

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



Alert Digest

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Senate Standing Committee for the Scrutiny of Bills

Members of the Committee

Senator the Hon H Coonan (Chair)

Senator M Bishop (Deputy Chair)

Senator D Cameron

Senator J Collins

Senator R Siewert

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.

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

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

Appropriation (Economic Security Strategy) Bill (No. 1) 2008-2009

Introduced into the House of Representatives on 11 November 2008
Portfolio: Finance and Deregulation

Background

This bill seeks appropriation authority from the Parliament for the additional expenditure of \$146.054 million from the Consolidated Revenue Fund to enable three Commonwealth agencies – the Department of Veterans’ Affairs, the Department of Education, Employment and Workplace Relations, and the Department of Families, Housing, Community Services and Indigenous Affairs – to implement a number of measures contained in the Federal Government’s Economic Security Strategy.

Legislative Instruments Act—determinations and sunset provisions Subclauses 10(6), 11(3) and 12(7)

Subclauses 10(6), 11(3) and 12(7) provide that Ministerial determinations made under subclause (2) of each of the above clauses in relation to adjusting appropriation items ‘is a legislative instrument and, despite subsection 44(2) of the *Legislative Instruments Act 2003*, section 42 (disallowance) of that Act applies to the determination. However, Part 6 (sunsetting) of that Act does not apply to the determination.’

The explanatory memorandum clearly explains the reason for these respective provisions noting (at paragraphs 30, 35 and 40) that ‘(d)espite subsection 44(2) of the [*Legislative Instruments Act 2003*,] which provides that instruments made under annual Appropriation Acts are not subject to disallowance, subclause 10(6) [and subclauses 11(3) and 12(7) provide] that a determination reducing [an appropriation item] is subject to disallowance in accordance with section 42 of the [*Legislative Instruments Act*]. Parliament retains the power to disallow a determination to reduce [an appropriation item] because any such determination will reduce the amount of an appropriation authorised by Parliament. Subclause 10(6) [and subclauses 11(3) and 12(7) also confirm] subsection 54(2) of the [*Legislative*

Instruments Act], which provides that instruments made under annual Appropriation Acts are not subject to sunseting’.

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

Appropriation (Economic Security Strategy) Bill (No. 2) 2008-2009

Introduced into the House of Representatives on 11 November 2008
Portfolio: Finance and Deregulation

Background

This bill proposes an appropriation of \$1.2 billion to enable the Department of the Treasury to make payments to the state and territories for implementation of the First Home Owners Boost, one of the measures contained in the Federal Government's Economic Security Strategy.

Legislative Instruments Act—determinations and sunset provisions Subclauses 12(3), 13(6) and 14(7)

Subclauses 12(3), 13(6) and 14(7) provide that Ministerial determinations made under subclause (2) of each of the above clauses in relation to adjusting appropriation items 'is a legislative instrument and, despite subsection 44(2) of the *Legislative Instruments Act 2003*, section 42 (disallowance) of that Act applies to the determination. However, Part 6 (sunsetting) of that Act does not apply to the determination'.

The explanatory memorandum clearly explains the reason for these respective provisions, noting (at paragraphs 32, 37 and 42) that '(d)espite subsection 44(2) of the [*Legislative Instruments Act 2003*,] which provides that instruments made under annual Appropriation Acts are not subject to disallowance, subclause 12(3) [and subclauses 13(6) and 14(7) provide] that a determination reducing [an appropriation item] is subject to disallowance in accordance with section 42 of the [Legislative Instruments Act]. Parliament retains the power to disallow a determination to reduce [an appropriation item] because any such determination will reduce the amount of an appropriation authorised by Parliament. Subclause 12(3) [and subclauses 13(6) and 14(7) also confirm] subsection 54(2) of the [Legislative Instruments Act], which provides that instruments made under annual Appropriation Acts are not subject to sunsetting'.

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

Climate Protection Bill 2008

Introduced into the House of Representatives on 10 November 2008

By Mr Windsor MP

Background

This bill seeks to ensure that:

- Australia meets its obligations under the Kyoto Convention and the Kyoto Protocol;
- Australia achieves a substantial reduction in human-derived greenhouse gas emissions;
- mandatory targets are set for reducing human-derived greenhouse gas emissions from Australia; and
- Australia meets these mandatory targets.

Explanatory memorandum

The Committee notes that this bill, introduced as a private Member's bill, was accompanied by a statement made on presentation of the bill 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 a full explanation of the intent and operation of the proposed provisions, 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 such documents. In this case, the Committee notes that Mr Windsor's statement provides some explanation of the operation of the bill.

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

Corporations Amendment (Short Selling) Bill 2008

Introduced into the House of Representatives on 13 November 2008

Portfolio: Treasury

Background

This bill amends the *Corporations Act 2001* to address the regulation of short selling of financial products and transactions. In particular, the bill:

- clarifies the Australian Securities and Investments Commission's powers to regulate all aspects of short selling of financial products and transactions;
- repeals sections of the Corporations Act that allow certain financial products to be sold even though the seller does not have an exercisable and unconditional right to vest the products in the buyer (naked short selling); and
- ensures the disclosure of covered short sale transactions (sales supported by securities obtained under a securities lending agreement).

Commencement more than six months after assent Subclause 2(1)

Item 4 in the table to subclause 2(1) provides that Schedule 3 of the bill is to commence on Proclamation, but in any event within 12 months of 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 explanatory memorandum gives no reason for the failure to comply with paragraph 19 of Drafting Direction No 1.3, and does not explain the reason for the period of delay of commencement being longer than

six months. The Committee **seeks the Treasurer's advice** as to the reason for this delay.

Pending the Treasurer'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.

Retrospective application Schedule 1, item 2

Proposed new section 1484 of the *Corporations Act 2001*, to be inserted by item 2 of Schedule 1, will validate various Class Orders made by the Australian Securities and Investments Commission (ASIC) on 22 and 23 September and 24 October 2008, and will therefore have some retrospective effect.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. In this case, the Committee notes that the explanatory memorandum (at paragraphs 2.3 and 2.4) states that ASIC issued these Class Orders in relation to short selling in light of the unprecedented volatility experienced in Australian and global financial markets during September and October 2008, and that it was essential to address any possible uncertainty surrounding the scope of ASIC's powers.

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

Nation-building Funds Bill 2008

Introduced into the House of Representatives on 13 November 2008

Portfolio: Finance and Deregulation

Background

Introduced with the Nation-building Funds (Consequential Amendments) Bill 2008, this bill establishes three new financial asset funds – the Building Australia Fund (BAF), the Education Investment Fund (EIF) and the Health and Hospitals Fund (HHF) – to provide for future investment in critical areas of infrastructure such as transport, communications, energy, water, education and health.

Where the BAF, EIF and HHF are used to finance capital projects in the states and territories, funding will be distributed through the Council of Australian Government (COAG) Reform Fund which is established in the COAG Reform Fund Bill 2008. The Committee provided comment on the COAG Reform Fund Bill 2008 in its *Alert Digest No. 12 of 2008*.

In particular, the bill:

- allows the Treasurer and the Finance Minister to credit funds to the BAF, EIF and HHF through Special Accounts (also established by the bill);
- provides the Future Fund Board with statutory responsibility for managing the investments of the BAF, EIF and HHF;
- expands the Future Fund Management Agency's operational activities as a result of the Future Fund Board's role in relation to the BAF, EIF and HHF;
- requires the responsible Ministers to issue Investment Mandates to the Future Fund Board regarding the investment of the BAF, EIF and HHF;
- provides for Infrastructure Australia and the newly established EIF and HHF Advisory Boards to give advice to certain Ministers regarding potential payments for infrastructure;

- requires relevant Ministers (in consultation with other Ministers) to formulate evaluation criteria to be applied by Infrastructure Australia and the EIF and HHF Advisory Boards;
- provides for the Finance Minister to direct payments from the BAF, EIF and HHF Special Accounts;
- provides for the annual Appropriation Acts to declare that a specified amount is the ‘general drawing rights limit’ in relation to a financial year;
- allows spending proposals from the BAF, EIF and HHF to include the acquisition, in the name of the Commonwealth, of financial assets in a company involved in the creation or development of relevant infrastructure; and
- provides for the overall level of debits from the BAF, EIF and HHF in a financial year to be consistent with the Government’s objective that the level of spending from the Funds should depend primarily on the macroeconomic conditions.

Special (standing) appropriations

Clauses 13, 61, 68, 75, 82, 132, 181, 188, 215 and 255

Clause 13 establishes the BAF Special Account, which is declared to be a Special Account for the purposes of the *Financial Management and Accountability Act 1997*. If an Act establishes a Special Account and identifies the purposes of the account then, by virtue of section 21 of the *Financial Management and Accountability Act 1997*, the Consolidated Revenue Fund is appropriated for those purposes. Clause 13, therefore, establishes a standing appropriation.

The explanatory memorandum states (at pages 13-14) that any amounts credited to the BAF Special Account are quarantined from the rest of the Consolidated Revenue Fund and can only be debited from the BAF for the purposes set out in clauses 18, 19 or 20, or for the purposes of channelling funds to a BAF Portfolio Special Account and to the COAG Reform Fund, in order to make BAF-related payments.

Clause 61 establishes the BAF Infrastructure Portfolio Special Account, clause 68 establishes the BAF Communications Portfolio Special Account, clause 75 establishes the BAF Energy Portfolio Special Account and clause 82 establishes the BAF Water Portfolio Special Account. Each of these is declared to be a Special Account for the purposes of the *Financial Management and Accountability Act 1997* and, therefore, establishes a standing appropriation. The Committee notes that clauses 62, 69, 76 and 83 specify the purposes for which money can be debited from each of these Special Accounts.

Similarly, Clause 132 establishes the EIF Special Account, clause 181 establishes the EIF Education Portfolio Special Account, clause 188 establishes the EIF Research Portfolio Special Account, clause 215 establishes the HHF Special Account and clause 255 establishes the HHF Portfolio Special Account. Each of these is also declared to be a Special Account for the purposes of the *Financial Management and Accountability Act 1997* and, therefore, establishes a standing appropriation. The Committee notes that subsequent provisions in each case specify the purposes for which money can be debited from each of these Special Accounts.

The Committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the Committee to report on whether bills:

- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

In scrutinising standing appropriations, the Committee looks to the explanatory memorandum for an explanation of the reason for the standing appropriation. In addition, the Committee likes to see:

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

In this instance, the Committee notes from the explanatory memorandum and the Minister's second reading speech that the initial credit of funds to the BAF, the EIF and the HHF will be limited in amount as follows:

- transfers to the BAF from the remaining proceeds of the Telstra 3 sale, the assets of the Communications Fund (which will be closed), and \$7.5 billion from the 2007-08 Budget surplus – totalling \$12.6 billion;
- transfers to the EIF from the assets of the Higher Education Endowment Fund (which will be closed) and \$2.5 billion from the 2007-08 Budget surplus – totalling \$8.7 billion; and
- transfer to the HHF of \$5 billion from the 2007-08 Budget surplus.

Although the bill does not specify a limit on the amount of funds that may be subsequently credited to the Special Accounts, the Committee notes that the funds can only be used for very specific purposes. Further, the explanatory memorandum (at pages 59-60, 104-105 and 136-137) explicitly states that the Government's intention is that payments against the BAF, EIF and HHF appropriations 'will be transparent and subject to parliamentary scrutiny with the aim of ensuring a managed and orderly rate of expenditure'. From the 2009-10 financial year onwards, the annual Appropriation Acts will specify the maximum limit on the amount that can be paid out from the Funds in a particular financial year, including payments that are channelled through the COAG Reform Fund.

In light of the fact that the money in each of the Special Accounts above is not available to be spent at the Government's unfettered discretion, the Committee considers that these standing (special) appropriations do not raise the same concerns as other Special Accounts to which the Committee has previously drawn to the attention of Senators.

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

**Legislative Instruments Act—exemption from disallowance
Subclauses 14(5), 15(3), 17(3), 109(3), 133(5), 134(3), 199(3), 216(5),
217(3) and 267(3)**

Subclauses 14(5), 15(3), 17(3), 133(5), 134(3), 216(5) and 217(3) provide that a determination by the relevant responsible Minister in relation to initial and subsequent amounts to be credited to each of the BAF, EIF and HHF Special Accounts under subclause (1) of each of those clauses ‘is a legislative instrument, but section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to the determination’. The explanatory memorandum (at pages 15-16, 70-71 and 112-113) states that, by declaring such determinations to be legislative instruments, they must be tabled in Parliament and published on the Federal Register of Legislative Instruments. However, such determinations ‘would usually be regarded as administrative, rather than legislative, in character’. Accordingly, it is not appropriate that they be disallowable as they are a one-off instrument that is made when the funds are about to be transferred. The explanatory memorandum also states that the same approach was taken in equivalent provisions in the *Future Fund Act 2006*.

Subclauses 109(3), 199(3) and 267(3) provide that a declaration by the Finance Minister, under subclause (1) of each clause, that a specified amount is a ‘general drawing rights limit’ in relation to a relevant Special Account for the period up to 30 June 2009 ‘is a legislative instrument, but section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to the determination’.

The explanatory memorandum states (at pages 60, 105 and 137 respectively) that, by declaring such determinations to be legislative instruments, they must be tabled and published in the Federal Register of Legislative Instruments. However, the Government considers that it would not be appropriate in the circumstances that the declarations be disallowable as they are one-off instruments required to enable payments to be made from the various Funds as early as possible in 2009 to ‘give effect to the Government’s announcement to fast track its nation-building agenda in response to the global financial crisis’.

Further, the explanatory memorandum (at pages 59-60, 104-105 and 136-137) specifically states that the Government’s intention is that payments against the BAF, EIF and HHF appropriations ‘will be transparent and subject to parliamentary scrutiny with the aim of ensuring a managed and orderly rate of

expenditure'. The Committee notes that, from the 2009-10 financial year onwards, the annual Appropriation Acts (rather than Ministerial determinations) will specify the maximum limit on the amount that can be paid out from the Funds in a particular financial year, including payments that are channelled through the COAG Reform Fund. This is intended to provide the Parliament with a mechanism by which it may supervise the rate at which the committed funds will be expended for investment in infrastructure.

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

Nation-building Funds (Consequential Amendments) Bill 2008

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

Background

Introduced with the Nation-building Funds Bill 2008, this bill supports the establishment of the new nation-building funds – the Building Australia Fund (BAF), the Education Investment Fund (EIF) and the Health and Hospitals Fund (HHF).

In particular, the bill:

- extends the operation of the *Future Fund Act 2006* to deal with the Future Fund Board's duties in relation to the BAF, the EIF and the HHF;
- closes the Communications Fund and the Higher Education Endowment Fund, and transfers the balance of their assets to the BAF and the EIF, respectively;
- repeals the *Higher Education Endowment Fund Act 2007* to reflect the closure of the Higher Education Endowment Fund;
- repeals Part 9C of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and amends the *Telstra Corporation Act 1991* to reflect the closure of the Communications Fund;
- allows for amounts to be transferred from the Future Fund to the BAF, EIF and HHF for the purposes of apportioning expenses that have been paid from one fund that should properly be apportioned between two or more of the funds; and
- repeals provisions of the *Income Tax Assessment Act 1997* allowing tax deductible gifts to be made to the Higher Education Endowment Fund, consistent with that fund being closed.

The bill also contains application and transitional provisions.

Legislative Instruments Act—exemptions Schedule 2, item 44

Proposed new subitems 2(3), 3(3) and 4(3) of Schedule 2A to the *Future Fund Act 2006*, to be inserted by item 44 of Schedule 2 to the bill, declare that Ministerial directions issued under subitems 2(1), 3(1) and 4(1), in relation to transfers of amounts from the Future Fund to the BAF, the EIF and the HHF, are not legislative instruments.

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*. Where the provision is a substantive exemption, the Committee would expect to see a full explanation justifying the need for the provision.

In this case, the explanatory memorandum does not indicate whether these subitems are included for the benefit of readers, or are an attempt to gain exemption from the *Legislative Instruments Act 2003*. The Committee **seeks the Minister's advice** whether this provision is declaratory in nature or provides 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.

Plebiscite for an Australian Republic Bill 2008

Introduced into the Senate on 11 November 2008

By Senator Bob Brown

Background

This bill provides for a plebiscite to be held to give the Australian people the opportunity to vote on whether Australia should become a republic.

The Committee has no comment on this bill.

Renewable Energy Amendment (Feed-in-Tariff for Electricity) Bill 2008

Introduced into the Senate on 11 November 2008

By Senator Milne

Background

This bill amends the *Renewable Energy (Electricity) Act 2000* to establish a national feed-in tariff (FiT) scheme to provide reliable, long-term financial support for the commercialisation of a range of both large and small-scale renewable energy technologies.

The bill is a revised version of the earlier Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008. The Committee provided comments on that bill, and sought advice from Senator Milne in relation to several proposed provisions, in its *Alert Digest No. 4 of 2008*. The Senator's response was included in the Committee's *Fifth Report of 2008*. The Committee notes that its previous concerns have been addressed in the revised version of the bill.

The Committee has no comment on this bill.

Social Security and Other Legislation Amendment (Economic Security Strategy) Bill 2008

Introduced into the House of Representatives on 11 November 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*, the *A New Tax System (Family Assistance) Act 1999*, the *A New Tax System (Family Assistance) (Administration) Act 1999*, the *Income Tax Assessment Act 1936*, the *Income Tax Assessment Act 1997*, the *Social Security Act 1991*, and the *Social Security (Administration) Act 1999* to provide for certain social security payments to be made to pensioners, seniors, people with disability, carers, veterans and families with dependent children. The measures contained in the bill are the key legislative component of the Federal Government's Economic Security Strategy.

The bill provides for one-off payments of:

- \$1,400 for single recipients or holders of stipulated payments or cards;
- \$2,100 for couples if both members of a couple receive or hold one of the stipulated payments or cards, and a single payment of \$1,050 if only one member of the couple does so;
- \$1,000 for each person cared for by recipients of carer allowance;
- \$1,000 for each child who attracts family tax benefit Part A for 14 October 2008; and
- \$1,000 for each dependent child who, for 14 October 2008, either attracts or receives youth allowance, ABSTUDY living allowance, or an education allowance under the Veterans' Children Education Scheme or the Military Rehabilitation and Compensation Act Education and Training Scheme.

The tax-free payments will be paid during the payment fortnight commencing on 8 December 2008.

Retrospective application

Schedule 1, item 1; Schedule 2, item 1; Schedule 3, item 4

A number of proposed new sections in the bill apply to circumstances as they relate to individuals as at 14 October 2008. The relevant provisions are:

- proposed new section 900 of the *Social Security Act 1991*, to be inserted by item 1 of Schedule 1;
- proposed new section 118ZZQ of the *Veterans' Entitlements Act 1986*, to be inserted by item 1 of Schedule 2;
- proposed new section 89 of the *A New Tax System (Family Assistance) Act 1999*, to be inserted by item 4 of Schedule 3; and
- proposed new section 93 of the *A New Tax System (Family Assistance) Act 1999*, also to be inserted by item 4 of Schedule 3.

As a matter of practice, the Committee draws attention to any bill which seeks to have retrospective impact and will comment adversely where such a bill has a detrimental effect on people. However, the Committee notes that in each of the proposed new sections outlined above, the retrospective application of eligibility requirements under the bill are beneficial to recipients of the Economic Security Strategy payments under the various Acts.

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

Determination of important matters by legislative instrument

Schedule 4

Schedule 4 would give to the Minister administering each of the Acts amended by this bill, a discretion to determine, by legislative instrument, a

scheme under which Economic Security Strategy payments may be made to persons in particular circumstances (who would not otherwise qualify for such payments). Schedule 4 provides for payments under the scheme ‘to be made out of the Consolidated Revenue Fund, which is appropriated accordingly’. The only limit on the width of the Minister’s discretion is that payments under the scheme must be in circumstances where the Minister considers that the primary scheme established in the bill ‘does not produce appropriate results’.

The Committee draws attention to provisions which may be considered to inappropriately delegate legislative powers of a kind that ought to be exercised by Parliament alone. In this instance, the detail of the scheme including, for example, the circumstances in which payments are to be made and the amount of any payments, is to be included in a legislative instrument, and the bill imposes no limit on the amount of funds that can be appropriated to implement the scheme.

Further, while any legislative instrument made under these provisions would be subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances, its terms of reference do not encompass the question of whether a Minister has properly exercised a discretion in deciding to make the legislative instrument. It therefore appears that Schedule 4 may make the rights of possible beneficiaries of such a scheme unduly dependent upon non-reviewable decisions.

However, the explanatory memorandum states (at page 24) that this scheme is substantially the same as the ‘one-off payments’ made in previous years, including the legislative instrument basis and the appropriation arrangements. The Committee notes that the Social Security and Veterans’ Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008 contained very similar provisions, which the Committee noted, but made no further comment on, in *Alert Digest No. 4 of 2008*. The explanation for the scheme in this bill is almost identical to that for the schemes in the bill introduced earlier this year.

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

Tax Agent Services Bill 2008

Introduced into the House of Representatives on 13 November 2008

Portfolio: Treasury

Background

This bill implements a new legislative regime to improve the regulatory environment in relation to the provision of tax agent services.

In particular, the bill:

- establishes a national Tax Practitioners Board as a statutory authority within the Australian Taxation Office to replace the existing state-based boards;
- requires that certain entities who are providing Business Activity Statement (BAS) services (BAS agents) be registered (in addition to tax agents);
- introduces a legislated Code of Professional Conduct to govern tax agents and BAS agents;
- provides for a wider and more flexible range of disciplinary sanctions which may be imposed by the Tax Practitioners Board; and
- introduces civil penalties and injunctions to replace criminal penalties for certain misconduct by agents and unregistered entities.

Commencement more than six months after assent

Subclause 1-5(1)

Item 2 in the table to subclause 1-5(1) provides that Parts 2 to 5 of the bill are to commence on Proclamation, but in any event within nine months after Assent. The Committee takes the view that Parliament is responsible for determining when laws are to come into force. The Committee will not generally 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 explanatory memorandum gives no reason for the failure to comply with paragraph 19 of Drafting Direction No 1.3, and does not explain the reason for the period of delay of commencement being longer than six months. The Committee **seeks the Treasurer's advice** as to the reason for this delay.

Pending the Treasurer'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.

Abrogation of the privilege against self-incrimination Clause 60-115

Subclause 60-115(1) would abrogate the privilege against self-incrimination for a person required to give information or evidence, or to produce a document or thing, under clauses 60-100 or 60-105. At common law, people can decline to answer questions on the grounds that their replies might tend to incriminate them. Legislation that 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, the Committee notes that subclause 60-115(2) limits the circumstances in which information so provided is admissible in evidence in proceedings against the affected person to offences against specific sections of the *Taxation Administration Act 1953* and the *Criminal Code*. The Committee accepts that this provision strikes a reasonable balance between the competing interests of obtaining information and protecting individuals' rights.

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

COMMENTARY ON AMENDMENTS TO BILLS

Independent Reviewer of Terrorism Laws Bill 2008 (No. 2)

On 13 November 2008, the Senate agreed to a number of amendments to the bill, none of which fall within the Committee's terms of reference.

Same-Sex Relationships (Equal Treatment in Commonwealth Laws–Superannuation) Bill 2008

On 12 November 2008, the Senate agreed to a number of amendments to the bill, none of which fall within the Committee's terms of reference. On 12 November 2008, the Senate also agreed to two Government requests for amendments in the House of Representatives.

Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008

On 11 November 2008, the Senate agreed to eight amendments to the bill, none of which fall within the Committee's terms of reference. On 12 November 2008, the House of Representatives agreed to the amendments made by the Senate.

**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
Tax Agent Services Bill 2008	Clauses 60-100 and 60-105	Failure to provide information to a public authority	Fine not exceeding 20 penalty units; or fine not exceeding 40 penalty units; or fine not exceeding 50 penalty units or imprisonment for a period not exceeding 12 months, or both (see further section 8E of the <i>Taxation Administration Act 1953</i>)

SCRUTINY OF STANDING APPROPRIATIONS

The Committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to the presence in bills of standing appropriations. It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the Committee to report on whether bills:

- (vi) inappropriately delegate legislative powers; or
- (vii) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Further details of the Committee's approach to scrutiny of standing appropriations are set out in the Committee's *Fourteenth Report of 2005*. The following is a list of the bills containing standing appropriations that have been introduced since the beginning of the 42nd Parliament.

Bills introduced with standing appropriation clauses – 42nd Parliament

*Indicates passed by Senate	Bills and Clauses
	COAG Reform Fund Bill 2008 — Clause 5 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Commonwealth Securities and Investment Legislation Amendment Bill 2008 — Schedule 1, item 10, subsection 5BA(7)
*	Defence Home Ownership Assistance Scheme Bill 2008 — Clause 84
*	Dental Benefits Bill 2008 — Clause 65
	Education Legislation Amendment Bill 2008 — Schedule 1, item 6, section 14B
*	Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008 — Schedule 1, item 29
*	Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Bill 2008 — Schedule 1, item 49, section 54A (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>); Schedule 2, item 23, section 70E (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008 — Schedule 1, item 79, section 94B (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)

*	Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008 — Schedule 5, item 141, section 65A
	Nation-building Funds Bill 2008 — Clauses 13, 61, 68, 75, 82, 132, 181, 188, 215, 255 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
*	Protection of the Sea Legislation Amendment Bill 2008 — Schedule 1, item 20, section 46N
*	Safe Work Australia Bill 2008 — Clause 64 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)
	Schools Assistance Bill 2008 — Clause 167
*	Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008 — Schedule 1, item 1
*	Wheat Export Marketing Bill 2008 — Clause 58 (CRF appropriated by virtue of section 21 of the <i>Financial Management and Accountability Act 1997</i>)

Other relevant appropriation clauses

*Indicates passed by Senate	Bills and Clauses
*	Social Security and Veterans' Entitlements Legislation Amendment (One-off Payments and Other Budget Measures) Bill 2008 — Schedule 2, items 1 and 2, and Schedule 4, item 1: special appropriation clauses – for a finite period of time (ie for circumstances arising in a particular financial year).
	Social Security and Other Legislation Amendment (Economic Security Strategy) Bill 2008 — Schedule 4, item 4: special appropriation clause – for a finite period of time (ie for circumstances arising in a particular financial year).

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

INDEX OF BILLS COMMENTED ON AND MINISTERIAL RESPONSES SOUGHT/RECEIVED - 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) 1(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	1(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	1(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	1(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) 1(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) 1(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	1(12.3.08)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Bills introduced 2008							
<i>Aged Care Amendment (2008 Measures No. 1) Act 2008</i>	1(12.3.08)	13.2.08	14.2.08	Health and Ageing	13.3.08	4.8.08	7(27.8.08)
<i>Australian Crime Commission Amendment Act 2007</i>	3(14.5.08)	19.9.07	18.9.07	Home Affairs	15.5.08	20.6.08	6(25.6.08)
Australian Energy Market Amendment (Minor Amendments) Bill 2008	3(14.5.08)	20.3.08	23.6.08	Resources, Energy and Tourism	15.5.08	28.5.08	4(4.6.08)
Australian Organ and Tissue Donation and Transplantation Authority Bill 2008	10(24.9.08)	18.9.08	13.11.08	Health and Ageing	25.9.08	14.10.08	11(15.10.08)
Civil Aviation Legislation Amendment (1999 Montreal Convention and Other Measures) Bill 2008	3(14.5.08)	20.3.08	16.6.08	Infrastructure, Transport, Regional Development and Local Government	15.5.08	19.6.08	6(25.6.08)
Communications Legislation Amendment (Miscellaneous Measures) Bill 2008	2(19.3.08)	17.3.08	12.3.08	Broadband, Communications and the Digital Economy	20.3.08	13.5.08	3(14.5.08)
Customs Amendment (Strengthening Border Controls) Bill 2008	3(14.5.08)	20.3.08	16.6.08	Home Affairs	15.5.08	13.6.08	5(18.6.08)
Customs Legislation Amendment (Modernising) Bill 2008	3(14.5.08)	20.3.08	16.6.08	Home Affairs	15.5.08	13.6.08	5(18.6.08)
Dairy Adjustment Levy Termination Bill 2008	11(15.10.08)	24.9.08	16.10.08	Agriculture, Fisheries and Forestry	16.10.08	7.11.08	12(12.11.08)
Dental Benefits Bill 2008	4(4.6.08)	29.5.08	18.6.08	Health and Ageing	5.6.08	23.6.08	6(25.6.08)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Drink Container Recycling Bill 2008	2(19.3.08)		13.3.08	Senator Fielding	20.3.08		
Environment Protection and Biodiversity Conservation Amendment (Control of Power Station Emissions) Bill 2008	6(25.6.08)		19.6.08	Senator Allison	26.6.08		
Excise Legislation Amendment (Condensate) Bill 2008	4(4.6.08)	15.5.08	16.6.08	Treasury	5.6.08	17.6.08	5(18.6.08)
Excise Tariff Amendment (Condensate) Bill 2008 Amendment	5(18.6.08)	15.5.08	16.6.08	Treasury	19.6.08	28.8.08	8(3.9.08)
Family Assistance Legislation Amendment (Child Care Budget and Other Measures) Bill 2008	4(4.6.08)	29.5.08	16.6.08	Education, Employment and Workplace Relations	5.6.08	18.6.08	6(25.6.08)
Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008	7(27.8.08)	25.6.08	1.9.08	Attorney-General	28.8.08	5.9.08	9(17.9.08)
Farm Household Support Amendment (Additional Drought Assistance Measures) Bill 2008	4(4.6.08)	29.5.08	16.6.08	Agriculture, Fisheries and Forestry	5.6.08	17.6.08	5(18.6.08)
Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008	1(12.3.08)	11.3.08	13.2.08	Treasury	13.3.08	18.3.08	2(19.3.08)
<i>Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008</i>	12(12.11.08)	15.10.08	16.10.08	Treasury	13.11.08		
First Home Saver Accounts Bill 2008	4(4.6.08)	28.5.08	16.6.08	Treasury	5.6.08	16.6.08	5(18.6.08)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority And Other Matters) Bill 2008	3(14.5.08)	20.3.08	16.6.08	Agriculture, Fisheries and Forestry	15.5.08	28.5.08	4(4.6.08)
Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008	6(25.6.08)	18.6.08	27.8.08	Environment, Heritage and the Arts	26.6.08	22.7.08	7(27.8.08)
Horse Disease Response Levy Bill 2008	1(12.3.08)	21.2.08	3.9.08	Agriculture, Fisheries and Forestry	13.3.08	9.7.08	7(27.8.08)
Horse Disease Response Levy Collection Bill 2008	1(12.3.08)	21.2.08	3.9.08	Agriculture, Fisheries and Forestry	13.3.08	9.7.08	7(27.8.08)
Independent Reviewer of Terrorism Laws Bill 2008	3(14.5.08)	17.3.08	3.9.08	Mr Georgiou MP	15.5.08	26.5.08	4(4.6.08)
Infrastructure Australia Bill 2008	1(12.3.08)	21.2.08	18.3.08	Infrastructure, Transport, Regional Development and Local Government	13.3.08	18.3.08	2(19.3.08)
National Commissioner for Children Bill 2008	3(14.5.08)		18.3.08	Senator Bartlett	15.5.08		
National Fuelwatch (Empowering Consumers) (Consequential Amendments) Bill 2008	4(4.6.08)	29.4.08	16.6.08	Treasury	5.6.08	24.6.08	6(25.6.08)
National Measurement Amendment Bill 2008	11(15.10.08)	24.9.08	24.11.08	Innovation, Industry, Science and Research	16.10.08	3.11.08	12(12.11.08)
National Rental Affordability Scheme Bill 2008	11(15.10.08)	24.9.08	10.11.08	Housing	16.10.08	11.11.08	12(12.11.08)

NAME OF BILL	ALERT DIGEST	INTRODUCED		MINISTER	RESPONSE		REPORT NUMBER
		HOUSE	SENATE		SOUGHT	RECEIVED	
Offshore Petroleum Amendment (Greenhouse Gas Storage) Bill 2008 Amendment	6(25.6.08) 10(24.9.08)	18.6.08	24.9.08	Resources, Energy and Tourism	25.6.08 25.9.08	1.8.08 23.10.08	7(27.8.08) 12(12.11.08)
Offshore Petroleum (Annual Fees) Amendment (Greenhouse Gas Storage) Bill 2008	6(25.6.08)	18.6.08	22.9.08	Resources, Energy and Tourism	25.6.08	1.8.08	7(27.8.08)
Offshore Petroleum (Registration Fees) Amendment (Greenhouse Gas Storage) Bill 2008	6(25.6.08)	18.6.08	22.9.08	Resources, Energy and Tourism	25.6.08	1.8.08	7(27.8.08)
Offshore Petroleum (Safety Levies) Amendment (Greenhouse Gas Storage) Bill 2008	6(25.6.08)	18.6.08	22.9.08	Resources, Energy and Tourism	25.6.08	1.8.08	7(27.8.08)
Protection of the Sea (Civil Liability For Bunker Oil Pollution Damage) Bill 2008	3(14.5.08)	20.3.08	16.6.08	Infrastructure, Transport, Regional Development and Local Government	15.5.08	2.6.08	4(4.6.08)
Renewable Energy (Electricity) Amendment (Feed-in-Tariff) Bill 2008	4(4.6.08)		15.5.08	Senator Milne	5.6.08	12.6.08	5(18.6.08)
Safe Work Australia Bill 2008	9(17.9.08)	4.9.08	23.9.08	Employment and Workplace Relations	18.9.08	23.09.08	10(24.9.08)
Unit Pricing (Easy comparison of Grocery prices) Bill 2008	4(4.6.08)		15.5.08	Senator Fielding	5.6.08	5.6.08	5(18.6.08)
Veterans' Affairs Legislation Amendment (International Agreements and Other Measures) Bill 2008	3(14.5.08)	19.3.08	16.6.08	Veterans' Affairs	15.5.08	24.6.08	6(25.6.08)

NAME OF BILL	ALERT DIGEST	INTRODUCED HOUSE SENATE		MINISTER	RESPONSE SOUGHT RECEIVED		REPORT NUMBER
<i>Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008</i>	1(12.3.08)	13.2.08	17.3.08	Employment and Workplace Relations	13.3.08 20.3.08	18.3.08 22.4.08	2(19.3.08) 3(14.5.08)