by air and by post.

The bill was introduced with the Customs Legislation Amendment (Import Processing Charges) Bill 2005.

*The Committee has no comment on this bill.*

## **Indigenous Education (Targeted Assistance) Amendment Bill 2005**

Introduced into the House of Representatives on 25 May 2005  
Portfolio: Education, Science and Training

### **Background**

The bill amends the *Indigenous Education Targeted Assistance Act 2000* to:

- appropriate additional funding for Indigenous students who move from remote communities to continue their schooling; and
- transfer funding for independent Indigenous vocational education and training providers to appropriations under the Skilling Australia's Workforce Bill 2005.

*The Committee has no comment on this bill.*

## **Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures Bill 2005**

Introduced into the House of Representatives on 26 May 2005

Portfolio: Justice and Customs

### **Background**

Schedule 1 of the bill inserts new serious drug offences into the *Criminal Code*. The new offences apply to drugs crossing Australia's borders and to drug dealing within Australia. Among the provisions are measures dealing with:

- trade in 'precursor' chemicals,
- increased penalties, including heavier penalties for people who use children to traffic in drugs;
- offences aimed at those who harm or endanger children by exposing them to the manufacture of drugs; and
- adding new drugs to the list of illicit substances.

Schedule 2 of the bill also makes amendments to the *Criminal Code* to criminalise the recruitment by armed groups (not part of the State) of persons under 18 years of age, an obligation under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

There are seven further schedules to the bill, including provisions:

- clarifying the functions of the Australian Federal Police in assisting other agencies and in operations in other countries [Schedule 4]; and
- clarifying the application of the power which allows Customs officers to detain a person in breach of a bail condition intended to prevent that person leaving Australia [Schedule 8].

## Uncertainty of commencement Schedule 2, item 3

By virtue of item 3 in the table in subclause 2(1) of this bill, the amendments proposed by Schedule 2 may commence on the day on which the Optional Protocol enters into force for Australia, but do not commence at all if the Optional Protocol does not come into force. However, the item does not provide any fixed date by which it can be finally determined that the Optional Protocol will **not** come into force.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force and has endorsed the formulation in paragraph 83 of *Drafting Direction No. 3 of 2003* from the Office of Parliamentary Counsel:

83 In some situations, there may be a need to build a time limit into the wording that states that the relevant items do not commence if an uncertain event does not occur. For example, “However, the items do not commence at all if the event mentioned in paragraph (b) does not occur before 1 July 2004” (where the event might, eg, be Australia entering into an international agreement).

In relation to the *Copyright Legislation Amendment Act 2004*, the Committee sought the advice of the Minister for Justice and Customs on a similar matter. In his response the Minister stated that ‘the Committee’s point will be kept in mind in the preparation of any future bills, the commencement of which is to be made contingent on the happening of some independent event.’ [*First Report of 2005*, at p. 6]

The Committee **seeks the Minister’s advice** as to whether the item might not provide a means of determining when (if ever) the Optional Protocol is to be regarded as not coming into force.

*Pending the Minister’s advice, 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.*

## **Explanatory memorandum Schedule 1**

The bill deals with a number of complex and serious matters and the Committee was pleased with the level of detail presented in the explanatory memorandum, particularly in seeking to justify the provisions to be inserted in the *Criminal Code* by Schedule 1—Serious drug offences.

The committee's practice is to alert senators to the risk that provisions may infringe one or more of the principles contained in its terms of reference. Often the Committee must seek from the responsible minister an explanation for that possible infringement. The determination of the issues raised is then left to the Senate as a whole. The Committee does not consider it necessary to seek further information from the Minister in relation to the matters listed below.

### **Delegation of legislative power Schedule 1, item 1 – proposed subsections 301.1 to 301.11**

Proposed new sections 301.1 to 301.5 of the *Criminal Code*, to be inserted by item 1 of Schedule 1 to this bill, would permit the creation of criminal offences by regulation. Although such regulations would have effect for no more than 12 months from the date on which they were made, the sections are clearly a delegation of legislative power to the Executive Council. The explanatory memorandum sets out the justification for these interim regulations at pages 13 to 16.

Similarly, proposed new sections 301.6 to 301.10 of the *Criminal Code*, also to be inserted by item 1 of Schedule 1, would permit the creation of criminal offences by a legislative instrument issued by the Minister. Proposed new section 301.11 provides that such instruments would generally have effect for no more than 28 days, and would have to be the subject of a public announcement by the Minister, and publication on the Internet and in newspapers. Again, the sections are clearly a delegation of legislative power, this time to the Minister. The explanatory memorandum sets out the justification for these emergency determinations at pages 16 to 20.

Paragraph (iv) of the Committee's terms of reference requires the committee to consider whether provisions 'inappropriately delegate legislative powers'.

While these provisions are clearly a delegation of legislative power, the Committee **leaves for the Senate as a whole** the question of whether that delegation is *inappropriate*.

*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.*

### **Absolute liability**

#### **Schedule 1, item 1 – various proposed subsections**

A large number of provisions proposed to be inserted in the *Criminal Code* by item 1 of Schedule 1 to this bill would apply absolute liability to the circumstance of quantity of a controlled drug in relation to the criminal offences created by those sections. Such absolute liability is applied by subsections 302.2(3), 302.3(3), 303.4(3), 303.5(3), 304.1(3), 304.2(3), 307.11(3), 307.12(3), 309.3(4), 309.7(4), 309.10(4), 305.3(3), 305.4(3), 306.2(3), 306.3(3), 307.2(3), 307.3(3), 307.5(3), 307.6(3), 309.12(4) and 309.14(4).

In each case, although the explanatory memorandum does not refer explicitly to the Committee's *Sixth Report of 2002 on the Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, it explains clearly the effect of the application of absolute liability, and seeks to justify its application to that circumstance. An example of such an explanation and justification is on pages 20 and 21 of the memorandum.

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

In the light of the comments throughout the explanatory memorandum relating to these subsections, the Committee merely notes these examples of the application of absolute criminal liability.

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

## **Reversal of the onus of proof**

### **Schedule 1, item 1 – various proposed subsections**

Various sections proposed to be added to the *Criminal Code* by item 1 of Schedule 1 would reverse the normal onus of proof in a criminal proceeding, by creating a presumption as to the necessary intention or belief of an accused person. The provisions are sections 302.5, 303.7, 305.6, 306.5, 306.6, 306.7, 306.8 and 307.14, and subsection 308.2(3).

In each case, the explanatory memorandum explains the effect of the presumption, and seeks to justify its inclusion in the legislation. An example of such an explanation and justification is on pages 24 and 25 of the memorandum.

The Committee usually comments adversely on provisions which place the onus on an accused person to disprove one or more elements of an offence with which he or she is charged. The Committee expects that the justification for such a provision will be set out in the explanatory memorandum.

In the light of the comments throughout the explanatory memorandum relating to these provisions, the Committee merely notes these examples of the reversal of the onus of proof in a criminal proceeding.

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

## **Strict liability**

### **Schedule 1, item 1 – various proposed subsections**

Various provisions proposed to be inserted in the *Criminal Code* by item 1 of Schedule 1 to this bill would apply strict liability to the circumstance that the person is respect of whom an accused person commits an offence is under the age of 18, and therefore a child. The relevant subsections are 309.2(2), 309.3(2), 309.4(2), 309.7(2), 309.8(2), 309.10(2), 309.11(2), 309.12(2), 309.13(2), 309.14(2) and 309.15(2).

Although the explanatory memorandum does not refer explicitly to the Committee's *Sixth Report of 2002 on the Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, in each case it explains clearly the effect of the application of strict liability, and seeks to justify it in these circumstances. An example of such an explanation and justification is on pages 63 to 64 of the memorandum.

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

In the light of the comments throughout the explanatory memorandum relating to these subsections, the Committee merely notes these examples of the application of strict criminal liability.

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

### **Strict liability**

#### **Schedule 1, item 1 – various proposed subsections**

Proposed new subsections 310.2(2), 310.3(2) and 310.4(2) of the *Criminal Code*, to be inserted by item 1 of Schedule 1 to the bill, would apply strict liability to the circumstance that the person in respect of whom an accused person commits an offence is under the age of 14.

Although the explanatory memorandum does not refer explicitly to the Committee's *Sixth Report of 2002 on the Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, it clearly explains, on page 77, the effect of the application of strict liability, and seeks to justify it in these circumstances. Again, in the light of these comments, the Committee merely notes these examples of the application of strict criminal liability.

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

## Maritime Transport Security Amendment Bill 2005

Introduced into the House of Representatives on 25 May 2005

Portfolio: Transport and Regional Services

### Background

The bill amends the *Maritime Transport Security Act 2003* to extend the coverage of that Act to Australia's offshore oil and gas facilities located in Australia's territorial sea, the Exclusive Economic Zone and the continental shelf.

The bill also amends that Act to provide for the introduction of the Maritime Security Identification Card (MSIC). According to the explanatory memorandum, the current provisions of the Act provide 'the power to make most of the regulations required to introduce and implement the MSIC scheme.' The amendments contained in the bill provide that regulations may be made:

- to enable the recovery of costs incurred by bodies issuing an MSIC; and
- to authorise the use or disclosure of personal information by relevant organisations conducting background checks to determine eligibility to hold an MSIC.

### Absolute and strict liability

#### Schedule 1, item 105

In its *Sixth Report of 2002* the Committee reported on the *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. It recommended a range of principles which the committee concluded should form the framework for Commonwealth policy and practice in relation to strict and absolute liability.

In February 2004, the Minister for Justice and Customs published a *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*. The Guide draws together the principles of the criminal law policy of the Commonwealth. Part 4.5 of the Guide contains a statement of the matters which should be considered in framing strict and absolute liability offences.

Although this bill creates both offences of strict liability and of absolute liability, it is not clear from the explanatory memorandum whether the principles contained in the Committee's report or the matters listed at Part 4.5 of the Guide have been considered.

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

Proposed new subsections 100C(3), 100D(3) and 100W(3) of the *Maritime Transport Security Act 2003*, to be added by item 105 of Schedule 1 to this bill, would create criminal offences of strict liability. The explanatory memorandum records the fact of the proposed imposition of strict criminal liability, but does not explain what that imposition involves.

Proposed new subsection 100ZD(2) of the same Act, also to be inserted by item 105 of Schedule 1, would apply absolute criminal liability to some elements of the offence created by subsection 100ZD(1). Again, the explanatory memorandum is silent as to the effect of applying absolute criminal liability.

The Committee **seeks the Minister's advice** as to the justification for the application of strict and absolute criminal liability and, further, whether consideration has been given to the principles contained in the *Sixth Report of 2002 on the Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and the matters listed at Part 4.5 of the *Guide to the Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers*.

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

## **Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Bill 2005**

Introduced into the House of Representatives on 26 May 2005

Portfolio: Arts and Sport

### **Background**

The bill is designed to prevent unauthorised commercial use of indicia and images associated with the Melbourne 2006 Commonwealth Games and to provide the Australian Customs Service with the authority to seize infringing goods. The protections are similar to those provided in connection with the Sydney 2000 Olympic Games.

*The Committee has no comment on this bill.*

## Skilling Australia's Workforce Bill 2005

Introduced into the House of Representatives on 11 May 2005  
Portfolio: Education, Science and Training

### Background

This bill implements new national training arrangements following the abolition of the Australian National Training Authority and transfer of its functions to the Department of Education, Science and Training from July 2005.

The bill appropriates \$4.397 billion for the period from July 2005 to December 2008, to be provided in grants to states and territories. The bill also provides for a new funding framework, the *Commonwealth-State Agreement for Skilling Australia's Workforce*, which will link funding for states and territories to a range of conditions and targets for training outcomes.

The bill was introduced with the Skilling Australia's Workforce (Repeal and Transitional Provisions) Bill 2005.

*The Committee has no comment on this bill.*

## **Skilling Australia's Workforce (Repeal and Transitional Provisions) Bill 2005**

Introduced into the House of Representatives on 11 May 2005

Portfolio: Education, Science and Training

### **Background**

Introduced with the Skilling Australia's Workforce Bill 2005, this bill repeals the *Australian National Training Authority Act 1992* and the *Vocational Education and Training Funding Act 1992*, and provides transitional arrangements for the transfer of functions and responsibilities from the Australian National Training Authority to the Department of Education, Science and Training.

*The Committee has no comment on this bill.*

## **Social Security Legislation Amendment (One-off Payments for Carers) Bill 2005**

Introduced into the House of Representatives on 11 May 2005  
Portfolio: Family and Community Services

### **Background**

This bill provides for 'one-off' payments to recipients of carer payments, carer service pensions and the carer allowance. These measures were announced by the Treasurer in the 2005 Budget.

According to the explanatory memorandum, the bill also provides for an administrative scheme 'to provide payments in circumstances where the statutory one-off payments regime does not produce an appropriate result'. That scheme will be established by legislative instrument.

*The Committee has no comment on this bill.*

## **Spyware Bill 2005**

Introduced into the Senate on 12 May 2005  
By Senator Greig as a Private Senator's bill.

### **Background**

According to its objects clause, the objects of the bill are to:

- regulate the unauthorised or surreptitious installation of computer software;
- require the clear disclosure to computer users of certain computer software features that may pose a threat to a user's privacy or the speed or operation of their computer; and
- give computer users the right and capacity to know what software is being installed on their computer, to refuse to have the software installed, and to be able to uninstall any software.

*The Committee has no comment on this bill.*

## Superannuation Bill 2005

Introduced into the House of Representatives on 12 May 2005

Portfolio: Finance and Administration

### Background

The Public Sector Superannuation Accumulation Plan (PSSAP) will be established as a fully-funded accumulation scheme for new Australian Government employees and office holders (and certain other prescribed persons) from 1 July 2005. The bill, together with the Superannuation (Consequential Amendments) Bill 2005, provides for the separation of the PSSAP from the Public Sector Superannuation Scheme, allowing it to operate on the same basis as similar superannuation schemes.

The bill provides the framework for Australian Government employers to offer employees and office holders with choice of fund and also provides that the PSSAP will be the 'default' fund for people employed under the *Public Service Act 1999* and certain other people prescribed by the Minister.

### Retrospective effect

#### Subclauses 5(5), 7(4), 8(7) and 13(6)

By virtue of subclauses 5(5), 7(4), 8(7) and 13(6), the Minister for Finance is empowered to make declarations which may have effect retrospectively for up to 12 months before the making of the declaration. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people.

In this case, the explanatory memorandum notes that the retrospective effect of such instruments 'will ensure that relevant employees are not disadvantaged' in various circumstances.

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

## **Parliamentary scrutiny**

### **Subclause 10(2)**

Subclause 10(2) provides that the Trust Deed by which the Public Sector Superannuation Accumulation Plan is established is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, but that section 42 of that Act does not apply, with the result that the Trust Deed is not disallowable.

The Committee regards that provision, by itself, as unexceptionable: section 44 of the Legislative Instruments Act generally exempts legislative instruments relating to superannuation from the disallowance provisions of the Act. However, clause 11 of the bill provides that **amendments** of the Trust Deed are legislative instruments and that '(4) Despite anything in section 44 of the *Legislative Instruments Act 2003*' such amendments *are* subject to disallowance. The explanatory memorandum does not provide any reason for the original Trust Deed not being subject to disallowance, but any amendments thereof being subject to such disallowance.

The Committee **seeks the Minister's advice** as to why, if amendments of the Trust Deed are to come under the scrutiny of the Regulations and Ordinances Committee, the Trust Deed itself is not subject to the same parliamentary oversight.

*Pending the Minister's advice, the Committee draws Senators' attention to the provisions, as they may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

## **'Henry VIII' clause**

### **Clause 22**

A Henry VIII clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation. Since its establishment, the Committee has consistently drawn attention to Henry VIII clauses and other provisions which (expressly or otherwise) permit subordinate legislation to amend or take

precedence over primary legislation. Such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

Clause 22 contains such a clause. The effect of subclause 22(2) is to permit the amendment of subclause (1) by regulation. Any such regulation would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* and to scrutiny by the Regulations and Ordinances Committee. This level of scrutiny would often meet this Committee's concerns. In this case, however, the effect of such a regulation would be to expose the Board of the PSSAP, and the Fund itself, to some form of taxation from which subclause 22(1) provides exemption. In effect, subclause 22(2) allows for the imposition of taxation by regulation.

One concern which the Committee has regularly raised in relation to the imposition of any form of taxation or levy by regulation is that the regulation takes effect as soon as it is made, and might not be disallowed for many sitting days after it has been made. Were a regulation under subclause 22(2) to be made, for instance, soon after the Parliament rose for the usual winter recess, the relevant tax could have effect for a number of months before a disallowance motion was considered by the Senate. In the meantime, the tax would have been validly levied, and could not be refunded without further Parliamentary intervention.

The Committee notes that similar provisions exist in relation to other superannuation schemes, for instance in section 26 of the *Superannuation Act 1990*. Nonetheless, the Committee **seeks the Minister's advice** as to whether it is appropriate to provide for the imposition of taxation through delegated legislation in this manner.

*Pending the Minister's advice, 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.*

## **Superannuation (Consequential Amendments) Bill 2005**

Introduced into the House of Representatives on 12 May 2005

Portfolio: Finance and Administration

### **Background**

Introduced with the Superannuation Bill 2005, this bill amends eight Acts and the Trust Deed under the *Superannuation Act 1990* as a consequence of the establishment of the Public Sector Superannuation Accumulation Plan as a separate superannuation fund.

The bill makes amendments dealing with the closure of the Public Sector Superannuation Scheme and the *Superannuation (Productivity Benefit) Act 1988* scheme to new employees, as well as the introduction of choice of fund provisions for Australian Government employees and office holders.

*The Committee has no comment on this bill.*

## **Superannuation Laws Amendment (Abolition of Surcharge) Bill 2005**

Introduced into the House of Representatives on 26 May 2005

Portfolio: Treasury

### **Background**

According to the explanatory memorandum, the bill 'abolishes the surcharge payable on individuals' surchargeable contributions and relevant termination payments, with effect from 1 July 2005.'

*The Committee has no comment on this bill.*

## **Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2005**

Introduced into the House of Representatives on 26 May 2005

Portfolio: Treasury

### **Background**

According to the Minister's second reading speech, the bill 'gives effect to announcements made by the Government earlier this year to ease the transition to superannuation choice for businesses and employees, and minimise the burden on employers in complying with their choice obligations.'

The bill amends superannuation legislation to:

- impose a penalty on employers who recoup from employees the costs of complying with 'choice of fund' requirements;
- specify the circumstances in which an employer does not have to provide a standard choice form;
- specify the role of ASIC in administering the 'no employer kick back' rule in section 68A of the *Superannuation Industry (Supervision) Act 1993*, as it does under the *Retirement Savings Accounts Act 1997*;
- extend the operation of the Superannuation Holding Accounts Special Account as an eligible choice fund to 30 June 2006; and
- clarify various other matters.

*The Committee has no comment on this bill.*

## **Tax Laws Amendment (2005 Measures No. 3) Bill 2005**

Introduced into the House of Representatives on 12 May 2005

Portfolio: Treasury

### **Background**

This bill is an omnibus tax laws amendment bill, comprising five Schedules and making amendments to four Acts. Topics include:

- tax concessions for philanthropy;
- correcting an ‘unintended outcome’ of the expansion of the foreign branch profits exemption relating to international shipping and airline profits;
- the disclosure of relevant information to the Corruption and Crime Commission of Western Australia; and
- standardising the age criteria for dependent children for certain tax concessions.

### **Retrospective application**

#### **Schedule 2**

By virtue of item 3 of Schedule 2 to this bill, the amendments proposed by that Schedule are to apply from 1 July 2004. As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, the explanatory memorandum notes that the amendments will have no financial impact.

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

## **Tax Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Bill 2005**

Introduced into the House of Representatives on 26 May 2005

Portfolio: Treasury

### **Background**

The bill will increase the Medicare levy low income threshold:

- for individuals and families, in line with increases in the consumer price index; and
- for pensioners below age pension age to ensure that those pensioners who do not have a tax liability will also not have a Medicare levy liability.

*The Committee has no comment on this bill.*

## **Tax Laws Amendment (Personal Income Tax Reduction) Bill 2005**

Introduced into the House of Representatives on 12 May 2005

Portfolio: Treasury

### **Background**

The bill amends:

- the *Income Tax Rates Act 1986* to reduce the lowest marginal tax rate and increase personal income tax thresholds for the 42 and 47 per cent tax brackets; and
- the *Medicare Levy Act 1986* to increase the threshold for the senior Australians tax offset.

*The Committee has no comment on this bill.*

## STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2005

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
<b>Bills dealt with in 2004</b>							
Australian Communications and Media Authority Bill 2004	12(8.12.04)	2.12.04	7.3.05	Communications, Information Technology and the Arts	9.12.04	14.3.05	3(16.3.05)
<i>Copyright Legislation Amendment Act 2004</i>	12(8.12.04)	9.12.04	30.11.04	Attorney-General	9.12.04	2.2.05	1(9.2.05)
James Hardie (Investigations and Proceedings) Bill 2004	12(8.12.04)	2.12.04	8.12.04	Treasury	9.12.04		
Water Efficiency Labelling and Standards Bill 2004	9(4.8.04) 12(8.12.04)	24.6.04	12.8.04	Environment and Heritage Reintroduced – no response required	5.8.04	24.12.04	1(9.2.05)
<b>Bill dealt with in 2005</b>							
AusLink (National Land Transport) Bill 2004	1(9.2.05)	9.12.04	10.2.05	Transport and Regional Services	10.2.05	28.4.05	4(11.5.05)
Aged Care Amendment (Transition Care and Assets Testing) Bill 2005	2(9.3.05)	10.2.05	7.3.05	Ageing	10.3.05	15.3.05	3(16.3.05)
Agricultural and Veterinary Chemicals Legislation Amendment (Levy and Fees) Bill 2005	2(9.3.05)	17.2.05	9.3.05	Agriculture, Fisheries and Forestry	10.3.05	11.3.05	3(16.3.05)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005	2(9.3.05)	17.2.05	11.5.05	Fisheries, Forestry and Conservation	10.3.05	4.5.05	4(11.5.05)
Defence Amendment Bill 2005	2(9.3.05)	10.2.05	7.3.05	Defence	10.3.05		
<i>Medical Indemnity Legislation Amendment Act 2005</i>	2(9.3.05)	17.2.05	9.3.05	Health and Ageing	10.3.05	28.4.05	4(11.5.05)
New International Tax Arrangements (Foreign-owned Branches and Other Measures) Bill 2005	4(11.5.05)	17.3.05		Treasurer	12.5.05	31.5.05	
Payment Systems (Regulation) Amendment Bill 2005	3(16.3.05)	10.3.05		Treasurer	17.3.05		