

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



Alert Digest

No. 13 of 2006

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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 A McEwen
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.

TABLE OF CONTENTS

Commentary on bills

• Anti-Money Laundering and Counter-Terrorism Financing Bill 2006	5
• Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006	12
• Australian Securities and Investments Commission Amendment (Audit Inspection) Bill 2006	14
• Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006	16
• Copyright Amendment Bill 2006	19
Crimes Amendment (Victim Impact Statements) Bill 2006	21
• Customs Legislation Amendment (New Zealand Rules of Origin) Bill 2006	22
• Great Barrier Reef Marine Park (Protecting the Great Barrier Reef from Oil Drilling and Exploration) Amendment Bill 2006	24
Inspector of Transport Security Bill 2006	25
Inspector of Transport Security (Consequential Provisions) Bill 2006	26
• Medibank Private Sale Bill 2006	27
Migration Legislation Amendment (Appropriate Review) Bill 2006	30

- **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.

Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006	31
• Tax Laws Amendment (2006 Measures No. 6) Bill 2006	32
Telecommunications Amendment (Integrated Public Number Database) Bill 2006	34
Provisions of bills which impose criminal sanctions for a failure to provide information	35
Scrutiny of standing appropriations	36

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

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Anti-Money Laundering and Counter-Terrorism Financing Bill 2006

Introduced into the House of Representatives on 1 November 2006
Portfolio: Justice and Customs

Background

Introduced with the Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006, this bill implements changes to Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) regulatory regime in relation to the identification, management and mitigation of money laundering and terrorism financing. The bill introduces reporting obligations for the financial sector in relation to customer due diligence, reporting of certain matters, development and maintenance of AML/CTF programs and record-keeping. The changes are to be phased in over two years and incorporate a risk based approach to compliance.

The bill expands the regulatory role of the Australian Transaction Reports and Analysis Centre (AUSTRAC) to provide advisory, monitoring and enforcement functions across a range of industry sectors. The bill provides for review of the operation of the provisions, regulations and AML/CTF rules at the end of seven years.

Commencement more than 6 months after assent Items 3-6, 8, 10, 14 and 16

Items 3, 5, 10, 14 and 16 in the table to subclause 2(1) provide that Divisions 1 to 5 and 7 of Part 2, Part 7 and Divisions 3 and 5 of Part 10 are to commence 12 months after assent to this bill. Items 4, 6 and 8 of the same table provide that Division 6 of Part 2 and Divisions 1 to 4 and 6 of Part 3 are to commence 24 months after Assent. The explanatory memorandum seeks to justify these delayed commencements, on pages 20-21, on the ground that it is necessary to 'stagger commencement of respective Parts according to the degree of difficulty in implementing the obligations imposed on reporting entities by particular Parts.' The explanatory memorandum also states that the

commencement times reflect the extent to which it is anticipated that business changes will be required in order to achieve compliance with the bill and that these commencement times have been settled in consultation between industry and AUSTRAC. The Committee notes that the commencements, in each case, will occur at a fixed time after Assent, and that there is no discretion allowed to the Executive in determining the time of commencement.

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

Abrogation of privilege against self-incrimination Clauses 48, 150, 169 and 205

Clause 48 would abrogate the privilege against self-incrimination for a person required to give a report to the Chief Executive Officer of the AUSTRAC under clause 47. Although subclause 48(2) would protect the information so provided from being admissible in evidence in proceedings against the affected person, the subclause does not protect the person from having information obtained from other sources being used against him or her, when that information has been obtained as a result of the compliance with clause 47. Subclause 150(4) also abrogates the privilege against self-incrimination, and, in the same way as subclause 48(2), subclause 150(5) provides only direct-use immunity but not derivative-use immunity. The explanatory memorandum seeks to justify these two instances of a lack of derivative-use immunity, on page 89, on the ground that to permit derivative-use immunity ‘would unacceptably fetter the effective investigation and prosecution of offences under the bill.’ The explanatory memorandum goes on to observe that subclauses 48(2) and 150(5), in providing direct-use immunity, provide greater immunity than provisions in other corporate regulation. Clauses 169 and 205 also abrogate the same privilege, and provide only direct-use immunity. In these instances, the explanatory memorandum explains the effect of the provisions, but does not seek to justify their insertion in this bill. The Committee considers that these provisions may be regarded as trespassing on personal rights and liberties. The Committee makes no further determination on this matter but **leaves for the Senate as a whole** the question of whether the amendments trespass *unduly* on personal rights and liberties.

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.

Strict liability

Subclauses 53(2), 55(2), 61(5) and 62(4)

Subclauses 74(3), 74(5), 74(7) and 74(9)

Subclause 66(4)

Various subclauses in this bill would impose strict liability for particular elements of offences created by the bill. The Committee notes that the explanation and justification provided in the explanatory memorandum for the imposition of strict liability in each case is partial and inconsistent. Subclauses 53(2), 55(2), 61(5) and 62(4) impose strict liability offences in relation to Reports about physical currency movements and in relation to notices about reporting obligations. However the Committee notes that the explanatory memorandum, on pages 93-98, merely describes the effect of the respective subclause and continues, in each case: 'See section 6.1 *Criminal Code* in relation to strict liability.'

This treatment is to be contrasted with the consideration of subclauses 74(3), (5), (7) and (9), which also impose strict liability for particular elements of other offences. In this case the explanatory memorandum explains rather more fully the effect of strict liability, but does not attempt to justify its imposition in these circumstances. On the other hand, subclause 66(5) imposes strict liability for the physical element of the offence created by subclause 66(4), and the explanatory memorandum, at page 102, not only explains the effect of imposing strict liability, but seeks to justify it, in this instance, by observing that without it there would be 'difficulty in proving that a person intentionally failed to do something, especially as the reason for the failure will usually only be within the knowledge of the defendant.'

The Committee notes that the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) advises that '[s]trict or absolute liability should only be used in an offence where there are well thought out grounds for this.' The Guide also observes that 'Commonwealth

Governments and Parliaments have long taken the view that any use of strict or absolute liability should be properly justified'. The Committee expects that the justification for the imposition of such offences should be clearly set out in the explanatory memorandum in each case. The Committee **seeks the Minister's advice** whether the explanatory memorandum could be amended to provide a clear justification for the imposition of strict liability in each of the circumstances where it is proposed to be imposed.

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.

Legislative Instruments Act — declarations Subclauses 75(3) and 191(6), 75(1) and 191(2)

Subclauses 75(3) and 191(6) provide respectively that the Register of Providers of Designated Remittance Services, required to be maintained under subclause 75(1), and a Remedial direction issued under subclause 191(2) are not legislative instruments. In each case, the explanatory memorandum apparently seeks to justify these provisions by stating that the register and direction respectively do not need to be made public because each document is not one that 'the public needs access to in order to understand rights and obligations under the bill.' The explanatory memorandum also states that Remedial directions may include commercially confidential information. The Committee **seeks the Minister's advice** as to whether either of these documents is legislative in character, or whether subclauses 75(3) and 191(6) have been included simply to assure readers that the documents in question are not legislative in character.

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.

Absolute liability

Subclauses 136(4) and 137(3), 136(1) and 137(1)

Subclauses 136(4) and 137(3) would impose absolute liability for one particular element of the offences created by subclauses 136(1) and 137(1) respectively. The element in respect of which absolute liability is imposed is that information was given, or a document produced, under this Act. The explanatory memorandum correctly observes that the imposition of absolute liability means that the prosecution need not prove fault in relation to that aspect of the offence, and that the defence of mistake of fact is not available. The explanatory memorandum seeks to justify these subclauses (at pages 148 and 149) on the basis that ‘it would be difficult for the prosecution to prove this element as the information would be only within the knowledge of the defendant.’ However, the Committee notes that Part 4.5 of the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs in February 2004, states that:

Application of strict or absolute liability to a particular physical element of an offence has generally only been considered appropriate where one of the following considerations is applicable:

- There is demonstrated evidence that the requirement to prove fault of that particular element is undermining or will undermine the deterrent effect of the offence, and there are legitimate grounds for penalising persons lacking ‘fault’ in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made an honest and reasonable mistake of fact in respect of that element.
- The element is a jurisdictional element rather than one going to the essence of the offence.
- Where one provision refers to another, strict liability should attach to that cross reference.

In light of the advice in the Guide, the Committee **seeks the Minister’s advice** as to the grounds for these subclauses.

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.

Absolute liability

Subclauses 139(2), 140(2) and 141(2), 139(1), 140(1) and 141(1)

Subclauses 139(2), 140(2) and 141(2) would impose absolute liability for one particular element of the offences created by subclauses 139(1), 140(1) and 141(1) respectively. The element in respect of which absolute liability is imposed is that ‘at least one provision of Division 2, 3 or 4 of Part 2 applies to the provision of a designated service’. Divisions 2, 3 and 4 of Part 2 deal with identification procedures to be carried out by financial institutions on their customers. The explanatory memorandum correctly observes that the imposition of absolute liability means that the prosecution need not prove fault in relation to that aspect of the offence, and that the defence of mistake of fact is not available. The explanatory memorandum seeks to justify these subclauses (at pages 151, 152 and 153 respectively) on the basis that their purpose is ‘to avoid the prosecution having to prove that the defendant was reckless’ as to this element of the offence, and that it would be ‘difficult for the prosecution to prove that the defendant was reckless’ as to this element of the offence. However, the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, makes no mention, in Part 4.5, of such a justification for strict liability and absolute liability, and observes that there should be ‘legitimate grounds for penalising a person who made an honest and reasonable mistake of fact’ in relation to the relevant element of the offence. The Committee **seeks the Minister’s advice** whether he could provide further information as to the justification for these subclauses.

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.

Search without warrant

Subclauses 199(4) and 200(7), (8) and (9)

Subclauses 199(4) and 200(7), (8) and (9) provide that either a police officer or ‘a customs officer in respect of whom a declaration under section 219ZA of the *Customs Act 1901* is in force’ may, ‘with such assistance as is reasonable and necessary’ carry out a search of any person who is about to leave

Australia or who has arrived in Australia, if the police or customs officer has reasonable grounds to believe that the person has either 'physical currency' or a bearer negotiable instrument on him or her or in clothing worn by the person. The explanatory memorandum notes, on page 177, that these powers are 'consistent with [the Financial Action Taskforce on Money Laundering] Special Recommendation IX for the prevention of terrorist financing.' That Taskforce is described, on page 4 of the explanatory memorandum, as having been established in 1989 by the Group of 7, and is an inter-governmental body (of which Australia is a founding member) whose purpose is 'the development and promotion of national and international policies to combat money laundering and terrorist financing.' The explanatory memorandum goes on to explain that the recommendation states that countries should have in place measures to detect the physical cross border transportation of currency and bearer negotiable instruments and that authorities should have legal authority to stop or restrain currency or bearer negotiable instruments.

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

Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006

Introduced into the House of Representatives on 1 November 2006
Portfolio: Justice and Customs

Background

Introduced with the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (AML/CTF), this bill makes transitional and consequential amendments to the *Administrative Decisions (Judicial Review) Act 1977*, the *Anti-Terrorism Act (No. 2) 2005*, the *Australian Securities and Investments Commission Act 2001*, the *Commonwealth Electoral Act 1918*, the *Corporations Act 2001*, the *Crimes Act 1914*, the *Criminal Code Act 1995*, the *Financial Management and Accountability Regulations 1997*, the *Financial Transaction Reports Act 1988*, the *Financial Transaction Reports Amendment Act 2006*, the *Freedom of Information Act 1982*, the *Inspector-General of Intelligence and Security Act 1986*, the *Law Enforcement Integrity Commissioner Act 2006*, the *Privacy Act 1988*, the *Proceeds of Crime Act 2002* and the *Surveillance Devices Act 2004*.

Retrospective commencement Schedule 1, items 2 to 11

Item 3 in the table to subclause 2(1) of this bill provides that items 2 to 11 of Schedule 1 commence on 14 December 2005, immediately after the commencement of section 2 of the *Anti-Terrorism Act (No. 2) 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. The Committee notes that whilst these items will commence retrospectively, the retrospectivity will not adversely affect any person, because the purpose of the amendments to be made by those items is to fix the commencement of various parts of the *Anti-Terrorism Act (No. 2) 2005* at 14 December 2006 at the latest.

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

**Administrative Decisions (Judicial Review) Act
Schedule 1, item 1**

Item 1 of Schedule 1 would amend the *Administrative Decisions (Judicial Review) Act 1977* so as to take decisions made under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* out of the purview of the earlier Act. The explanatory memorandum notes, accurately, that this amendment is ‘consistent with the current position of similar decisions under the *Financial Transactions Reports Act 1988* which are excluded from review under’ the Act of 1977.

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

Australian Securities and Investments Commission Amendment (Audit Inspection) Bill 2006

Introduced into the House of Representatives on 18 October 2006

Portfolio: Treasury

Background

This bill amends the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001* to facilitate the Australian Securities and Investments Commission (ASIC) entering into co-operative arrangements with foreign regulatory bodies relating to audit regulation and to provide ASIC with enhanced information-gathering powers in relation to audit inspections.

The bill also contains a technical amendment to the *Corporations Act 2001* to extend the current immunity against criminal liability to cover all financial reports for periods ending on or before 29 June 2007 that are audited using auditing standards made by professional bodies.

Retrospective commencement Schedule 2

Item 3 in the Table to subclause 2(1) of this bill provides for the amendments proposed in Schedule 2 to commence retrospectively on 1 July 2004, immediately after the commencement of Schedule 1 to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosures) Act 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. However, the Committee notes the explanatory memorandum observes, at paragraph 4.66, that '[t]he purpose of the technical amendment is to ensure that the current immunity against criminal liability under subsection 1455(5) [of the *Corporations Act 2001*] is extended to cover all financial reports for periods ending on or before 29 June 2007 that are using those standards made by the professional accounting bodies.' The

Committee notes the retrospective commencement of this Schedule will be beneficial to at least some auditors.

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

Commonwealth Radioactive Waste Management Legislation Amendment Bill 2006

Introduced into the House of Representatives on 2 November 2006
Portfolio: Education, Science and Training

Background

This bill amends the *Commonwealth Radioactive Waste Management Act 2005* to provide for the return of Aboriginal land selected as a site for a Commonwealth radioactive waste management facility to its traditional owners once the land is no longer required for the facility. The bill also provides indemnity to the land trust(s) should any contamination occur following the return of the land.

Administrative Decisions (Judicial Review) Act Schedule 1, item 1

Item 1 of Schedule 1 would amend the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to add a nomination of a possible site for a radioactive waste management facility under section 3A of the *Commonwealth Radioactive Waste Management Act 2005* to the class of decisions to which the ADJR Act does not apply. The Second Reading Speech states that the reason for this amendment is to prevent politically motivated challenges to a land council nomination. While the Committee considers that this amendment makes rights, liberties or obligations dependent upon non-reviewable decisions, it **leaves for the Senate as whole** the question of whether it does so *unduly*.

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.

Administrative review **Schedule 1, item 4**

Item 4 of Schedule 1 would include within a class of decisions which the Act already declares not to be subject to the rules of administrative law requiring procedural fairness a nomination of a possible site for a radioactive waste management facility or an approval of such a nomination. Although the Committee considers that this amendment would also make rights, liberties or obligations dependent upon non-reviewable decisions, it **leaves for the Senate as a whole** the question of whether it does so *unduly*.

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.

Delegation of legislative power **Schedule 1, item 6**

Proposed new subsection 14B(1) of the *Commonwealth Radioactive Waste Management Act 2005*, to be inserted by item 6 of Schedule 1, would give the Minister the power to declare 'in his or her absolute discretion' that land which had been selected as a site for a radioactive waste management facility is no longer required for that purpose. Because of the absolute discretion granted to the Minister in making such a declaration, it would be difficult for any person aggrieved by that decision to mount a challenge thereto. Although this bill does not propose to take a declaration under new subsection 14B(1) out of the purview of the *Administrative Decisions (Judicial Review) Act 1977*, the Committee considers that it would nevertheless appear that the amendment makes rights, liberties or obligations dependent upon non-reviewable decisions. However, the Committee **leaves for the Senate as a whole** the question of whether it does so *unduly*.

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.

Copyright Amendment Bill 2006

Introduced into the House of Representatives on 19 October 2006

Portfolio: Attorney-General

Background

This bill amends the *Copyright Act 1968* to implement recommendations from a number of copyright law reviews including changes to address copyright piracy through:

- the creation of a number of indictable, summary and strict liability offences;
- changes to evidential presumption provisions in civil criminal proceedings to assist copyright owners;
- amendments to the definition of 'article' to clarify the protection of digital files; and
- amendments to the 'Notice of Objection' provisions consistent with changes made to the *Trade Marks Act 1995*.

The bill also implements Australia's obligations under the Australia-United States Free Trade Agreement.

The bill also contains application and transitional provisions.

Strict liability

Schedule 1, items 6 and 33

A number of provisions to be inserted in the *Copyright Act 1968* by this bill would create offences of strict liability. The provisions to be inserted by item 6 of Schedule 1 are proposed new subsections 132AD(5), 132AE(5), 132AF(7) and (8), 132AG(7) and (8), 132AH(5), 132AI(7) and (8), 132AJ(5), 132AL(8) and (9), 132AN(5), 132AO(5), 132AQ(5), 132AR(5) and 132AS(5) and those to be inserted by item 33 of Schedule 1 are proposed new subsections 248PA(5), 248PB(5), 248PC(5), 248PD(5), 248PE(6), 248PF(5), 248PG(5), 248PH(5), 248PI(5), 248PJ(7) and (8), 248PK(5), 248PL(5),

248PM(5), 248QB(6), 248QC(5), 248QD(5), 248QE(7) and (8), 248QF(5), 248QG(5) and 248QH(5).

In each case, the explanatory memorandum notes the fact that the imposition of strict liability means that no fault element is required to be proved, and that the offence has a maximum penalty of 60 penalty units and that it will be ‘underpinned by an infringement notice scheme to be inserted into the Copyright Regulations.’ The explanatory memorandum makes no explicit reference to the Committee’s *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation* or to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide), however, the Committee notes that the new offences appear to fall broadly within the principles stated in the Guide. While the Committee would generally prefer to see a more detailed justification for such offences, it makes no further comment in this case.

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

Crimes Amendment (Victim Impact Statements) Bill 2006

Introduced into the Senate on 18 October 2006

By Senator Ludwig

Background

This bill amends the *Crimes Act 1914* to provide for victim impact statements and victim reports to be presented in federal criminal proceedings.

The Committee has no comment on this bill.

Customs Legislation Amendment (New Zealand Rules of Origin) Bill 2006

Introduced into the House of Representatives on 1 November 2006
Portfolio: Justice and Customs

Background

This bill amends the *Customs Act 1901* by introducing new rules of origin for goods imported into Australia from New Zealand. The bill gives effect to recent amendments to the Australia New Zealand Closer Economic Relations Trade Agreement to enable goods that have been determined as New Zealand originating goods to enter Australia at preferential rates of customs duty. The new rules would apply to goods imported on or after 1 January 2007.

The bill also contains complementary amendments to the *Customs Tariff Act 1995* and consequential provisions in relation to the *Customs Tariff (Anti-Dumping) Act 1975* and the *Legislative Instruments Act 2003*.

Delegation of legislative power Schedule 1, item 1

Proposed new subsection 153ZIB(2) and (3) of the *Customs Act 1901*, to be inserted by item 1 of Schedule 1, would provide for the making of regulations for the purposes of proposed new Division 1E of the Act and proposed new subsection 153ZIB(6) would allow such regulations to ‘apply, adopt or incorporate any matter contained in any instrument or other writing as in force or existing from time to time.’ The explanatory memorandum states that ‘[t]his provision will override section 49A of the *Acts Interpretation Act 1901* in order to enable the *Customs New Zealand Rules of Origin Regulations 2006* (New Zealand Regulations) to refer to the general accounting principles of New Zealand for the purposes of the regional value content calculations’. The Committee notes that following the repeal of Division 12 of the *Acts Interpretation Act 1901* in 2005, subsection 14(2) of the *Legislative Instruments Act 2003* deals with prescribing matters by reference to other instruments.

The Committee also notes that, while the stated purpose of the provision might be regarded as a sufficient reason for a provision of this type, the terms of the provision go very much wider than that stated purpose and permit the incorporation into the regulations of any material at all. The Committee **seeks the Minister's advice** as to the justification for this considerable delegation of legislative power.

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)(v) of the Committee's terms of reference.

Great Barrier Reef Marine Park (Protecting the Great Barrier Reef from Oil Drilling and Exploration) Amendment Bill 2006

Introduced into the House of Representatives on 30 October 2006

By Mr Albanese

Background

This bill, similar to a bill of the same name introduced in 2004, amends the *Great Barrier Reef Marine Park Act 1975* to provide for an extension of the boundaries of the Great Barrier Reef Region.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Member's bill, was not accompanied by a second reading speech or explanatory memorandum. The consideration of bills by the Committee and by the parliament is assisted if they are accompanied by explanatory memoranda. The Committee recognises, of course, that private Senators and Members do not generally have access to the resources of departments and agencies to assist in the development of such documents. In this context, the Committee notes that the Department of the Senate has developed a set of guidelines to assist Senators with the preparation of private bills and explanatory material, *Preparing Private Senator's Bills, Explanatory Memoranda and Second Reading Speeches: A Guide for Senators*. This guide, which is available from the Clerk Assistant (Procedure) and on the Senate's intranet site, may also assist Members in preparing explanatory memoranda.

In this case, the proposed amendments do not appear to fall within the Committee's terms of reference.

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

Inspector of Transport Security Bill 2006

Introduced into the House of Representatives on 18 October 2006
Portfolio: Transport and Regional Services

Background

Introduced with the Inspector of Transport Security (Consequential Provisions) Bill 2006, this bill creates the role of the Inspector of Transport Security to undertake independent inquiries into transport security and the security of offshore facilities at the direction of the Minister.

The Committee has no comment on this bill.

Inspector of Transport Security (Consequential Provisions) Bill 2006

Introduced into the House of Representatives on 18 October 2006
Portfolio: Transport and Regional Services

Background

Introduced with the Inspector of Transport Security Bill 2006, this bill amends the *Freedom of Information Act 1982* to provide that information generated or gathered by the Inspector of Transport Security in the course of an inquiry is exempt from a freedom of information request.

The Committee has no comment on this bill.

Medibank Private Sale Bill 2006

Introduced into the House of Representatives on 18 October 2006

Portfolio: Finance and Administration

Background

This bill amends the *Health Insurance Commission (Reform and Separation of Functions) Act 1997* and the *National Health Act 1953*, to provide for the conversion of Medibank Private from a ‘not for profit’ company to a ‘for profit’ company and to provide for the sale of the Commonwealth’s equity in the company.

The bill provides for exemptions from the *Corporations Act 2001* and other legislation in relation to the conduct of the sale, provides for Medibank Private Limited, and any holding company, to remain an Australian company for a period of 5 years following the sale, and limits individual share ownership to 15 per cent for five years.

Schedule 3 to the bill makes consequential amendments to the *Commonwealth Borrowing Levy Act 1987*, the *Health Insurance Commission (Reform and Separation of Functions) Act 1997* and the *Remuneration Tribunal Act 1973*, which will come into effect when the sale of the Commonwealth’s equity in Medibank Private has been finalised.

Commencement

Schedule 3

Item 3 in the Table to subclause 2(1) of this bill provides for the amendments proposed in Schedule 3 to commence on the day on which, in the opinion of the Minister for Finance, all the shares in Medibank Private Ltd are held by persons other than the Commonwealth or a wholly-owned Commonwealth company. That day is described as the designated sale day. Schedule 3 provides that the levy imposed on borrowing by the *Commonwealth Borrowing Levy Act 1987*, and the *Remuneration Tribunal Act 1973* do not apply after the date of sale. Schedule 3 also ensures that sections of the *Corporations Act 2001* apply to Medibank Private Limited after the

finalisation of the sale. While the bill contains provisions to authorise and facilitate the sale of shares in Medibank Private Ltd, there is no provision in this bill which would require the sale of all the shares. Therefore Schedule 3 may never commence. The Committee has a long standing concern with provisions that do not commence until an uncertain event occurs. Such provisions make it difficult for readers to determine whether the provisions in question have commenced. The Committee prefers to see a time limit imposed on such provisions and **seeks the Minister's advice** whether some appropriate time frame might be applied in this case.

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.

Legislative Instruments Act — disallowance Subclause 3(3)

Subclause 3(3) provides that the declaration of the designated sale day (as mentioned in the previous paragraph) is a legislative instrument, but that section 42 of the *Legislative Instruments Act 2003* (the LIA) does not apply to it, with the result that it would not be disallowable. The explanatory memorandum, at paragraph 44, seeks to justify this denial of the possibility of disallowance by asserting that 'the Minister [for Finance] will be in the best position to make an assessment of when the sale of the Commonwealth's shares has been completed' and therefore 'it is not appropriate that the Minister's declaration be subject to Parliamentary disallowance.' The Committee notes that the Parliament will at least be informed of the terms of the Minister's declaration as the declaration would be required to be registered in accordance with section 24 of the LIA and tabled in accordance with section 38.

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

Legislative Instruments Act — exemptions Schedule 2, subitems 5(4) and 5(5)

Subitem 5(4) of Schedule 2 would permit the Minister for Finance to make a written determination setting out the rules for a Medibank Private sale scheme, but subitem 5(5) would declare that such a determination, despite being a legislative instrument, is not disallowable, because section 42 of the *Legislative Instruments Act 2003* does not apply to it. The explanatory memorandum, at paragraph 72, seeks to justify this denial of effective Parliamentary scrutiny by observing first, that the determination is in effect a direction by the Minister to Medibank Private companies, and therefore already exempt from disallowance under item 41 of the table in subsection 44(2) of the *Legislative Instruments Act 2003*, and secondly that the determination will deal with action to be taken by the Commonwealth itself. The Committee notes that item 41 of the table in subsection 44(2) provides that Ministerial directions to any person or body are not subject to disallowance. The Committee **seeks the Minister's clarification** of the nature of the rules to be determined under subitem 5(4) and the extent to which they could be regarded to be a Ministerial direction.

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.

Migration Legislation Amendment (Appropriate Review) Bill 2006

Introduced into the Senate on 19 October 2006

Portfolio: Senator Bartlett

Background

This bill repeals Regulations 4.31 and 4.31C of the *Migration Regulations 1994*, in relation to fees for reviews of decision by the Refugee Review Tribunal and repeals clause 010.6 of Schedule 2 of the Regulations, which imposes limitations on employment for non-citizens in certain circumstances.

The Committee has no comment on this bill.

Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Bill 2006

Introduced into the Senate on 19 October 2006

By Senator Patterson

Background

This bill amends the *Prohibition on Human Cloning Act 2002* and the *Research Involving Human Embryos Act 2002* in response to the recommendations of the Legislation Review: *Prohibition of Human Cloning Act 2002* and *Research Involving Human Embryos Act 2002*, Reports, December 2005 (the Lockhart Review). The bill retains existing prohibitions on certain human reproductive cloning and other assisted reproductive technology activities and permits certain human embryo research, under licence. The bill also amends the short title of the *Prohibition of Human Cloning Act 2002* and amends the Customs (Prohibited Exports) Regulations 1958.

The Committee has no comment on this bill.

Tax Laws Amendment (2006 Measures No. 6) Bill 2006

Introduced into the House of Representatives on 2 November 2006

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1997*, the *Income Tax Assessment Act 1936*, the *Taxation Laws Amendment Act (No. 5) 2001*, the *Tax Laws Amendment (2006 Measures No. 3) Act 2006*, the *Airports (Transitional) Act 1996* and the *A New Tax System (Goods and Services Tax) Act 1999* to update the list of deductible gift recipients (DGRs) and extend the period for which deductions are allowed for gifts to certain funds that have time limited DGR status.

The bill also contains application and technical provisions, and a transitional provision transferring power from the Prime Minister to the Treasurer to appoint acting Commissioners of Taxation during periods of absence from office.

Retrospective commencement

Schedule 2, item 24

Item 4 in the table to subclause 2(1) of this bill provides that item 24 of Schedule 2 commences on 14 September 2006, immediately after the commencement of Part 1 of Schedule 2 to the *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006*.

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. The Committee notes, however, that the explanatory memorandum makes it clear, in paragraphs 2.23 and 2.24, that this retrospectivity is designed solely to correct a drafting error in the earlier legislation, and will make no difference to the substantive law.

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

Telecommunications Amendment (Integrated Public Number Database) Bill 2006

Introduced into the House of Representatives on 19 October 2006
Portfolio: Communications, Information Technology and the Arts

Background

This bill amends the *Telecommunications Act 1997* to provide for information contained in the integrated public number database (IPND) to be used for certain specified purposes subject to safeguards to limit wider disclosure and use of such information. The bill provides for the Australian Communications and Media Authority to make an integrated public number database scheme for the granting of authorisations.

The Committee has no comment on this bill.

PROVISIONS OF BILLS WHICH IMPOSE CRIMINAL SANCTIONS FOR A FAILURE TO PROVIDE INFORMATION

The Committee's *Eighth Report of 1998* dealt with the appropriate basis for penalty provisions for offences involving the giving or withholding of information. In that Report, the Committee recommended that the Attorney-General develop more detailed criteria to ensure that the penalties imposed for such offences were 'more consistent, more appropriate, and make greater use of a wider range of non-custodial penalties'. The Committee also recommended that such criteria be made available to Ministers, drafters and to the Parliament.

The Government responded to that Report on 14 December 1998. In that response, the Minister for Justice referred to the ongoing development of the Commonwealth *Criminal Code*, which would include rationalising penalty provisions for 'administration of justice offences'. The Minister undertook to provide further information when the review of penalty levels and applicable principles had taken place.

For information, the following Table sets out penalties for 'information-related' offences in the legislation covered in this *Digest*. The Committee notes that imprisonment is still prescribed as a penalty for some such offences.

TABLE

Bill/Act	Section/Subsection	Offence	Penalty
Anti-Money Laundering and Counter-Terrorism Financing Bill 2006	Subclauses 150(3) and 167(3) and clause 204	Fail to provide information to a public authority	Imprisonment for 6 months or 30 penalty units, or both

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 41st Parliament.

Bills introduced with standing appropriation clauses - 41st Parliament

*Indicates passed by Senate	Bills and Clauses
*	Appropriation (Regional Telecommunications Services) Bill 2005-2006 – clause 13
*	Asbestos-related Claims (Management of Commonwealth Liabilities) Bill 2005 – subclause 8(2)
*	Asbestos-related Claims (Management of Commonwealth Liabilities) (Consequential and Transitional Provisions) Bill 2005 – subclause 5(3)
*	Australian Technical Colleges (Flexibility in Achieving Australia's Skills Needs) Bill 2005 – clause 23
*	Financial Framework Legislation Amendment Bill 2004 – Schedule 1, item 397, paragraphs 124(1)(b) and (c) and item 422, subsection 235(2) [also Schedule 1, items 58, 63, 82, 86, 95, 99, 114, 135, 136, 145, 153, 164, 169, 182, 197, 205, 218, 261, 293, 317, 324, 370, 419, 437, 448, 484 and 493 – CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>]
*	Human Services Legislation Amendment Bill 2005 – Schedule 2, subitem 720(4)
*	Indigenous Education (Targeted Assistance) Amendment Bill 2004 – Schedule 1, item 3, subsection 14A(1)
	Indigenous Education (Targeted Assistance) Amendment Bill 2006 – Schedule 1, subsection 14A

	Medibank Private Sale Bill 2006 – Schedule 2, items 8 and 61
*	National Water Commission Bill 2004 – CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>
*	Offshore Petroleum Bill 2005 – clause 56
*	Schools Assistance (Learning Together—Achievement Through Choice and Opportunity) Bill 2004 – clause 133
*	Skilling Australia’s Workforce Bill 2005 – clause 40
*	Superannuation Bill 2005 – subclause 29(4)
*	Superannuation (Consequential Amendments) Bill 2005 – Schedule 5, item 1, subsection 4AA(5) and Schedule 6, item 1, subsection 12A(5)
*	Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005 – Schedule 1, item 1, subsections 158ZO(4), 158ZP(7) and 158ZQ(5) and Schedule 3, item 1, subsection 136C(4)
*	Textile Clothing and Footwear Strategic Investment Program Amendment (Post-2005 Scheme) Bill 2004 – Schedule 1, item 12, section 37ZH and subsection 37ZJ(3)
*	Water Efficiency Labelling and Standards Bill 2004 – CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>

Other relevant appropriation clauses

*Indicates Passed by Senate	Bills and Clauses
*	AusLink (National Land Transport—Consequential and Transitional Provisions) Bill 2004 – Schedule 2, item 3: special appropriation clause – for a finite amount and a finite period of time.
*	Social Security Legislation Amendment (One-off Payments for Carers) Bill 2005 – Schedule 2, item 1: special appropriation clause – for a finite period of time (i.e. for circumstances arising in a particular financial year).

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2005/2006

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Bills dealt with in 2005							
Australian Citizenship Bill 2005	14(30.11.05)	9.11.05		Citizenship and Multicultural Affairs	1.12.05	13.2.06	1(1.3.06)
Corporations (Aboriginal and Torres Strait Islander) Bill 2005	8(10.8.05) 9(17.8.05)	23.6.05	16.10.06	Immigration and Multicultural and Indigenous Affairs	11.8.05	10.10.06	8(11.10.06)
Fuel Quality Standards (Renewable Content of Motor Vehicle Fuel) Amendment Bill 2005	11(14.9.05)	5.9.05	--	Mr Katter	15.9.05	--	RNP
Parliamentary (Judicial Misbehaviour or Incapacity) Commission Bill 2005	11(14.9.05)	5.9.05	--	Mr Kerr	15.9.05	--	RNP
<i>Workplace Relations Amendment (Work Choices) Act 2005</i>	13(9.11.05)	2.11.05	10.11.05	Employment and Workplace Relations	10.11.05	28.3.06	2(29.3.06)
Bills dealt with in 2006							
Aboriginal Land Rights (Northern Territory) Amendment Bill 2006	5(14.6.06)	31.5.06	20.6.06	Families, Community Services and Indigenous Affairs	15.6.06	20.6.06 17.7.06	4(21.6.06) 5(9.8.06)
Aged Care Amendment (Residential Care) Bill 2006	11(11.10.06)		13.9.06	Health and Ageing	12.10.06	17.10.06	9(18.10.06)
Aged Care (Bond Security) Bill 2005	1(8.2.06)	8.12.05	9.2.06	Ageing	9.2.06	23.3.06	2(29.3.06)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Airport Development and Aviation Noise Ombudsman Bill 2006	4(10.5.06)	27.3.06		Mr Georganus	11.5.06		
ASIO Legislation Amendment Bill 2006 Noise Ombudsman Bill 2006	4(10.5.06)	29.3.06	13.6.06	Attorney-General	11.5.06	8.6.06	3(14.6.06)
Australian Participants in British Nuclear Tests (Treatment) Bill 2006	11(11.10.06)	14.9.06	12.10.06	Veterans' Affairs	12.10.06		
Australian Sports Anti-Doping Authority Bill 2005	1(8.2.06)	7.12.05	9.2.06	Arts and Sport	9.2.06	27.2.06	1(1.3.06)
Customs Legislation Amendment (Modernising Import Controls and Other Measures) Bill 2006	7(9.8.06)		21.6.06	Justice and Customs	10.8.06	15.8.06	6(16.8.06)
Datacasting Transmitter Licence Fees Bill 2006	12(18.10.06)	12.10.06		Communications, Information Technology and the Arts	19.10.06		
<i>Defence Legislation Amendment (Aid to Civilian Authorities) Act 2005</i>	1(8.2.06)	13.2.06	7.12.05	Defence	9.2.06	27.3.06	2(29.3.06)
Defence Legislation Amendment Bill 2006	11(11.10.06)	14.9.06		Defence	12.10.06		
Education Services for Overseas Students Legislation Amendment (2006 Measures No. 1) Bill 2006	5(14.6.06)	31.5.06	14.9.06	Education, Science and Training	15.6.06	19.7.06	5(9.8.06)
Environment and Heritage Legislation Amendment Bill (No. 1) 2006	12(18.10.06)	12.10.06	6.11.06	Environment and Heritage	19.10.06		

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006	5(14.6.06)	25.5.06	13.6.06	Families, Community Services and Indigenous Affairs	15.6.06	20.6.06	4(21.6.06)
Families, Community Services and Indigenous Affairs and Veterans' Affairs Legislation Amendment (2006 Budget Measures) Bill 2006	11(11.10.06)	14.9.06	11.10.06	Families, Community Services and Indigenous Affairs	12.10.06	7.11.06	10(8.11.06)
Fuel Quality Standards (Renewable Content of Motor Vehicle Fuel) Amendment Bill 2006	10(13.9.06)	4.9.06	--	Mr Katter	14.9.06		
Housing Loans Insurance Corporation (Transfer of Assets and Abolition) Repeal Bill 2006	11(11.10.06)	13.9.06	11.10.06	Treasurer	12.10.06	17.10.06	9(18.10.06)
Law and Justice Legislation Amendment (Marking of Plastic Explosives) Bill 2006	10(13.9.06)	7.9.06		Attorney-General	14.9.06	17.10.06	10(8.11.06)
Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006	4(10.5.06)	29.3.06	22.6.06	Attorney-General	11.5.06	20.6.06	4(21.6.06)
Law Enforcement Integrity Commissioner Bill 2006	4(10.5.06)	29.3.06	22.6.06	Attorney-General	11.5.06	20.6.06	4(21.6.06)
Migration Amendment (Designated Unauthorised Arrivals) Bill 2006	5(14.6.06)	11.5.06	--	Immigration and Multicultural Affairs	15.6.06		Message Rep
Migration Amendment (Visa Integrity) Bill 2006	7(9.8.06)		21.6.06	Immigration and Multicultural Affairs	10.8.06	10.10.06	8(11.10.06)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Protection of the Sea (Harmful Anti-Fouling System) Bill 2006	7(9.8.06)	22.6.06	7.9.06	Transport and Regional Services	10.8.06	5.9.06	7(6.9.06)
Renewable Energy (Electricity) Amendment Bill 2006	3(29.3.06)	2.3.06	21.6.06	Environment and Heritage	30.3.06	18.5.06	4(21.6.06)
Tax Laws Amendment (2006 Measures No. 4) Bill 2006	7(9.8.06)	22.6.06	16.10.06	Treasurer	10.8.06	17.10.06	9(18.10.06)
Telecommunications (Interception) Amendment Bill 2006	2(1.3.06)	16.2.06	1.3.06	Attorney-General	2.3.06	17.3.06	2(29.3.06)
Trade Practices Legislation Amendment Bill 2006	7(9.8.06)	19.6.06		Mr Katter	10.8.06		

