

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



Alert Digest

No. 1 of 2008

12 March 2008

Senate Standing Committee
for the
Scrutiny of Bills

Alert Digest No. 1 of 2008

12 March 2008

ISSN 1329-668X

Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator the Hon C Ellison (Chair)

Senator M Bishop (Deputy Chair)

Senator A McEwen

Senator A Murray

Senator R Ray

Senator the Hon J Troeth

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

Bills restored to the <i>Notice Paper</i>	5
• <i>Aged Care Amendment (2008 Measures No. 1) Act 2008</i>	7
• Alcohol Toll Reduction Bill 2007	9
Amendments Incorporation Amendment Bill 2008	11
Appropriation Bill (No. 3) 2007-2008	12
Appropriation Bill (No. 4) 2007-2008	13
<i>Appropriation (Drought and Equine Influenza Assistance) Act (No. 1) 2007-2008</i>	14
<i>Appropriation (Drought and Equine Influenza Assistance) Act (No. 2) 2007-2008</i>	15
• Australian Securities and Investments Commission (Fair Bank and Credit Card Fees) Amendment Bill 2008	16
• Classification (Publications, Films and Computer Games) Amendment (Assessments and Advertising) Bill 2008	18
• Commonwealth Authorities and Companies Amendment Bill 2008	20
Cross-Border Insolvency Bill 2008	24
Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008	25
• Defence Legislation Amendment Bill 2008	26

- **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.

• Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008	29
• Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008	32
Higher Education Support Amendment (Removal of the Higher Education Workplace Relations Requirements and National Governance Protocols Requirements and Other Matters) Bill 2008	37
Higher Education Support Amendment (VET FEE-HELP Assistance) Bill 2008	38
• Horse Disease Response Levy Bill 2008	39
• Horse Disease Response Levy Collection Bill 2008	41
Horse Disease Response Levy (Consequential Amendments) Bill 2008	45
Indigenous Education (Targeted Assistance) Amendment (2008 Measures No. 1) Bill 2008	46
• Infrastructure Australia Bill 2008	47
Lands Acquisition Legislation Amendment Bill 2008	49
Marriage (Relationships Equality) Amendment Bill 2008	50
National Film and Sound Archive Bill 2008	51
Offshore Petroleum Amendment (Miscellaneous Measures) Bill 2008	52
• Poker Machine Harm Reduction Tax (Administration) Bill 2008	53

- **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.

Renewable Energy Legislation Amendment (Renewable Power Percentage) Bill 2008	55
• Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008	56
• Screen Australia and the National Film and Sound Archive (Consequential and Transitional Provisions) Bill 2008	57
Screen Australia Bill 2008	59
Skills Australia Bill 2008	60
Social Security and Veterans' Affairs Legislation Amendment (Enhanced Allowances) Bill 2008	61
Stolen Generation Compensation Bill 2008	62
• Tax Laws Amendment (2008 Measures No. 1) Bill 2008	63
Tax Laws Amendment (Personal Income Tax Reduction) Bill 2008	66
Telecommunications (Interception and Access) Amendment Bill 2008	67
Telecommunications Legislation Amendment (Communications Fund) Bill 2008	68
• Therapeutic Goods Amendment (Poisons Standard) Bill 2008	69
• Trade Practices Amendment (Access Declarations) Bill 2008	72
• Trade Practices (Creeping Acquisitions) Amendment Bill 2007	74
• Tradex Scheme Amendment Bill 2008	76

- **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.

• Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008	77
Commentary on amendments to bills	80
Provisions of bills which impose criminal sanctions for a failure to provide information	81

- **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.

Bills restored to the *Notice Paper*

On 13 and 14 February 2008, on the motions of Senators Fielding and Bartlett, a number of bills introduced in the Senate in previous Parliaments were restored to the *Notice Paper*. The Committee has dealt with many of these bills in previous reports and digests, as indicated below.

Alcohol Toll Reduction Bill 2007

See below in this Alert Digest

Cluster Munitions (Prohibition) Bill 2006

See *Alert Digest No. 1 of 2007*

Constitution Alteration (Appropriations for the Ordinary Annual Services of the Government) 2001 [2004]

See *Alert Digest No. 9 of 2001*

Constitution Alteration (Electors' Initiative, Fixed Term Parliaments and Qualification of Members) 2000 [2004]

See *Alert Digest No. 5 of 2000*

Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007

See *Alert Digest No. 3 of 2007*

Electoral Amendment (Political Honesty) Bill 2003 [2004]

See *Fourth Report of 2003*

Euthanasia Laws (Repeal) Bill 2004

See *Alert Digest No. 3 of 2004*

Genetic Privacy and Non-discrimination Bill 1998 [2004]

See *Fourth Report of 1998*

Ministers of State (Post-Retirement Employment Restrictions) Bill 2002 [2004]

See *Alert Digest No. 3 of 2002*

National Market Driven Efficiency Target Bill 2007

See *Tenth Report of 2007*

Parliamentary Charter of Rights and Freedoms Bill 2001 [2005]

See *Alert Digest No. 8 of 1995*

Patents Amendment Bill 1996 [2004]

See *Alert Digest No. 5 of 1996*

Peace and Non-Violence Commission Bill 2007

See Alert Digest No. 8 of 2007

Privacy (Data Security Breach Notification) Bill 2007

See Alert Digest No. 11 of 2007

Privacy (Extension to Political Acts and Practices) Amendment Bill 2006

See Alert Digest No. 7 of 2006

Protecting Children from Junk Food Advertising Bill 2006

See Alert Digest No. 4 of 2006

Public Interest Disclosures Bill 2007

See Alert Digest No. 7 of 2007

Qantas Sale (Keep Jetstar Australian) Amendment Bill 2007

See Alert Digest No. 3 of 2007

Repatriation of Citizens Bill 2007

See Alert Digest No. 5 of 2007

Republic (Consultation of the People) Bill 2001 [2004]

See Alert Digest No. 11 of 2004

Same-Sex Marriages Bill 2006

See Alert Digest No. 6 of 2006

Same Sex: Same Entitlements Bill 2007

See Alert Digest No. 11 of 2007

State Elections (One Vote, One Value) Bill 2001 [2004]

See Alert Digest No. 10 of 2001

Taxation Laws Amendment (Scholarships) Bill 2005

See Alert Digest No. 8 of 2005

Textbook Subsidy Bill 2003 [2004]

See Twelfth Report of 2003

Trade Practices (Creeping Acquisitions) Amendment Bill 2007

See below in this Alert Digest

Uranium Mining in or near Australian World Heritage Properties (Prohibition) Bill 1998 [2004]

See Alert Digest No. 8 of 1998

Workplace Relations (Guaranteeing Paid Maternity Leave) Amendment Bill 2007

See Alert Digest No. 12 of 2007

Aged Care Amendment (2008 Measures No. 1) Act 2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Health and Ageing

Background

This bill amends the *Aged Care Act 1997*, the *Aged Care (Bond Security) Act 2006* and the *Aged Care (Bond Security) Levy Act 2006* to simplify both the fees and charges paid by residents of aged care facilities and the subsidies paid by the Government for residents who cannot fully meet their own care and accommodation costs. The bill:

- applies a new income test that treats all income in the same way, irrespective of whether it is income from a pension or income from a private source;
- combines the current concessional resident supplement and pensioner supplement into a single asset-tested accommodation supplement;
- provides that the maximum level of the new accommodation supplement will be increased through delegated legislation;
- broadens eligibility for community care grants for providers of Community Aged Care Packages and extends eligibility to providers of Extended Aged Care at Home and Extended Aged Care at Home – Dementia packages; and
- extends the application of aged care legislation to include the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.

The new arrangements are proposed to take effect from 20 March 2008.

The bill also contains application, technical and transitional provisions.

While this bill has already been passed by both Houses and was assented to on 18 February 2008, the following comments are provided by the Committee for the information of Senators.

**Insufficiently defined administrative powers
Schedule 1, item 130, subsection 78B-3(2)**

Proposed new subsection 78B-3(2), to be inserted by item 130 of Schedule 1, provides that if the Secretary of the Department of Health and Ageing requires further information to determine an application for flexible care grants, the Secretary may give to the applicant a notice requesting the further information within the period specified in the notice or, if no period is specified in the notice, within 28 days after receiving the notice. Proposed new subsection 78B-3(3) provides that failure to provide the additional information within the required timeframe will result in the application being taken to have been withdrawn.

Where a bill confers powers of this nature on an official, the Committee has an expectation that these powers will be exercised in a way that is not arbitrary or unreasonable. The clause as currently written would allow the Secretary to request information within very short periods of time, should he or she choose to do so, without having regard to the circumstances of the applicant or what would be considered reasonable in the normal course of events.

The Committee **seeks the Minister's advice** as to why it was considered necessary for the Secretary to be able to specify a period of less than 28 days for the production of additional information and whether it might be possible to limit this power in some way so as to ensure that it is not used in an arbitrary or unreasonable manner.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Alcohol Toll Reduction Bill 2007

Introduced into the Senate on 19 September 2007 and restored to the *Notice Paper* on 13 February 2008

By Senator Fielding

Background

This bill amends the *Australian Communications and Media Authority Act 2005*, the *Broadcasting Services Act 1992* and the *Food Standards Australia New Zealand Act 1991* to:

- restrict alcohol advertising on TV and radio to after 9pm and before 5am;
- require the Australian Communications and Media Authority (ACMA) to determine standards that are to be observed by commercial television broadcasting licensees in relation to alcohol advertising;
- establish a Responsible Advertising of Alcohol Division within the ACMA Authority to approve the content of alcohol advertisements and provide advice to broadcasters on alcohol advertising; and
- require Food Standards Australia New Zealand to develop a standard to provide for the labelling of alcohol products and food containing alcohol.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by an explanation of the intent and operation of the proposed amendments, preferably in the form of an explanatory memorandum.

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 explanatory memoranda. 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 assist Senators and Members in preparing explanatory memoranda.

In this instance, the Committee notes that the second reading speech provides some explanation of the intent and operation of the proposed amendments.

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

Amendments Incorporation Amendment Bill 2008

Introduced into the House of Representatives on 12 February 2008
Portfolio: Prime Minister

Background

This bill amends the *Amendments Incorporation Act 1905* in respect of the publication of Acts in printed and electronic form.

As this bill is a ‘privilege’¹ bill, it is not accompanied by an explanatory memorandum or second reading speech.

The Committee has no comment on this bill.

¹ Harris, I.C. (Ed.), *House of Representatives Practice, Fifth Edition*, p. 218.

Appropriation Bill (No. 3) 2007-2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Finance and Deregulation

Background

This bill appropriates an additional \$2.44 billion from the Consolidated Revenue Fund to meet payments for the ordinary annual services of the government, and for related purposes, for the year ending 30 June 2008.

The Committee has no comment on this bill.

Appropriation Bill (No. 4) 2007-2008

Introduced into the House of Representatives on 13 February 2008

Portfolio: Finance and Deregulation

Background

The bill appropriates money (\$898.5 million) from the Consolidated Revenue Fund, additional to the appropriation made by the *Appropriation Act (No. 2) 2007-2008*, to provide additional funding to agencies for:

- expenses in relation to grants to the states and for payments to the Northern Territory, the Australian Capital Territory and local government authorities; and
- non-operating purposes, such as equity injections and loans.

The Committee has no comment on this bill.

Appropriation (Drought and Equine Influenza Assistance) Act (No. 1) 2007-2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Finance and Deregulation

Background

This bill appropriates \$507 million from the Consolidated Revenue Fund for the ordinary annual services of the Government in relation to drought and equine influenza assistance, and for related purposes. The measures provided for in the bill include additional Exceptional Circumstances drought funding for farmers and farm-dependent small businesses and emergency assistance to the horse industry following the outbreak of equine influenza.

This bill has already been passed by both Houses and was assented to on 18 February 2008.

The Committee has no comment on this bill.

Appropriation (Drought and Equine Influenza Assistance) Act (No. 2) 2007-2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Finance and Deregulation

Background

This bill appropriates \$545 million from the Consolidated Revenue Fund to provide additional funding to the States, Territories and local government authorities during the 2007-08 financial year in respect of drought relief assistance and to reimburse them for costs associated with the national response to the eradication of equine influenza.

This bill has already been passed by both Houses and was assented to on 18 February 2008.

The Committee has no comment on this bill.

Australian Securities and Investments Commission (Fair Bank and Credit Card Fees) Amendment Bill 2008

Introduced into the Senate on 14 February 2008

By Senator Fielding

Background

This bill amends the *Australian Securities and Investments Commission Act 2001* to limit the bank and credit card penalty fees that may be charged by financial institutions.

Senator Fielding previously introduced the Australian Securities and Investments Commission (Fair Bank and Credit Card Fees) Amendment Bill 2007 on 21 June 2007.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by an explanation of the intent and operation of the proposed amendments, preferably in the form of an explanatory memorandum.

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 explanatory memoranda. 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 assist Senators and Members in preparing explanatory memoranda.

In this instance, the Committee notes that the second reading speech provides some explanation of the intent and operation of the proposed amendments.

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

Classification (Publications, Films and Computer Games) Amendment (Assessments and Advertising) Bill 2008

Introduced into the House of Representatives on 14 February 2008
Portfolio: Home Affairs

Background

This bill amends the *Classification (Publications, Films and Computer Games) Act 1995* to:

- replace the prohibition on advertising unclassified films and computer games with a new scheme that will allow advertising, subject to conditions to be set out in a new legislative instrument;
- enable an industry based self-assessment scheme to be established for films that are episodes of a television series, and series related material, where that series has been broadcast in Australia. The scheme will allow an application for classification of a box set of episodes of a television series to be accompanied by a report from an authorised assessor; and
- update the definition of *advertisement* to explicitly include advertising on the Internet and to exclude product merchandising, such as clothing.

The bill also contains application and transitional provisions.

Commencement on Proclamation Schedule 1

Item 2 in the table to subclause 2(1) of this bill provides that the amendments proposed in Schedule 1 will commence on Proclamation, but may not commence until up to 12 months after Assent.

The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less. Where the

delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with Paragraph 19 of Drafting Direction No. 1.3. In this instance, the Committee notes that the explanatory memorandum advises that the delayed commencement is ‘necessary to enable complementary State and Territory legislation to replace existing offences for advertising unclassified films and computer games to be enacted.’

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

Commonwealth Authorities and Companies Amendment Bill 2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Finance and Deregulation

Background

This bill amends the *Commonwealth Authorities and Companies Act 1997* (CAC Act) with the aim of improving accountability and governance arrangements for Commonwealth authorities and Commonwealth companies covered by the Act. Amongst other things the bill:

- provides for the Minister for Finance to issue, by legislative instrument, a General Policy Order, which could be expressed to apply to all Commonwealth companies, a particular class, or to specified Commonwealth authorities or wholly-owned Commonwealth companies;
- requires all Commonwealth companies to provide a base level of reporting to their responsible Minister;
- clarifies the use of credit cards and credit vouchers by Commonwealth authorities and introduces criminal penalties for their misuse;
- provides that the directors of a Commonwealth authority or company, rather than the Auditor-General, must provide the financial statements and audit reports of subsidiaries to their responsible Minister; and
- seeks to better align the CAC Act with the *Corporations Act 2001*, particularly in relation to offences, penalties and terminology.

In addition to amending the CAC Act, the bill makes consequential amendments to the *Australian Broadcasting Corporation Act 1983*, the *Australian Industry Development Corporation Act 1970*, the *Australian National University Act 1991*, the *Legislative Instruments Act 2003* and the *Special Broadcasting Service Act 1991*.

The bill also contains application and transitional provisions.

Commencement on Proclamation Schedule 1, item 42

Item 3 in the table to subclause 2(1) of this bill provides that the amendments proposed in item 42 of Schedule 1 will commence on Proclamation, but if it does not commence within 12 months after Assent, the amendments are thereupon repealed. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less. Where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation, in accordance with Paragraph 19 of Drafting Direction No. 1.3.

In this instance, the Committee notes that the explanatory memorandum seeks to justify the delayed commencement on the basis that the additional time is required for the making of regulations, which are essential to the operation of the amendments, and for ‘detailed consultation to occur with Commonwealth authorities’. The explanatory memorandum indicates that such consultation is necessary because the amendments provide for new criminal offences relating to the use of Commonwealth authority credit cards and credit vouchers and also for exemptions from criminal liability in certain circumstances.

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

Strict liability Schedule 1, items 35, 37 and 39

The Committee will generally draw to Senators’ attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum that accompanies the bill. This bill creates several offences of strict liability:

- proposed new subsection 27F(1A) of the *Commonwealth Authorities and Companies Act 1997*, to be inserted by item 35 of Schedule 1, would apply strict liability to aspects of the offence created by subsection 27F(1), which relates to the failure to disclose material personal interests;

- proposed new subsection 27J(1B), to be inserted by item 37 of Schedule 1, imposes strict liability for the offence based on subsection 27J(1), which relates to a director with a material personal interest in a matter being present or voting on a matter when it is being considered at a director's meeting; and
- proposed new subsection 27N(3), to be inserted by item 39 of Schedule 1, imposes strict liability for the offence based on subsection 27N(2), which prohibits insuring officers against certain liabilities, such as wilful breach of duty.

The Committee notes that, in each case, the explanatory memorandum (paragraphs 57 to 62) seeks to justify this imposition of strict criminal liability on the basis of ensuring consistency with similar provisions in the *Corporations Act 2001*. In addition, the penalty in each case is either 5 or 10 penalty units, which is well below the 60 penalty units that is suggested to be a maximum for offences of strict liability in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

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

Legislative Instruments Act—exemptions Schedule 1, item 53

Proposed new subsection 48A(5) of the *Commonwealth Authorities and Companies Act 1997*, to be inserted by item 53 of Schedule 1, declares a General Policy Order made under new subsection 48A(1) to be a legislative instrument, but provides that neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to it. The Committee notes from the explanatory memorandum (paragraph 26) that a General Policy Order is to be exempt from disallowance and sunsetting as 'the instruments will be internal management tools of the Executive Government and intended to be within the control of the Executive.'

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

Legislative Instrument Act—exemptions
Schedule 1, subitems 73(2) or 73(3)

Sub-item 73(4) of Schedule 1 proposes that a determination made under sub-item (2) or (3) is a legislative instrument, but that neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to it. The Committee notes from the explanatory memorandum (paragraph 147) that item 73 is a transitional provision, which seeks to ensure a smooth transition to the General Policy Orders provided for under proposed new section 48A of the *Commonwealth Authorities and Companies Act 1997* (refer above).

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

Cross-Border Insolvency Bill 2008

Introduced into the Senate on 13 February 2008

Portfolio: Superannuation and Corporate Law

Background

This bill adapts the Model Law on Cross-Border Insolvency, developed by the United Nations Commission on International Trade Law, for enactment as a law of Australia. The Model Law:

- sets out the conditions under which persons administering a foreign insolvency proceeding have access to local courts;
- sets out the conditions for recognition of a foreign insolvency proceeding and for granting relief to the representatives of such a proceeding;
- permits foreign creditors to participate in local insolvency proceedings;
- permits courts and insolvency practitioners from different countries to cooperate more effectively; and
- makes provision for co-ordination of insolvency proceedings that are taking place concurrently in different States.

The bill also contains applications provisions.

The Committee has no comment on this bill.

Defence Amendment (Parliamentary Approval of Overseas Service) Bill 2008

Introduced into the Senate on 13 February 2008

By Senator Bartlett

Background

This bill seeks to amend section 50C of the *Defence Act 1903* to provide that members of the Australian Defence Force may not serve beyond the territorial limits of Australia, except in specified circumstances, unless approved by both Houses of Parliament.

The Committee has no comment on this bill.

Defence Legislation Amendment Bill 2008

Introduced into the House of Representatives on 20 February 2008

Portfolio: Defence

This bill was originally introduced into the House of Representatives on 15 August 2007 and passed the House on 19 September 2007.

Background

This bill amends the *Defence Force Discipline Act 1982*, the *Defence Force Discipline Appeals Act 1955* and the *Defence Act 1903* to implement elements of the Government's response to the recommendations of the Senate Foreign Affairs, Defence and Trade References Committee report *The effectiveness of Australia's military justice system*. The bill:

- provides an accused with the right to elect trial by a Military Judge of the Australian Military Court (AMC), instead of a summary authority, for all but a limited number of certain disciplinary offences;
- clarifies that a summary authority will not be subject to the same formal rules of evidence that apply to a trial in the AMC, but that the rules of natural justice, together with basic evidentiary principles, will continue to apply;
- provides for review by a 'reviewing authority' in respect of technical errors related to the awarding of punishments and orders by a summary authority, for example, where the imposition of a punishment is beyond the power of the summary authority;
- requires that certain, more severe, punishments be approved by a 'reviewing authority' before they take effect;
- introduces an automatic right of appeal from a summary authority to a Military Judge of the AMC;
- provides a Military Judge of the AMC with a statutory discretion to deal with an appeal on its merits, by way of a fresh trial and/or a 'paper review' of the evidence; and
- seeks to ensure that legal officers in the Australian Defence Force are not subject to inappropriate command direction in the exercise of their professional capacity.

The bill also contains application, consequential, saving, technical and transitional provisions.

Retrospective commencement
Schedule 7, item 38

Item 9 in the table to subclause 2(1) of this bill provides that the amendments proposed in item 38 of Schedule 7 will commence immediately after the commencement of item 7 of Schedule 2 to the *Defence Legislation Amendment Act 2006*. That latter item commenced on 11 December 2006, so the amendment proposed in the current bill will have some retrospective effect.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that, in this instance, the proposed amendment is technical only and does not change the substantive law. The Committee further notes that the explanatory memorandum could have been clearer on this point.

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

Retrospective commencement
Schedule 7, items 39 and 45

Items 10 and 12 in the table to subclause 2(1) of this bill provide that the amendments proposed in items 39 and 45 of Schedule 7 will commence immediately after the commencement of items 59 and 230 respectively of Schedule 1 to the *Defence Legislation Amendment Act 2006*. Those latter items commenced on 1 October 2007, so the amendments proposed in the current bill will have some retrospective effect.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes that, in this instance, the

proposed amendments are technical only and correct earlier drafting errors. The Committee further notes that the explanatory memorandum could have been clearer on this point.

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

Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008

Introduced into the House of Representatives on 21 February 2008

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the *Broadcasting Services Act 1992*, the *Northern Territory National Emergency Response Act 2007*, the *Classification (Publications, Films and Computer Games) Act 1995* and the *Aboriginal Land Rights (Northern Territory) Act 1976* to make adjustments to the ‘special measures’ implemented in 2007, which aimed to protect Aboriginal children in the Northern Territory. The bill:

- prohibits certain pay television licensees from providing television channels that contain a large amount of R18+ programming to certain prescribed areas;
- allows prohibited pornographic material to be transported through a prescribed area to a place outside the prescribed area and ensures that
 - such goods cannot be seized (or if seized can be returned), and
 - an offence does not apply if a person proves that the material was brought into a prescribed area for the sole purpose of transporting it to a place outside the prescribed area;
- repeals the permit system amendments that came into force on 17 February 2008, which gave public access to certain Aboriginal land; and
- provides that a roadhouse may be licensed as a community store if a community is substantially dependent upon it for the provision of groceries and drinks.

Personal rights and liberties
Schedule 1, items 10 and 16

Proposed new subclause 13(1) of Schedule 2 to the *Broadcasting Services Act 1992*, to be added by item 10 of Schedule 1 to this bill, provides that clause 12 of Schedule 2 to the *Broadcasting Services Act 1992*, and any other provisions of that Act which relate to clause 12, ‘are intended to apply to the exclusion of a law of the Northern Territory that deals with discrimination so far as that law would otherwise apply.’

The Committee notes from the explanatory memorandum (page 7) that clause 12 must be read with proposed new section 127A of the *Northern Territory National Emergency Response Act 2007*, which is to be inserted by item 16 of Schedule 1 to this bill. The explanatory memorandum advises that:

New section 127A(2) sets out the object of this Part, when read together with new clause 12 of Schedule 2 to the Broadcasting Services Act. This object is to protect communities from violence and sexual abuse and should be read as a ‘special measure’ for the purposes of the Racial Discrimination Act 1975.’

Based on Article 1.4 of the Convention on the Elimination of All Forms of Racial Discrimination a ‘special measure’ is defined as:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The Committee notes that the explanatory memorandum seeks to justify the implementation of such ‘special measures’ on the basis that they are ‘intended to advance Indigenous Australia, and especially Indigenous children’ and ‘the prohibition is for a limited period of time, and is not intended to result in the maintenance of separate rights for different racial groups for any longer than is necessary’. Nevertheless, the Committee considers that these provisions may be considered to trespass on personal rights and liberties but, as is its

practice, **leaves for the Senate as a whole** the question of whether they do so *unduly*.

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.

Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008

Introduced into the Senate on 13 February 2008

Portfolio: Treasury

Background

This bill amends a number of Acts, including the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995*, and the *Retirement Savings Accounts Act 1997*, with a view to:

- improving the efficiency, transparency and consistency of the process for disqualifying individuals from operating financial sector entities; and
- enhancing the accountability of the Australian Prudential Regulation Authority (APRA) for administrative decision-making under various Acts.

Schedule 1 introduces a court-based process for disqualifying an individual from operating an APRA-regulated entity.

Schedule 2 streamlines APRA's direction powers into a general directions provision under the *Banking Act 1959*, the *Insurance Act 1973*, and the *Life Insurance Act 1995*. Such directions may be subject to merits review by the Administrative Appeals Tribunal.

Schedule 3 removes ministerial consent from certain administrative decisions made by APRA or the Australian Taxation Office, where wider policy interests are not involved.

Schedule 4 expands the availability of merits review for appropriate administrative decisions made by APRA or the ATO, consistent with the guidelines developed by the Administrative Review Council.

The bill also contains application, consequential and transitional provisions.

Retrospective application Schedule 1

Sub-items 9(3) and 21(3), item 34 and sub-items 40(3) and 70(5) of Schedule 1 provide that various provisions of the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995*, the *Retirement Savings Accounts Act 1997* and the *Superannuation Industry (Supervision) Act 1993*, as proposed to be amended by provisions in this bill, ‘apply in relation to any conduct engaged in by a person whether before or after [the item in question] commences.’ The relevant provisions will therefore have a measure of retrospective application.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. The Committee notes from the explanatory memorandum (paragraph 1.1), however, that the proposed amendments replace a system of disqualification by the APRA with a system of disqualification by the Federal Court. The explanatory memorandum (paragraphs 1.23 and 1.24) further notes that these application provisions ‘ensure [that] all conduct that may warrant a disqualification is captured under the new law.’

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

Strict liability Schedule 1, items 10, 17, 28, 32, 38, 57 and 67 and Schedule 2, item 12

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

This bill includes numerous provisions that create offences of strict liability, namely:

- proposed new subsections 24(3) and 24(6) of the *Insurance Act 1973*, to be inserted by item 10 of Schedule 1;
- proposed new subsections 43A(3) and 43A(6) of the *Insurance Act 1973*, to be inserted by item 17 of Schedule 1;
- proposed new subsection 125A(10) of the *Life Insurance Act 1995*, to be inserted by item 28 of Schedule 1;
- proposed new subsections 245(4) and 245(5B) of the *Life Insurance Act 1995*, to be inserted by item 32 of Schedule 1;
- proposed new subsection 67B(3) of the *Retirement Savings Accounts Act 1997*, to be inserted by item 38 of Schedule 1;
- proposed new subsections 126K(3), (6) and (8) of the *Superannuation Industry (Supervision) Act 1993*, to be inserted by item 57 of Schedule 1;
- proposed new subsection 131C(3) of the *Superannuation Industry (Supervision) Act 1993*, to be inserted by item 67 of Schedule 1; and
- proposed new subsections 108(2) and (5) of the *Insurance Act 1973*, to be inserted by item 12 of Schedule 2.

The Committee notes that the explanatory memorandum (paragraphs 1.16 to 1.19 and 2.20) seeks to justify the creation of these strict liability offences on the basis that they are ‘offences for non-compliance with basic regulatory requirements that should be complied with by all persons’ and that the use of offences of strict liability ‘is designed to enhance the effectiveness of the enforcement regime in deterring contravention of key prudential requirements.’

In its *Sixth Report of 2002*, the Committee acknowledged that strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime, however, it also indicated that strict liability should only be introduced after careful consideration on a case-by-case basis of all the available options, rather than by applying a rigid formula. The Committee is of the view that the justification provided in the explanatory memorandum for the imposition of strict liability appears to be a generic one, which fails to

demonstrate that consideration has been given to its application on a case-by-case basis.

The Committee **seeks the Treasurer's advice** whether consideration was given to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* in the framing of each of these provisions.

Pending the Treasurer'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.

Exclusion of merits review

Schedule 2, item 12 and Schedule 4, items 7 and 35

Proposed new subsection 104(10) of the *Insurance Act 1973*, to be inserted by item 12 of Schedule 2, provides that a reconsideration of a decision by the Treasurer or the APRA, and a further review thereof under the *Administrative Appeals Tribunal Act 1975*, is available for directions given by that Authority to a general insurer, or a non-operating holding company of a general insurer, on the basis of the grounds specified in new paragraphs 104(1)(a) to (d). This means that if such a direction is given on the basis of a ground specified in paragraphs 104(1)(e) to (j), no such reconsideration or review is available.

Item 7 of Schedule 4, which inserts a new subsection 11CA(5A) into the *Banking Act 1959*, and item 35 of Schedule 4, which inserts a new paragraph 236(1)(zq) into the *Life Insurance Act 1995*, have a similar effect, excluding from review decisions based on specified grounds.

The Committee consistently draws attention to provisions that explicitly exclude review by relevant appeal bodies or otherwise fail to provide for administrative review. In this instance, however, the Committee notes from the explanatory memorandum (paragraph 2.15) that APRA decisions are excluded from merits review where the 'triggers...contain appropriate materiality tests and are serious situations where failure by APRA to act immediately would materially prejudice the interests of depositors,

policyholders or beneficiaries, or the stability of the Australian financial system.’

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

Higher Education Support Amendment (Removal of the Higher Education Workplace Relations Requirements and National Governance Protocols Requirements and Other Matters) Bill 2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Education, Employment and Workplace Relations

Background

This bill repeals section 33-17 of the *Higher Education Support Act 2003*, removing the requirement that higher education providers meet the Higher Education Workplace Relations Requirements and the National Governance Protocols as a condition of their Commonwealth Grant Scheme funding.

The bill also contains an application provision and a number of minor technical amendments aimed at improving the operation of the Act.

The Committee has no comment on this bill.

Higher Education Support Amendment (VET FEE-HELP Assistance) Bill 2008

Introduced into the House of Representatives on 14 February 2008
Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the VET FEE-HELP Assistance Scheme provisions in the *Higher Education Support Act 2003*, broadening the guidelines-making powers.

The Committee has no comment on this bill.

Horse Disease Response Levy Bill 2008

Introduced into the House of Representatives on 21 February 2008

Portfolio: Agriculture, Fisheries and Forestry

Background

Introduced with the Horse Disease Response Levy Collection Bill 2008 and the Horse Disease Response Levy (Consequential Amendments) Bill 2008, this bill imposes a levy on the initial registration of horses. The aim of the levy is to assist the horse industry to repay any amount paid by the Commonwealth on behalf of the horse industry in the event of an outbreak of an emergency horse disease.

Imposing a levy by regulation

Clause 5

Clause 5 of this bill provides that the rate of horse disease response levy imposed by clause 4 is to be fixed by regulations, with no upper limit being set in the bill. The Committee has consistently drawn attention to legislation that provides for the rate of a levy to be set by regulation. This creates a risk that the levy may, in fact, become a tax. In the Committee's opinion, it is for Parliament, rather than the makers of subordinate legislation, to set a rate of tax.

The Committee recognises, however, that where the rate of a levy needs to be changed frequently and expeditiously, this may be better done through amending regulations rather than the enabling statute. Where a compelling case can be made for the rate to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. For example, the Committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.

In this instance, the Committee notes that the explanatory memorandum provides no explanation as to why the rate of the levy needs to be set by

regulation. Similarly, the explanatory memorandum gives no explanation of why the primary legislation does not provide some limits on the exercise of this power, such as specifying a maximum amount above which the levy cannot be set by regulation, or a formula for calculating the amount of the levy. The Committee **seeks the Minister's advice** in respect of these matters.

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.

Horse Disease Response Levy Collection Bill 2008

Introduced into the House of Representatives on 21 February 2008

Portfolio: Agriculture, Fisheries and Forestry

Background

Introduced with the Horse Disease Response Levy Bill 2008 and the Horse Disease Response Levy (Consequential Amendments) Bill 2008, this bill provides for collection and administration of a horse disease response levy on the initial registration of horses. The bill:

- provides for the collection of horse disease response levies by persons or bodies that register horses;
- outlines the liability of horse registration bodies regarding the horse disease response levy payments made by horse owners to the Commonwealth;
- provides for penalties to apply to unpaid levies and for the remission of any penalties resulting from late payment; and
- includes information gathering powers.

The bill also contains application provisions.

Insufficiently defined administrative powers

Subclause 14(1)

Subclause 14(1) provides that an ‘authorised person may give a person a written notice requiring the person to give the authorised person, within the time specified in the notice, specified information or documents relevant to the operation of this Act.’ Where a bill confers powers of this nature on an official, the Committee has an expectation that these powers will be exercised in a way that is not arbitrary or unreasonable. The clause as currently written would allow the authorised person to request information within very short periods of time, should he or she choose to do so, without having regard to the circumstances of the person affected or what would be considered reasonable in the normal course of events.

The Committee **seeks the Minister's advice** as to why it was considered necessary for the authorised person to be able to specify the timeframe in which information or documents must be supplied and whether it might be possible to limit this power in some way so as to ensure that it is not used in an arbitrary or unreasonable manner.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Strict liability

Subclause 15(1)

Subclause 15(3) provides that the offence created by subclause 15(1) – of refusing or failing to give a return, information or document that a person is required to give – is an offence of strict liability. The Committee will generally draw to Senators' attention provisions that create strict liability offences. Where a bill creates such an offence, the Committee considers that the reason for its imposition should be set out in the explanatory memorandum which accompanies the bill.

In this instance, the Committee notes that the explanatory memorandum merely states that 'this clause provides for strict liability offence provisions to ensure that the Commonwealth's horse disease response levy collection requirements... are adhered to.' It does not indicate whether the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Minister for Justice and Customs in February 2004, was consulted in the framing of this offence. The Committee notes, however, that the maximum penalty for the offence is 60 penalty units, which is the maximum proposed in that *Guide*.

The Committee **seeks the Minister's advice** whether the recommendations in the *Guide* were considered in the drafting of this clause.

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.

Abrogation of the privilege against self-incrimination Subclause 15(4)

Subclause 15(4) would abrogate the privilege against self-incrimination for a person required to answer a question or produce a document under subclause 15(1). At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation which interferes with this common law privilege trespasses on personal rights and liberties. The Committee does not see this privilege as absolute, however, recognising that the public benefit in obtaining information may outweigh the harm to civil rights. One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures.

In this case, proposed subclause 15(5) limits the circumstances in which information so provided is admissible in evidence in proceedings against the affected person. The Committee therefore accepts that this provision strikes a reasonable balance between the competing interests of obtaining information and protecting individual rights.

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

Wide delegation Subclause 20(1)

Subclause 20(1) would permit the Secretary of the Department to 'delegate all or any of his or her powers under this Act or the regulations to an APS employee in the Department'. The Committee has consistently drawn attention to legislation which allows delegations to a relatively large class of

persons, with little or no specificity as to their qualifications or attributes. Where such delegations are made, the Committee considers that an explanation of why such broad delegations are considered necessary should be included in the explanatory memorandum. In this instance the explanatory memorandum provides no explanation as to why this wide power of delegation is considered necessary. The Committee **seeks the Minister's advice** as to the reason for this wide power of delegation and whether it should be limited in some way.

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Horse Disease Response Levy (Consequential Amendments) Bill 2008

Introduced into the House of Representatives on 21 February 2008

Portfolio: Agriculture, Fisheries and Forestry

Background

Introduced with the Horse Disease Response Levy Bill 2008 and the Horse Disease Response Levy Collection Bill 2008, this bill amends the *Australian Animal Health Council (Live-stock Industries) Funding Act 1996* to enable horse disease response levies to be appropriated to the Australian Animal Health Council, to be used to repay the Commonwealth for underwriting the horse industry's share of the costs of responding to emergency horse diseases.

The bill also provides a mechanism for any excess horse disease response levies that are collected to be appropriated to relevant horse industry research and development bodies for research and development activities or for the promotion or maintenance of the health of horses.

The Committee has no comment on this bill.

Indigenous Education (Targeted Assistance) Amendment (2008 Measures No. 1) Bill 2008

Introduced into the House of Representatives on 14 February 2008
Portfolio: Education, Employment and Workplace Relations

Background

This bill amends the *Indigenous Education (Targeted Assistance) Act 2000* to appropriate additional funding of \$7.162 million over the 2008 program year (in initial 2005 prices) to provide for the recruitment of an additional 50 teachers to assist Indigenous children in remote communities in the Northern Territory.

The Committee has no comment on this bill.

Infrastructure Australia Bill 2008

Introduced into the House of Representatives on 21 February 2008

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Background

This bill establishes Infrastructure Australia to provide advice to governments, investors and owners of infrastructure regarding:

- nationally significant infrastructure priorities;
- policy and regulation reforms desirable to improve the efficient utilisation of national infrastructure networks;
- options to address impediments to the development and provision of efficient national infrastructure;
- infrastructure policy issues arising from climate change;
- the needs of users; and
- mechanisms for financing investment in infrastructure.

The bill provides for the appointment and remuneration of members of Infrastructure Australia, specifies meeting and reporting requirements and creates a new office of Infrastructure Coordinator, which will be a statutory office within the Infrastructure, Transport, Regional Development and Local Government portfolio.

Legislative Instruments Act—declarations Subclauses 5(5), 6(6) and 28(4)

Subclause 5(5) declares that a direction made under paragraph 5(2)(j) is not a legislative instrument. Subclause 6(6) declares that a direction given by the Minister under subsection 6(1) is not a legislative instrument and subclause 28(4) declares that a direction made under subsection 28(2) is not a legislative instrument.

As outlined in Drafting Direction No. 3.8, where a provision specifies that an instrument is *not* a legislative instrument, the Committee would expect the explanatory memorandum to explain whether the provision is merely declaratory (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*. In this instance, the explanatory memorandum makes no mention of any of the subclauses outlined above and, as such, provides no explanation as to whether these clauses are declaratory or provide for a substantive exemption.

The Committee **seeks the Minister's advice** whether these provisions are declaratory in nature or provide for a substantive exemption and whether it would be possible to include this information, together with a rationale for any substantive exemption, in the explanatory memorandum.

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.

Lands Acquisition Legislation Amendment Bill 2008

Introduced into the House of Representatives on 13 February 2008

Portfolio: Finance and Deregulation

Background

This bill amends the *Lands Acquisition Act 1989* to, among other things,:

- enable the promulgation of Commonwealth Mining Regulations for the administration of mining on Commonwealth land;
- empower the Federal Court to have jurisdiction in matters arising under such regulations;
- provide for a penalty regime for breaches of the regulations under the Act;
- enable the Minister for Finance and Deregulation to initiate an offer of compensation to an interest holder without a claim being made;
- make the Cocos (Keeling) Islands land administration exempt from the Act, consistent with the Christmas Island and Norfolk Island Acts; and
- repeal the *Lands Acquisition (Defence) Act 1968*, which is now redundant.

The Committee has no comment on this bill.

Marriage (Relationships Equality) Amendment Bill 2008

Introduced into the Senate on 14 February 2008
By Senator Nettle

Background

This bill amends the *Marriage Act 1961* to create marriage equality for all relationships, regardless of sexual orientation or gender identity.

Senator Nettle previously introduced the Marriage (Relationships Equality) Amendment Bill 2007 on 1 March 2007.

The Committee has no comment on this bill.

National Film and Sound Archive Bill 2008

Introduced into the House of Representatives on 20 February 2008
Portfolio: Environment, Heritage and the Arts

Background

Introduced with the Screen Australia Bill 2008 and the Screen Australia and the National Film and Sound Archive (Consequential and Transitional Provisions) Bill 2008, this bill establishes the National Film and Sound Archive as a body corporate with its own Board. The bill:

- defines the functions and powers of the National Film and Sound Archive;
- provides for the establishment of a Board and for the appointment, termination and remuneration of members;
- establishes Board procedures and reporting requirements;
- establishes the position of Chief Executive Officer of the National Film and Sound Archive and provides for the appointment, termination and remuneration of the Office holder;
- provides for the appointment of staff and consultants and for the development of a corporate plan; and
- outlines financial and reporting arrangements.

The Committee has no comment on this bill.

Offshore Petroleum Amendment (Miscellaneous Measures) Bill 2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Resources, Energy and Tourism

Background

This bill amends the *Offshore Petroleum Act 2006* to:

- make some technical corrections following the rewrite of the *Petroleum (Submerged Lands) Act 1967*;
- convert geodetic data references of area descriptions to the current Geocentric Datum of Australia references; and
- repeal section 327 of the Act, which allows the Minister to exercise his emergency powers in the 'Area to be Avoided' (offshore Victoria in the Gippsland Basin), as a more comprehensive security regime has been implemented under the *Maritime Transport and Offshore Facilities Security Act 2003*.

The Committee has no comment on this bill.

Poker Machine Harm Reduction Tax (Administration) Bill 2008

Introduced into the Senate on 14 February 2008

By Senator Fielding

Background

This bill:

- provides that a licensed operator of one or more licensed poker machines is liable to pay a poker machine harm reduction tax from the financial year beginning 1 July 2009, with some exceptions;
- specifies the amount of poker machine harm reduction tax payable each financial year, as a percentage of poker machine gross revenue return;
- establishes a Poker Machine Harm Reduction Transition Fund into which the harm reduction tax and interest must be deposited. The fund to be used to make grants to
 - local community and sporting groups to continue community activities, in cases where such groups no longer receive funding from licensed operators of poker machines,
 - support evidence-based compulsive gambling treatment, rehabilitation, research and prevention programs, and
 - promote community education about gambling; and
- establishes a Poker Machine Harm Reduction Transition Fund Supervisory Board and provides for the appointment and remuneration of Board members.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by an explanation of the

intent and operation of the proposed amendments, preferably in the form of an explanatory memorandum.

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 explanatory memoranda. 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 assist Senators and Members in preparing explanatory memoranda.

In this instance, the Committee notes that the second reading speech provides some explanation of the intent and operation of the proposed amendments.

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

Renewable Energy Legislation Amendment (Renewable Power Percentage) Bill 2008

Introduced into the Senate on 14 February 2008

By Senator Allison

Background

This bill amends the Renewable Energy (Electricity) Regulations 2001 to expand the Mandatory Renewable Energy Target from 2008.

The Committee has no comment on this bill.

Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008

Introduced into the Senate on 14 February 2008

By Senator Brown

Background

This bill seeks to repeal the *Euthanasia Laws Act 1997* to restore the Northern Territory *Rights of the Terminally Ill Act 1995*, which it overturned.

Explanatory Memorandum

The Committee notes that this bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by an explanation of the intent and operation of the proposed amendments, preferably in the form of an explanatory memorandum.

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 explanatory memoranda. 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 assist Senators and Members in preparing explanatory memoranda.

In this instance, the Committee notes that the second reading speech provides some explanation of the intent and operation of the proposed amendments.

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

Screen Australia and the National Film and Sound Archive (Consequential and Transitional Provisions) Bill 2008

Introduced into the House of Representatives on 20 February 2008

Portfolio: Environment, Heritage and the Arts

Background

Introduced with the Screen Australia Bill 2008 and the National Film and Sound Archive Bill 2008, this bill deals with consequential and transitional matters related to the establishment of Screen Australia and the National Film and Sound Archive. Amongst other things, the bill:

- repeals the *Australian Film Commission Act 1975* and provides for the winding up of Film Finance Corporation Australia Limited and Film Australia Limited and the transfer of the assets and liabilities of these agencies to Screen Australia, the National Film and Sound Archive or the Australian Film, Television and Radio School;
- provides for the transfer of employees of the existing agencies as appropriate;
- contains consequential provisions in relation to the *Australian Film, Television and Radio School Act 1973* and the *Income Tax Assessment Act 1997*; and
- provides for the Ministerial appointment of the first Chief Executive Officers of Screen Australia and the National Film and Sound Archive.

Legislative Instruments Act - exemption Schedule 2, subitem 36(1)

Subitem 36(3) of Schedule 2 to this bill provides that a direction made under subitem 36(1) 'is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* apply to it.' Subitem 36(1) permits the Finance Minister to allocate money

that has already been appropriated by the Parliament to either Screen Australia or the National Film and Sound Archive, despite the initial appropriation having been to the Australian Film Commission.

The Committee notes from the explanatory memorandum that the direction made under subitem 36(1) is:

...intended to cover a once only transitional arrangement to split the 2008/2009 appropriation for the AFC [Australian Film Commission] between SA [Screen Australia] and the NFSA [National Film and Sound Archive]. There would be no change to the overall appropriation amount. The split cannot be made in the Appropriation Act itself due to timing considerations. The sunseting exemption is to ensure that the instrument is enduring and will be permanently available through publication on the Federal Register of Legislative Instruments. The disallowance exemption is required so that the operations of SA and the NFSA will not be disrupted.

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

Screen Australia Bill 2008

Introduced into the House of Representatives on 20 February 2008
Portfolio: Environment, Heritage and the Arts

Background

Introduced with the National Film and Sound Archive Bill 2008 and the National Film and Sound Archive (Consequential and Transitional Provisions) Bill 2008, this bill establishes Screen Australia as a body corporate with its own Board. The bill:

- defines the functions and powers of Screen Australia;
- provides for the establishment of a Board and for the appointment, termination and remuneration of members;
- establishes Board procedures and reporting requirements;
- establishes the position of Chief Executive Officer of Screen Australia and provides for the appointment, termination and remuneration of the Office holder;
- provides for the appointment of staff and consultants and for the development of a corporate plan; and
- outlines financial and reporting arrangements.

The Committee has no comment on this bill.

Skills Australia Bill 2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Education, Employment and Workplace Relations

Background

This bill establishes Skills Australia, an independent statutory body that will provide advice to the Government. Skills Australia will comprise seven members drawn from a range of backgrounds and will be responsible for:

- analysing current and emerging skills needs and forecasting demands across industry sectors;
- assessing evidence from commissioned research and industry stakeholders to inform Australia's workforce development needs;
- distributing information from research and consultations with stakeholders to business and workers so that they have the necessary information to inform their training and employment decisions;
- making recommendations to Government on current and future skills needs to help inform decisions to encourage skills formation and drive ongoing reforms to the education and training sector, including on priorities for the investment of public funds; and
- establishing and maintaining relationships with relevant State bodies and authorities to inform its advice on current and future demand for skills and facilitate alignment of priorities for responses to skills needs.

The Committee has no comment on this bill.

Social Security and Veterans' Affairs Legislation Amendment (Enhanced Allowances) Bill 2008

Introduced into the House of Representatives on 14 February 2008

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Background

This bill amends the *Social Security Act 1991*, the *Social Security (Administration) Act 1999*, the *Veterans' Entitlements Act 1986* and the *Military Rehabilitation and Compensation Act 2004*. The bill extends qualification for utilities allowance to people who are under pension age and receiving a disability support pension, carer payment, wife pension, widow B pension or bereavement allowance, and to people who are under qualifying age and receiving a service pension or income support supplement.

The bill also:

- increases the annual rate of utilities allowance to \$500 and provides for the allowance to be paid in quarterly instalments;
- increases the annual seniors' concession allowance from \$218 to \$500, also to be paid in quarterly instalments; and
- increases the rate of telephone allowance for certain income support recipients who have an internet connection at home.

The bill also contains transitional provisions.

The Committee has no comment on this bill.

Stolen Generation Compensation Bill 2008

Introduced into the Senate on 14 February 2008

By Senator Bartlett

Background

This bill provides for ex gratia payments to be made to Aboriginal and Torres Strait Islander children removed from their families under the Aborigines Ordinance (1911 or 1918) or who were forcibly removed from their family prior to 31 December 1975 under similar legislation. The bill:

- establishes a Stolen Generations Fund from which ex-gratia payments are to be made and specifies the application process and eligibility criteria for receipt of ex-gratia payments;
- establishes a Stolen Generations Tribunal and defines the functions and powers of the Tribunal;
- provides for the appointment and remuneration of Tribunal members and addresses issues of confidentiality, protection from liability and reporting requirements;
- provides that funding is to be allocated for healing centres and services of assistance for people in receipt of compensation; and
- provides that funding is to be allocated for a Funeral Trust Fund for the provision of funeral services for the deceased.

Senator Bartlett previously introduced the Stolen Generation Compensation Bill 2007 on 13 September 2007.

The Committee has no comment on this bill.

Tax Laws Amendment (2008 Measures No. 1) Bill 2008

Introduced into the House of Representatives on 13 February 2008

Portfolio: Treasury

Background

This bill amends the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997* and the *Income Tax (Transitional Provisions) Act 1997*.

Schedule 1 removes tax deductibility for contributions and gifts to political parties, members and candidates.

Schedule 2 provides that a superannuation lump sum paid to a person who has a terminal medical condition is tax free.

Schedule 3 provides for a deduction for capital expenditure for the establishment of trees in carbon sink forests.

Schedule 4 extends eligibility for the beneficiary tax offset to individuals in receipt of the Equine Workers Hardship Wage Supplement Payment.

Schedule 5 provides tax-free grants to tobacco growers who undertake to exit all agricultural enterprises for at least five years.

Schedule 6 amends the farm management deposit scheme to align the tax law with the guidelines for declaring either 'all primary producers' in a geographical area, or 'specified classes of primary producers' within a geographical area, to be in exceptional circumstances.

The bill also contains application provisions.

Delayed commencement
Schedule 3, part 2

Item 4 in the table to subclause 2(1) of this bill provides that the amendments proposed in Part 2 of Schedule 3 will not commence until 1 July 2012. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will generally not comment where the period of delayed commencement is six months or less, however, where the delay is longer the Committee expects that the explanatory memorandum to the bill will provide an explanation.

In this instance the Committee notes that, although this delay in commencement is much greater than 6 months after Assent, the reason for the delay is that Schedule 3 provides for a tax deduction for capital expenditure for the establishment of trees in a carbon sink forest. Part 1 provides for an immediate deduction in the period 2007-08 to 2011-12, while Part 2 of the Schedule provides for a lower rate of deduction for the subsequent period.

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

Retrospective application
Schedule 2

Item 5 of Schedule 2 provides that the amendments made by that Schedule apply to superannuation benefits paid on or after 1 July 2007 to a member having a terminal medical condition. As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this instance, however, the Committee notes from the explanatory memorandum that ‘as the amendments remove tax on affected payments, the retrospective application of the changes will not disadvantage taxpayers.’

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

**Retrospective application
Schedule 5**

Item 5 of Schedule 5 provides that the amendments made by that Schedule apply to ‘tobacco industry exit grants received in the 2006-07 income year and later income years.’ 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 instance, however, the Committee notes from the explanatory memorandum that the amendments are beneficial to recipients.

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

**Retrospective application
Schedule 6, item 2**

Item 2 of Schedule 6 provides that the amendments made by that Schedule apply to ‘assessments for the 2002-03 year of income and later years of income.’ 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 instance, however, the Committee notes from the explanatory memorandum that the ‘revenue cost of this measure is expected to be nil’ or that there may be a small cost to revenue.

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

Tax Laws Amendment (Personal Income Tax Reduction) Bill 2008

Introduced into the House of Representatives on 14 February 2008
Portfolio: Treasury

Background

This bill amends:

- the *Income Tax Rates Act 1986* to increase the threshold at which the 30 per cent marginal tax rate begins to apply and to decrease the 40 per cent marginal tax rate to 38 per cent from 1 July 2009 and to 37 per cent from 1 July 2010;
- the *Income Tax Assessment Act 1936* to increase the maximum amount of low income tax offset; and
- the *Medicare Levy Act 1986* to increase the income threshold at which the Medicare levy becomes payable for taxpayers who are eligible for the senior Australians tax offset.

The bill also contains application, consequential and transitional provisions.

The Committee has no comment on this bill.

Telecommunications (Interception and Access) Amendment Bill 2008

Introduced into the House of Representatives on 20 February 2008
Portfolio: Attorney-General

Background

This bill amends the *Telecommunications (Interception and Access) Act 1979* to extend the operation of the sunset provisions by 18 months (currently set to sunset on 13 June 2008), to enable the continued protection of specified highly secure networks while consultation occurs on a long-term solution. The bill will allow security agencies to continue to monitor all communications within their corporate networks for the purpose of protecting and maintaining their network and enforcing professional standards. The bill also:

- clarifies agencies' reporting requirements under the *Telecommunications (Interception and Access) Act 1979*;
- clarifies that multiple telecommunications devices can be intercepted on the one named person warrant; and
- makes minor and technical amendments arising from the transfer of duties from the Australian Federal Police to the Attorney-General's Department following the passage of the *Telecommunications (Interception) Act 2006*.

The Committee has no comment on this bill.

Telecommunications Legislation Amendment (Communications Fund) Bill 2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Telecommunications (Consumer Protection and Service Standards) Act 1999* to enable money in the Communications Fund to be used for purposes relating to the deployment of a National Broadband Network. In addition, the bill repeals:

- section 158ZJA of the Act, which requires the balance of the Communications Fund not to fall below \$2 billion; and
- section 158ZJ of the Act, as that provision is now spent.

The bill also contains consequential and transitional provisions.

The Committee has no comment on this bill.

Therapeutic Goods Amendment (Poisons Standard) Bill 2008

Introduced into the House of Representatives on 14 February 2008
Portfolio: Health and Ageing

Background

This bill addresses the legal consequences arising from a recent decision of the Federal Court in *Roche Products v National Drugs and Poisons Schedule Committee*. The Federal Court held that decisions made by the Committee under subsection 52D(2) of the *Therapeutic Goods Act 1989*, which include decisions to amend the Poisons Standard, are legislative in character and made in the exercise of delegated legislative power.

The bill amends the *Therapeutic Goods Act 1989* to treat the Poisons Standard and amendments made to it, which may have been repealed because they were not registered on the Federal Register of Legislative Instruments within the required timeframe, to have been properly registered under the *Legislative Instruments Act 2003* and to have met any other requirements of that Act. The bill also provides for ‘just terms’ compensation in the event that the measures contained in the bill could be construed as amounting to an acquisition of property in a particular case.

Legislative Instruments Act—exemptions Schedule 1, item 2

Proposed new subsection 52D(4A) of the *Therapeutic Goods Act 1989*, to be inserted by item 2 of Schedule 1, provides that an instrument made under existing paragraph 52D(2)(a) or (b) of that Act is a legislative instrument, but that it is not subject to disallowance under section 42 of the *Legislative Instruments Act 2003*.

The Committee notes the justification for exempting these instruments from the *Legislative Instruments Act 2003* put forward in the explanatory memorandum, that decisions under section 52D ought not to be subject to disallowance in order to ‘ensure certainty in the continuing application of

State and Territory laws which refer to Poisons Standards.’ The Committee further notes from the explanatory memorandum that the exemption proposed here is ‘very similar in scope to an existing exemption (section 44(1) of the *Legislative Instruments Act 2003*) which recognises that it is inappropriate for Commonwealth instruments forming part of an inter-governmental scheme to be unilaterally disallowed.

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

Retrospective operation Schedule 1, item 3

Proposed new section 52EA of the *Therapeutic Goods Act 1989*, to be inserted by item 3 of Schedule 1, would validate any instruments made under section 52D of that Act in light of the Federal Court decision in *Roche Products v National Drugs and Poisons Schedule Committee* [2007] FCA 1352, which held that decisions made by the National Drugs and Poisons Schedule Committee (DPSC) under section 52D were legislative instruments. Since the DPSC had previously received independent legal advice that such decisions were not legislative instruments, none of them had been registered under the *Legislative Instruments Act 2003* or complied in any other way with that Act.

The Committee notes from the explanatory memorandum that:

The retrospective effect of the amendments will not add any new regulatory requirement. Rather, the retrospective effect of the amendments is necessary to preserve the status quo of the Poisons Standard and amendments made to it, before the Roche decision. Decisions and actions taken by both the regulator and business relied upon the enforceability and integrity of the Poisons Standard and its amendments, and the retrospective effect of the Bill is necessary to provide certainty for those decisions and actions.

The Committee further notes that the bill provides for ‘just terms’ compensation in the event that the measures contained in the bill could be construed in any way as amounting to an acquisition of property in a particular case.

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

Trade Practices Amendment (Access Declarations) Bill 2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Broadband, Communications and the Digital Economy

Background

This bill amends the *Trade Practices Act 1974* to clarify that access declarations, and extension notices which extend the period of access declarations, are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*. This is in response to the recent Federal Court decision in *Roche Products Pty Limited v National Drugs and Poisons Schedule Committee* [2007] FCA 1352, as a result of which it is possible that access declarations may be open to legal challenge on the basis that they are legislative instruments and are invalid as they have not been registered or tabled.

This bill aims to provide certainty to the telecommunications sector by clarifying that access declarations (including variations and revocations) and extensions to the period of access declarations are not, and are taken to never have been, legislative instruments for the purposes of the *Legislative Instruments Act 2003*. The bill also includes a ‘just terms’ provision that will provide compensation in the event that the provisions are found to give rise to an acquisition of property from a person otherwise than on just terms.

Legislative Instruments Act—exemptions Schedule 1, items 1 and 2

Proposed new subsections 152AL(9) to (11) of the *Trade Practices Act 1974*, to be inserted by item 1 of Schedule 1, provide that access declarations made under that section are not, and never have been, legislative instruments under the *Legislative Instruments Act 2003*. Furthermore, proposed new subsection 152ALA(10) of the *Trade Practices Act 1974*, to be inserted by item 2 of Schedule 1, provides that an extension notice under subsection 152ALA(4) is not, and never has been, a legislative instrument.

The Committee notes from the explanatory memorandum that the purpose of these amendments is to forestall any argument that, in light of the Federal Court decision in *Roche Products Pty Limited v National Drugs and Poisons Schedule Committee* [2007] FCA 1352, such declarations or notices might be legislative instruments.

The Committee further notes from the explanatory memorandum that a ‘high level of accountability applies to the making of access declarations’ and that, therefore, there is no need for the further accountability provided for in the *Legislative Instruments Act 2003*.

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

Trade Practices (Creeping Acquisitions) Amendment Bill 2007

Introduced into the Senate on 20 September 2007 and restored to the *Notice Paper* on 13 February 2008

By Senator Fielding

Background

This bill amends the *Trade Practices Act 1974* to provide that a corporation or person must not directly or indirectly acquire shares or assets in a body corporate or corporation if the cumulative impact of such acquisitions during the preceding six years would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Senator's bill, was accompanied only by a second reading speech and was introduced without an explanatory memorandum. The consideration of bills by the Committee and by the Parliament is assisted if they are accompanied by an explanation of the intent and operation of the proposed amendments, preferably in the form of an explanatory memorandum.

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 explanatory memoranda. 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 assist Senators and Members in preparing explanatory memoranda.

In this instance, the Committee notes that the second reading speech provides some explanation of the intent and operation of the proposed amendments.

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

Tradex Scheme Amendment Bill 2008

Introduced into the House of Representatives on 21 February 2008
Portfolio: Innovation, Industry, Science and Research

Background

This bill amends the *Tradex Scheme Act 1999* to decouple the Tradex Act from those provisions of the Customs Regulations that allow for the drawback of customs duty (the Drawback Regulations). The decoupling will allow the Tradex Scheme to remain consistent with the Drawback Regulations without being dependent upon them.

In addition, the bill includes amendments aimed at improving the administration of the Tradex Scheme and reducing the regulatory burden on industry. The bill also contains an application provision.

Retrospective application Schedule 1, item 4

Item 5 of Schedule 1 provides that the amendment made to subsection 5(1) of the *Tradex Scheme Act 1999* by item 4 of Schedule 1, applies (among other things) to an application for a Tradex order which has been made, but not determined, before the commencement of the Schedule.

As a matter of practice, the Committee draws attention to any bill that seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this instance, however, the Committee notes from the explanatory memorandum (paragraph 10) that ‘the retrospective application of the new provisions will ensure that current Tradex order holders will benefit from those provisions.’

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

Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

Introduced into the House of Representatives on 13 February 2008
Portfolio: Employment and Workplace Relations

Background

This bill amends the *Workplace Relations Act 1996*, along with a number of other Acts, to give effect to key Government election commitments and to begin the transition to a new workplace relations system. The bill:

- prevents Australian Workplace Agreements (AWA) being made after the commencement of the Act;
- creates an Individual Transitional Employment Agreement (ITEA), which can be made up until 31 December 2009 between an employee and an employer that employed at least one employee on an individual employment agreement at 1 December 2007;
- replaces the ‘fairness test’ with a no-disadvantage test for both ITEAs and collective agreements;
- introduces a number of changes relating to the circumstances in which workplace agreements commence operation;
- repeals provisions allowing unilateral termination of collective agreements and empowers the Australian Industrial Relations Commission (AIRC) to terminate a collective agreement on application; and
- introduces a new Part 10A dealing with award modernisation.

The bill also contains application, consequential and transitional provisions.

Legislative Instruments Act—exemptions Schedule 2, Item 9

Proposed new subsections 576C(6) of the *Workplace Relations Act 1999*, to be inserted by item 9 of Schedule 2, provides that neither an ‘award modernisation request’ nor ‘an instrument made under subsection [576C(4)]’ of that Act is a legislative instrument. Similarly, proposed new subsection 576G(4) of the *Workplace Relations Act 1999*, also to be inserted by item 9 of Schedule 2, provides that ‘a modern award’ is not a legislative instrument.

The Committee notes that, in both cases, the explanatory memorandum advises that the intention of these clauses is to exempt the instruments from being legislative instruments for the purposes of the *Legislative Instruments Act 2003* and that the exemptions are ‘consistent with the existing exemption for instruments that deal with persons’ terms and conditions of employment’.

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

Ousting of judicial review Schedule 2, Item 9

Proposed new subsection 576ZA(1) provides that a modern award or an order varying an award:

- (a) *is final and conclusive; and*
- (b) *must not be challenged, appealed against, reviewed, quashed or called in question in any court; and*
- (c) *is not subject to prohibition, mandamus or injunction in any court or any account.*

This is a privative clause that appears to limit the ability of those affected by a modern award, or an order varying an award, to seek judicial review. The Committee is of the view that ousting of judicial review is not a matter to be undertaken lightly by the Parliament. It has the potential to upset the delicate arrangement of checks and balances upon which our constitutional democracy is based. It is the function of the courts within our society to ensure that executive action affecting those subject to Australian law is carried out in

accordance with the law. It is cause for the utmost caution when one arm of government (in this case the Executive) seeks the approval of the second arm of government (the Parliament) to exclude the third arm of government (the Judiciary) from its legitimate role. We ignore the doctrine of separation of power at our peril.

In this instance, the Committee notes that the explanatory memorandum does not seek to provide a justification for the proposed ousting of judicial review, other than stating that it would ‘protect the validity of modern awards and orders varying modern awards’. The Committee **seeks the advice of the Minister** on the proposed operation of this privative clause, including: whether it goes further than the established practice in respect of industrial awards; whether it will allow for judicial review of secondary instruments, such as employer/employee agreements, created under a modern award; and whether the privative clause applies to all modern awards or only those created in the Northern Territory.

Pending the Minister’s advice, 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.

COMMENTARY ON AMENDMENTS TO BILLS

Therapeutic Goods Amendment (Poisons Standard) Bill 2008

On 21 February 2008 the House of Representatives agreed to two amendments to the bill, neither of which fall within the Committee's terms of reference.

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
Horse Disease Response Levy Collection Bill 2007	Subclause 15(1)	Fail to provide information to a public authority	60 penalty units
Tax Laws Amendment (2008 Measures No. 1) Bill 2008	Subsections 40-1035(4) and 40-1035(6)	Failure to provide information in response to a notice issued under subclause 40-1035(3)	10 penalty units

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 2007/2008

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Bills dealt with in 2007							
Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures Bill 2007	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 2(12.3.08)
Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007	8(8.8.07)	21.6.07	13.9.07	Treasurer	9.8.07	20.9.07	2(12.3.08)
Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007	8(8.8.07)	21.6.07	13.9.07	Treasurer	9.8.07	19.9.07	2(12.3.08)
National Greenhouse and Energy Reporting Bill 2007	11(12.9.07)	15.8.07	18.9.07	Environment and Water Resources	13.9.07	2.10.07	2(12.3.08)
<i>Northern Territory National Emergency Response Act 2007</i>	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 2(12.3.08)
<i>Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007</i>	9(13.8.07)	7.8.07	8.8.07	Families, Community Services and Indigenous Affairs	13.8.07 13.9.07	16.8.07 17.10.07	9(12.9.07) 2(12.3.08)
<i>Water Act 2007</i>	10(15.8.07)	8.8.07	15.8.07	Environment and Water Resources	16.8.07	23.11.07	2(12.3.08)